



## ENFORCEMENT OF FUNDAMENTAL RIGHTS BY LOWER COURTS: TOWARDS A COHERENT SYSTEM OF CONSTITUTIONAL REVIEW IN MEXICO

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**ABSTRACT.** *This article reviews the evolution of constitutional judicial review in Mexico. It claims that while the Mexican legal system has fluctuated between two fairly consolidated constitutional review models —the American and the continental European— it has so far disregarded at least one major factor strongly embedded within the rules of both. Stated differently, most constitutional scrutiny regarding fundamental rights —the essential prerogatives and freedoms to which every person as such is entitled under the constitution— should be fulfilled by lower courts empowered for such purpose within ordinary adjudication procedures. For this reason, constitutional jurisdiction should play only a guiding role —even when solving a specific controversy on its merits— in the enforcement of these rights. While the rules of these two models leave the vast majority of legal controversies regarding fundamental rights outside constitutional jurisdiction, they guarantee that the interpretation of the few leading cases that are formally reviewed impact the rest of the legal system. Instead, the Mexican rules of constitutional scrutiny have fostered excessive dependence on specialized constitutional courts. Simultaneously, they have weakened —through artificial differentiations regarding the review of statutes— the guiding role of constitutional interpretation in the legal realm. This results in a complex system that is neither effective in making constitutional rules guide conduct nor in wholly enforcing fundamental rights.*

**KEY WORDS:** *Constitutional review, fundamental rights, Mexico, lower courts.*

**RESUMEN.** *Este artículo analiza críticamente la evolución del control constitucional en México. Argumenta que mientras el sistema mexicano ha fluctuado entre dos modelos bastante consolidados de justicia constitucional —el americano y el europeo continental—, en México se ha descuidado por lo menos una premisa fundamental que se encuentra fuertemente arraigada en las reglas de ambos modelos. A saber, que la gran parte del control constitucional relacionada*

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*con la protección de derechos fundamentales debe ser tarea de los tribunales ordinarios —facultados para tal efecto dentro de los procedimientos jurisdiccionales ordinarios— y, por lo tanto, que la jurisdicción constitucional debe jugar sólo un papel de guía —aun cuando resuelva casos concretos— en la tutela de los derechos fundamentales. Así, mientras las reglas de dichos modelos dejan formalmente fuera de la jurisdicción constitucional la gran mayoría de los asuntos relacionados con derechos fundamentales, aquéllas garantizan que la interpretación constitucional —surgida de los pocos casos trascendentales que logran llegar a la jurisdicción constitucional— siempre adquiera generalidad en el orden jurídico. Por el contrario, las reglas mexicanas han fomentado una excesiva dependencia en la jurisdicción constitucional especializada y, simultáneamente, han debilitado, a través de distinciones artificiales, la función de guía en el orden jurídico de la interpretación constitucional. Esta situación resulta en un complicado sistema que no es efectivo en lograr que las reglas constitucionales guíen la conducta ni tampoco en tutelar satisfactoriamente los derechos fundamentales.*

PALABRAS CLAVE: *Control constitucional, México, derechos fundamentales, tribunales ordinarios.*

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## I. INTRODUCTION

On July 14, 2011 the Mexican Supreme Court determined that all the courts in the country —regardless of their federal or local character— are entitled “to *disapply the general norms that, in their opinion, are considered to be in violation of the human rights contained in the Federal Constitution and in the international treaties to which the Mexican State is a party.*”<sup>1</sup> This unusual decision introducing in Mexico

<sup>1</sup> “*Expediente Varios 912/2010* y votos particulares formulados por los ministros Margarita Beatriz Luna Ramos, Sergio Salvador Aguirre Anguiano y Luis María Aguilar Morales; así como votos particulares y concurrentes de los ministros Arturo Zaldívar Lelo de Larrea y Jorge

the so-called “diffused” or decentralized constitutional review<sup>2</sup> was reached by the Supreme Court within days after the enactment of a series of long-awaited constitutional amendments that aimed at more effective enforcement of human rights.<sup>3</sup> Procedurally speaking the Supreme Court’s decision originated from an international judgment issued two years before by the Inter-American Court of Human Rights on the case of *Radilla-Pacheco v. Mexico*.<sup>4</sup> Given its proximity to the amendments on human rights, however, the Supreme Court’s decision was considered a follow-up to those desired constitutional changes. Correspondingly, its novel conclusions allowing any court to strike down unconstitutional and/or “unconventional”<sup>5</sup> statutes were regarded almost unanimously as a favorable and thus welcome adjustment for human rights protection in Mexico.<sup>6</sup> Many believed it was about time for the Mexican legal system to treat local judges as “grown-ups”; and for Mexicans to be able to enforce their constitutional rights without over-relying on the outdated and highly complex constitutional writ of *Amparo*.<sup>7</sup> Legal scholars

