# JUDICIAL REVIEW AND AMPARO PROCEEDING IN LATIN AMERICA.

## A GENERAL COMPARATIVE LAW OVERVIEW*

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Judicial review of the constitutionality of legislation an judicial protection of constitutional rights have been developing in Latin America since the 19th century, where the two main judicial review systems known in comparative law[1] have been applied, that is, the diffuse (decentralized) and the concentrated (centralized) methods of judicial review. In some cases, one of these methods have been established as the only one existing in some countries, in other cases, they have been adopted in a mixed or parallel way, coexisting for the purpose of guarantying the supremacy of the Constitutions. This last solution has been followed in many Latin American countries, in the same sense that was it was also followed in Europe, in Portugal.[2]

The main criteria for classifying these systems of judicial review or control of the constitutionality of State acts, particularly of statutes, is basically based on the number of courts that carry out that task of exercising constitutional justice, in the sense that judicial review can be assigned to all the courts of a given country (diffuse method), or to only one single court (concentrated system), whether the Supreme Court or a special Constitutional Court created for such purpose.

In the first case, that is, in the diffuse method, when all the courts of a given country are empowered to act as constitutional judges controlling the constitutionality of statutes, the system has been identified as the "American system", because it was first adopted in the United States, particularly after the well known *Marbury* v. *Madison* case U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803). Notwithstanding, the system is not only specific to countries with common law systems, since it has also been developed in countries with Roman or civil law traditions, precisely like those in Latin America. This method of judicial review has also been called as diffuse or decentralized,[3] because in it, the judicial control powers belongs to all the courts, from the lowest level up to the Supreme Court of the country, allowing them not to apply a statute in the particular case they have to decide, when they consider it unconstitutional and void, thereby giving prevalence to the Constitution.[4]

Since the 19th Century this diffuse method has been applied in almost all Latin American countries, as is the case of Argentina (1860), Brazil (1890), Colombia (1850), Dominican Republic (1844), Mexico (1857), Venezuela (1897), and also since the 20th Century in Ecuador, Guatemala,

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* Ponencia para el *VIII Congreso de Derecho Procesal Constitucional*, Centro de Estudios de Derecho Procesal Constitucional, Universidad Monteávila, Caracas, 5-6 de mayo de 2022. This Paper has originally written for the preparation of two Lectures that I delivered at Fordham Law School, New York City in 2008. The first Lecture, on *Judicial Review in Latin America. A general overview,* was delivered at the Constitutional Comparative Law Course of Professor Ruti G. Teitel, on February 11, 2008; and the second Lecture, on *The Latin American "Amparo". A General Overview,* was delivered in the *Latin America Workshop on Human Rights & Legal Theory*, Leitner Center for International Law and Justice, on April 4th, 2008. The Papert was updated in 2010.

1 See in general M. Cappelletti, *Judicial Review in the Contemporary World*, Indianapolis 1971, p. 45 and M. Cappelleti and J.C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations", in *Harvard Law Review*, 79, 6, April 1966, p. 1207.

2 See Allan R. Brewer–Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; *Études de Droit Public Comparé*, Bruylant, Bruxelles 2001, pp. 855 ff.

3 See M. Cappelletti, "El control judicial de la constitucionalidad de las leyes en el derecho comparado", in *Revista de la Facultad de Derecho de México*, Nº 61, 1966, p. 28.

4 See Allan R. Brewer Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

Nicaragua, and Peru.[5] Only in Argentina, the method strictly follows the American model. In the other countries it exists, but applied in combination with the concentrated method of judicial review.

Following the American model, when applying the diffuse method of judicial review of legislation, the decisions of the courts only have *inter partes* effect, that is, related to a particular case where the decision has been issued and to the parties in the process. So the courts do not annul the statutes considered unconstitutional, but only declare them void and unconstitutional, and not applicable to the case.

In the second method of judicial review, that is the concentrated one, when the power to control the constitutionality of legislation is given to a single judicial organ of the State, whether it is the Supreme Court or a special Constitutional Court created for such particular purpose, it has been identified as the "Austrian" system, because in Europe, it was first established in Austria in 1920, due to the influence of Hans Kelsen,[6] who proposed the creation of the Constitutional Court. It has also been called the "European system" because after World War II it was followed in other European countries, as was the case of Germany, Italy, France, Portugal and Spain, countries where Constitutional Tribunal or Courts were created. It is a concentrated system of judicial review, as opposed to the diffuse system, because the power to control the constitutionality of statutes is given only to one single Constitutional Court or Tribunal, that must decide on the matter in an objective way without any reference to a particular case or controversy, with powers, in general, to declare the nullity of the challenge statutes with general, *erga omnes* effects.

But before Kelsen's proposals and before the European experiences, and even though without the creation of special Constitutional Courts or Tribunals, the concentrated method of judicial review also was established since the middle of the 19th Century in Latin America by assigning to the existing Supreme Court of the countries, the power to nullify statutes on grounds of unconstitutionality. This was the case in Colombia and in Venezuela where an authentic concentrated system of judicial review exercised by means of a popular action has existed since 1858, initially in the hands of the Supreme Courts and more recently, through a Constitutional Court in Colombia or a Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela, having the monopoly of annulling statutes on the grounds of their unconstitutionality.

This concentrated system has been adopted in all Latin American counties, except Argentina. In Bolivia, Costa Rica, Chile, Ecuador, El Salvador, Honduras, Panama, Paraguay and Uruguay, the system is conceived as exclusively concentrated; and on these countries, only in Bolivia, Ecuador and Chile, the concentrated judicial review power is exercised by a Constitutional Tribunal or Court that have been specially created. In the other countries it is the Supreme Court the one exercising judicial review powers, in some cases through a Constitutional Chamber.

In the other Latin American countries, the system has moved to a mixed one, combining the diffuse and the concentrated methods of judicial review. It is the case of Brazil, Colombia, the Dominican Republic, Guatemala, Mexico, Nicaragua, Peru and Venezuela. In this latter group, only in Colombia, Guatemala, Peru and Dominican Republic, a Constitutional Court or Tribunal has been crated; and in Nicaragua, El Salvador and Venezuela what has been created is a Constitutional Chamber within the Supreme Court of Justice.

In the concentrated system of judicial review, the petition for judicial review of legislation can be brought before the Court, whether by means of a direct action filed against the statute, in which case its constitutionality is the only matter in discussion in the proceeding, without any reference or relation to a particular case or controversy; or whether by means of an incidental constitutional question or request that must be raised in a particular case or controversy, where, on the contrary, the main issue of litigation is not the constitutional question, but what constitutes the merits of the case.

Other distinction can be made in the concentrated system regarding the direct actions of unconstitutionality, referred, first, to the standing to sue, which can be a limited one, as occurs in

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5 See Allan R. Brewer–Carías, "La jurisdicción constitucional en América Latina", in Domingo García Belaúnde and Francisco Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117–161.

6 See H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle), *Revue du droit public et de la science politique en France et à l'étranger*, Paris 1928, pp. 197–257; Allan R. Brewer Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

many countries (reserved to High Officials) or can be open to the citizenship, through a popular action (*action popularis*) as is the case in Colombia, Ecuador, El Salvador, Nicaragua, Panama and Venezuela. And second, to the moment of the filling of the action, which can be prior to the enactment of the particular challenged statute (*a priori* control) like for instance in Europe was the case of France (up to 2009); or after the statute has come into effect (*a posteriori* control), like in Europe has been the cases of Germany, Italy and Spain. In Latin America, in all the counties having a concentrated system of judicial review, the control is always *a posteriori* one, although in some countries both possibilities have been established, as is the case of Colombia, Ecuador and Venezuela, in similar way that was established in Europe, in Spain and Portugal.

But in addition to judicial review of the constitutionality of legislation, Latin American countries have also developed the amparo proceeding (suit, action or recourse of amparo of *tutela* or *protección*) which is one of the most distinguishable features of Latin American constitutional law, established as an extraordinary judicial remedy specifically conceived for the protection of constitutional rights against harms or threats inflicted by authorities or individuals,[7] which has also influenced similar actions in other counties.[8] This remedy was introduced in Latin America since the 19th century, particularly in 1857, in México, as the *juicio de amparo*, which according to the unanimous opinion of all the Mexican scholars, had its origins in the American judicial review of constitutionality of statutes system, as was described by Alexis de Tocqueville (*Democracy in America,* 1835),[9] a few years after *Malbury v. Madison* U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803).

Nonetheless, the fact is that in a quite different way to the model, the amparo suit evolved, on the one hand, in México, into a unique and very complex *juicio de amparo*, exclusively found in that country where in addition to protect individuals against authorities and all their acts, is the instrument *par excellence* in order to seek judicial review of legislation, in addition to other judicial means; and on the other hand, in all the other Latin American countries, as an extraordinary judicial action, recourse or petition established exclusively for the protection of constitutional rights.

Being both, the judicial review proceedings in order to control the constitutionality of legislation and the amparo as a mean for the protection of constitutional rights, judicial institutions that since the 19th century are essential parts of their constitutional systems; in order to analyze them in Latin America I am going to analyze the subject in three parts::

***First***, Judicial Review and Amparo in countries having only a diffuse system of judicial review, which is only the case of Argentina;

***Second***, Judicial Review and Amparo in countries having only a concentrated system of judicial review, which is the case of Costa Rica, El Salvador, Honduras and Panama in Central America; and of Bolivia, Ecuador, Chile, Paraguay and Uruguay in South America;

And ***Third***, countries having a mixed system of judicial review, that is, at the same time the diffuse and the concentrated ones, which is the case of México in North America; of Dominican Republic in the Caribbean; of Guatemala and Nicaragua in Central America; and of Brazil, Colombia, Peru and Venezuela in South America.

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7. See Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Edit. Porrúa, México 2006; Allan R. Brewer–Carías, *El amparo a los derechos y libertades constitucionales. Una aproximación comparativa*, Cuadernos de la Cátedra de Derecho Público, Nº 1, Universidad Católica del Táchira, San Cristóbal 1993, 138 pp.; also published by the Inter American Institute on Human Rights, (Interdisciplinary Course), San José, Costa Rica, 1993, (mimeo), 120 pp. and in *La protección jurídica del ciudadano. Estudios en Homenaje al Profesor Jesús González Pérez*, Tomo 3, Editorial Civitas, Madrid 1993, pp. 2.695–2.740; Allan R. BREWER–CARÍAS, *Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano)*, Instituto Interamericano de Derechos Humanos, San José 2005; and Allan R. BREWER–CARÍAS, *Constitutional Protection of Human Rights in Latin America. A Constitutional Comparative Law Study on the amparo proceeding*, Cambridge University Press, New York 2009.

8 It has been the case of the Philippines with the Writ of Amparo. See Allan R. BREWER–CARÍAS, The Latin American Amparo Proceeding and the Writ of Amparo in The Philippines," in *ity University of Hong Kong Law Review***,** Volume 1:1 October 2009, pp 73–90

9 See Alexis De Tocqueville, *Democracy in America* (Ed. by J.P. Mayer and M. Lerner), The Fontana Library, London, 1968, Vol. 1, p. 120–124.See Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, pp. 15, 33; Eduardo Ferrer Mac–Gregor, *La acción constitucional de amparo en México y España, Estudio de Derecho Comparado*, 2nd Edition, Edit. Porrúa, México D.F. 2000; Héctor Fix–Zamudio, *Ensayos sobre el derecho de amparo, Universidad Nacional Autónoma de México*, Editorial Porrúa, México 2003.

## I. JUDICIAL REVIEW AND AMPARO IN COUNTRIES ONLY APPLYING THE DIFFUSE METHOD OF JUDICIAL REVIEW OF LEGISLATION: THE CASE OF ARGENTINA

In Latin America, Argentina is the only country where the diffuse method of judicial review remains as being the only one applied in order to control the constitutionality of legislation.

The Argentinean system of judicial review system,[10] is perhaps the one that more closely follows the United States model, also derived from the supremacy clause established in the 1860 Constitution which as in the United States, does not expressly confer any judicial review power upon the Supreme Court or the other courts. So in the case of Argentina, judicial review was also a creation of the Supreme Court, based on the same principles of supremacy of the Constitution and judicial duty when applying the law.

The first case in which judicial review power was exercised was the *Sojo* case (1887) concerning the unconstitutionality of a federal statute that tried to extend the original jurisdiction of the Supreme Court[11] as also happened in the *Marbury* v. *Madison* case U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803), in which the Constitution was considered as the supreme law of the land and the courts were empowered to maintain its supremacy over the statutes which infringed it.[12]

Therefore, through the work of the courts, in the Argentinean system of judicial review, all the courts have the power to declare the unconstitutionality of treaties[13] and legislative acts[14] whether at national or provincial levels.

So in a similar way as the United States system of judicial review, the Argentinean system has also an incidental character, in the sense that the question of constitutionality is not the principal matter of a process. The question has to be raised by a party in a particular judicial controversy, case or process, normally through an exception, at any moment before the decision in the case is adopted by the court.

Thus, in the particular case[15] a party can raise the question of unconstitutionality of the statute to be applied, alleging that the statute which is considered invalid injures his own rights. Consequently, in Argentina, as in the United States, the question of unconstitutionality cannot be raised *ex officio,*[16] except in cases where "public order" is involved.[17]

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10 See in general Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Ed. Asrea, Buenos Aires 2002; Ricardo Haro, *El control de constitucionalidad*, Editorial Zavalia, Buenos Aires, Argentina, 2003; Juan Carlos Hitters, "La jurisdicción constitucional en Argentina", in Domingo García Belaunde and Francisco Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Ed. Dykinson, Madrid, España, 1997; Maximiliano Toricelli, *El sistema de control constitucional argentino*, Editorial Lexis Nexis Depalma, Buenos Aires, Argentina, 2002.

11 See A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952., p. 5; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, p. 41, 43, 179 who speaks about a "pretorian creation" of judicial review by the Supreme Court, p. 179. See Jorge Reinaldo Vanossi and P.F. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996 (also printed as *Institutuciones de defense de la Constitución en la Argentina*, Universidad Nacional Autónoma de México, Congreso Internacional sobre la Constitución y su defense, México 1982); H. Quiroga Lavie, *Derecho constitucional*, Buenos Aires 1978, p. 481. Previously in 1863 the first Supreme Court decisions were adopted in constitutional matters but referred to provincial and executive acts. See. A.E. Ghigliani, *Idem,* p. 58.

12 See. A.E. Ghigliani, *Idem,* p. 58.

13 In particular, regarding the unconstitutionality of Treaties and the posibility of the Courts to control them, A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, p. 62; Jorge Reinaldo Vanossi, *Aspectos del recurso extraordinario de inconstitucionalidad*, Buenos Aires 1966, p. 91, and *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 277.

14 See Néstor.Pedro Sagües, *Recurso Extraordinario*, Buenos Aires 1984, Vol. I, p. 91; Jorge Reinaldo Vanossi and P.F. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; J.R. Vanossi, *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 155.

15 Article 100 of the Constitution; R. Bielsa, *Idem*., p. 213, 214; A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952., pp. 75, 80; J.R. Vanossi and P.F. Ubertone, *Idem*., p. 23; .M. Lozada, *Derecho Constitucional Argentino*, Buenos Aires 1972, Vol. I, p. 342.

16 R. Bielsa, *Idem*., p. 198, 214; H. Quiroga Lavie, *Derecho constitucional*, Buenos Aires 1978, p. 479.

17 G. Bidart Campos, *El derecho constitucional del poder*, Vol. II, Chap. XXIX; J.R. Vanossi, *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 318, 319; J.R. Vanossi and P.E. Ubertone, "Control

In addition, it has been considered that the constitutional question raised in the case, particularly due to the presumption of constitutionality of all statutes, must be of an unavoidable character, in the sense that its decision must be alleged to be essential to the resolution of the case which depends on it. For that purpose the constitutional question must be clear and undoubted.[18]

Finally, it must be said that in the Argentinean system, the Supreme Court of the Nation has developed the same exception to judicial review established in the United States system, concerning the political questions. Even though the Constitution does not expressly establish anything on the matter, these political questions are related to the "acts of government" or "political acts" exercised by State political bodies in accordance with powers exclusively and directly attributed to them in the Constitution.[19]

The courts in Argentina, as in the United States, when deciding constitutional questions regarding statutes, do not have the power to annul or repeal a law. This power is reserved to the legislative body, so the only thing the courts can do is to refuse or reject its application in the particular case when they consider it unconstitutional. The statute, therefore, when considered unconstitutional and non–applicable by the judge, is considered void, with no effect whatsoever,[20] but only in the particular case, remaining valid and generally applicable, so in principle, even the same court, can change its criteria about the unconstitutionality of the statute and apply it in the future.[21]

Being a federal state, the Argentinean Judiciary is regulated through national and provincial statutes, and the Supreme Court of Justice, which is the only judicial body created in the Constitution, is the "final interpreter" or "the defendant of the Constitution", having also two sorts of jurisdiction: original and appellate ones.[22] It has been through the appellate jurisdiction and by means of the "extraordinary recourse" in cases decided by the National Chambers of Appeals and by the Superior Courts of the Provinces that the constitutional cases can reach the Supreme Court, with similar results to the request for *writ of certiorari* before the United States Supreme Court can be achieved.

Nonetheless, the main difference between both extraordinary means is that contrary to the United States system, the Supreme Court of Argentina does not have discretionary powers in accepting extraordinary recourses, which in the case is a mandatory jurisdiction, exercised as a consequence of a right the parties have to file them.

When deciding these extraordinary recourses, the Supreme Court does not act as a third instance court, its power of review only concentrated on matters regarding constitutional questions.[23]

That is why, in a different way to the appeal, the extraordinary recourse must be motivated and founded on constitutional reasons, and one of the important conditions for its admissibility is that the constitutional question raised, must have been discussed in the proceeding before the lower courts. Therefore, the Supreme Court has rejected the recourse when the constitutional issue has not been discussed and decided in the lower courts.[24]

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jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; .R. Bielsa, *Idem*, 255; H. Quiroga Lavie, *Idem*, p. 479.

18 A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, p. 89; S.M. Losada *Derecho Constitucional Argentino*, Buenos Aires 1972, Vol. I, p. 341; H. Quiroga Lavie, *Derecho constitucional*, Buenos Aires 1978, p. 480. Thus when an interpretation of the statute avoiding the consideration of the constitutional question is possible, the court must follow this path. See A.E. Ghigliani, *Idem*, p. 91.

19 A.E. Ghigliani, *Idem*., p. 85; H. Quiroga Lavie, *Idem*, p. 482; S.M. Losada, *Derecho Constitucional Argentino*, Buenos Aires 1972, Vol. I, p. 343; J.R. Vanossi and P.E. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996.

20 A.E. Ghigliani, *Idem*, p. 95; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, pp. 197, 198, 345; N.P. Sagües, *Derecho procesal Constitucional*, Tomo I, Cuarta edición, 2002, p. 156.

21 A.E. Ghigliani, *Idem*, p. 92, 97; R. Bielsa, *Idem*, p. 196; N. P. Sagües, *Idem*, p. 177.

22 R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, pp. 60–61, 270; J.R. Vanossi and P.F. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996.

23 R. Bielsa, *Idem*, p. 222; N. P. Sagües, *Idem*, p. 270; pp. 185, 221, 228, 275.

24 R. Bielsa, *Idem*, p. 190, 202–205, 209, 245, 252.

Another aspect that must be highlighted is that in the Argentinean system, the Supreme Court decisions on judicial review on constitutional issues in principle are not obligatory for the other courts or for the inferior courts;[25] that is, they do not have *stare decisis* effects. In the 1949 constitutional reform, an attempt was made to give binding effects on the national and provincial courts to the interpretation adopted by the Supreme Court of Justice regarding articles of the Constitution,[26] but this provision was later repealed and the situation today is the absolute power of all courts to render their judgment autonomously with their own constitutional interpretation. Nonetheless, the fact is that the Supreme Court has progressively imposed the doctrine of the binding effects of its decisions,[27] developing what has been called "*de facto stare decisis*" doctrine regarding the interpretation of the Constitution and of federal laws, aiming to provide litigants with some degree of certainty as to how the law must be interpreted, a requirement the Court finds embedded in the due process clause of our Constitution. In the *García Aguilera* case decided in 1870, barely eight years after the court's establishment, the Supreme Court held, in a since then oft–repeated statement, that "lower courts are required to adjust their proceedings and decisions to those of the Supreme Court in similar cases,"[28] from which they can only depart if they give "valid motives."