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Mario Pardo Rebolledo” [Miscellaneous File 912/2010], Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Diario Oficial de la Federación [D.O.], 4 de octubre de 2011, Segunda Sección, p. 75 (Mex.) (author’s translation).

<sup>2</sup> Decentralized constitutional review refers to those systems —based on the American model of constitutional scrutiny— where the powers to control the constitutionality of statutes is given to every court in the legal system and not only —as it occurs in systems based on the continental European model— to a specialised constitutional court. For a short comparison in English between both models see Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMPARATIVE POLITICS* 218-39 (Danièle Caramani ed., Oxford University Press, 2008).

<sup>3</sup> While colloquially these amendments have been handled jointly as the “Constitutional Reform on Human Rights,” technically they were approved and published separately. The division was based on whether the articles subject to reform concerned procedural or substantive law. See, respectively, “Decreto por el que se reforman, adicionan y derogan diversas disposiciones de los artículos 94, 103, 104 y 107 de la Constitución Política de los Estados Unidos Mexicanos” [Decree to amend, add and derogate several provisions from articles 94, 103, 104, and 107 of the Mexican Constitution] [hereinafter *Reforma constitucional en Amparo 2011*], Diario Oficial de la Federación [D.O.], 6 de junio de 2011, Primera Sección, pp. 2-6 (Mex.) and “Decreto por el que se modifica la denominación del capítulo I del título primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos” [Decree to modify the name of First Title’s Chapter I and amend several articles of the Mexican Constitution] [hereinafter *Reforma constitucional en Derechos Humanos*], Diario Oficial de la Federación [D.O.], 10 de junio de 2011, pp. 2-5 (Mex.).

<sup>4</sup> *Radilla-Pacheco v. Mexico*, Inter-Am. Ct. H.R. (ser. C) N° 209, Nov. 23, 2009.

<sup>5</sup> The term “unconventional” refers to those acts that are in violation of international conventions or treaties.

<sup>6</sup> For a few dissenting voices against these developments see José Roldán Xopa, *Conjeturas sobre la reforma constitucional III*, SAPERE AUDE (August 24, 2011) available at <http://joseroldanxopa.wordpress.com/2011/08/24/conjeturas-sobre-la-reforma-constitucional-iii/> (last visited May 31, 2012).

<sup>7</sup> The writ of *Amparo* —as it will be further explained in some detail— is a constitutional mechanism developed in Mexico for the judicial enforcement of fundamental rights against

and practitioners rejoiced at the inclusion of ordinary courts in constitutional scrutiny; the Mexican Supreme Court had taken a decisive step towards the decentralization of justice and the enforcement of basic rights.<sup>8</sup>

Not even a month went by, however, when —based on the Supreme Court decision— a statute was struck down by a local court. On August 8<sup>th</sup>, 2011 an appeals court in the state of Nuevo León deemed a provision of the state's criminal code unconstitutional and, as a result, refused to apply it. The verdict —called the *Nuevo León* case<sup>9</sup>— emerged in the context of Mexico's "War on Drugs."<sup>10</sup> The case concerned the indictment of two local police officers who had been arrested for supposedly reporting on military activities to criminal organizations. The local policemen had allegedly used their cell phones to inform members of organized crime about a special "anti-drugs" operation being carried out by the navy in a Monterrey suburb. The state prosecutor indicted these men for —among other offences— a felony labeled under state law as "*Crimes against the administration and procurement of justice.*"<sup>11</sup> While the trial judge initially ruled that the suspects were to be held in custody to answer the charges, the state court of appeals carried out *ex officio* the diffused constitutional review and modified the ruling. The appellate judge felt that the code's provisions wrongfully delegated the power to define a felony to an authority different from the legislative power. For this reason, the state code's provisions were a so-called "criminal law in blank"<sup>12</sup> prohibited by Article 14

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acts of authority. It falls exclusively in the jurisdiction of the Federal Judicial Power. *See infra* section III.