But in addition to judicial review, the Constitution of Argentina in an article that was included in the constitutional reform of 1994, establishes three specific actions for the protection of human rights protection: the "amparo", the habeas data and the habeas corpus actions (Article 43). [29]

Regarding the "amparo" action, the Constitution provides that any person may file a prompt and summary proceeding against any act or omission attributed to of public authorities or to individuals, for the protection of the rights and guaranties recognized by the Constitution, the treaties or the statutes, which can only be brought before a court if there is no other more suitable judicial mean.

The same article 43 of the Constitution also provides for a collective action of "amparo" that can be filed by the affected party, the people's defendant and non–profit associations, in order to protect collective rights, like the rights to a proper environment and to free competition, and the user and consumer rights, as well as the rights that have general collective impact.

In the case of Argentina, these three specific remedies for the protection of all human rights are regulated in three separate statutes: the "amparo" Action Law (*Ley de acción de amparo, Ley 16986/1966*), the Habeas Corpus Law (*Ley 23098/1984*) and the Personal Data Protection Law (*Ley 25366/2000*).[30]

But, as aforementioned, even though the "amparo" action was regulated for the first time in the 1994 Constitution, in practice it was created four decades before by the Supreme Court in the *Angel Siri* Case of 27 December 1957[31] in which the power of ordinary courts to protect fundamental rights of citizens against violation from public authorities actions was definitively admitted. At that time, the Constitution only provided for the habeas corpus action (Article 18) which was regulated in the provisions of the Criminal Procedural Code (Title IV, Section II, Book IV) and established for the protection of physical and personal freedom against illegal or arbitrary

25 R. Bielsa, *Idem*, pp. 49, 198, 267; A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, pp. 97, 98.

26 Article 95 of the 1949 Constitution. See C.A. Ayanagaray, *Efectos de la declaración de inconstitucionalidad,* Buenos Aires 1955, p. 11; R. Bielsa, *Idem*, p. 268.

27 Néstor P. Sagües has called the "Argentinean stare decisis." See Néstor P. Sagües, "Los efectos de las sentencias constitucionales en el derecho argentino," in *Anuario Iberoamericano de Justicia Constitucional*, Centro de Estudios Políticos y Constitucionales, Nº 12, 2008, Madrid 2008, p. 345–347.

28 Fallos 9:53 (1870).

29 See Juan F. Armagnague et al., *Derecho a la información, hábeas data e Internet*, Ediciones La Roca, Buenos Aires 2002; Miguel Ángel Ekmekdjian et al., *Hábeas Data. El derecho a la intimidad frente a la revolución informática*, Edic. Depalma, Buenos Aires 1998; Osvaldo Alfredo Gozaíni, *Derecho Procesal Constitucional, Hábeas Data. Protección de datos personales. Ley 25.326 y reglamentación (decreto 1558/2001),* Rubinzal–Culzoni Editores, Santa Fe, Argentina 2002.

30 See in general, José Luis Lazzarini, *El Juicio de Amparo*, La Ley, Buenos Aires, 1987; Néstor Pedro Sagües, *Derecho Procesal Constitucional. Acción de Amparo*, Vol 3., Editorial Astrea, Buenos Aires 1988, and "El derecho de amparo en Argentina", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *El derecho de amparo en el mundo*, Edit. Porrúa, México 2006, pp. 41–80.

31 See. G. R. Carrio, *Algunos aspectos del recurso de amparo*, Buenos Aires 1959, p. 9; J. R. Vanossi, *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 277.

detentions.[32] Regarding other constitutional rights, they were only protected through the ordinary judicial means, so the courts considered that the habeas corpus could not be used for such purpose.

That is why, for instance, in 1950 the Supreme Court of the Nation in the *Bartolo* Case, rejected the application of the *habeas corpus* proceeding to obtain judicial protection of constitutional rights other than personal freedom, ruling that "nor in the text, or in its spirit, or in the constitutional tradition of the habeas corpus institution, can be found any basis for its application for the protection of the rights of property or of freedom of commerce and industry", concluding that against the infringements of such rights, the statutes set forth administrative and judicial remedies."[33]

This situation radically changed in 1957 as a result of the decision of the *Angel Siri* case, who was the director of a newspaper (Mercedes) in the Province of Buenos Aires, which was shut down by the Government. He filed a petition requesting "amparo" for the protection of his freedom of press and his right to work, which was rejected by the corresponding criminal court, arguing that the petition was filed as a habeas corpus action which was only established for the protection of physical and personal freedom and not of other constitutional rights. By means of an extraordinary recourse, the case arrived before the Supreme Court, which in a decision of December 27, 1957 repeal the lower court decision, and admitted the action of "amparo", following these arguments: First, that in the case, the violation of the constitutional guaranty of freedom of press and the right to work was duly argued; second, that the arbitrary governmental violation affecting those rights was proved; and third, that those rights needed to be protected by the courts, concluding that for such purpose the absence of a statutory regulation on "amparo" could not be a valid argument to reject the judicial protection. In brief, the Supreme Court considered in its decision that the constitutional rights and guaranties of the peoples, once declared in the Constitution, needed always to be judicially protected, regardless of the existence of a regulatory statute on the matter.[34]

The second important decision of the Argentinean Supreme Court on "amparo" matters was issued a year later, in the *Samuel Kot* Case, of October 5th, 1958. In this case the plaintiff was the owner of an industry, which had been occupied by workers on strike. After an "amparo" petition that was filed before a lower court was rejected, once the procedure reached the Supreme Court, the "amparo" was admitted, and the Court ordered the restitution of the occupied premises to its owner. The Court decided that in any case when in a manifest way the illegitimacy of a restriction to any of the essential constitutional rights clearly appears, and when the resolution of the case through the judicial ordinary means could cause grave and irreparable damages, then the courts must immediately re–establish the harmed right by means of the "amparo" action, even applying the habeas corpus procedure.

But beside admitting the "amparo" action without constitutional or legal provision, the other very important issue decided by the Supreme Court in this *Kot Case* was that the "amparo" was not only intended to protect rights against acts of authorities, but also against private individuals' illegitimate actions when if seeking protection by means of the ordinary judicial procedure, serious and irreparable harm could affect the claimant.[35]

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32 See: Néstor Pedro Sagües, *Derecho Procesal Constitucional. Hábeas Corpus*, Volume 4, 2nd Edition, Editorial Astrea, Buenos Aires 1988, p. 116.

33 See the references to the *Barolo* Case in Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, p. 66.

34 See the reference to the *Siri* Case in José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 26 ff y 373 ff.; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad,* Ed. Astrea, Buenos Aires 1987, pp. 5; Néstor Pedro Sagües, *Derecho Procesal Constitucional. Acción de Amparo*, Volume 3, 2nd Edition, Editorial Astrea, Buenos Aires 1988, pp. 9 ff.

35 See the references to the *Samuel Samuel Kot Ltd*. Case of 5 September, 1958, in S.V. Linares Quintana, *Acción de amparo*, Buenos Aires 1960, p. 25; José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 243 ff; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires 1987, pp. 6.; Susana Albanese, *Garantías Judiciales. Algunos requisitos del debido proceso legal en el derecho internacional de los derechos humanos*, Ediar S.A. Editora, Comercial, Industrial y Financiera, Buenos Aires 2000; Augusto M. Morillo et al., *El amparo. Régimen procesal,* 3rd Edition, Librería Editora Platense SRL, La Plata 1998, 430 pp.; Néstor Pedro Sagües, *Derecho Procesal Constitucional,* Vol. 3, *Acción de Amparo,* 2nd Edition, Editorial Astrea, Buenos Aires 1988.

After these decisions, the "amparo" action developed through judicial interpretation up to the enactment of the 1966 Amparo Law 16.986,[36] which in spite of the doctrine set forth in the *Kot case*, only referred to the action of "amparo" against acts of the State, leaving aside the "amparo" against individuals that nonetheless, was is filed in accordance to the Civil and Commercial Procedure Code of the Nation (Article 32,1, Sub–sections 2 and 498).[37]

According to this 1966 Law, the "amparo" action can be brought before the competent judge of first instance (Article 4) for the protection of all constitutional rights and freedoms against acts or omissions of public authorities, but not against judicial decisions or against statutes, which are excluded from the "amparo" action.

This action is thus basically directed, in Argentina, to be filed against administrative actions or omission, and can only be filed when no other judicial or administrative recourses or remedies exist to assure the claimed protection. So that if they exist, they must be previously exhausted, unless it is proved that they are incapable of redressing the damage and their processing can lead to serious and irreparable harm. This can also be considered as a common trend of the amparo action in Latin America, as an extraordinary remedy, similar to what happens with the injunction procedure in the United States.

As mentioned, the amparo action is filed before the first instance courts and also in this case, the cases can only reach the Supreme Court by means of an extraordinary recourse which can only be filed when in the judicial decision a matter of judicial review of constitutionality is resolved,[38] in a similar way as constitutional questions can reach the Supreme Court in the United States.

In the Argentinean system of judicial review, even though the amparo action is also an important tool to raise constitutional questions, discussions have raised regarding the applicability of the diffuse method of judicial review by the courts, precisely when deciding actions for amparo.

In the initial development of the amparo, and in spite of the diffuse system of judicial review followed in Argentina, the Supreme Court, in a contradictory way, established the criteria that the courts, when deciding amparo cases, have no power to decide on the constitutionality of legislation, reducing their powers to decide only on acts or facts that could violate fundamental rights. Thus, the amparo could not be granted when the complaint contained the allegation of unconstitutionality of a statute on which the relevant acts or facts were based.[39] This doctrine was incorporated in the Law 16.986 of 18 October 1966 on the recourse for amparo, in which it was expressly established that the "action for amparo will not be admissible when the decision upon the invalidity of the act will require.... the declaration of the unconstitutionality of statues, decrees or ordinances." (Article 2,d).

But one year later, in 1967, the Supreme Court, without expressly declaring the unconstitutionality of this provision, in the *Outon* case,[40] decided its inapplicability and accepted the criteria that when considering amparo cases, the courts have the power to review the unconstitutionality of legislation.[41]

But in spite of Argentina being the only Latin American country that has kept the diffuse method of judicial review as the only one applicable in order to control the constitutionality of

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36 See José Luis Lazzarini, *El juicio de amparo*, Buenos Aires, l987; Néstor Pedro Sagüés, *Derecho Procesal Constitucional. Acción de Amparo*, Buenos Aires, 1988; Néstor Pedro Sagüés, "El derecho de amparo en Argentina", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 41–80.

37 J. L. Lazzarini, *Idem*, p. 229.

38 See Elias Guastavino, *Recurso extraordinario de inconstitucionalidad*, Ed. La Roca, Buenos Aires, Argentina, 1992; Lino Enrique Palacio, *El recurso extraordinario federal. Teoría y Técnica*, Abeledo–Perrot, Buenos Aires, 1992.

39 See the *Aserradero Clipper SRL case* (1961), J. R. Vanossi, *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 286.

40 *Outon* Case of 29 March 1967. J. R. Vanossi, *Idem*, p. 288.

41 G. J. Bidart Campos, *Régimen legal del amparo*, 1969; G. J. Bidart Campos, "E1 control de constitucionalidad en el juicio de amparo y la arbitrariedad o ilegalidad del acto lesivo", *Jurisprudencia argentina*, 23–4–1969; N. P. Sagües, "El juicio de amparo y el planteo de inconstitucionalidad", *Jurisprudencia argentina*, 20–7–1973; J. R. J. R. Vanossi, *Idem*, pp. 288–292; José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 80, 86; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires 1987, p. 58; Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, pp. 71, 117.

legislation, the diffuse method of judicial review is also applied in Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru and Venezuela but with the main difference that it is applied within a mixed system of judicial review (diffuse and concentrated).

## II. JUDICIAL REVIEW AND AMPARO IN COUNTRIES APPLYING ONLY THE CONCENTRATED METHOD OF JUDICIAL REVIEW OF LEGISLATION

Other Latin American countries, do not apply at all the diffuse method of judicial review, having adopted only the concentrated one, as is the case of Bolivia, Ecuador, Chile, Costa Rica, El Salvador, Honduras, Panama, Paraguay and Uruguay. Some countries have attributed the power to decide on the unconstitutionality of statutes to the existing Supreme Court, as is the case in Costa Rica, El Salvador, Honduras, Panama, Paraguay and Uruguay; and others, as in Europe, to a special Constitutional Tribunal created for such purpose, [42] as is the case in Bolivia, Ecuador and Chile. In the former group, in some countries, a special Constitutional Chamber of the Supreme Court has been created for the purpose of being the Constitutional Jurisdiction (Costa Rica, El Salvador, Honduras and Paraguay).

The Supreme Court of Constitutional Tribunal can be reach on matters of judicial review trough a direct action or in an incidental way by means of a referral of the constitutional question made by a lower court ex officio or at a party request. In general the action of unconstitutionality of statutes is subjected to standing rules limiting it to some High Officials of the State (Bolivia, Chile and Costa Rica). In some countries a popular action is provided (Panama, Ecuador and El Salvador) and in Uruguay the action is given to the interested party. Only in Uruguay, no direct action exists, and the Supreme Court can only be reach in the incidental way. Only in Ecuador an incidental mean of judicial review is provided, imposing the courts to raise before the Constitutional Court, ex officio or at a party request, the questions of constitutionality of statutes.

In all the countries with only an exclusive concentrated system of judicial review, except in Paraguay and Uruguay where it has inter partes effects, the effects of the Supreme Court of Constitutional Tribunal decision on the unconstitutionality of statutes, have annullatory, erga onmes effects.

Finally, being a concentrated system of judicial review, in these countries some mechanism have been established in order to assure that the decisions on other constitutional matters different to judicial review, like those adopted in amparo proceedings for the protection of constitutional rights, can reach the higher constitutional court. For such purpose, in Bolivia, an automatic review power of the Constitutional Court has been set forth and in Honduras, a recourse for revision is provided.

In these countries with only a concentrated system of judicial review, another distinction can be made specifically regarding the judicial competencies on matter of amparo, in the sense that in some of these countries, the concentrated method on matters of constitutionality is an absolute one, also including the amparo proceeding, as is the case in Costa Rica and El Salvador, where the power to decide the "amparo" action has also been concentrated in a "Constitutional Jurisdiction", as it also happens with the "amparo" actions in Europe. In Latin America, this is an exceptional trend, not being in general terms the Supreme Courts or the Constitutional Tribunals the only ones empowered to decide on matters of amparo. On the contrary, in the majority of the Latin American countries with or without concentrated system of judicial review, the "amparo" jurisdiction corresponds to a variety of courts and judges.

That is why, for the purpose of studying the concentrated method of judicial review as the only one applied in some countries, a distinction must be made between countries where the "amparo" proceedings are also attributed to the single court exercising the concentrated power of judicial review, and countries where there are attributed to the whole Judiciary, independently of the concentrated method of judicial review.

### *1. The Absolute Concentrated Systems of Judicial Review and Amparo*

The first group of countries refers to those where the competence on all constitutional matters, including amparo, is reserved to one single court. This is the system followed in Europe, in

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[42] See Allan R. Brewer–Carías, "La jurisdicción constitucional en América Latina", in Domingo García Belaúnde and Francisco Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117–161.

Germany[43], Austria[44] and Spain[45] where the "amparo" recourses can only be filed before the same Constitutional Courts or Tribunals that have the exclusive power to decide on matters of judicial review. In Latin America, this system is only followed in Costa Rica and El Salvador, where the Constitutional Chambers of the Supreme Courts, have the monopoly of the concentrated systems of judicial review in order to annul statutes on the grounds of unconstitutionality, and are also the sole and exclusive courts to hear and decide on matters of "amparo" and habeas corpus.

### *A.* The Constitutional Chamber in Costa Rica with exclusive powers on matters of judicial review, and the amparo action

The concentrated system of judicial review was established in Costa Rica in the 1989 Constitutional reform, when the Constitutional Chamber of the Supreme Court was created with the exclusive power to declare the unconstitutionality of statutes and other State acts, with nullifying effects (Article 10). For this purpose, the Chamber can be reached through the following means set forth in the Law on Constitutional Jurisdiction (article 73):

First, by means of a direct action of unconstitutionality that can be brought before the Chamber against any statute or executive regulation, or international treaty considered contrary to the Constitution, and even against constitutional amendments approved in violation of the constitutional procedure.

This principal unconstitutionality action can only be brought before the Constitutional Chamber by the General Comptroller, the Attorney General, the Public Prosecutor and the Peoples' Defendant (Article 75). Nonetheless, the action can also be brought before the Chamber in a similar way to a popular action in cases involving the defense of diffuse or collective interests filed against executive regulation or self executing statutes which do not require additional public actions for its enforcement.[46]

Second, the action can also be exercised in an incidental way before the Constitutional Chamber when a party raises the constitutional question in a particular judicial case, even in cases of habeas corpus and "amparo", as a mean for the protection of the rights and interest of the affected parties (Article 75).

In all these cases of actions, the decisions of the Chamber when declaring the unconstitutionality of the challenged statute have nullifying and general *erga omnes* effects.

Third, in addition to the direct or incidental action of unconstitutionality, the other important mean for judicial review is the judicial referrals on constitutional matters that any courts can raise *ex officio* before the Constitutional Chamber when they have doubts regarding the constitutionality of the statutes they must apply for the resolution of the case (Article 120). In these cases, the lower court must prepare a resolution on the constitutional questions that must be sent to the Constitutional Chamber. The judicial procedure of the case must be suspended until the Constitutional Chamber decision is taken, having obligatory character and *res judicata* effects (articles 104 and 117).

On the other hand, the Constitution of Costa Rica has also expressly regulated the right of persons to file recourses of habeas corpus and "amparo" in order to seek for the protection of their constitutional rights, attributing to the same Constitutional Chamber the exclusive competency to decide on the matter. [47]

In this regard, Article 48 of the Constitution provides that "every person has the right to the habeas corpus recourse in order to guarantee his personal freedom and integrity, and to the

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43 See I. V. Munch. "El recurso de amparo constitucional como instrumento jurídico y político en la República Federal de Alemania", in Revista *de Estudios Políticos*, Nº 7, Madrid, 1979, pp. 269–289; Klaus Schlaich, "El Tribunal constitucional alemán", in L. Favoreu et al., *Tribunales Constitucionales Europeos Derechos Fundamentales*, Madrid, 1984, pp. 133–232.

44 See F. Ermacora, "El Tribunal Constitucional Austríaco", in the *Tribunal Constitucional*, Dirección General de lo Contencioso del Estado, Instituto de Estudios Fiscales, Madrid, 1981, Volumen I, pp. 409–459.

45 See Joan Oliver Araujo, *El recurso de amparo*, Palma de Mallorca, 1986; Antonio Moya Garrido, *El recurso de amparo según la doctrina del Tribunal Constitucional*, Barcelona, 1983; José L. Cascajo Castro and Vicente Gimeno Sendra, *El recurso de amparo*, Madrid, 1985; Antonio Cano Mata, *El recurso de amparo*, Madrid, 1983.

46 See Rubén Hernández Valle, *El Control de la Constitucionalidad de las Leyes*, San José, 1990.

47 See, in general, Rubén Hernández Valle, *La tutela de los derechos fundamentales*, Editorial Juricentro, San José 1990; Rubén Hernández Valle, "El recurso de amparo en Costa Rica", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 257–304.

"amparo" recourse in order to be reestablished in the enjoyment of the rights declared in the Constitution, as well as those fundamental rights set forth in international instruments on human rights applicable in the Republic."

In Costa Rica, both the habeas corpus and the "amparo" recourses are also regulated in a single statute, the Constitutional Jurisdiction Law (*Ley de la Jurisdicción Constitucional, Ley Nº 7135*) of October 11, 1989.[48] According to article 29 of this Law, the recourse of "amparo" can be filed against any provision, decision or resolution and, in general, against any public administration action, omission or material activity which is not founded in an effective administrative act and has violated or threatened to violate the constitutional rights.

As in Argentina, the law excludes the "amparo" action against statutes or other regulatory provisions. Nonetheless, they can be challenged together with the individual acts applying them, or when containing self executing or automatically applicable provisions, in the sense that their provisions become immediately obligatory simply upon their sanctioning. But in such cases, the Chamber must decide the matter of the unconstitutionality of the statute, not in the "amparo" proceeding, but in a general way following the procedure of the action of unconstitutionality.

The Law also excludes the "amparo" action against judicial resolutions or other authorities' acts when executing judicial decisions, and against the acts or provisions in electoral matters issued by the Supreme Tribunal of Elections (Article 30).

Regarding individuals, Costa Rica's Law as in Argentina, admits the possibility of the "amparo" actions to be filed against any harming actions or omissions from individuals, but in this case, in a limited way only referred to persons or corporations exercising public functions or powers that by law or by fact place them in a position of power against which ordinary judicial remedies are clearly insufficient to guaranty the protection of fundamental rights and freedoms (Article 57).

### *B. The Constitutional Chamber of the Supreme Court in El Salvador with exclusive powers on judicial review, and the amparo action*

In El Salvador, the concentrated judicial review system established in the Constitution was the result of the creation of the Constitutional Chamber of the Supreme Court by the Constitutional reform of 1991–1992, with the exclusive power to declare the unconstitutionality of statutes, decrees and regulations challenged by means of a direct action, having the power to annull them with general *erga omnes* effects.

But in the case of El Salvador, contrary to the Costa Rican regulation, ann similar to Colombia, Nicaragua, Panama and Venezuela, the action in order to file petitions regarding the unconstitutionality of statutes, is not restricted in its standing, but is conceived as a popular action that can be brought before the Chamber by any citizen (Articles 2 and 10, Law).

In addition in El Salvador, Article 247 of the Constitution also sets forth the two common specific judicial means for the protection of all constitutional right: the "amparo" and the habeas corpus actions, the latter also for the protection of personal freedom. As in Costa Rica, the only competent court to hear and decide on this matter is the Constitutional Chamber of the Supreme Court of Justice, also establishing a concentrated judicial system of "amparo" (Article 247)[49]. The only exception to this rule exists in matters of habeas corpus when the aggrieving action takes place outside the capital, San Salvador, cases in which the habeas corpus recourse can be filed before the Chambers of Second Instance (article 42). In such cases, and only if they deny the liberty of the aggrieved party, can the case be reviewed by the Constitutional Chamber.

The regulation of the "amparo" and habeas corpus action in El Salvador is also set forth, along with the other constitutional processes, in one single statute: the 1960 Statute on Constitutional Proceedings (*Ley de Procedimientos Constitucionales*) of 1960, as amended in 1997.[50]

According to this Law, the action of "amparo" can be filed against any actions or omissions of any authority, public official or decentralized bodies. Regarding judicial decisions, contrary to

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[48] See in general, Rubén Hernández Valle, "El recurso de amparo en Costa Rica", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 257–304

[49] See Manuel Arturo Montecino Giralt, "El amparo en El Salvador", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 333–380.

[50] See in general, Manuel A. Montecino Giralt, "El amparo en El Salvador", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *El derecho de amparo en el mundo*, Edit. Porrúa, México 2006, pp. 333–380.

Argentina and Costa Rica, the action can also be filed but just against judicial definitive decisions issued by the Judicial Review of Administrative Action courts when violating the rights guaranteed in the Constitution or which impeding its exercise (Article 12).

The Law expressly refers to the extraordinary character of the action of "amparo", also providing, as in Argentina, that it can only be filed when the act against which it is formulated cannot be reparable by means of other remedies.

### *2. The Concentrated Systems of Judicial Review Combined With the Amparo Proceeding Before a Variety of Courts*

With the exception of the two abovementioned cases of Costa Rica and El Salvador where all constitutional judicial matters are concentrated in one single Constitutional Chamber of the Supreme Court, in all the other Latin American countries with concentrated systems of judicial review, the actions or recourses of "amparo" and habeas corpus are regulated in a diffuse way in the sense that they can be filed before a wide range of courts, generally the first instance courts, as is the case of Bolivia, Brazil, Colombia, Chile, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

So, even in countries where a concentrated system of judicial review has also been established as the only method to control the constitutionality of legislation, as is the case of Bolivia, Ecuador, Chile, Honduras, Panama, Paraguay and Uruguay, the jurisdiction to decide "amparo" and habeas corpus actions is attributed to multiple courts.

#### *A. The Plurinational Constitutional Tribunal in Bolivia, and the actions of constitutional amparo, freedom (habeas corpus) and of protection of privacy (habeas data)*

In Bolivia, since the 1994 constitutional reform, the judicial review system has also been configured as an exclusively concentrated one,[51] corresponding, to the Plurinational Constitutional Tribunal, established in article 132 of the 2008 Constitution, the exclusive power to declare the nullity of statutes considered unconstitutional, also with general (*erga omnes*) effects.[52] For such purpose, the action of the unconstitutionality of a juridical norm (for instance, of a statute or of a general executive acts) can be brought before the Constitutional Tribunal by means of a direct action of abstract character, that can by filed by any individual or collective person. According to the Constitutional Tribunal Law, it is also possible for the parties in a particular case or *ex officio* by the judge to raise the question of unconstitutionality of statutes before the Constitutional Tribunal by means of an incidental recourse, when the decision of a particular case depends upon its constitutionality (Article 59).

So with the exception of decisions on the cases of actions of constitutional "amparo", actions of freedom (*acción de libertad* or habeas corpus) and action of protection of privacy (habeas data), the ordinary courts cannot rule on constitutional matters, and must refer the control of constitutionality of statutes to the Constitutional Tribunal.

The Constitution of Bolivia in effect, regulates the action of freedom (habeas corpus), the action of constitutional "amparo" and the action for the protection of privacy (articles 125 to 131). The first of such actions can be filed for the protection of life in cases of being in danger, and also personal freedom when somebody claims they are being illegally persecuted, detained, prosecuted or held (Article 125).

Regarding the action of constitutional "amparo", Article 128 of the Constitution conceived it as an action for the protection of all constitutional rights declared in the Constitution and in statutes, which can also be filed against any illegal or undue acts or omissions from public officials or private individuals or collective persons that restrict, suppress or threaten to restrict or withhold

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51 See in general José Antonio Rivera Santibañez, "La jurisdicción constitucional en Bolivia. Cinco años en defensa del orden constitucional y democrático", in *Revista Iberoamericana de Derecho Procesal Constitucional,* Nº 1, enero, junio 2004, Ed. Porrúa, 2004; José Antonio Rivera Santibañez, "El control constitucional en Bolivia", in *Anuario Iberoamericano de Justicia Constitucional.* Centro de Estudios Políticos y Constitucionales Nº 3, 1999, pp. 205–237; José Antonio Rivera Santivañez, "Los valores supremos y principios fundamentales en la jurisprudencia constitucional", in *La Justicia Constitucional en Bolivia 1998–2003,* Ed. Tribunal Constitucional–AECI, Bolivia, 2003. pp. 347 ff.; Benjamín Miguel Harb, "La jurisdicción constitucional en Bolivia", in *La Jurisdicción Constitucional en Iberoamérica*, Ed. Dykinson, Madrid, España, 1997, pp. 337 ff.

52 Jorge Asbún Rojas, "Control constitucional en Bolivia, evolución y perspectivas", in *Jurisdicción Constitucional*, Academia Boliviana de Estudios Constitucionales. Editora El País, Santa Cruz, Bolivia, 2000, p. 86.

such rights (Article 128)[53]. In this cases the action can only be filed when there is no other mean or legal recourse available for the immediate protection of the restricted, suspended or threatened right or guaranty.

Law 1.836 of 1998 of the Constitutional Tribunal (*Ley Nº 1836 del Tribunal Constitucional*) enacted in 1998, provides that the constitutional "amparo" can be brought before the highest Courts in the Department capitals or before the District Judges in the Provinces (Article 95) and shall be admitted "against any unlawful resolution, act or omission of an authority or official, provided there is no other procedure or recourse available to immediately protect the rights and guaranties", which, as established in Argentina and El Salvador, confirms its extraordinary character. Judicial decisions are excluded from the "amparo" action when they can be modified or suppressed by means of other recourses (Article 96,3).

The Law also admits, like in Argentina, the filing of the "amparo" action "against any unlawful act or omission of a person or group of private individuals that restricts, suppresses or threatens the rights or guaranties recognized by the Constitution and the Laws" (Article 94).

Regarding the action for protection of privacy, article 130.I of the 2008 Constitution has established if in order to ensure that any individual or collective person deeming being undue and illegitimately prevented of knowing, objecting or obtaining the erase or rectification of data anyway registered in public or private archives or databases, affecting his fundamental right to personal and family personal privacy, or his own image, honor and reputation.

In Bolivia, according to the Constitution (Article 202,6) the decisions adopted in all these actions of freedom, constitutional amparo and protection of privacy can be reviewed by the Plurinational Constitutional Tribunal. For such purpose the Law of the Constitutional Tribunal (Article 7,8), establishes that all those judicial decisions must be sent to the Constitutional Tribunal in order to be reviewed. But in this case of Bolivia, similar to the situation in Colombia, but different to the provisions in Argentina, Brazil, and Venezuelan where an extraordinary recourse for revision is provided, the power of the Constitutional Tribunal to review the "amparo," habeas corpus and habeas data decisions is exercised, not because of an extraordinary recourse, but because of an obligatory review duty, for which purpose the decisions must automatically be sent by the courts to the Constitutional Tribunal. Through this power, the Tribunal can guaranty the uniformity of the constitutional interpretation.

The action of constitutional "amparo" and the action of freedom (habeas corpus) have been regulated in one single statute along with other constitutional procedures, the Constitutional Tribunal Law.[54]

### *B. The Constitutional Court in Ecuador, and the actions for amparo, habeas corpus and habeas data*

Since the approval of the 2008 Constitution, Ecuador abandoned the mixed system of judicial review, transforming its system into an exclusive concentrated one.

In effect, before the 2008 Constitution, a mixed system of judicial review of legislation existed in the country, combining the diffuse and the concentrated methods, which were developed bases on a similar provision to the one included in the current article 424 of the 2008 Constitution, which prescribes not only that "The Constitution is the superior norm and prevails over any other legal norm," but that "The norms and acts of the public power must conform to the constitutional provisions and in contrary case they will have no juridical efficacy". Nonetheless, and notwithstanding the permanence of the same provision, the system has been radically changed, eliminating the diffuse method of judicial review.

In effect, Article 425 of the Constitution begins by establishing the hierarchy of all norms, providing that in case of conflict, the Constitutional Court and all judges and authorities are empowered to decide, and to apply the provision with superior hierarchy. Although this provision could lead to consider that the Constitution had maintained the diffuse method of judicial review,

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53 See José Antonio Rivera Santibáñez, "El amparo constitucional en Bolivia", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 81–122.

54 See in general, José A. Rivera Santivañez, *Jurisdicción constitucional. Procesos constitucionales en Bolivia*, Ed. Kipus, Cochabamba 2004, and "El amparo constitucional en Bolivia", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 81–122.

the fact is that the general power of all judges to decide not to apply provisions considered unconstitutional has been eliminated, by instead establishing an incidental mean for the exercise of its concentrated judicial review powers by the Constitutional Court.

In effect, article 428 of the same 2008 Constitution established that when a judge, whether ex officio or at a party's request, deems that a legal provision is contrary to the Constitution or to an international instruments on human rights establishing more favorable rights that those recognized in the Constitution, is stead of deciding giving preference to the constitutional provision, it must suspend the procedure and refer the files to the Constitutional Court, which in a term of no more than 45 days, must decide upon the constitutionality of the provision. Consequently, the powers of the courts to declare the inapplicability of the legal provision contrary to the Constitution or to international treaties or covenants when deciding cases or controversies, was eliminated. In the previous regime, what was established as a complement to the diffuse method of judicial review, was that in all cases of diffuse judicial review decisions, the courts were to produce a report on the issue of unconstitutionality of the statute, that was due to be sent to the Constitutional Tribunal in order for it to decide the matter in a general and obligatory way, that is to say, with *erga omnes* effects.

Regarding the direct concentrated method of judicial review, the 2008 Constitution assigns the Constitutional Court, created in substitution of the Constitutional Tribunal at its turn created in 1998 in substitution of a original Constitutional Guarantees Tribunal,[55] the power to decide when requested through "public actions on unconstitutionality" filed against all normative acts of general character issued by organs and authorities of the State, having as it effect the invalidity of the challenged provision (article 425,1). In the previous regulations, the standing to file these actions was reduced to the President of the Republic, the National Congress, the Supreme Court, one thousand citizens or by any person having a previous favorable report from the Peoples' Defendant (Article 18, 1997 Constitutional Control Law).

The Constitution of Ecuador also provides for the three fundamental judicial means designed for the protection of human rights: the habeas corpus, habeas data and action for protection ("amparo").

The habeas corpus recourse, provided in article 89 of the Constitution can be files by any person who thinks that he has been illegally, arbitrarily or illegitimately deprived of his freedom by order of public authorities or persons, and also, in order to protect the life and physical integrity of persons deprived of freedom.

Regarding the protection action it is also conceived as a judicial remedy, in order to provide direct and effective protection (amparo) of the rights recognized in the Constitution, that can be filed when such rights were infringed by actions or omissions of any public non judicial authority; against public policies that deprive the enjoyment or exercise of constitutional rights;[56] or when the violation, being provoked by individuals providing public services or acting by delegation or concession, cause grave damage to the affected person; or when the latter is in situation of subordination, defenseless or discrimination. From this provision, it result that the amparo action is not admissible against judicial decisions, and the competent courts to hear the "amparo" action are the first instance courts (Article 47, Constitutional Control Law).

The Constitution also provides in article 92 for the action of habeas that can be filed by any person in order to know the existence and to have access to documents, genetic data, personal database or reports regarding itself or regarding his assets, located in public or private entities; as

55 See in general Hernán Salgado Pesantes, "El control de constitucionalidad en la Carta Política del Ecuador", in *Una mirada a los Tribunales Constitucionales. Las experiencias recientes*. Lecturas Constitucionales Andinas Nº 4, Ed. Comisión Andina de Juristas, Lima, Perú; Ernesto López Freire, "Evolución del control de constitucionalidad en el Ecuador", in *Derecho Constitucional para fortalecer la democracia ecuatoriana*, Ed. Tribunal Constitucional – Kas, Quito, Ecuador, 1999; Marco Morales Tobar, "Actualidad de la Justicia Constitucional en el Ecuador", in Luis López Guerra, (Coord.). *La Justicia Constitucional en la actualidad*, Corporación Editora Nacional, Quito, Ecuador, pp. 77–165; Oswaldo Cevallos Bueno, "El sistema de control concentrado y el constitucionalismo en el Ecuador", in *Anuario Iberoamericano de Justicia Constitucional*, Nº 6, 2002, Madrid, España, 2002.

56 Hernán Salgado Pesantes, "La garantía de amparo en Ecuador", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 305–331.

well as to know the use that is made of the same, the purpose and origin of personal information, and the term of the file or database.

These three remedies, habeas corpus, habeas data and the action of protection ("amparo") have been also regulated in one single statute along with other constitutional proceedings: the Constitutional Control Law (*Ley de Control Constitucional*, Ley Nº 000 RO/99) of July 2, 1997.[57]

Finally, it must be mentioned that for the purpose of unifying the jurisprudence in constitutional matters, according to the the Constitutional Control Law, all the decisions granting "amparo" claims must obligatorily be sent to the Constitutional Tribunal in order to be confirmed or repeal. In cases of decisions denying the "amparo" action (as well as the habeas corpus or habeas data actions), they can be appealed before the same Constitutional Court (Articles 12,3; 31; 52).

Also, in matters of "amparo" when the constitutional protection is granted by the competent courts applying the diffuse method of judicial review declaring the unconstitutionality of statutes,[58]according to the Law they must send the report on the question of constitutionality to the Constitutional Tribunal for its confirmation (Article 12,6).

### *C. The Constitutional Tribunal in Chile, and the recourses for protection and of habeas corpus*

According to the concentrated judicial review system established in Chile[59] since 1990, and according to the provisions of the 2005 Constitutional Reform, the question of unconstitutionality of statutes can reach the Constitutional Tribunal (Article 82), by two means: a direct action that can be brought before the Tribunal by some public entities and high officials like the President of the Republic, the Senate, the Representative Chamber and the General Comptroller; or by means of a referral of a constitutional question made by any court at the request of any of the parties when the resolution of the case depends on the constitutionality of the provision, in which cases, the decision regarding the inapplicability of a statutory provision in a particular case has only *inter partes* effects. Only when the Constitutional Tribunal decides an action of unconstitutionality of statutes, does the ruling annulling the statute have general *erga omnes* effects (article 82,7).

In Chile, Articles 20 and 21 of the Constitution, in addition to the habeas corpus recourse and with antecedents in the Constitutional Act Nº 3 (Decree–Law 1.552) of 1976, also establishes the "amparo" recourse called recourse for protection (*recurso de protección*) conceived, as in Colombia, to protect only certain constitutional rights and freedoms, which are enumerated in some paragraph of article 19 of the Constitution, basically referred to civil and individual rights, freedom of economic rights and the right to live in an environment free of contamination. In this regard, the Chilean provisions, follow the same pattern of the German and Spanish constitutional regulations regarding the "amparo" recourse, established only the protection of "fundamental rights". The consequence of these rules is that all the other constitutional rights not enumerated or listed as protected by the recourse for protection, must be enforced by means of the ordinary judicial procedures

The Chilean "*recurso de protección*" is the only action for amparo constitutionally established in Latin America which has not yet been statutorily regulated, which of course has not prevented it exercise,[60] particularly in cases where there is an urgent need for the protection. The recourse is

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57 See in general, Rafael Oyarte Martínez, *Manual de Amparo Constitucional. Guía de litigio constitucional*, CLD–Konrad Adenauer, Quito 2003; Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, and "La garantía de amparo en Ecuador", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 305–331.

58 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, Ecuador, 2004, p. 85.

59 See in general Raúl Bertelsen Repetto, *Control de constitucionalidad de la ley*, Editorial Jurídica de Chile, Santiago, Chile, 1969; Francisco Zúñiga Urbina, *Jurisdicción constitucional en Chile*, Tomo II, Ed. Universidad Central de Chile, Santiago, 2002; Humberto Nogueira Alcalá, "El Tribunal Constitucional chileno", in *Lecturas Constitucionales Andinas*, Nº 1, Ed. Comisión Andina de Juristas, Lima, Perú, 1991; Lautaro Ríos Álvarez Álvarez, "La Justicia Constitucional en Chile", in *La Revista de Derecho*, Nº 1, Ed. Facultad de Derecho, Universidad Central, Santiago, Chile, 1988; Teodoro Rivera, "El Tribunal Constitucional", in *Revista Chilena de Derecho*, Volumen 11 Nº 23, Santiago, Chile, 1984.

60 See in Enrique Paillas, *El recurso de protección ante el derecho comparado*, Santiago de Chile, l990, pp. 80 ff.

only regulated by a Supreme Court regulation: *Auto acordado de la Corte Suprema de Justicia sobre tramitación del Recurso de Protección de Garantías Constitucionales, 1992.*[61]

The recourse for protection must be brought before the Courts of Appeals, which can immediately adopt the rulings they consider appropriate for re–establishing the rule of law and assuring the due protection of the affected party's rights (Article 20).[62]

The Chilean Constitution (Article 21) also provide for the habeas corpus recourse for the protection of personal freedom and safety, naming it in this case, as the "amparo" recourse.

One aspect that must be highlighted regarding the Chilean recourse for protection is that when deciding the case, the courts cannot adopt any decision on judicial review of legislation which is reserved to the Constitutional Tribunal. Consequently, when deciding a recourse of protection, if the court considers that the applicable statute is unconstitutional, it cannot decide on the matter, but has to refer the case to the Constitutional Tribunal for its decision.

### *D. The Constitutional Chamber of the Supreme Court of Justice in Honduras, and the actions for amparo and habeas corpus*

Article 320 of the Honduran Constitution sets forth the general rule on judicial review in the country declaring that "in cases of incompatibility between a constitutional norm and an ordinary statutory one, the courts must apply the former."

In the same sense as it is established in the Constitutions of Colombia, Guatemala and Venezuela, this constitutional provision of Honduras without doubts establishes the diffuse method of judicial review.[63] Nonetheless, the 2004 Law on Constitutional Justice (*Ley de Justicia Constitucional*),[64] failed to regulate such method in the country, and, instead, limited itself to established only an exclusive concentrated method of judicial review of legislation by attributing to the Constitutional Chamber of the Supreme Court the monopoly to annul statutes on the grounds of their unconstitutionality. According to this power, the Constitutional Chamber can declare the unconstitutionality of statutes "on grounds of form or in its contents" (Articles 184; 315,5).