<sup>8</sup> See, e.g., José Ramón Cossío, *La descentralización de la justicia*, EL UNIVERSAL, October 18, 2011, at A18 (Mex.).

<sup>9</sup> "TOCA Penal Artículo 43/11" [Crim. App. 43/11], Cuarta Sala Penal Unitaria del Poder Judicial del Estado de Nuevo León [4th Nuevo León St. Crim. Ct. App.], August 8, 2011 (Mex.).

<sup>10</sup> This is the term with which it is referred to the Mexican government's policy against drug trafficking. Since 2006 it has increased substantially the involvement of the military —army, air force, and navy— in the enforcement of drug laws. For a brief overview in English see DAVID A. SHIRK, *THE DRUG WAR IN MEXICO: CONFRONTING A SHARED THREAT* (New York, Council on Foreign Relations, 2011).

<sup>11</sup> Código Penal para el Estado de Nuevo León [Nuevo León St. Crim. Code] *as amended* January 1997, Art. 224, V, Periódico Oficial del Estado de Nuevo León [Nuevo León St. Official Journal], 26 de Marzo de 1990 (Mex.). ("Article 224. The penalties in this chapter shall be imposed to public servants, whether employees or auxiliary personnel, of the administration and procurement of justice as well as of the administrative courts, who carry out any of the following offences: ...V. Not complying with an order issued and legally notified by his/her superior official, without a lawful reason to do so.") (Author's translation).

<sup>12</sup> There is no exact translation in English for the term "*ley penal en blanco*". This concept is related to the criminal law principle *nullum crimen sine lege scripta* (there shall be no felony without a written statute) and refers, in short, to criminal statutes that delegate the power to define punishable offences to another entity. Since the power to define crimes in modern democratic regimes is invested exclusively in the legislator, such statutes are considered invalid. For a suc-

of the Federal Constitution.<sup>13</sup> He concluded that the defendants could not be further prosecuted and ordered their immediate release.<sup>14</sup>

Alarmed by this outcome —*Nuevo León* was not open to further appeal<sup>15</sup>— at a time when Mexican legal institutions were being threatened by organized crime and the government was spending heavily to confront it, a group of federal senators from three major political parties responded in October with a bill “to regulate the exercise of diffused control.”<sup>16</sup> The senators were clearly more concerned about the possibility of letting guilty offenders get away unpunished than about individuals imprisoned on the grounds of an article already considered unconstitutional by a court of law. Their intention is that whenever a lower court<sup>17</sup> deems a general norm unconstitutional or unconventional—and therefore refuses to apply it to the controversy at hand—the decision against the validity of such norm can be further reviewed by a federal court. Specifically, the bill proposes a mechanism whereby the federal Attorney General is entitled to challenge before a federal Three-Judge Panel Circuit Court<sup>18</sup> every decision by a lower court that carries out diffused constitutional review. The ordinary judgment will not have any effects until the federal court confirms the invalidation of the general norm or, otherwise, until the federal Attorney General refuses to challenge the judgment<sup>19</sup>. This means that the final decision will always rest on a federal organ. This proposal is currently being discussed in the Senate and, as it has support from the three major national parties, is very likely to be approved within the next few months.<sup>20</sup>

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cinct explanation in English see MICHAEL BOHLANDER, *PRINCIPLES OF GERMAN CRIMINAL LAW* 18-27 (Oxford, Hart Publishing, 2008).

<sup>13</sup> See “TOCA Penal Artículo 43/2011,” *supra* note 9, at 22.

<sup>14</sup> The trial judge had authorized the detention of the defendants only on the basis of the crime contained in Article 192 of the state’s criminal code (*i.e.* “Crimes against official institutions and public servants”). Even though this part of the ruling was reversed on appeal (which would have turned unnecessary a decision regarding any other offence), the state prosecutor had lodged a joint appeal against the trial judge’s exclusion of Article 224, V as basis for the detention. Therefore, the appellate judge was compelled to solve this issue as well. See *id.* at 29-30.

<sup>15</sup> Being a decision on appeal for a felony that lacks a victim as such, it fitted into the few cases that could have not be reviewed by means of *Amparo*.

<sup>16</sup> “Iniciativa que contiene proyecto de decreto por el que se expide la Ley Reglamentaria de los artículos 1º y 133 de la Constitución Política de los Estados Unidos Mexicanos” [Bill to Enact the Regulatory Law of Articles 1 and 133 of the Mexican Constitution] [hereinafter *Iniciativa de Ley de Control Difuso*], Gaceta del Senado [Senate’s Gazette], 3 de noviembre de 2011, t. I, p. 111 (Mex.) (author’s translation).

<sup>17</sup> This means—in accordance with Article 2 of the proposal—every court that is not dealing with a writ of *Amparo*. See *id.*

<sup>18</sup> These courts belong to the Federal Judicial Power and are essentially responsible for solving the writs of *Amparo* filed against definitive judgments delivered by local judicial authorities. See *infra* section III.

<sup>19</sup> See *Iniciativa de Ley de Control Difuso*, *supra* note 16, at 112 (Article 6 of the bill).

<sup>20</sup> This manuscript was handed in on June 1<sup>st</sup>, 2012.

Based on events directly following the Supreme Court's decision authorizing diffused constitutional review, it did not take long for the initial wave of excitement to prove unjustified or, in any case, highly exaggerated. Already before the decision almost every local judgment in Mexico could be reviewed by the federal judiciary through the writ of *Amparo*. If those few judgments that could not be reviewed through *Amparo* (e.g. *Nuevo León*) will now end up anyway in a federal court (as envisaged in the senators' bill), then it is clear that the establishment of diffused review did not bring the intended judicial decentralization. Someone might argue that the Supreme Court's good intentions are just being blocked by a short-sighted group of congressmen. Not even before the senators presented their proposal, however, it would have been reasonable to think that a solution to the serious deficiency of human rights' enforcement in Mexico could be merely the general authorization of courts to quash legislation. Any legal system that lacks consistency extends an invitation to chaos. In this sense, *Nuevo León* was a fortunate coincidence. Irrespective of whether the judge was right or wrong when he concluded the unconstitutionality of the local criminal code (which is still debated and more a task for criminal law scholars),<sup>21</sup> that controversial ruling touched upon a far more important issue. It showed that the question of which organ should be entitled to strike down unconstitutional statutes in a given constitutional framework—and when it should be able to do it—was not only a matter of whim or “turf” between the ordinary and the constitutional courts. *Nuevo León* evidenced that this problem is also a matter of legal predictability and, for that reason, a fundamental *Rule-of-law* question. As such, constitutional judicial review represents an issue that should have been addressed with thoughtfulness and prudence.

In contrast, the continuous legal adjustments just described—which basically “patch up” previous calculations—suggest a lack of both vision and planning in the restructuring of Mexican constitutional review. For this reason, they raise a red flag about the effectiveness of the system governing the enforcement of fundamental rights in the country. This paper is motivated by this concern and analyzes the Mexican constitutional judicial review system. It specifically explores whether the development of constitutional scrutiny has genuinely succeeded or at least set favorable conditions for enabling Mexico to more effectively enforce fundamental rights—the essential prerogatives and freedoms to which every person as such is entitled under the constitution. While the structure of the Mexican legal system has fluctuated between two fairly consolidated models of judicial constitutional review—the American and continental European models—it has so far disregarded at least one major factor strongly embedded within the rules of both: The bulk of constitutional scrutiny regarding fundamental rights should be a task fulfilled by ordinary courts empowered for such purpose within the ordinary adjudication

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<sup>21</sup> See Roldán Xopa, *supra* note 6.

procedures. Constitutional jurisdiction, on the other hand, should only play a guiding role—even when solving a specific controversy on its merits—in the enforcement of fundamental rights.<sup>22</sup> While the rules of these two models leave the great majority of legal controversies concerning fundamental rights outside constitutional jurisdiction, they guarantee that the interpretation of the few leading cases that reach the constitutional jurisdiction impact the rest of the legal system. Instead, the Mexican rules of constitutional scrutiny have fostered excessive dependence on specialized constitutional courts. Simultaneously, they have weakened the guiding role of constitutional interpretation in the legal realm. This situation results in an ineffective and complex system of constitutional review that fails both to enforce constitutional guidelines and wholly protect fundamental rights.

Before this assertion is further developed, it is necessary to mention that this work mainly rests on two assumptions which, albeit controversial, cannot be further discussed here. First, the enforceability of fundamental rights is an essential element of the Rule-of-law.<sup>23</sup> Secondly, and of equal importance, is that the Rule-of-law is a virtue of the legal system which is first and foremost—albeit not exclusively—entrusted to the judiciary.<sup>24</sup> Stated differently, an effective justice system is a pre-condition of the Rule-of-law but it is not the Rule-of-law itself. This said, it is appropriate to begin by explaining concisely the two most consolidated models of constitutional scrutiny in the world. Particular emphasis is put on how these prototypes have dealt with the issue of fundamental rights enforcement.