For such purpose, the constitutional questions can reach the Constitutional Chamber also through two means: First, through an action of unconstitutionality that can be brought before the Constitutional Chamber by persons with personal interest against statutes and constitutional amendments when approved contrary to the formalities set forth in the Constitution and against approbatory statutes of international treaties sanctioned without following the constitutional formalities (Article 17). It is also admissible against statutes that contravene the provisions of an international treaty or convention in force (article 76).

Second, the questions of constitutionality can also reach the Constitutional Chamber in an incidental way, as an exception raised by a party in any particular case (Article 82), or by the referral of the case that any court can make before the Chamber, before deciding the case (Article 87).

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61 See in general, Eduardo Soto Kloss, *El recurso de protección. Orígenes, docgtrina, jurisprudencia,* Editorial Jurídica de Chile, Santiago 1982; Humberto Nogueira Alcalá, "El derecho y acción constitucional de protección (amparo) de los derechos fundamentales en Chile a inicios del Siglo XXI", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 159–211.

62 See in general Pedro Aberastury et al., *Acciones constitucionales de amparo y protección: realidad y prospectiva en Chile y América Latina,* Editorial Universidad de Talca, Talca 2000, Chile; Juan Manuel Errazuriz Gatica et al., *Aspectos procesales del recurso de protección,* Editorial Jurídica de Chile, Santiago de Chile 1989; Sergio Lira Herrera, *El recurso de protección. Naturaleza Jurídica, Doctrina, Jurisprudencia, Derecho Comparado*, Editorial Jurídica de Chile, Santiago de Chile 1990; Enrique Paillas, *El recurso de protección ante el derecho comparado*, Editorial Jurídica de Chile, Santiago de Chile 1990; Humberto Nogueira Alcalá, "El derecho y acción constitucional de protección (amparo) de los derechos fundamentales en Chile a inicios del Siglo XXI", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 159–211.

63 See Allan R. Brewer–Carías, "El sistema de justicia constitucional en Honduras", in *El sistema de Justicia Constitucional en Honduras (Comentarios a la Ley sobre Justicia Constitucional),* Instituto Interamericano de Derechos Humanos, Corte Suprema de Justicia. República de Honduras, San José, 2004, pp. 27 ff.

64 See Allan R. Brewer–Carías, "La reforma del sistema de justicia constitucional en Honduras", in *Revista Iberoamericana de Derecho Procesal Constitucional. Proceso y Constitución* (Directores Eduardo Ferrer Mac–Gregor y Aníbal Quiroga León), Nº 4, 2005, Editorial Porrúa, México, pp. 57–77; and "El sistema de justicia constitucional en Honduras", in *El sistema de Justicia Constitucional en Honduras (Comentarios a la Ley sobre Justicia Constitucional),* Instituto Interamericano de Derechos Humanos, Corte Suprema de Justicia. República de Honduras, San José, 2004, pp. 1–148.

In both cases, whether through the action of unconstitutionality or by means of the incidental constitutional question, the decision of the Constitutional Chamber regarding the unconstitutionality of statutes also has general *erga omnes* effects (Article 94).

The Constitution of Honduras also provides for two separate actions for the protection of human rights: "amparo" and habeas corpus, that must be filed according to what is provide in the already mentioned general statute on constitutional proceedings, the Constitutional Judicial Review statute (*Ley sobre la Justicia Constitucional*) of 2004.[65]

Regarding the recourse of "amparo", Article 183 of the Constitution declares the right of any person to file the recourse, in order to be restored in the enjoyment of all rights declared or recognized in the Constitution, and in addition, in treaties, covenants and other international instruments of human rights (Article 183 Constitution, Article 41,1 Law), against public authority actions or facts, comprising statutes, judicial decisions or administrative acts and also omissions or threats of violation (Articles 13 and 41, Law). In this cases, and depending on the rank of the injurer's public authority, the action of "amparo" that can be filed before a variety of courts,.

Regarding individuals, as in Colombia, Costa Rica and Ecuador, the action can be filed against their actions only when issued exercising delegated public powers, that is, against institutions maintained by public funds and those acting by delegation of a State entity by virtue of a concession, contract or other valid resolution (Article 42)[66]..

The Constitution of Honduras, like the solution in Guatemala, also expressly admits the "amparo" against statutes, establishing the right of any party to file the action for amparo, in order to have a judicial declaration ruling that its provisions do not oblige the plaintiff and are not applicable when they contravene, diminish or distort any of the rights recognized in this Constitution"

In the case of Honduras, the "amparo" decisions are subject to an obligatory review by the corresponding superior court, and those issued by the Appellate Courts also subject to review by the Constitutional Chamber of the Supreme Court, but in this case on a discretionary basis, by means of the parties' request (articles 68, 69, Law). Thus, the Constitutional Chamber can always be the last resort to decide upon the matters of "amparo".

On the other hand, by means of the "amparo" action is possible to consider that in Honduras the diffuse method of judicial review can be applied, in the sense that in a contrary sense to the other Latin American regulations in concentrated systems, the Constitution allows the courts to decide that a statute is not to be enforced against the claimant nor is it applicable in a specific case when such statute contravenes, diminishes or distorts a right recognized by this Constitution," (183,2 Constitution)

### *E. The Supreme Court of Justice of Panama, and the actions for amparo and habeas corpus*

The judicial review system of Panama, is also conceived as a concentrated one, attributing to the Supreme Court of Justice the exclusive power (Article 203,1) to protect the integrity of the Constitution and to control the constitutionality of legislation also by means of two different methods: a direct popular action or by means of a question of constitutionality that can be raised by the parties to the case as an incident before a lower court, or *ex officio* by the respective court.[67]

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65 See in general, Francisco D. Gómez Bueso, "El derecho de amparo en Honduras", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 409–460; and Allan R. BREWER–CARÍAS, "El sistema de justicia constitucional en Honduras", in *El sistema de justicia constitucional en Honduras (Comentarios a la ley sobre Justicia Constitucional),* Instituto Interamericano de Derechos Humanos, San José 2004, pp, 107–140.

66 See Francisco Daniel Gómez Bueso, "El derecho de amparo en Honduras", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 409–460.

67 See in general on the Panamanian system of judicial review, Carlos Bolívar Pedreschi,. *El control de la constitucionalidad en Panamá*. Ediciones Guadarrama, España, 1965; Edgardo Molina Mola, *La jurisdicción constitucional en Panamá*. Edit. Biblioteca Jurídica Dike, Colombia, 1998; Rigoberto González Montenegro, *Los desafíos de la justicia constitucional panameña*, Instituto de Estudios Políticos e Internacionales, Panamá 2002; Allan R. Brewer–Carias, "El sistema panameño de justicia constitucional a la luz del Derecho Comparado," in *Revista Novum Ius*, Edicion Nº 15º, Editada por los Miembros de la Asociación Nueva Generación Jurídica publicación estudiantil de la Facultad de Derecho y Ciencias Políticas de la Universidad de Panamá, Panamá, 2010. pp. 130–168

Regarding the action of unconstitutionality, in similar terms as in Colombia, El Salvador, Nicaragua and Venezuela, it is conceived as a popular action that can be brought before the Supreme Court by anybody in order to denounce the unconstitutionality of statutes, decrees, decisions or acts founded in substantive or formal questions (Article 2559).

In both cases, the Supreme Court's decision is final, definitive, obligatory and with general but non retroactive effects, and must be published in the *Official Gazette* (article 2573 Judicial Code).

On the other hand, following the general trend of Latin America, the Constitution of Panama also distinguishes two specific judicial means for the protection of constitutional rights: the habeas corpus and the "amparo" recourses.

Regarding the recourse of "amparo", the Constitution of Panama set forth the right of any person to have revoked any order to do or to refrain from doing issued by any public servant violating the rights and guaranties set forth in the Constitution (Article 50).

Thus, the "amparo" is also conceived in Panamá for the protection of constitutional rights only against authority actions and is not admitted against individual unconstitutional actions. The action can be filed before the ordinary first instance courts, except in cases of high rank officials, in which cases the Supreme Court is the competent one.[68]

Panama together with Paraguay, are the only two countries where the statutory regulation regarding habeas corpus and "amparo" are set forth in the general procedural code, the Judicial Code (*Código Judicial, Libro IV Instituciones de garantía*), Articles 2574–2614 (habeas corpus) and 2615–2632 (*amparo de garantía constitucionales*) of 1987.[69]

According to the Code, the "amparo of constitutional guaranties" can be brought before the courts against any acts that harm or injure the fundamental rights and guaranties set forth in the Constitution (Article 2615) and also against judicial decisions when all the existing judicial means to challenge them have been exhausted; but it cannot refer to judicial decisions adopted by the Electoral Tribunal or by the Supreme Court of Justice or any of its Chambers.

### *F. The Constitutional Chamber of the Supreme Court of Justice in Paraguay, and the recourses for amparo, habeas corpus and habeas data*

Since 1992, the Constitution of Paraguay establishes a concentrated system of judicial review attributing to the Constitutional Chamber of the Supreme Court of Justice, the exclusive power to decide on all matters dealing with judicial review of legislation.[70]

According to this method, the Supreme Court of Justice has the power to decide actions and exceptions seeking to declare the unconstitutionality and inapplicability of statutes contrary to the Constitution. For such purpose, when a judge hearing a particular case considers the applicable statute contrary to the Constitution, he must send the files, even *ex officio*, to the Constitutional Chamber of the Supreme Court of Justice, in order for the Court to decide the question of unconstitutionality when evident (Article 582 Code).

The main distinctive feature of the Paraguayan concentrated judicial review system is that contrary to all the other countries with the same concentrated system, there is not a direct action of unconstitutionality that can be filed before the Chamber, so that the constitutional questions regarding the unconstitutionality of statutes can only reach the Supreme Court in an incidental way. That is why the Supreme Court decisions only declare in the particular case the inapplicability of the statute provisions, having only *inter partes* effects regarding the particular case (Article 260, Constitution)[71], being this provision, together with the Uruguayan one, an exception regarding the general pattern in the other Latin American countries.

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68 See: Lao Santizo P., *Acotaciones al amparo de garantías constitucionales panameño*, Editorial Jurídica Sanvas, San José, Costa Rica 1987; Arturo Hoyos, "El proceso de amparo de derechos fundamentales en Panamá", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *Idem,* pp. 565–580.

69 See in general, Arturo Hoyos, "El proceso de amparo de derechos fundamentales en Panamá", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 565–580.

70 See in general, Norbert Lösing, "La justicia constitucional en Paraguay y Uruguay", in *Anuario de Derecho Constitucional Latinoamericano* 2002. Ed. KAS, Montevideo, Uruguay, 2002; Luis Lezcano Claude, *El control de constitucionalidad en el Paraguay,* Ed. La Ley Paraguaya S.A. Asunción, Paraguay, 2000.

71 L.M. Argaña, "Control de la Constitucionalidad de las Leyes en Paraguay", in *Memoria de la Reunión de Presidentes de Cortes Supremas de Justicia en Iberoamérica, el Caribe, España y Portugal,* Caracas 1982, pp. 550, 551, 669, 671.

On the other hand, the Constitution of Paraguay also regulates in a very detailed way three judicial means for the protection of constitutional rights: the "amparo", the *habeas corpus* (Article 133)[72] and the habeas data recourses (Article 135).

Regarding the petition for "amparo", according to Article 134 of the Constitution, it can be filed by anyone who considers himself seriously affected in his rights or guaranties by a clearly illegitimate act or omission, either by governmental authorities or individuals, or who may be in imminent danger that his constitutional rights and guaranties may be curtailed, and whom, in light of the urgency of the matter cannot obtain adequate remedy through regular legal means. In all such cases, the affected person may file a petition for "amparo" before a competent judge[73].

The "amparo" petition, originally regulated in the 1971 Law Nº 341 of Amparo (*Ley 341/71 reglamentaria del "amparo")*, since 1988 has been regulated in a section of the Civil Procedure Code (articles 565–588)[74], which, as in Argentina and Costa Rica, provides that it is not admissible against judicial decisions and resolutions, nor in the procedure of formation, sanction and promulgation of statutes, or when the matter refers to the individual freedom protected by the recourse of habeas corpus (Article 565,a,b).

According to Article 566 of the Code, the petition for "amparo" can be filed before any first instance court with jurisdiction in the place where the act or omission could have effect. Nonetheless, regarding electoral questions and matters related to political organization, the competent court will be those of the electoral jurisdiction (Article 134 Constitution).

### *G. The Supreme Court of Justice in Uruguay, and the actions for amparo and habeas corpus*

Since 1934, Article 256 of the Uruguayan Constitution,[75] has assigned the Supreme Court of Justice the exclusive and original power to declare the unconstitutionality of statutes and other State acts with force of statutes, whether founded on formal or substantive reasons as a consequence of an action of unconstitutionality that can be filed before the Court by all those who deem that their personal and legitimate interests have been harmed (Article 258)[76]. Thus, regarding the quality to sue (standing), the Uruguayan regulation has similarities with the Honduran one.

The constitutional question can also be submitted to the Supreme Court in an incidental way by a referral made *ex officio* or as a consequence of an exception of unconstitutionality raised by a party in a particular case by an inferior court (Article 258).

In all cases, similar to the Paraguayan solution where the question on the constitutionality of statutes referred only to particular cases, the decisions of the Supreme Court on matters of constitutionality only refer to the particular case in which the question is raised (Article 259)[77] and also has *inter partes* effects.

Regarding the amparo action, the Constitution of Uruguay, if it is true that it does not expressly and specifically provide for it, nonetheless it has been deducted from Articles 7,72 and 332 of the 1966 Constitution, that declare the general right of all inhabitants of the Republic "to be protected in the enjoyment of their life, honor, freedom, safety, work and property". In contrast, the

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72 See: Evelio Fernández Arévalos, *Habeas Corpus Régimen Constitucional y legal en el Paraguay*, Intercontinental Editora, Asunción, Paraguay 2000.

73 See Jorge Seall–Sasiain, "El amparo en Paraguay", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 58–591.

74 See in general, Jorge Seall–Sasian, "El amparo en Paraguay", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 581–591

75 Originally the system was established in 1934, and later in 1951. See H. Gross Espiell, *La Constitución y su Defensa*, Congreso, printed for the International Congress on La Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, pp. 7, 11. The system remained in the 1966 Constitution, in the "Acta Institucional Nº 8 de 1977"and in the "Acta Institucional Nº 12 de 1981". *Idem,* pp. 16, 20.

76 Article 258. See H. Gross Espiell, "La Constitución y su Defensa", *Idem,*. 28, 29; J.P. Gatto de Souza, "Control de la Constitucionalidad de los Actos del Poder público en Uruguay", in *Memoria de la Reunión de Presidentes de Cortes Supremas de Justicia en Iberoamérica, el Caribe, España y Portugal,* Caracas 1982, pp. 661, 662.

77 This principle is clear regarding the incidental mean of judicial review where the question of constitutionality is raised in a particular case, but originates doubts regarding the action of unconstitutionality. According to the Law Nº 13747 of 1969 which regulates the procedures in matters of judicial review, the decision of the Supreme Court impedes the application of the challenged norms declared unconstitutional regarding the plaintiff, and authorizes its use as an exception in all other judicial proceedings, including the judicial review of Public administration activities. See H. Gross Espiell, "La Constitución y su Defensa", *Idem,* p. 29.

Constitution expressly provide for the action of habeas corpus (Article 17) to protect any undue imprisonment.

Nonetheless, the "amparo" recourse has been regulated in the 1988 *Amparo* Law Nº 16011 (*Ley de amparo*),[78], which establishes that any person, human or artificial, public or private, except in those cases where an action of *habeas corpus* is admitted, may bring an action of "amparo" against any act, omission or fact of the public sector authorities, as well as of private individuals that in a illegitimate and evident unlawful way, currently or imminently, impair, restrict, alter or threaten any of the rights and freedoms expressly or implicitly recognized by the Constitution (Article 72).

This action of "amparo" for the protection of all constitutional rights and freedoms may be brought before the judges of first instance in the place where the act, fact or omission under dispute have produced effect (Article 3).[79]

However, Law Nº 16.011, like in Argentina, Costa Rica and in Paraguay, excludes all judicial acts issued in judicial controversies from the action of "amparo". The acts of the Electoral Court, and the statutes and decrees of departmental governments that have force of statute in their jurisdiction (Article 1) are also excluded, as in Costa Rica and Panama,

This action of "amparo" in the Uruguayan system, as in Argentina, is only admitted when there are no other judicial or administrative means available for obtaining the same result of protection or "amparo", or when, if they exist, they are clearly ineffective for protecting the right (Article 2).

In the proceeding of the "amparo" action, constitutional questions regarding the unconstitutionality of statutes may also arise, but as in Paraguay, the ordinary court cannot resolve them and must refer the matter to the Supreme Court of Justice, as a consequence of the concentrated method of judicial review of legislation that exists.[80]

## III. JUDICIAL REVIEW AND AMPARO IN COUNTRIES APPLYING THE MIXED SYSTEM OF JUDICIAL REVIEW OF LEGISLATION

Except in the case of Argentina which remains the most similar to the "American model",[81] the judicial review system in all the other Latin American countries applying the same diffuse method of judicial review has moved from the original exclusive diffuse one towards a mixed one, by also adopting the concentrated method. This is the case of Brazil, Colombia, Dominican Republic, Guatemala, Mexico, Nicaragua, Peru and Venezuela. This transition towards the mixed system has happened even in Mexico, a country that with the peculiarities of its *juicio de amparo*, also moved in 1994 from the original diffuse system of judicial review initially and precisely established since 1857 with the amparo suit, to the current mixed system of judicial review by attributing to the Supreme Court the power to annul, with general effects, statutes directly challenged by some high officials

This mixed system mean that in all these countries, for the resolution of particular cases or controversies, all the courts are empowered to decide upon the unconstitutionality of legislation,

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78 See in general, José R. Saravia Antúnez, Recurso de Amparo. Práctica Constitucional, Fundación Cultura Universitaria, Montevideo 1993; Héctor Gros Espiell, "El derecho de amparo en Uruguay", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 633–648.

79 See in general Luis Alberto Viera et al., *Ley de Amparo. Comentarios, Texto Legal y Antecedentes legislativos a su sanción. Jurisprudencia sobre el amparo*, 2nd Edition, Ediciones IDEA, Montevideo 1993; Miguel Ángel Semino, "Comentarios sobre la acción de amparo en el Derecha uruguayo", in *Boletín de la Comisión Andina de Jurista,* Nº 27, Lima, 1986; Héctor Gross Espiel, "El derecho de amparo en el Uruguay", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 633–648.

80 See in general José Korseniak, "La Justicia constitucional en Uruguay", in *La Revista de Derecho,* año III, enero–junio 1989, Facultad de Derecho, Universidad Central, 1989; Héctor Gross Espiell, "La jurisdicción constitucional en el Uruguay", in *La Jurisdicción Constitucional en Iberoamérica*, Ed. Universidad Externado de Colombia, Bogotá Colombia, 1984; Eduardo Esteva G. "La jurisdicción constitucional en Uruguay", in Domingo García Belaunde and Francisco Fernández Segado (Coord.), *La Jurisdicción Constitucional en Iberoamérica,*. Ed. Dykinson, Madrid 1997; Norbert Lösing, "La justicia constitucional en Paraguay y Uruguay", in *Anuario de Derecho Constitucional Latinoamericano 2002,* Ed. Kas, Montevideo 2002.

81 See A. E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, who speaks about "Northamerican filiation" of the judicial control of constitutionality in Argentinian law, p. 6, 55, 115; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, p. 116; J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las Leyes: una contribución de las Américas a la ciencia política", in *Revista de la Facultad de Derecho de México,* Universidad Nacional Autónoma de México, T. XII, Nº 45, México 1962, p. 652; C.J. Friedrich, *The Impact of American Constitutionalism Abroad,* Boston 1967, p. 83.

and to not apply for the resolution of the case the statutes they considered contrary to the Constitution, giving preference to the latter. At the same time, the Supreme Court (Brazil, Dominican Republic, Mexico), its Constitutional Chamber ( Nicaragua, Venezuela) or the Constitutional Court or Tribunal (Colombia, Guatemala, Peru) are also empowered to decide upon the unconstitutionality of statutes, when requested through a direct action that can be filed by some high public officials (Brazil, Dominican Republic, Guatemala, Mexico, Peru), or by any citizen through a popular action (Colombia, Nicaragua, Venezuela). In all these cases, the Court or Tribunal has the power to annul, with general effects, the challenged statutes.