## II. MODELS OF CONSTITUTIONAL REVIEW AND FUNDAMENTAL RIGHTS

There are two major consolidated models that serve as prototypes of constitutional scrutiny in modern legal systems. Due to their origins, they are usually referred to as the “American” and the “continental European” mod-

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<sup>22</sup> See Wolfgang Hoffmann-Riem, *Nachvollziehende Grundrechtskontrolle*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 173, 189 (2003).

<sup>23</sup> See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 27 (Oxford, Clarendon Press, 1985). Against this position see the classical essay of Joseph Raz, *The Rule-of-law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-29 (Oxford, Clarendon Press, 1979).

<sup>24</sup> See LON FULLER, *THE MORALITY OF LAW* 81-2 (New Haven, Yale University Press, 1964); Raz, *supra* note 23, at 225-26 (“It is of the essence of the law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law. Since conformity to the rule of law is the virtue of law in itself, law as law regardless of the purposes it serves, it is understandable and right that the rule of law is thought of as among the few virtues of law which are the special responsibility of the courts and the legal profession.”) A classic critique to this position comes from the denial of a substantial difference between an administrative act and a judicial decision. See Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 30, 52 (1929).



els. Whereas the former developed in the United States in the 19<sup>th</sup> century and goes back to the US Supreme Court's seminal judgment in *Marbury v. Madison*,<sup>25</sup> the latter emerged in Austria and Germany just before World War II and is based instead on the ideas of Hans Kelsen.<sup>26</sup> For this reason, these models are frequently associated with the *common law* and *civil law* traditions. While there is already much literature comparing these two models, most efforts emphasize their differences with respect to the judicial body authorized to review the constitutionality of statutes.<sup>27</sup> Since every court in the US has the power to strike down statutes on the basis of their constitutionality, this model is known as diffused or decentralized. In the continental European model, on the other hand, one single constitutional court has a monopoly on these powers; thus, this model is also called concentrated or centralized.<sup>28</sup> This variation—which results in different ways of attaining consistency in constitutional interpretation—is typically explained as the product of different conceptions of the “separation of powers” based on each legal tradition.<sup>29</sup> In the United States, the judiciary has historically enjoyed equal status before the other two branches of government and, as a result, constitutional review of statutes has been assumed since its establishment as a power of the courts. It is thus usually referred to as *judicial review*. In contrast, European courts have traditionally played a subordinate role with respect to Parliament.<sup>30</sup> In continental Europe there has existed an historic distinction between the notions of judicial review (*richterliches Prüfungsrecht*) and constitutional review (*Verfassungskontrolle*), as well as of the entities empowered to carry them out.<sup>31</sup>

<sup>25</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>26</sup> See Stone Sweet, *supra* note 2, at 232.

<sup>27</sup> For a short yet insightful overview of these approaches see JOSÉ RAMÓN COSSÍO, SISTEMAS Y MODELOS DE CONTROL CONSTITUCIONAL EN MÉXICO 129-32 (Mexico, IJ-UNAM, 2011).

<sup>28</sup> While some authors (mostly in Germany) use the terminology “unity model” (*Einheitsmodell*) in reference to the American and “separation model” (*Trennungsmodell*) when referring to the European, this semantic distinction just emphasizes whether the constitutional review is carried out by an organ within the ordinary judiciary or rather by a separated entity. See KLAUS SCHLAICH & STEFAN KORIOETH, DAS BUNDESVERFASSUNGSGERICHT 2-3 (München, Verlag C.H. Beck, 10th ed. 2010).

<sup>29</sup> E.g., Stone Sweet, *supra* note 2, at 223.

<sup>30</sup> “Parliamentary Sovereignty” is a doctrine that recognizes Parliament’s right “to make or unmake any law whatever.” See ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3-4 (Indianapolis, Liberty/Classics, 8th ed. [1915] 1982). It also bans any other body to overrule such laws. See *id.* (“...no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament”). In continental Europe the supremacy of Parliament was associated to Rousseau’s notion of the “general will”. This assumed that the power of the people as expressed through its representatives is supreme and thus not subject to any review. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 1-2 (Cambridge University Press, 2005).