Finally, being a mixed system of judicial review where the concentrated method is applied by a Supreme Court of a Constitutional Tribunal, also in these countries some mechanism have been established in order to assure that the decisions on constitutional matters whether by applying the diffuse method of judicial review by lower courts, or those adopted in amparo proceedings for the protection of constitutional rights, can reach the higher constitutional court. For such purpose, in Colombia an automatic review power of the Constitutional Court or Tribunal has been set forth; in Brazil and Venezuela, an extraordinary recourse for revision before the Supreme Court has been establish; in Guatemala and Nicaragua, an appeal has been provided; and in a very exceptional way, a discretionary power of revision has been established in Mexico.

Additionally, in all these countries, the amparo proceeding for the protection of constitutional rights has also been regulated, generally following the diffuse judicial pattern by attributing competence to decide the cases to a variety of courts, mainly the first instance courts, and not to a single one. The only exception is Nicaragua, where the Supreme Court is the only competent court to decide upon amparo matters.

### *1. The Federal Tribunal in Brazil, and the mandado de segurança, mandado de injunção, habeas corpus and habeas data*

The mixed system of judicial review of the constitutionality of legislation , since the 19th Century has been developing in Brazil, combining the diffuse and the concentrated method of judicial review.

The diffuse method, clearly influenced by the United States constitutional system,[82] was introduced in the 1891 Federal Constitution by empowering the Supreme Federal Tribunal to review, through an extraordinary recourse, the decisions of the federal courts and of the courts of the States in which the constitutionality of treaties or federal statutes were questioned (article III, I, 1891 Constitution). As a consequence of this express constitutional attribution, the Federal Law Nº 221 of November 20, 1984 (Article 13,10) expressly assigned to all federal courts the power to judge upon the validity of statutes and executive regulations when they considered them unconstitutional, and to decide upon their inapplicability when deciding a particular case.[83]

According to this diffuse system of judicial review in Brazil, all the courts of first instance have the power to decide not to apply laws (federal, state or municipal) that they deem unconstitutional when a party to the proceeding has raised the question of constitutionality,[84] or when the challenged particular authority act, in cases of *mandado de segurança* or the *habeas corpus* recourses, is alleged to be issued in execution of a statute deemed unconstitutional In these cases, the question must be examined before the final decision of the case is adopted in a decision with *inter partes* effects on the case.[85]

The constitutional question can also be decided, in the appellate jurisdiction, in which case, if the court of second instance is a collegiate court, the decision upon matters of unconstitutionality of legislation must be adopted by a majority vote.[86]

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82 See O.A. Bandeira de Mello, *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 157; J. Alfonso da Silva, *Sistema de defensa da Constituiçao brasileira*, Congreso sobre la Constitución y su Defensa, Universidad nacional Autónoma de México, México 1982, p. 29. (mimeo).

83 Thus, the diffuse system of judicial review of legislation was established in Brazil at the end of the 19th century, and was perfected through the subsequent constitutional reforms of 1926, 1934, 1937, 1946 and 1967. See O.A. Bandeira De Mello, *Idem*, pp. 158–237.

84 J. Alfonso Da Silva, J. Alfonso Da Silva, *Curso de direito constitucional positivo*, Sao Paulo 1984, p. 18.

85 J. Alfonso da Silva, *Sistema de defensa da Constituiçao brasileira*, Congreso sobre la Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, pp. 41,64.

86 This qualified vote was first established in the 1934 Constitution (Article 179), and is always required. See O.A. Bandeira De Mello, *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 159.

But, the most distinctive feature of the Brazilian diffuse method of judicial review (Article 119, III,b,c), is that since its constitutional creation in 1894, the power of the Supreme Tribunal to intervene in all proceedings in which constitutional questions are resolved was also established when requested through an extraordinary recourse. In these cases, the Supreme Court's decisions have to be sent to the Federal Senate which has the power to "suspend the execution of all or part of a statute or decree when declared unconstitutional by the Supreme Federal Tribunal through a definitive decision" (Article 42, VII Federal Constitution) in which case the effects of the Senate's decisions has *erga omnes* and *ex nunc* effects.[87].

This diffuse system of judicial review, initially established in an exclusive way, in 1934 was transformed into a mixed system, when in addition, the Constitution established the concentrated method of judicial review by empowering the Federal Supreme Tribunal to declare the unconstitutionality of Member States' Constitutions or statutes when requested by means of a direct action of unconstitutionality that could be filed directly before the Tribunal by the Attorney General of the Republic (Article 12,2).

This direct action of unconstitutionality, originally established to defend federal constitutional principles against Member States acts, was extended through subsequent constitutional and statutory reforms (including the 1965 constitutional amendment and the Law Nº 2271 of 22 July 1954), in order to allow the constitutional control over Federal and Member States statutes.[88.] In these reforms the standing to sue was also extended, so that now, the action of unconstitutionality can be filed by the President of the Republic, by the boards of the Senate and of the Representative Chamber, as well as of the Legislative Assemblies of the States; by the States' governors and by the Attorney General of the Republic. In addition, it can be filed by the Federal Council of the Federal Bar (*Ordem dos advogados de Brasil*), the political parties represented in Congress, and the trade unions confederations and class entities (article 103, constitution). The decisions of the Supreme Tribunal resolving the actions when declaring the unconstitutionality of statutes have, *erga omnes* effects.[89]

Consequently, since 1934, the Brazilian system of judicial review can be considered as a mixed one in which the diffuse method of judicial review operates in combination with a concentrated one,[90] being one of its particular trends, ever since its establishment in 1891, the power assigned to the Supreme Tribunal to review lower courts' decisions on matters of constitutionality through an extraordinary recourse that can be brought before the Tribunal against judicial decision issued on matters of constitutionality by the Superior Federal Court or by the Regional Federal Courts, when their decisions are considered to be inconsistent with the Constitution; and in cases in which the courts have denied the validity of treaties or federal statutes, or have declared their unconstitutionality; or when a local government law or act has been challenged as unconstitutional for being contrary to a valid federal law (Article 199. III, b,c. Constitution).

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87 Article 119, III b,c, Constitution *Cf.* J. Alfonso Da Silva, *Sistema de defensa da Constituiçao brasileira,* Congreso sobre la Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, pp. 32, 34, 43, 73; J. Alfonso Da Silva, *Curso de direito constitucional positivo,* Sao Paulo 1984, pp. 17, 18; O.A. Bandeira De Mello, *A teoria das Constituiçoes rigidas,* Sao Paulo 1980, p. 215; H. Fix–Zamudio and J. Carpizo, "Amerique Latine", in L. Favoreu and J.A. Jolowicz (ed.), *Le contrôle juridictionnel des lois*, Paris 1986, p. 121.

88 See J. Alfonso Da Silva, *Sistema de defensa da Constituiçao brasileira,* Congreso sobre la Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, p. 31.

89 See, José Carlos Barbosa M, "El control judicial de la constitucionalidad de las leyes en el derecho brasileño: Un bosquejo", in Eduardo Ferrer Mac–Gregor (Coord.), *Derecho Procesal Constitucional*, Tomo III, Editorial Porrúa, México 2003, Tomo III, p. 1999.

90 See A. Buzaid, "La accion directa de inconstitucionalidad en el derecho brasileño", in *Revista de la Facultad de Derecho,* UCAB, Nº 19–22, Caracas 1964, p. 55; O.A. Bandeira De Mello, *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 157. See in general Mantel Goncalves Ferreira Filho, "O sistema constitucional brasileiro e as recentes inovacoes no controle de constitucionalidade", in *Anuario Iberoamericano de Justicia Constitucional*, Nº 5, 2001, Centro de Estudios Políticos y Constitucionales, Madrid, España, 2001; José Carlos Barbosa Moreira, "El control judicial de la constitucionalidad de las leyes en el Brasil: un bosquejo", in *Desafíos del control de constitucionalidad,* Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; Paulo Bonavides, "Jurisdicao constitucional e legitimidade (algumas observacoes sobre o Brasil)", in *Anuario IberoamerivanoIberoamericano de Justicia Constitucional* Nº 7, Centro de Estudios Políticos y Constitucionales, Madrid, 2003; Enrique Ricardo Lewandowski, "Notas sobre o controle da constitucionalidade no Brasil", in Edgar Corzo Sosa et al., *Justicia Constitucional Comparada,* Ed. Universidad Nacional Autónoma de México, México D.F. 1993; Zeno Veloso, *Controle jurisdicional de constitucionalidade*, Ed. Cejup, Belém, Brasil, 1999.

On the other hand, in Brazil, Article 5 of the Constitution establishes four actions for the protection of constitutional rights and guaranties: in addition to the habeas corpus,[91] and habeas data recourses, it provides for the *mandado de segurança* and the *mandado de injunção*, both which are the most similar to the amparo decisions. The procedural rules regarding the *mandado de segurança* are set forth in *Lei* Nº 1.533, of December 31, 1951; and *Lei* Nº 4.348, of June 26, 1964.[92]

The *mandado de segurança* and the recourse for *habeas corpus* were set forth in the 1934 Constitution;[93] and the *mandado de injunçao* and the recourse of *habeas data* established in the 1988 Constitution,[94] being Brazil the first Latin American country to have constitutionalized this latter to guaranty the right to have access to official records and the rights to rectify or correct the information they contain (Article 5, LXXII).

The *mandado de segurança* was expressly provided for the protection of fundamental rights, except for personal freedom and the right to free movement which are protected by the recourse for *habeas corpus* (Article 153, 21). According to the Law N° 1533 of December 31 1951, it is only admitted against illegal or abuse of power actions adopted by public authority or corporations when exercising public attributions (Article 5, LXIX). The *mandado de segurança*, as is the case of the "amparo" action in Argentina, cannot be filed against statutes, even being of auto–applicative or self–executing nature.[95]

The 1988 Constitution also provided for a *mandado de segurança* of a collective nature, conceived as a mean for protecting collective interests that can be brought before the courts by political parties represented in the National Congress, and by trade union and other legally organized entities or associations for the defense of the interests of their members or associates (Article 5, LXX).

This *mandado de segurança* can be brought before a variety of courts, and only if there are no other administrative recourses that can be filed against the challenged act, or if against judicial decisions, when no other recourses are provided in procedural law to obtain for their modification.

The *mandado de injunçao* was established to protect constitutional rights against the omissions of State authorities to regulate their exercise, particularly referring to constitutional rights related to nationality and citizenship when the lack of legislative or regulatory provisions make them unenforceable (Article 5, LXXI). So the action is filed in order to obtain a court order directed to the legislative or regulatory bodies to produce determined regulatory acts, the absence of which affects or harms the specific right.[96] In these cases, the courts cannot surrogate themselves in the powers of the legislative body, in the sense that they cannot "legislate" by means of this writ of

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91 The habeas corpus can be brought before the courts whenever anyone suffers or feels threatened with suffering violence or duress in his or her freedom of movement because of illegal acts or abuses of power (Article 5, LXVIII of the Constitution). The right of movement (*ius ambuland*) is defined as the right of every person to enter, stay and leave national territory with his belongings (Article 5, XV). In principle, the action is brought before the Tribunals of First Criminal Instance, but actions may be heard by the Appeals Tribunals and even by the Supreme Federal Tribunal if action is brought against the Tribunal of First Instance or against the Appeals Tribunal.

92 See in general, J. Cretella Junior, *Comentários à la Lei do mandado de segurança*, Forense, Rio de Janeiro, 1992; José Afonso de Silva, "El mandamiento de seguridad en Brasil", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, pp. 123–157.

93 Article 113,33 Constitution 1934. See A. Ríos Espinoza, Presupuestos constitucionales del mandato de seguridad", in *Boletín del Instituto de Derecho Comparado de México*, Universidad Nacional Autónoma de México, Nº 46, México 1963, p. 71. Also published in H. Fix–Zamudio, A. Ríos Espinosa and N. Alcalá Zamora, *Tres estudios sobre el mandato de seguridad brasileño*, México 1963, pp. 71–96.

94 See in general. José Alfonso Da Silva, *Mandado de injunçao e habeas data*, Sao Paulo, 1989; Dimar Ackel Filho, *Writs Constitutionais*, Sao Paulo, 1988; Nagib Slaibi Filho, *Anotaçoes a Constituiçao de 1988*, Río de Janeiro, 1989; Celso Agrícola Barbi, Do *Mandado de Segurança*, 7th Edition de acordo com o Código de Processo Civil de 1973 e legislação posterior, Editora Forense, Río de Janeiro 1993; J. Cretella Júnior, *Comentários à ley do mandado de segurança (de acordo com a constituição de 5 de outubro de 1988*, 5th Edition, Editora Forense, Río de Janeiro 1992; José Alfonso Da Silva, "El mandamiento de seguridad en Brasil", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 123–157.

95 See H. Fix–Zamudio, "Mandato de seguridad y juicio de amparo", in *Boletín del Instituto de Derecho Comparado de México*, Universidad Nacional Autónoma de México, N° 46, México 1963, pp. 11, 17.

96 If the regulatory omission is attributable to the highest authorities of the Republic, the competent court to decide the mandado de injunçao is the Supreme Federal Tribunal. In other cases, the High Courts of Justice are the ones competent to do so.

*injunçao*, and are restricted to order or instruct for the protection of the constitutional right when unenforceable because of the lack of regulation.

### *2. The Constitutional Court in Colombia, and the actions for "tutela" and habeas corpus*

The system of judicial review also established since the 19th century in Colombia, has always been a mixed system of judicial review of legislation, which in a very similar way to the Venezuelan one, mixed the diffuse and concentrated methods of judicial review.[97]

Regarding the diffuse method of judicial review it was consolidated since the 1910 Constitution, which expressly attributed to all courts the power to declare the inapplicability of statutes deemed contrary to the Constitution. As in all cases where the diffuse method is applied, the courts cannot annul the statutes, the declaration of their unconstitutionality only being referred to the particular case, in the sense that the court must limit the ruling to not apply the unconstitutional statute to the case, with *inter partes* effects.

This method was developed in parallel with a concentrated method of judicial review by attributing the former Supreme Court of Justice and now the Constitutional Court, the power to annul statutes with general effects on the grounds of their unconstitutionality, when requested by means of a popular action. It was also in the 1910 Constitution that the role of the Supreme Court as "guardian of the integrity of the Constitution" was consolidated, a role that today is accomplished by the Constitutional Court.[98]

On the other hand, for the immediate protection of constitutional rights, the 1991 Constitution created the "action for tutela," using a word that in Spanish has the same general meaning as "amparo" and as "protección".

This action for "*tutela*", is referred in Article 86 of the Constitution as a preferred and summary proceeding that can be used for the immediate protection of certain constitutional rights (like in Chiile) that are those listed in the Constitution as "fundamental rights" or that are considered as such because of their connection with them. The Constitution refers to the action for *tutela* providing that it can be filed against public officials' violations and also against individual or corporations whose activities may particularly affect collective interest.

The action can only be filed when the injured party has no other judicial mean for the protection of his rights, unless when the tutela action is used as a transitory mean to prevent irreparable damages.

The *tutela* action, created by the 1991 Constitution was immediately regulated in the decree–law Nº 2591 of November 19, 1991, and subsequently developed by decree Nº 306 of February 19, 1992 and decree Nº 382 of July 12, 2000.[99]

In addition to the habeas corpus recourse, which is regulated in the Criminal Code, the Constitution also provide for a "popular action" established for the protection of collective rights and interests when related to the protection of public property, public space use, public safety and public health, administrative behavior, the environment, free economic competition and others of the same nature defined by statute.

In particular, regarding the "action of *tutela*", its statutory regulation issued by Decree Nº 2.591 of 1991, [100] and its very important application by the courts, have molded an effective judicial mean

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97 See in general Eduardo Cifuentes Muñoz, "La Jurisdicción constitucional en Colombia", in F. fernández Segado and Domingo García Belaúnde, *La Jurisdicción constitucional en Iberoamérica*, Ed Dykinson, Madrid, España, 1997; Luis Carlos Sáchica, *La Corte Constitucional y su jurisdicción*, Ed. Temis. Bogotá Colombia, 1993. Concerning the mixed character of the system see: J. Vidal Perdomo, *Derecho constitucional general*, Bogotá 1985, p. 42; D.R. Salazar, *Constitución Política de Colombia*, Bogotá 1982, p. 305; E. Sarria, *Guarda de la Constitución*, Bogotá p. 78.

98 See Allan R. Brewer–Carías, *El Sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia (Temas de Derecho Público Nº 39) y Pontificia Universidad Javeriana (Quaestiones Juridicae Nº 5), Bogotá 1995.

99 See in general, Manuel José Cepeda, *La Tutela. Materiales y reflexiones sobre su signifycado*, Imprenta nacional, Bogotá1992; Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá 2004; Julio César Ortiz Gutierrez, "La acción de tutela en la Carta Politica de 1991. El derecho de amparo y su influencia en el ordenamiento constitucional de Colombia", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 213–256.

100 See, in general, in regard to the tutela in Colombia, Jorge Arenas Salazar, *La Tutela Una acción humanitaria*, 1st Edition 1992, Ediciones Librería Doctrina y Ley, Santa Fe de Bogotá D.C., Colombia 1992; Manuel José Cepeda, *La Tutela*

for the protection of fundamental constitutional rights, which can be filed before the courts[101] at all times and in any place for the immediate protection of fundamental constitutional rights, whenever they are harmed by the action or the omission of any public authority or by certain individuals. In the latter case, they must be those rendering a public service, whose conduct can seriously and directly affects collective interests, and regarding which the aggrieved party finds himself in a position of subordination or defenselessness.

The Constitution does not exclude any State act from the tutela action, so Article 40 of the Decree 2591 expressly provided for the action for tutela against judicial decisions. Notwithstanding, the following year this article was annulled by the Constitutional Court by a decision issued on October 1, 1992, considering it unconstitutional[102] because it was contrary to the general principle of *res judicata* effects of the judicial rulings, as an expression of the due process rights. With this Constitutional Court ruling, all arbitrary judicial decisions were left out of specific control. But in spite of the annulment of the article, this situation was amended by the same Constitutional Court through the development of the so called doctrine of arbitrariness, precisely conceived to allow the admission of the tutela actions against judicial decisions when issued as a result of courts arbitrary ruling or *voie de fait.* [103]

According to Article 86 of the Constitution, the action for tutela can only be admitted when the affected party does not have any other preferred and brief mean for judicial defense (Article 6,2 of the Decree Nº 2591), and in such cases, when filed "to obtain temporary judicial relief to avoid irreparable harm", being understood as irreparable damage those " that can only be wholly repaired by means of compensation" (Article 6,1). The Tutela Law also provides, similar to the Venezuelan "amparo" regulations, that in these cases "when used as a preliminary protective relief to avoid irreparable harm, the action of *tutela* may be brought conjunctly with the actions for annulment filed against administrative acts before the judicial review of administrative action jurisdiction (*contencioso administrativo*).

In all these cases, the judge may determine that the challenged administrative act "would not be applied to the specific protected situation pending the final decision on the nullity of the challenged act." (Decree Nº 2.591, Article 8).

The creation of the Constitutional Court in 1991 as the ultimate guardian of the Constitution also originated the attribution to the Court of the power to review all the judicial decisions resolving actions for tutela. But, contrary to the Venezuelan or Argentinean regulations on this matter, the competence of the Constitutional Court in Colombia in the case is not the result of the filing of a specific recourse for review, but, as in Bolivia, is an attribution that must be automatically accomplished by the Court, although in a discretionary way (Article 33). For such purpose, in all cases where tutela decisions are not appealed, they must always be automatically

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*Materiales y Reflexiones sobre su significado*, Imprenta Nacional, Bogotá 1992; Oscar José Dueñas Ruiz, *Acción de Tutela, Su esencia en la práctica, 50 respuestas básicas, Corte Suprema, Consejo de Estado, Legislación*, Ediciones Librería del Profesional, Santa Fe de Bogotá D.C., Colombia 1992; Federico González Campos, La Tutela: *Interpretación doctrinaria y jurisprudencial*, 2nd Edition, Ediciones Jurídicas Gustavo Ibáñez, Santa Fe de Bogotá 1994; Manuel José Cepeda, *Las Carta de Derechos. Su interpretación y sus implicaciones*, Temis, Bogotá 1993; Juan Manuel Charry U., *La acción de tutela*, Editorial Temis, Bogotá 1992; Julio César Ortiz Gutierrez, "La acción de tutela en la Carta política de 1991. El derecho de amparo y su influencia en el ordenamiento constituicional de Colombia", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 213–256.

101 The Constitution sets forth that the action of tutela for the protection of fundamental constitutional rights can be brought "before the judges"; which according to Decree 2.591 of 1991 are those with jurisdiction in the place where the violation or threat of violation have taken place (Article 37). In another Decree Nº 1380 of 2000, regarding the courts with jurisdiction to decide the tutela actions, it was established that they must be file: before the Districts' Superior Courts when against any national public authority; before the Circuit courts when against any national or departmental decentralized entity for public services; before the municipal courts when against district or municipal authorities and against individuals; before the Cundinamarca Judicial review of administrative actions when against any general administrative act issued by a national authorities; before the respective superior court when against any judicial decision; and before a Corporation in its corresponding Chamber when against the Supreme Court of Justice, the Consejo de Estado or the Superior Council of the Judiciary, or its Disciplinary Chamber.

102 See the decision Nº C–543 of September 24, 1992 in *Derecho Colombiano*, Bogotá 1992, pp. 471 to 499; and in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá 2001, pp. 1009 ff.

103 See the decision Nº. T–231 of May 13, 1994, in *Idem*, pp. 1022 ff.

sent for revision before the Constitutional Court (Article 31). But even in cases in which the tutela decisions are appealed, the matter must also reach the Constitutional Court because the superior court's decision, whether confirming or revoking the appealed decision, must also be automatically sent for review before the Constitutional Court (Article 32). In all these cases, the Constitutional Chamber has discretionary powers to determine which decision of tutela will be examined (Article 33).

These Constitutional Court review decisions only produce effects regarding the particular case; thus the first instance court must be immediately notified, and in its turn, must notify the parties and adopt the necessary decisions in order to conform their own initial ruling to the Constitutional Court decision.

### *3. The Constitutional Tribunal in the Dominican Republic, and the actions for amparo, habeas corpus and habeas data*

The Dominican Republic also has a mixed system of judicial review which combines the diffuse method of judicial review with the concentrated one. Regarding the former, since 1844, the Constitution sets forth that "all statutes, decrees, resolutions, regulations or acts contrary to the Constitution are null and void" (article 6, 2010 Constitution). From this express supremacy clause the courts developed their general power to declare statutes unconstitutional and not applicable when resolving particular cases,[104] which has been expressly regulated in article 188 of the 2010 Constitution that empowers all courts to decide the exception of constitutionality in the cases they must decide. On the other hand, regarding the concentrated method of judicial review, the Constitutional Tribunal created in article 184 of the 2010 Constitution has the exclusive power to hear and decide action of unconstitutionality against statutes, decrees, regulations, resolutions and ordinances that can be filed by the President of the Republic, on third of the members of the Senate or of the Chambers of representatives, and also by any party with a legitimate interest legally protected (Article 185,1) In such cases, the Constitutional Tribunal decisions have *erga omnes* effects.

The previous Constitutions of the Dominican Republic only established the judicial guaranties for the protection of personal safety by means of the action of habeas corpus (Article 8) for the protection of personal freedom, which was initially regulated by the 1978 Habeas Corpus Law (*Ley de habeas corpus*). Since 2002 it was regulated in the Procedural Criminal Code (Ley 76–02) (articles 381–392).[105] Based on such regulations, the Supreme Court traditionally limited the procedure of habeas corpus for the protection of physical freedom and safety, excluding any possibility of using it in order to protect other constitutional rights. Apart from the Cuban Constitution, the Dominican Constitution was then the only Latin American one which did not expressly regulate the "amparo" action as a specific judicial mean for the protection of the other constitutional rights. As aforementioned, the other Constitution that does not expressly provide for the amparo action is the Uruguayan one, but the action has been deducted from other guaranties established in it.

Nonetheless, the omission on the Dominican Republic Constitution did not prevented the Supreme Court of Justice from admitting the "amparo" action, applying for that purpose the American Convention on Human Rights. It occur in a decision of February 24, 1999 in the *Productos Avon S.A.* Case, when the Supreme Court, based on the American Convention on Human Rights, admitted the "amparo" recourse for the protection of constitutional rights, in a case involving a judicial decision, assigning the power to decide on amparo matter, to the courts of first instance;[106] and establishing the general procedural rules for the proceeding.

This judicial doctrine regarding the admissibility of the "amparo" recourse leads to the sanctioning, in 2006, of the Law 437–06 establishing the recourse for amparo (*Ley Nº 437–06 que*

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104 See M. Berges Chupani, "Informe", in *Memoria de la Reunión de Cortes Superiores de Justicia de Ibero–America, El Caribe, España y Portugal*, Caracas 1983, p. 380.

105 See in general, Juan de la Rosa, *El recurso de amparo*, Edit. Serrales, Santo Domingo, 2001.

106 Since then, the amparo action was successfully used for the protection of constitutional rights. Among the multiple cases is a very interesting 2002 case in which the Court of First Instance of the National District ordered the National Citizenship Registry to issue the Identification Card to two boys born in the Republic from illegally settled Haitian parents, arguing that the rejection of such documents constituted a violation of the boys' identity and citizenship rights. The matter finally reached the Inter American Court on Human Rights. See Samuel Arias Arzeno, "El Amparo en la República Dominicana: su Evolución Jurisprudencial", in *Revista Estudios Juridicos*, Vol. XI, Nº 3, Ediciones Capeldom, Septiembre–Diciembre 2002.

*establece el Recurso de Amparo)*, "against any act or omission from public authorities of from any individual, which in an actual and imminent way and with manifest arbitrariness and illegality, harms, restrict, alter of threat the rights and guaranties recognized explicit or implicit in the Constitution" (article 1). Nonetheless, and even though the amparo recourse was admitted by the Supreme Court in 1999 as a public law institution in a case brought before the Court against a judicial decision, the 2006 Law expressly excluded the amparo recourse against "jurisdictional acts issued by any court within the Judicial Power" (Judiciary) (article 3,a); also providing that no judicial process before any court can be suspended by the exercise of the action for amparo (article 5).

The courts of first instance are the competent on matters of amparo (article 6), being the recourse an "autonomous action" which imply that in the Dominican Republic, the amparo action is not subjected to the previous exhaustion of other recourses or judicial means establish to challenge the act or omission (article 4).

The 2010 Constitution has definitively incorporated the amparo action within its provisions, establishing in its article 72 that everybody has such action in order to file claims before the courts for the immediate protection of his fundamental rights, not protected through habeas corpus, when harmed or threatened by actions or omissions of public authorities or by individuals, for making effective the enforcement of a statute or the execution of an administrative act, or for guarantying diffused or collective rights.

The 2010 Constitution, in addition, set forth for the action of habeas data, that anybody can file in order to know the existence and to have access to the data concerning itself incorporated in registries or public or private databanks; providing that in case of falsely or discrimination, he can request for it suppression, rectification, updating or confidentiality (article 70).

### *4. The Constitutional Court in Guatemala, and the amparo*

The judicial review system of Guatemala is also a mixed system which combines the diffuse and concentrated methods. The former has been traditionally set forth in Guatemala, derived from the principle of the supremacy of the Constitution, expressly provided in Article 115 of the Amparo Law when it declares that all "statutes, governmental dispositions or any order regulating the exercise of rights guarantied in the Constitution shall be null and void if they violate, diminish, restrict or distort them. No statute can contravene the Constitution's disposition. Statutes that violate or distort the constitutional norms are null and void."

On the other hand, the consequence of this principle is the possibility of the parties to raise in any particular case (including cases of "amparo" and habeas corpus), before any court, at any instance or in cassation, but before the decision on the merits is issued, the question of the unconstitutionality of the statute in order to obtain a declaration of its inapplicability to the particular case. (Articles 116 and 120)

The question of unconstitutionality can be brought and raised as an action or as an exception or incident in the particular case, before the competent court by the Public prosecutor or by the parties. The decision which must be issued in three days, can be appealed before the Constitutional Courts (Article 121). If the question of unconstitutionality of a statute supporting the claim is raised has an exception or incident, the competent court must also resolve the matter (Article 123); and the decision can also be appealed before the Constitutional court. (Article 130)

The concentrated method of judicial review is exercised by the Constitutional Court which is empowered to hear actions of unconstitutionality filed against statutes, regulations or general dispositions. (Article 133) This action can be brought before the Court by the Public Prosecutor and the Human Rights Commissioner; and also by the board of directors of the Lawyer's (Bar) Association (*Colegio de Abogados*), and by any person with the help of three lawyers who are members of the Bar. (Article 134).

The statutes, regulations or general dispositions declared unconstitutional, will cease in their effects from the following day after the publication of the Constitutional Court decisions in the *Official Gazette* (Article 140), the decision of the Constitutional Court having general *erga omnes* effects.

On the other hand, in Guatemala, Article 265 of the Constitution sets forth the "amparo", as a specific judicial mean with the purpose of protecting the people's constitutional rights against the violations or the threats to their rights in order to restore their effectiveness. The Constitution emphatically states that "there is no scope that could escape from the "amparo" as constitutional

protection, since it is possible to file the action against acts, resolutions, provisions or statutes which explicitly or implicitly threatens, restricts or violates the rights guarantied by the Constitution and the statutes" (Article 265).[107]

For such protection, the constitutional provision only refers to actions from public authorities, but this has not prevented the admission of the "amparo" for the protection of all rights declared in the Constitution and also in statutes, as well as against individual actions.

The regulation of the action of "amparo" in Guatemala is also set forth in a general statute, the 1986 Amparo, Personal Exhibition and Constitutionality Statute (Decree Nº 1–86, *Ley de amparo, exhibición personal y de constitucionalidad*).[108]

According to Article 10 of this Law, the "amparo" is established to protect all rights against any situation provoking any risk, threat, restriction or violation, whether from authorities or private entities. Notwithstanding, regarding the latter, Article 9 of the Amparo Law restrict the "amparo" action only against private entities that are supported with public funds or that have been created by statute or by virtue of a concession, or those that act by delegation of the State, by virtue of a contract or a concession. Amparo can also be filed against entities to which certain individuals are legally compelled to be part of them (professional corporations) and other that are recognized by statute, like political parties, associations, societies, trade unions, cooperatives and similar.

Article 10 of the Amparo Law enumerates a few examples according to which everybody has the right to ask for "amparo",[109] including, like in Honduras, the "amparo" against statutes which is conceived as a mean to obtain in a judicial decision in a particular case, a declaration that a statute, regulation, resolution or act of any authority does not oblige the plaintiff or injured party because it contradicts or restricts any of the rights guarantied in the Constitution or recognized by any statute. (Article 10,b).

Article 263 of the Constitution and Article 82 of the Amparo Law also regulate the right to *habeas corpus* in favor of anyone who is illegally arrested, detained or in any other way prevented from enjoying personal freedom, threatened with losing such freedom, or suffering humiliation, even when their imprisonment or detention is legally founded. In such cases, the affected party has the right to request his immediate personal appearance (*habeas corpus*) before the court, either for his constitutional guarantee of freedom to be reinstated, for the humiliations to cease, or to terminate the duress to which he was being subjected.

The competent courts to hear and to decide on amparo matters vary regarding the challenged acts,[110] and in all the cases, the amparo decisions are subjected to appeal before the Constitutional Court (Art 60), which can be filed by the parties, the Public prosecutor and the Human Rights

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107 See Jorge Mario García Laguardia, "Las garantías jurisdiccionales para la tutela de los derechos humanos en Guatemala: Hábeas corpus y amparo", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 381–408.

108 See in general, Jorge Mario García Laguardia, "Las garantías jurisdiccionales para la tutela de los derechos humanos en Guatemala. Habeas courpus y amparo", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 381–408.

109 Article 10: a) To ask to be maintained or to be restituted in the enjoyment of the rights and guaranties set forth in the Constitution or any other statute; b) In order to seek a declaration in a particular case, that a statute, regulation, resolution or authority act does not oblige the plaintiff because it contradicts or restricts any of the rights guarantied in the Constitution or recognized by any other statute; c) In order to seek a declaration in a particular case that a non legislative disposition or resolution of Congress is not applicable to the plaintiff because it violates a constitutional right; d) When an authority of any jurisdiction issues a regulation, accord or resolution of any kind that abuses power or exceeds its legal attributions, or when it has no attributions or they are exercised in a way that the harm caused or that can be caused would be irreparable through any other mean of defense. e) When in administrative activities the affected party is compelled to accomplish unreasonable or illegal formalities, task or activities, or when no suppressive mean or recourse exists; f) When the petitions or formalities before administrative authorities are not resolved in the delay fixed by statutes, or in case that no delay exists, in a delay of 30 days once exhausted the procedure, or when the petitions are not admitted; g) In political matters when the rights recognized in the Constitution or statutes are injured by political organizations; h) In judicial and administrative matters, regarding which the statutes set forth procedures and recourses according to due process rules that can serve to adequately resolve them, if after the exhaustion of threat by the interested party, the threat, restriction or violation to the rights recognized in the Constitution and guarantied by the statute persist.

110 For instance, according to Articles 11 et seq. of the 1986 Law of Amparo, the Constitutional Court, is competent in the cases of amparo brought against the Congress of the Republic, the Supreme Court of Justice, the President and the Vice President of the Republic, an the The Supreme Court of Justice must decide the cases of amparo brought against the Supreme Electoral Tribunal; Ministers or Vice Ministers of State when acting in the name of their Office.

Commissioner (Article 63). The Constitutional Court in its decision can confirm, revoke or modify the lower court resolution (Article 67); and can also annul the whole proceeding when it is proved that the formalities had not been observed.

### *5. The Supreme Court of the Nation in México, and the "juicio de amparo"*

Regarding judicial review of constitutionality of statutes, since the 1994 constitutional reform, the Mexican system has moved from an original exclusive diffuse system into a mixed system of judicial review by the incorporation of the concentrated method exercised by the Supreme Court by means of an abstract judicial review proceeding of statutes, with the power to decide in these cases with general binding effect.

According to article 105,II of the Constitution, in these cases, in order for the Supreme Court of the Nation to decide, a judicial action must be filed against federal statutes on the grounds of their unconstitutionality, the standing to sue being limited to members of Congress in number equivalent to the 33% of the members of the Chamber of Representatives or of the Senate; and to the Attorney General of the Republic. In the cases of actions against electoral statutes, the national representatives of the political parties also have standing to sue.

In all these cases, as mentioned, the Supreme Court can declare the invalidity of the statute with general *erga omnes* effects when approved by no less than 8 of the 11 votes.[111]

But the most important feature of the Mexican system of judicial review, related to the diffused method of judicial review, is the amparo suit (*juicio de amparo*) that can also be initiated be means of an action brought before the courts of the Federation for the protection of all individual guaranties declared in the Constitution, but only against actions accomplished by authorities, such as statutes, judicial decisions or administrative acts, and not against private individual actions. Since its introduction in the 1847 Acts of Constitutional Reform (article 25) as the duty of federal courts to provide protection to citizens against State actions, the *juicio de amparo* has developed allowing the courts to decide, always in particular cases or controversies, without making general declarations concerning the challenged act.

This "amparo" suit is also set forth to resolve any controversy arising from statutes' and authorities' acts which violate individual guaranties; and to resolve any controversy produced by federal statutes' or authorities' acts harming or restricting the States' sovereignty, or by States' statutes of authorities' acts invading the sphere or federal authority (Article 1,1 of the Amparo Law).

In all these cases of "amparo", the judicial protection is granted by means of a quick and efficient procedure witch in the various expressions of the "amparo" suit, follows the same general procedural trends: the absence of formalisms; the role of the judges as intermediaries between the parties; the inquisitorial character of the procedure which grants the judge a wide range of powers to conduct and direct it, that can also to be exercised *ex officio*; and the concentration of the procedure steps in only one hearing.[112]

Article 107 of the Constitution regulates in a very extensive and detailed way the procedural rules for the exercise of the "amparo" action, and the competent courts to hear the cases. In this basic regulation, the traditional Mexican rule established is that in deciding the cases, the courts can not make any general declaration as to the statute or act on which the complaint is based.The "amparo" suit has also been regulated in Mexico in a specific "amparo" statute which develops Articles 103 and 107 of the Constitution *(Ley de amparo reglamentaria de los artículos 103 y 107 de la Constitución Política)* of 1936, which has been amended many times.[113]

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111 See José Brage Camazano, "El control abstracto de la constitucionalidad de las leyes en México", in Eduardo Ferrer Mac Gregor (Coordinador), *Derecho Procesal Constitucional*, Editorial Porrúa, México, Vol. I, 2003, pp. 919 ff.

112 See Héctor Fix–Zamudio, *Ensayos sobre el derecho de amparo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2003; Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, "El derecho de amparo en México", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 461– 521.

113 See in general, Hector Fix–Zamudio, *Ensayos sobre el derecho de amparo*, Universidad nacional Autónoma de México, Editorial Porrúa, México 2003; Ignacio Burgoa, *El Juicio de Amparo*, Ediorial Porrúa, México1991; Eduardo Ferrer Mac–Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002; Héctor Fix–Zamudio and Eduardo Ferrer Mac–Grego, "El derecho de amparo en México", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 461–521.

But this trial of amparo, if it is true that is the only judicial mean that can be used for the judicial protection of constitutional rights and guaranties as well as for judicial review of the constitutionality of legislation, in its substance is a collection of various proceedings assembled in a very complex procedural institution, comprising at least five different judicial processes that in all other countries with a civil law tradition are different ones. These five different aspects, contents or expressions of the trial for *amparo,* as systematized by Professor Héctor Fix–Zamudio,[114] are the following:

The first aspect of the *juicio de amparo* is the so called "amparo" for the protection of freedom (*amparo de la libertad*), which is a judicial mean for the protection of fundamental rights established in the Constitution. This trial for "amparo" is equivalent to the *habeas corpus* proceeding for the protection of personal liberty, but in Mexico can also serve for the protection of all other fundamental rights or guaranties established in Articles 1 to 29 when violated by an act of an authority.[115]

The second aspect of the trial for amparo is the amparo against judicial decisions (Article 107, III, V Constitution ) called "*amparo judicial"* or "*amparo casación",* filed by a party in a particular case alleging that the judge, when deciding, has incorrectly applied the pertinent legal provision. In this case, the amparo is a recourse to challenge judicial decisions very similar to the recourse of cassation that exists in procedural law in all civil law countries which are filed before the Supreme Courts of Justice to control the legality or constitutionality of judicial decisions. The institution is elsewhere called *recurso de casación*, according to the French tradition, and is filed before the Court on cassation or before the Cassation Chambers of the Supreme Court as an extraordinary judicial mean to challenge definitive and final judicial decisions founded on violations of the Constitution, or of statutes or of the judicial procedural formalities. By this judicial mean, the Supreme Courts assures the uniformity of judicial interpretation and application of the law. In Mexico this well known extraordinary judicial recourse is regulated as one of the modalities or expressions of the *juicio de amparo*.

The third aspect of the trial for amparo is the so–called administrative amparo (*amparo administrativo*) through which it is possible to challenge administrative acts that violate the Constitution or the statutes (Article 107, IV Constitution), resulting in this case, in a judicial mean for judicial review of administrative action. This means is equivalent to the *contencioso–administrativo* recourses (Judicial review of administrative actions) that, also following the French influence, exists in many of the civil law countries.These recourses are commonly filed before special courts (*contencioso administrativo)* specifically established for the purpose to control the legality and constitutionality of Public Administration's actions and, in particular, of administrative acts, seeking their annulment.[116] In Mexico, on the contrary, the administrative amparo is the judicial mean established to control the legality of administrative action and for the protection of individual constitutional rights and guaranties against administrative acts, substituting what in other countries is the *jurisdicción contencioso administrativa.*[117]

The fourth aspect of the trial for amparo is the so called agrarian amparo (*amparo agrario*) which is set up for the protection of peasants' rights against acts of public authorities, particularly referring to collective rural property rights (Article 107, II.).