<sup>31</sup> See DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 4-7 (Durham, Duke University Press, 2nd ed. 1997).



In the American model the ability to review the constitutionality of legislative action —and directly provide a remedy for a breach— represents a significant judicial power regardless of whether the courts involved are federal or local. Constitutional review is thus carried out directly within ordinary judicial procedures and only insofar it is necessary to solve the legal dispute brought before the court.<sup>32</sup> While these review powers include the ability to evaluate the constitutionality of laws such as statutes, the court's decision regarding the unconstitutionality of a statute has—in principle—only effects *inter partes*. This means, in lay terms, that such a judgment is binding exclusively upon the parties to the litigation.<sup>33</sup> This does not, however, mean that the model disregards predictability or that it fosters unequal treatment before the law. Constitutional scrutiny is carried out within the ordinary trial. This implies that the constitutional interpretation is also subject to the traditional common law mechanisms aimed at achieving consistency “between law as declared and as actually administered.”<sup>34</sup> Firstly, a conclusion regarding the unconstitutionality of a statute is subject to revision before a higher court in the judicial hierarchy.<sup>35</sup> Secondly, the equivalent constitutional cases that follow ought to be ruled—in line with the doctrine of *stare decisis*<sup>36</sup>—exactly as the higher court has determined. Logically, as the US Supreme Court is the highest court in the judicial hierarchy, its decisions declaring the unconstitutionality of statutes in fact prevent these laws' further application. Through these mechanisms the American model reaches uniformity in the interpretation of constitutional rules among the different courts of the land. At the same time, it avoids that every controversy becomes an issue of statutory unconstitutionality. To summarize, the diffused model embraces a general duty for the judiciary to safeguard the supremacy of the constitution vis-à-vis the activity of the State. The judgments determining the invalidity of statutes, however, have the possibility to reach a higher court. This higher court's constitutional interpretation —albeit with direct effects only for the

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<sup>32</sup> In the American model, “abstract constitutional review” is excluded. See Stone Sweet, *supra* note 2, at 222.

<sup>33</sup> To consider the *inter partes* effects unreservedly as a feature of US constitutional judgments—specially regarding decisions made by the US Supreme Court—is a bit to oversimplify. Whereas a decision of the US Supreme Court declaring a statute unconstitutional does not remove it from the books, it does prevent—as it will be explained below—the statute's further enforcement. See VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 458 (New York, Foundation Press, 1999). (“...US decisions are frequently described as binding only upon the parties to the litigation. This is far too simplistic and may not be accurate at all with constitutional adjudication in the US Supreme Court...”)

<sup>34</sup> FULLER, *supra* note 24, at 81.

<sup>35</sup> See 28 U.S.C. § 1257 (2006).

<sup>36</sup> This is the rule—developed in common law systems—which binds courts to the authority of superior courts. It forces them to solve a case in the same way it has been previously decided by a higher authority in the judicial hierarchy. See JACKSON & TUSHNET, *supra* note 33, at 458.

parties within the dispute—spreads to the rest of the legal system through the binding precedent rule.

In the continental European model, on the other hand, the power of review of acts of the executive corresponds to lower courts. The authority to strike down unconstitutional statutes, however, is monopolized by a legal body that—albeit frequently jurisdictional—is structurally separate from the ordinary judiciary. This model assumes only a specialized constitutional body has the authority to review the constitutionality of legislative (or Parliamentary) action. For this reason, lower courts may not directly carry out constitutional review—not even to refuse to apply “unconstitutional” statutes in particular cases—and legislation may only be struck down by the constitutional court by means of specialized procedures.<sup>37</sup> These are extraordinary mechanisms which—though usually related to an ordinary legal controversy—run separately from the ordinary adjudication procedures. Consequently, if the constitutional court invalidates a statute because it is deemed unconstitutional, such statute is immediately expelled from the legal system.<sup>38</sup> Since the constitutional court’s judgments are immediately binding upon every authority—executive, legislative, and judicial—its decisions regarding statutes are said to have *erga omnes* or universal effects.<sup>39</sup> This however does not imply that the ordinary judiciary does not play a crucial role in the constitutional review of legislative acts. The constitutional validity of legislation still could be a main factor in establishing the “legal correctness” of an administrative act or even a judgment. For this reason the regular courts are always entitled to initiate a specialized mechanism—also called “referral” procedure—at the constitutional court to review a statute. While this constitutional mechanism is admissible only if this is needed to solve the case at hand, it emphasizes the importance of lower courts in the implementation of the constitutional guidelines.<sup>40</sup> Nevertheless, the model developed within a legal tradition where the character of a judge as a law maker is rather feared

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<sup>37</sup> This is the so-called rejection monopoly (*Verwerfungsmonopol*) proper of the continental European model. See SCHLAICH & KORIOTH, *supra* note 28, at 99.