And finally, the fifth aspect of the trial for amparo, is the so called amparo against laws *(amparo contra leyes),* as a judicial mean directed to challenge statutes that violate the Constitution,

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114 See H. Fix–Zamudio, *El juicio de amparo*, México 1964, p. 243, 377; H. Fix–Zamudio, "Reflexiones sobre la naturaleza procesal del amparo", in *Revista de la Facultad de Derecho de México*, 56, 1964, p. 980; H. Fix–Zamudio, "Lineamientos fundamentales del proceso social agrario en el derecho mexicano", in *Atti della Seconda Assemblea. Istituto di Dirito Agrario Internazionale a Comparato,* Vol. I, Milán 1964, p. 402; Eduardo Ferrer Mac–Gregor, *La acción constitucional de amparo en México y España, Estudio de Derecho Comparado*, 2nd Edition, Edit. Porrúa, México 2000; Ignacio Burgoa O., *El juicio de amparo,* Twenty–eighth Edition, Editorial Porrúa S.A., México 1991.

115 See Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, p. 92.

116 Even in some Latin American countries, like Colombia, a Consejo de Estado has been created following the Conseil d'État French model, as the head of a Judicial Review of Administrative Action separate Jurisdiction. In the other countries, the head of the Jurisdiction has been located in the Supreme Court, and the main purpose of it, as mentioned, is to challenge administrative acts seeking their annulment when considered unconstitutional or illegal. The important trend of such Jurisdiction is that it is not only devoted to protect human or constitutional rights, but in general, the legality of the administrative actions.

117 An exception has always been the Tribunal Fiscal de la Federación.

resulting in this case, in a judicial review mean of the constitutionality of legislation. It is exercised in a direct way against statutes without the need for any additional administrative or judicial act of enforcement or of application of the statute considered unconstitutional; which implies that the challenged statute must have a self executing character.

All of these five "amparo" proceedings are developed before a variety of courts, so for instance, when the petition of "amparo" is filed against federal or local statutes, international treaties, national executive regulations or State's Governors' regulations or any other administrative regulations, it must be filed before the District Courts (article 114 Amparo Law).[118]

From all these five aspects or expressions of the "amparo" suit, the conclusion is that in Mexico, the "amparo" is not really one single adjective guaranty (action or recourse) for the protection of constitutional rights, but is rather a varied range of judicial processes and procedures all used for the protection of constitutional guaranties. It is a unique judicial proceeding which, with all its procedural peculiarities, cannot be reproduced in any other legal system. It was initially established following the United States judicial review model,[119] also as a mean for judicial review of the constitutionality of statutes following the features of the diffuse method of judicial review of legislation[120], but it eveolved in a quite different way

Regarding the amparo against statutes, always filed against "public authorities"[121], is a mean for judicial review of the constitutionality of legislation, sought through an "action of unconstitutionality" that is filed before a federal District Court (Article 107, XII). The defendants in the case are the organs of the State that have intervened in the process of formation of the statute, namely, the Congress of the Union or the state Legislatures which have sanctioned it; the President of the Republic or the Governors of the states which have enacted it, and the Secretaries of state which have countersigned it and ordered its publication.[122] In these cases, it is provided that the federal district courts decisions are reviewable by the Supreme Court of Justice (Article 107, VIII,a).

The *amparo* against statutes, therefore, is a direct action filed against a statute when it directly affects the plaintiff's guaranties, without the need of any other intermediate or subsequent administrative or judicial act, that is, a statute that with its sole enactment causes personal and direct prejudice to the plaintiff. [123]

Regarding the effects of the judicial decision on any of the aspects of the trial for *amparo*, including the cases of judicial review of constitutionality of legislation, since the initial 19th Century provision for the trial for *amparo*, the Constitution has expressly emphasized that the courts cannot "make any general declaration as to the law or act on which the complaint is based". Consequently, the judgment can "only affect private individuals" and is limited to protect them in the particular case to which the complaint refers (Article 107,II).[124] Therefore, the decision in a *juicio de amparo* in which judicial review of legislation is accomplished, as it happens with the decisions of the Supreme Courts in Paraguay and Uruguay, only has *inter partes* effects, and can never consist in general declarations with *erga omnes* effects.

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118 H. Fix–Zamudio, "Algunos problemas que plantea el amparo contra leyes", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, México 1960, pp. 15, 20.

119 J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la ciencia política", in *Revista de la Facultad de Derecho de México*, N° 45, México 1962, p. 657.

120 H. Fix–Zamudio, "Algunos problemas que plantea el amparo contra leyes", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, México 1960,p. 22, 23.

121 This aspect, particularly regarding judicial review of statutes, reveals another substantial difference between the Mexican system and the general diffuse system of judicial review, in which the parties in the particular process where a constitutional question is raised, continue to be the same.

122 H. Fix–Zamudio, "Algunos problemas que plantea el amparo contra leyes", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, México 1960, p. 21.

123 That is why, in principle, the action seeking the amparo against laws must be brought before the court within 30 days after their enactment, or within 15 days after the first act of execution of the said statute so as to protect the plaintiff's rights to sue. Article 21 Amparo Law. See H. Fix–Zamudio, *Idem*, pp. 24, 32; Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, pp. 164, 171, 176.

124 The principle is named the "Otero formula" due to its inclusion in the 1857 constitution under the influence of Mariano Otero. See H, Fix–Zamudio, *Idem*, p. 33, 37.

Therefore, the courts, in their amparo decisions regarding the unconstitutionality of statutes, can not annul or repeal them; and similarly to all legal systems with the diffuse method of judicial review, the statute remains in the books and can be applied by the courts, the only effect of the declaration of its unconstitutionality being directed to the parties in the particular process.

As a consequence, the decisions of the trials for *amparo* do not have general binding effects, being only obligatory to other courts when a precedent is established by means of *jurisprudencia* (Article 107, XIII, 1 Constitution), which according to that Amparo Law is attained when five consecutive decisions to the same effect, uninterrupted by any incompatible ruling, are rendered by the Supreme Court of Justice or by the Collegiate Circuit Courts.[125] Nonetheless, the *jurisprudencia* can be modified when the respective Court pronounces a contradictory judgment with a qualified majority of votes of its members (Article 139).[126]

It must also be highlighted that according to a constitutional reform passed in 1983, the Supreme Court of Mexico was vested with a discretionary power to review the cases of "amparo" of constitutional importance (*facultad de atracción*), with some similarities to the writ of certiorari. Nevertheless, Collegiate Circuit Courts' decisions in direct *amparo* are not reviewable by the Supreme Court if they are based "on a precedent established by the Supreme Court of Justice as to the constitutionality of a statute or the direct interpretation of a provision of the Constitution".

Also, according to another constitutional reform sanctioned in 1988, the Supreme Court was also attributed the power to decide in last instance all cases of "amparo" where the decision involves the unconstitutionality of a federal statute or establishes a direct interpretation of a provision of the Constitution (article 107,IX).

Both attributions allow the Supreme Court to give final interpretation of the Constitution in a uniform way,[127] its decisions limited to resolve upon the actual constitutional questions.

### *6. The Constitutional Chamber of the Supreme Court of Justice in Nicaragua, and the recourses for amparo and habeas corpus*

The system of judicial review established in Nicaragua is also a mixed one, combining the diffuse and the concentrated methods. Regarding the diffuse method, the Constitution assigns to all courts (Article 182 of the Constitution) when resolving particular cases, the general power to decide upon the unconstitutionality of statutes, of course, with only *inter partes* effects.

On the other hand, the Constitution also assigns the Supreme Court of Justice the power to decide upon the unconstitutionality of statutes, decrees or regulations when challenged by means of an action of unconstitutionality which, as in Colombia, El Salvador, Panamá and Venezuela, is also conceived as a popular action that can be brought directly by any citizen (Article 2 of the Amparo Law). When deciding such popular action, the Supreme Court's decision declaring the unconstitutionality of the challenged statute, has general effects, preventing its application by the courts (Articles 18 and 19).

But in the Nicaraguan system, the question of the unconstitutionality of a statute, decree or regulation, can also be raised before the Constitutional Chamber of the Supreme Court by means of recourse of cassation and also, as mentioned, through a recourse of "amparo" filed by the corresponding party in the procedure of a case. In the former case, the Supreme Court, in addition to the cassation ruling regarding the challenged judicial decision, can also declare its nullity. And in the case of "amparo" recourses, as mentioned, they can serve as a judicial mean for judicial

125 Article 192, 193. See in Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, pp. 256, 257.

126 Nevertheless, as *jurisprudencia* can be established by the federal Collegiate Circuit Courts and by the Supreme Court, contradictory interpretations of the constitution can exist, having binding effects upon the lower courts. In order to resolve these conflicts, the constitution establishes the power of the Supreme Court or of the Collegiate Circuit Court to resolve the conflict, when the contradiction is denounced by the Chambers of the Supreme Court or another Collegiate Circuit Court; by the Attorney General or by any of the parties to the cases in which the jurisprudencia was established (Article 107, XIII). Anyway the resolution of the contradiction between judicial doctrines, has the sole purpose of determining one single *jurisprudencia* on the matter, and does not affect particular juridical situations, derived from the contradictory judicial decisions adopted in the respective trials (Article 107, XIII). See the comments in J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la ciencia política", in *Revista de la Facultad de Derecho de México*, 45, México 1962, p. 662.

127 See Joaquin Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, p. 153–155.

review of legislation, and the Supreme Court has the exclusive power to decide on the matter. So in these cases, in addition to the constitutional protection granted to the party in accordance to the "amparo" petition, the Supreme Court can also declare the unconstitutionality of the statute, decree or regulation, also with general effects (Article 18)[128]

The Amparo Law also provides that in any judicial decision other than "amparo", issued applying the diffuse method of judicial review with express declaration of the unconstitutionality of a statute, if such decision cannot be challenged by means of a cassation recourse, the respective court must send it to the Supreme Court in order for this Court to ratify the unconstitutionality of the statute, decree or regulation and declare its inapplicability.[129]

According to these means, in order to guarantee the uniformity of jurisprudence in constitutional matters, the Supreme Court in Nicaragua always has the power to review judicial decisions on constitutional matters.

On the other hand, the Constitution of Nicaragua provides for a recourse for "amparo", as well as the habeas corpus recourse established for the protection of people's freedom, physical integrity and safety (Articles 188 and 189 of the Constitution), both regulated in one general "amparo" statute (*Ley de amparo*) of 1988.[130]

Regarding the "amparo" action, the Constitution only provides that "the persons whose constitutional rights have been violated or are in peril of being violated, can file the recourse of personal exhibition or the recourse of "amparo". No constitutional provision exists regarding the origin of the violation, so that if it is true that the recourse could then be brought against violations provoked by public officials and individuals, the latter case has not been regulated. Like in Costa Rica and El Salvador, Nicaragua has also established a concentrated judicial system of "amparo" by granting the Supreme Court of Justice the exclusive power to decide the "amparo" actions (Article 164,3), but with the difference that in those countries, the judicial review system is an exclusively concentrated one, exercised by the Constitutional Chamber of the Supreme Courts. In Nicaragua, the judicial review system is a mixed one.

According to the Law, the recourse of amparo in Nicaragua is set forth against any provision, act or resolution, and in general against any action or omission from any official, authority or agent that violates or an attempt to violate the rights declared in the Constitution (Article 45), and is not admitted against violations or threats committed by individuals.

Regarding the procedure of the Nicaraguan concentrated "amparo", it is also different from the one in Costa Rica and El Salvador, particularly because the recourse for "amparo", although being decided by the Supreme Court, is not directly filed before it, but before the Courts of Appeals. So in Nicaragua, the procedure on the "amparo" suit has two steps: one that must be accomplished, including the possible suspension of the effects of the challenged act, before the Courts of Appeals; and the second that must be accomplished before the Supreme Court where the files must be sent for the final decision. The Courts of Appeals are also empowered to reject the recourses, in which cases the plaintiff can bring the case before the Supreme Court also by means of an action of "amparo" (Article 25 Law)[131].

### *7. The Constitutional Tribunal in Peru, and the recourses for amparo, habeas corpus and habeas data*

The judicial review system of the constitutionality of legislation has also being conceived in Peru as a mixed one,[132] since it combines the diffuse system of judicial review with the concentrated one attributed to the Constitutional Tribunal[133]. The former is expressly set forth in

128 Nonetheless, in these cases, the decision does not have retroactive effects in the sense that it cannot affect third party rights acquired from those statutes or regulations (Articles 20 and 22).

129 In such cases the decisions also cannot affect third party rights acquired from those statutes or regulations (Articles 21 and 22).

130 See in general, Iván Escobar Fornos, "El amparo en Nicaragua", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 523–563

131 See Iván Escobar Fornos, "El amparo en Nicaragua", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 523–563.

132 See Aníbal Quiroga León, "Control difuso y control concentrado en el derecho procesal Perúano", in *Revista Derecho* Nº 50, diciembre de 1996, Facultad de Derecho de la Pontificia Universidad Católica del Perú, Lima, Perú, 1996, pp. 207 ff.

133 See in general Domingo García Belaunde, "La jurisdicción constitucional en Perú", in D. García Belaúnde, y F. Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Ed. Dykinson, Madrid, España, 1977; Domingo García

Article 138 of the 1993 Constitution which provides that "in any process, if an incompatibility exists between a constitutional provision and a statute, the courts must prefer the former" (Article 138), having of course their decisions, in such cases, only *inter partes* effects.

But in the case of Peru, the diffuse method of judicial review has a peculiarity in the sense that all the courts' decisions regarding the inapplicability of statutes based on constitutional arguments must obligatorily be sent for revision to the Supreme Court of Justice and not to the Constitutional Tribunal. This provision, sanctioned before the Constitutional Procedures Code was enacted, has remained in force, empowering the Supreme Court, through its Constitutional Law and Social Chamber, to determine if the decision of the ordinary court on constitutional matters was adequate or not (Article 14, Organic Law of the Judiciary)[134].

But in addition to the diffuse method of judicial review, a concentrated method is also set forth in the Constitution of Peru, by attributing the Constitutional Tribunal the power to hear in unique instance the actions of unconstitutionality (Article 202,1) that can be filed against statutes, legislative decrees, urgency decrees, treaties approved by Congress, Congressional internal regulations, regional norms and municipal ordinances (Article 77, Code).

This action can be brought before the Constitutional Tribunal by high public officials, as the President of the Republic, the Prosecutor General, the Peoples Defendant; by a number equivalent to 25% of representatives to the Congress; and also, by 5,000 citizen whose signatures must be validated by the National Jury of Elections. When the challenged act is a local government regulation, the action can be filed by 1% of the citizens of the corresponding entity. The Presidents of Regions with the vote of the Regional Councils, or the provincial mayors with the vote of the local Councils can also file actions of unconstitutionality in matter of their jurisdiction; and also the professional associations (*Colegios)* in matters of their specialty (Article 203; Article 99 Code).

The decision of the Constitutional Tribunal, in all these cases of the concentrated method of judicial review when declaring the unconstitutionality of a statute or normative provision, produces general *erga omnes* effects, from the day of its publication in the *Official Gazzette* (Article 204, Constitution; Articles 81,82 Code).

The Constitution of Peru in its enumeration of the constitutional guaranties also provides for the three actions for constitutional protection: the habeas corpus, the "amparo" and the habeas data actions (Article 200). [135]

The action of *habeas corpus* that can be filed against any action or omission by any authority, official or person that impairs or threatens individual freedom, and the action of *habeas data* can be filed against any act or omission by any authority, official or person that impairs or threatens the rights to request and receive information from any public office, except when they affect personal privacy or were excluded for national security. The action of habeas data can also de filed to assure that public or private information services will not release information that affects personal and familiar privacy. (Article 2, 5 and 6).

All these actions (habeas corpus, "amparo" and habeas data) have been regulated in the Constitutional Procedural Code sanctioned in 2004 (Ley Nº 28237, *Código Procesal Constitucional*)[136], which in addition to regulate all the juducial review procedures, provide that in

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Belaunde, "La jurisdicción constitucional y el modelo dual o paralelo", in *La Justicia Constitucional a fines del siglo XX*, *Revista del Instituto de Ciencias Políticas y Derecho Constitucional*, año VII, Nº 6, Palestra editores, Huancayo, Perú; Domingo García Belaunde (Coordinador) *La Constitución y su defensa*, Ed Jurídica Grijley, Lima, 2003, p. 96. César Landa, *Teoría del Derecho procesal Constitucional*, Ed. Palestra, Lima, Perú, 2004; José Palomino Manchego, José, "Control y magistratura constitucional en el Perú", in Juan Vega Gómez, and Edgar Corzo Sosa (Coord.*), Instrumentos de tutela y justicia constitucional, Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México; Domingo García Belaúnde and Gerardo Eto Cruz, "El proceso de amparo en el Perú", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 593–632.

134 Quiroga León, Aníbal, "El derecho procesal constitucional Perúano", in Juan Vega Gómez and Edgar Corzo Sosa (Coord.) *Instrumentos de tutela y justicia constitucional, Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México, pp. 471 ff.

135 See in general, Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004; Domingo García Belaúnde and Gerardo Eto Cruz, "El proceso de amparo en el Perú", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 593–632

136 The Code repealed the previous statutes regulating the amparo and the habeas corpus recourses (Law 23.506 of 1982, and Law 25.398 of 1991). See Samuel B. Abad Yupanqui et al., *Código Procesal Constitucional*, Ed. Palestra, Lima 2004; Alberto

matters of "amparo", the competent courts to hear the proceeding are the Civil Courts with jurisdiction on the place where the right is affected, or where the plaintiff or defendant have their residence. (Article 51) When the harm is caused by a judicial decision, the competent court is always the Civil Chamber of the respective superior court of justice.

Article 200 of the Constitution also establishes the action of "amparo" to protect all other rights recognized by the Constitution which are impaired or threatened by any authority, official or private individuals in order to restore things to the situation they had previous to the violation (Article 1). As in Paraguay, according to the Constitution, the action of "amparo" is not admissible against statutes or against judicial decisions, but with the difference that in Peru, the exclusion refers only to judicial decisions issued in a regular proceeding.

According to the same Code, the "amparo" action shall only be admitted when previous procedures have been exhausted (Articles 5,4; 45); and in any case, when doubts exists over the exhaustion of prior procedures. (Article 45)

All judicial decisions denying the habeas corpus, "amparo" and habeas data can be review by the Constitutional Tribunal, which has the power to hear the cases in last and definitive instance (Article 202,2 Constitution). In addition, all the other decisions can also reach the Constitutional Tribunal of Peru by means of a recourse of constitutional damage (*agravio*) that can be filed against all second instance judicial decision denying the claim (Article 18, Code). If this constitutional damage recourse is denied, the interested party can also file before the Constitutional Tribunal a recourse of complaint (*queja*), in which case, if the Tribunal considered the complaint duly supported, it will proceed to decide the constitutional damage recourse, asking the superior court to send the corresponding files. (Article 19).

If the Constitutional Tribunal considers that the challenged judicial decision has been issued as a consequence of a procedural error or vice affecting its sense, it can annul it and order the reposition of the procedure to the situation previous to when the defect happened. In cases in which the vice only affects the challenged decision, the Tribunal must repeal it and issue a substantive ruling. (Article 20)

### *8. The Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela, and the amparo proceeding*

The other country with a mixed system of judicial review established since the 19th Century[137] is Venezuela, where the diffuse method is also expressly regulated in Article 334 of the 1999 Constitution, following a legal tradition that can be traced back to the 1897 Civil Procedure Code, by granting all courts, even *ex officio*, the power to declare statutes inapplicable for the resolution of a given case when they consider them unconstitutional and, hence, giving preference to constitutional rules.[138]

On the other hand, Article 336 of the same 1999 Constitution, also following a constitutional tradition that can be traced back to the 1858 Constitution,[139] establishes the concentrated method

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Borea Odria, *Las garantías constitucionales: Habeas Corpus y Amparo*, Libros Perúanos S.A., Lima 1992; Alberto Borea Odría, *El amparo y el Hábeas Corpus en el Perú de Hoy*, Lima, 1985.

137 With respect to this mixed character of the Venezuelan system, the former Supreme Court has analyzed the scope of judicial review of the constitutionality of statutes and has correctly pointed out that this is the responsibility: "not only of the Supreme Tribunal of the Republic, but also of all the judges, whatever their rank and standing may be. It is sufficient that an official is part of the Judiciary for him to be a custodian of the Constitution and, consequently, to apply its ruling preferentially over those of ordinary statutes. Nonetheless, the application of the Constitution by the judges, only has effects in the particular case at issue and, for that very reason, only affects the interested parties in the conflict. In contrast, when constitutional illegitimacy in a law is declared by the Supreme [Tribunal] when exercising its sovereign function, as the interpreter of the Constitution, and in response to the pertinent [popular] action, the effects of the decision extend erga omnes and have the force of law. In the first case, the review is incidental and special, and in the second, principal and general. When this happens –that is to say when the recourse is autonomous– the control is either formal or material, depending on whether the nullity has to do with an irregularity relating to the process of drafting the statute, or whether –despite the legislation having been correct from the formalist point of view– the intrinsic content of the statute suffers from substantial defects." See Federal Court (which in 1961 was substituted by the Supreme Court of Justice), decision June 19, 1953, *Gaceta Forense*, 1, 1953, pp. 77–78

138 See in general, Allan R. BREWER–CARÍAS, *E1 control de la constitucionalidad de los actos estatales,* Caracas 1977; and also "Algunas consideraciones sobre el control jurisdiccional de la constitucionalidad de los actos estatales en el derecho venezolano", in *Revista de Administración Pública,* Nº 76, Madrid 1975, pp. 419–446.

139 See J. G. Andueza, *La jurisdicción constitucional en el derecho venezolano*, Caracas 1955 p. 46.

of judicial review by granting to the Constitutional Chamber of the Supreme Tribunal, as Constitutional Jurisdiction, the power to decide with nullifying effects upon the constitutionality of statutes and other national, state or municipal normative acts and acts of government adopted by the President of the Republic when requested, as is also established in Colombia, El Salvador, Nicaragua and Panama, by means of a popular action. This concentrated method of judicial review of the constitutionality of statutes and other similar State acts allows the Supreme Tribunal of Justice to declare them null and void with general *erga omnes* effects when they violate the Constitution.

Within this mixed system of judicial review, in addition, the Constitution also establishes a constitutional right for amparo[140]or for protection by the courts that everybody have for the protection of all the rights and freedoms enshrined in the Constitution and in international treaties, or which, even if not listed in the text, are inherent to the human person.[141]

As in Guatemala and Mexico, the Constitution does not set forth a separate action of habeas corpus for the protection of personal freedom and liberty, instead it establishes that the action for "amparo" regarding freedom or safety, may be exercised by any person in which cases "the detainee shall be immediately transferred to the court, without delay".

Additionally, the Venezuelan Constitution has also set forth the habeas data recourse, guaranteeing the right to have access to the information and data concerning the claimant contained in official or private registries, as well as to know about the use that has been made of the information and about its purpose, and to petition the competent court for the updating, rectification or destruction of erroneous records and those that unlawfully affect the petitioner's right (Article 28).

The "amparo" action is regulated in a Statute on Amparo for the protection of constitutional rights and guaranties sanctioned in 1988 (*Ley Orgánica de Amparo sobre derechos y garantías constitucionales*).[142]

This right to amparo can be exercised through an "autonomous action for amparo"[143] that in general is filed before the first instance court (Article 7 Amparo Law);[144] or by means of pre

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140 Regarding this constitutional provision, Héctor Fix Zamudio pointed out in 1970 that Article 49 of the 1961 Constitution, "definitively enshrined the right to amparo as a procedural instrument to protect all the constitutionally enshrined fundamental rights of the human person", in what he described as "one of the most outstanding achievements of the very advanced Magna Carta of 1961. See Héctor Fix Zamudio, "Algunos aspectos comparativos del derecho de amparo en México y Venezuela", *Libro Homenaje a la Memoria de Lorenzo Herrera Mendoza*, UCV, Caracas 1970, Volumen II, pp. 333–390. This trend has been followed in Article 27 of the 1999 Constitution. See Héctor Fix–Zamudio, "La teoría de Allan R. BREWER–CARÍAS sobre el derecho de amparo latinoamericano y el juicio de amparo mexicano", in *El Derecho Público a comienzos del Siglo XXI. Libro Homenaje al profesor Allan R. Brewer–Carías*, Volumen I, Instituto de Derecho Público, Editorial Civitas, Madrid 2003, pp. 1125 ff.

141 On the action of amparo in Venezuela, in general, see Gustavo Briceño V., *Comentarios a la Ley de Amparo*, Editorial Kinesis, Caracas 1991; Rafael J. Chavero Gazdik, *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001; Gustavo José Linares Benzo, *El Proceso de Amparo*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Caracas 1999; Hildegard Rondón De Sansó, *Amparo Constitucional*, Caracas 1988; Hildegard Rondón De Sansó, *La acción de amparo contra los poderes públicos*, Editorial Arte, Caracas 1994; Carlos M. Ayala Corao and Rafael J. Chavero Gazidk, "El amparo constitucional en Venezuela", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 649–692.

142 See in general, Allan R. BREWER–CARÍAS, *Instituciones políticas y constitucionales, Vol. V, El derecho y la acción de amparo*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas–San Cristóbal 1998; Hildegard Rondón de Sansó, *Amparo constitucional*, Caracas 1988; Gustavo J. Linares Benzo, *El proceso de amparo*, Universidad Central de Venezuela, Caracas 1999; Rafael J. Chavero Gazdik, *El Nuevo regimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001; Allan R. Brewer–Carías, Carlos Ayala Corao and Rafael J. Chavero G., *Ley Orgánica de Amparo sobre derechos y garantías constitucionales*, Editorial Jurídica Venezolana, Caracas 2007; Carlos Ayala Corao and Rafael Chavero G., "El amparo constitucional en Venezuela", in Héctor Fix–Zamudio and Eduardo Ferrer Mac–Gregor, *Idem*, Edit. Porrúa, México 2006, pp. 649–692.

143 See Allan R. Brewer–Carías, "El derecho de amparo y la acción de amparo", in Revista *de Derecho Público*, Nº 22, Editorial Jurídica Venezolana, Caracas 1985, pp. 51 ff.

144 According to the Constitution, the right to protection may be exercised, according to the law, before "the Courts", and thus, as it has been said, the organization of the legal and procedural system does not provide for one single judicial action to guaranty the enjoyment and exercise of constitutional rights to be brought before one single Court. In Venezuela, according to Article 7 of the Organic Law on Amparo, the competent courts to decide amparo actions are the First Instance Courts with jurisdiction on matters related to the constitutional rights or guaranties violated, in the place where the facts, acts of omission

existing ordinary or extraordinary legal actions or recourses to which an "amparo" petition can be joined, and the judge is empowered to immediately re–establish the infringed legal situation. In all such cases, it is not that the ordinary means substitute the constitutional right of protection (or diminish it), but that they can serve as the judicial mean for protection since the judge is empowered to protect fundamental rights and immediately re–establish the infringed legal situation.[145]

This last possibility does not presuppose in Venezuela that for the filing of an autonomous "amparo" action, all other pre–existing legal judicial or administrative means have to be exhausted, as is the case for instance, of the recourse for amparo or the "constitutional complaint" developed in Europe, particularly in Germany and in Spain.[146]

This right for "amparo" has been regulated in the 1988 Organic Law of Amparo,[147] expressly providing for its exercise, not only by means of an autonomous action for "amparo", or by the filing of the amparo petition jointly with the popular action of unconstitutionality against statutes and State acts of the same rank and value (Article 3); with the judicial review of administrative actions recourses against administrative acts or against omissions from Public Administration (article 5); or with another ordinary judicial actions (article 6,5).[148]

The same Supreme Court has also ruled that in these latter cases, the action for "amparo" is not an autonomous action, "but an extraordinary one, ancillary to the action or recourse to which it has been joined, thus subject to its final decision. Being joint actions, the case must be heard by the competent court regarding the principal one"[149].

Regarding the first mean for protection, that is, the autonomous action for "amparo", in principle it can be brought before the first instance courts[150], having a re–establishing nature and

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have occurred. Regarding amparo of personal freedom and security, the competent courts should be the Criminal First Instance courts (Article 40). Nonetheless, when the facts, acts or omissions harming or threatening to harm the constitutional right or guaranty occurs in a place where no First Instance court exists, the amparo action may be brought before and any judge of the site, which must decide according to the law, and in a 24 hour delay it must send the files for consultation to the competent First Instance court (Article 9). Only in cases in which facts, actions or omissions of the President of the Republic, his Cabinet members, the National Electoral Council, the Prosecutor General, the Attorney general and the General Comptroller of the Republic are involved does the power to decide the amparo actions correspond to the Constitutional Chamber of the Supreme Tribunal of Justice (Article 8).

145 Allan R. Brewer–Carías, "La reciente evolución jurisprudencial en relación a la admisibilidad del recurso de amparo", in *Revista de derecho público*, Nº 19, Caracas 1984, pp. 207–218.

146 In these countries, the protective remedy is really an authentic "recourse" that is brought, in principle, against judicial decisions. In Germany, for example, to bring a constitutional complaint for the protection of constitutional rights before the Federal Constitutional Tribunal, the available ordinary judicial means need to be previously exhausted, which definitively entails a recourse against a final judicial decision, even though, in exceptional cases, a direct complaint for protection may be allowed in certain specific cases and with respect to a very limited number of constitutional rights. See K. Schlaich, "Procedures et techniques de protection des droits fondamentaux. Tribunal Constitutionnel Fédéral allemand", in L. Favoreu (ed.), *Cours constitutionnelles européenes et droits fondamentaux,* Paris 1982, pp. 105–164. In Spain, all legal recourses need to be exhausted in order to bring a "recurso de amparo" of constitutional rights before the Constitutional Tribunal, and, particularly when dealing with protection against administrative activities, the ordinary means for judicial review of administrative decisions must be definitively exhausted. For this reason, the recourse for protection in Spain is eventually a means for judicial review of decisions taken by the Administrative Judicial review courts. See J.L. García Ruíz, *Recurso de amparo en el derecho español,* Madrid 1980. F. Castedo Álvarez, "El recurso de amparo constitucional", in Instituto de Estudios Fiscales, *El Tribunal Constitucional*, Madrid 1981, Vol. I, pp. 179–208.

147 See *Gaceta Oficial* Nº 33.891 of January 22, 1988. See Allan R. BREWER–CARÍAS, Carlos M. Ayala Corao and Rafael Chavero G., *Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales*, Caracas 2007. See also Allan R. BREWER–CARÍAS, *Instituciones Políticas y Constitucionales*, Tomo V, *El derecho y la acción de amparo*, Editorial Jurídica Venezolana, Caracas 1998, pp. 163 et seq.

148 See the Supreme Court decision of July 7, 1991 (Case*: Tarjetas Banvenez*), in *Revista de Derecho Público*, Nº 47, Editorial Jurídica Venezolana, Caracas 1991, pp. 169–174.

149 See in *Revista de Derecho Público*, Nº 50, Editorial Jurídica Venezolana, Caracas 1992, pp. 183–184. See Allan R. BREWER–CARÍAS, "Observaciones críticas al Proyecto de Ley de la Acción de Amparo de los Derechos Fundamentales (1985)"; "Proyecto de Ley Orgánica sobre el Derecho de Amparo (1987)"; and "Propuestas de reforma al Proyecto de Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales (1987)", in *Estudios de Derecho Público, Tomo III, (Labor en el Senado 1985–1987)*, Ediciones del Congreso de la República, Caracas 1989, pp. 71–186; 187–204; 205–229

150 Regarding amparo of personal freedom and security the competent courts should be the Criminal First Instance courts (Article 40). Nonetheless, when the facts, acts or omissions harming or threatening to harm the constitutional right or guarantee occurs in a place where no First Instance court exists, the amparo action may be brought before and judge of the place, which must decide according to the law, and in a 24 hour delay it must send the files for consultation to the competent First Instance court

"is a sufficient judicial mean in itself in order to return the things to the situation they were when the right was violated and to definitively make the offender act or fact disappear. In such cases, the plaintiff must invoke and demonstrate that it is a matter of flagrant, vulgar, direct and immediate constitutional harm, and the courts must decide based on the violation of the Constitution and not only on the violation of statutes.[151]

In all these other cases of "amparo" petitions filed jointly with other judicial means, contrary to the Mexican system, they do not substitute the ordinary or extraordinary judicial means by naming them all as "amparo"; only providing that the "amparo" claim can be filed jointly with those other judicial means"[152].

From all these regulations it results that the Venezuelan right for "amparo", as it happened with the Mexican system, also has certain peculiarities that distinguish it from the other similar institutions for the protection of the constitutional rights and guaranties established in Latin America.[153] Beside the adjective consequences of the "amparo" being a constitutional right, it can be characterized by the following trends:

First, the right of "amparo" can be exercised in Venezuela for the protection of all constitutional rights, not only of civil individual rights. Consequently, the social, economic, cultural, environmental and political rights declared in the Constitution and in international treaties are also protected by means of "amparo". The habeas corpus *is* an aspect of the right to constitutional protection, or one of the expressions of the *amparo*.

Second, the right to "amparo" seeks to assure protection of constitutional rights and guaranties against any disturbance in their enjoyment and exercise, whether originated by public authorities or by private individuals without distinction[154].

And in the case of disturbance by public authorities, the "amparo" is admissible against statutes, against legislative, administrative and judicial acts, and against material or factual courses of action of Public Administration or public officials.

Third, the decision of the judge, as a consequence of the exercise of this right to "amparo", whether through the pre–existing actions or recourses or by means of the autonomous action for "amparo", is not limited to be of a precautionary or preliminary nature, but to re–establish the infringed legal situation by deciding on the merits, that is, the constitutionality of the alleged disturbance of the constitutional right.

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(Article 9). Only in cases in which facts, actions or omissions of the President of the Republic, his Cabinet members, the National Electoral Council, the Prosecutor General, the Attorney general and the General Comptroller of the Republic are involved, the power to decide the amparo actions correspond in only instance to the Constitutional Chamber of the Supreme Tribunal of Justice (Article 8).

151 Decision of July 7, 1991. See the text in *Revista de Derecho Público*, Nº 47, Editorial Jurídica Venezolana, Caracas 1991, pp. 169–174.

152 In this regard, the Supreme Court of Justice has clearly set forth the proceeding rules as follows: "The amparo claims filed jointly with another action or recourse have all the inherent adjective character of the actions' joint proceedings, that is: it must be decided by only one court (the one competent regarding the principal action), and both claims (amparo and nullity or other) must be heard in only one proceeding that has two stages: the preliminary one regarding the amparo, and the contradictory one, which must include in its final decision, the preliminary one which ends in such time, as well as the decision on the requested nullity. In other words, if because of the above analyzed characteristics the amparo order [for instance when the amparo is filed conjunctly with other action] is reduced only and exclusively to the preliminary suspension of a challenged act, the decision which resolves the requested nullity leaves without effects the preventive preliminary measure, whether the challenged act is declared null or not." *Idem*, p. 171.

153 See, in general, H. Fix Zamudio, *La protección procesal de los derechos humanos ante las jurisdicciones nacionales,* Madrid, 1982, pp. 366.

154 The Constitution makes no distinction in this respect, and thus the action for amparo is perfectly admissible against actions by individuals, the action for amparo has doubtlessly been conceived as a traditional means of protection against actions by the state and its authorities. However, despite this tradition of conceiving the action for protection as a means of protecting rights and guarantees against public actions, in Venezuela, the scope with which this is regulated by Article 27 of the Constitution allows the action for amparo to be brought against individual actions, that is to say, when the disruption of the enjoyment and exercise of rights originates from private individuals or organizations. This also differentiates the Venezuelan system from that which exists in other systems such as México or Spain, in which the "action for amparo" is solely conceived against public actions. For this reason, in Spain the recourse of amparo is expressed as a review of decisions by the administrative judicial court when reviewing administrative acts. See J. González Pérez, *Derecho procesal constitucional*, Madrid, 1980, p. 278.

Fourth, since the Venezuelan system of judicial review is a mixed one, judicial review of legislation can also be exercised by the courts when deciding action for "amparo" when, for instance, the alleged violation of the right is based on a statute deemed unconstitutional. In such cases, if the protection requested is granted by the courts, it must previously declare the statute inapplicable on the grounds of it being unconstitutional. Therefore, in such cases, judicial review of the constitutionality of legislation can also be exercised when an action for "amparo" of fundamental rights is filed.

Finally, in the Venezuelan systems of judicial review and of "amparo", according to the 1999 Constitution an extraordinary review recourse can be filed before the Constitutional Chamber of the Supreme Court against judicial final decisions issued in "amparo" suits and also, against any judicial decision issued when applying the diffuse method of judicial review resolving the inapplicability of statutes because they are considered unconstitutional (Article 336,10).

The essential trend of this attribution of the Constitutional Chamber is its discretionary character[155] that allows it to choose the cases to be reviewed. As the same Constitutional Chamber of the Supreme Tribunal pointed it out in its decision Nº 727 of April 8th, 2003, "in the cases of the decisions subject to revision, the Constitution does not provide for the creation of a third instance. What has set forth the constitutional provision is an exceptional and discretional power of the Constitutional Chamber that as such, must be exercised with maxim prudence regarding the admission of recourses for review final judicial decisions."[156]

## FINAL REMARKS

Any system of judicial review can be considered in its own context as the ultimate result of the process of consolidation of the rule of law. That is why, due to the general consolidation of democracy in contemporary world, it has had a very important development, being perhaps the most important trend of today's constitutional law. In particular, in Latin America, without doubts, it has been because of the consolidation of democracy, which during the past five decades is possible to find a very important, wide and varied catalogue of judicial review means such as the one previously analyzed.

Judicial review, consequently, is the most important instrument that democratic countries have in order to guarantee the supremacy of the Constitution, the rule of law and the enforcement of constitutional rights. Of course, in order to ensure such functions, Constitutional Courts or Tribunals, or the Supreme Courts or Tribunals need to be effectively independent and autonomous entities, at the exclusive service of the Constitution. On the contrary, if the power vested upon the Supreme Courts or the Constitutional Tribunals is exercised against the democratic principles, instead of being instruments to sustain the rule of law, they can constitute the most powerful instrument for the consolidation of authoritarian governments.

Consequently, it is evident that the sole regulation in a Constitution, of various methods of judicial review and of the corresponding actions and recourses, is not enough to guarantee the subjection of State powers to the Constitution, and particularly, to preserve the constitutional division and separation of powers, which still is the most important principle of democracy. The condition for such functions to be performed has always being the existence of a real, independent and autonomous judiciary, and in particular, of the adequate institutions (Constitutionals Court or Supreme Tribunals) disposed for controlling the constitutionality of State acts and capable of controlling the exercise of political power and of annulling unconstitutional State acts.

Unfortunately, in some Latin American countries like for instance, my own country, Venezuela, notwithstanding the formally marvelous system of judicial review enshrined in the Constitutions that I have previously described, which combines all the imaginable instruments and methods for that purpose; due to the concentration of state power developed during the past decade in the National Assembly and in the Executive, and due to the political control exercised upon the Supreme Tribunal of Justice, the rule of law has been progressively demolished, and the

155 As mentioned, in a certain way similar to the *writ of cerciorari* in the North American system. See Jesús María Casal, *Constitución y Justicia Constitucional*, Caracas 2002, p. 92.

156 See *Revisión de la sentencia dictada por la Sala Electoral en fecha 21 de noviembre de 2002* Case, in *Revista de Derecho Público*, Nº 93–96, Editorial Jurídica Venezolana, Caracas 2003. See decision of November 2, 2000,*Roderick A. Muñoz P.* Case, in *Revista de Derecho Público*, Nº 84, (octubre–diciembre), Editorial Jurídica Venezolana, Caracas 2000, p. 367

authoritarian elements enshrined in the 1999 Constitution, have been progressively developed and consolidated, precisely through the decisions of the Constitutional Chamber of the Supreme Tribunals, being the result, the progressive weakening of the rule of law.[157] In such cases, the politically controlled Constitutional judge (Constitutional Chamber of the Supreme Tribunal of Justice), instead of being the guarantor of constitutionalism, of democracy and of the rule of law, unfortunately has been the instrument used by the Government in order to cover up with some sort of "constitutional" or "legality" prints of camouflage, the authoritarian regime that has been developed.

New York, May 2022

[157] See Allan R. Brewer–Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010.