<sup>38</sup> In Germany, however, the Federal Constitutional Court (BVerfG) has developed ways to avoid declaring a statute unconstitutional and therefore to immediately expel it from the legal system. The court has, for instance, declared a statute’s “incompatibility with the constitution” (*Unvereinbarerklärung*) and provided the legislator with a deadline to overcome the incompatible situation. These cases have typically involved statutes that violated the equality clause by excluding a certain group from a legal benefit that was given to another. See WERNER HEUN, *FUNKTIONELL-RECHTLICHE SCHRANKEN DER VERFASSUNGSGERICHTSBARKEIT* 21-4 (Nomos, Baden-Baden, 1992).

<sup>39</sup> See SCHLAICH & KORIOTH, *supra* note 28, at 244-6.

<sup>40</sup> See, e.g., the procedures of *Vorlageverfahren* in the Grundgesetz [GG] [German Basic Law], Art. 100; *cuestión de inconstitucionalidad* in the Constitución Española [CE] [Spanish Constitution], Art. 163; and, recently introduced, *question constitutionnelle* in the Constitution de la République française [Const. Fr.] [French Constitution], Art. 61-1.

than favored<sup>41</sup> and where the doctrine of binding precedent does not play a predominant role in legal predictability.<sup>42</sup> The invalidity of legislation—even if initially detected by a court within an ordinary trial—should therefore be declared by a specialized organ whose decisions have “force of statute” and thus are immediately binding to every other authority in the system.<sup>43</sup>

For predictability sake it is necessary to be aware of the different consistency rules surrounding the scrutiny of statutes on each of these two models.<sup>44</sup> Yet to focus exclusively on this difference is definitely too simplistic and could be misleading. The error is especially common when conceptualizing constitutional review in systems following the continental European model. Indeed, the terminology “diffused” versus “concentrated” can lead to the erroneous belief that in concentrated systems constitutional review is monopolized by the constitutional court.<sup>45</sup> However, not even when it provides for the review of legislation the concentrated model depends exclusively on the activity of the constitutional jurisdiction. As mentioned above, while it is true that in centralized systems only the constitutional court may strike down statutes, lower courts play a crucial role in this process by means of the “referral” procedure.<sup>46</sup> Furthermore, in continental European systems the enforcement of constitutional supremacy also goes beyond the acts of the legislative power.<sup>47</sup> As it happens in the US, the ordinary judiciary in the continental European model contributes substantially with constitutional review of other kinds of government activity. It is a precondition for the Rule-of-law that the activity of the State as a whole is legally bound to the “law in the layman sense”<sup>48</sup> (*i.e.* to the Constitution). Consequently, constitutional systems have developed mechanisms to supervise that not only acts of the legislative but also of the executive and even of the judiciary are carried out within the constitutional boundaries. These rules pursue that such acts of authority are in line especially with the constitutional provisions granting fundamental rights. Yet if

<sup>41</sup> See Martin Shapiro, *Judicial Delegation Doctrines: The US, Britain, and France*, 25 WEST EUROPEAN POLITICS 173, 174-5 (2002).

<sup>42</sup> See KOMMERS, *supra* note 31, at 42.

<sup>43</sup> See, *e.g.*, Gesetz über das Bundesverfassungsgericht [BVerfGG] [German Federal Constitutional Court Act], § 31.

<sup>44</sup> See JACKSON & TUSHNET, *supra* note 33, at 458. (“If all courts could decide constitutional questions without *stare decisis* effect, Capelletti suggests, a chaotic situation with respect to the validity of laws would result.”)

<sup>45</sup> *E.g.* COSSIO, *supra* note 27, at 132. As it is shown in *infra* section III, the Mexican evolution of constitutional scrutiny suggests this misunderstanding.

<sup>46</sup> See SCHLAICH & KORIOTH, *supra* note 28, at 99.

<sup>47</sup> It is often said that the “pure” continental European model excludes constitutional scrutiny of administrative and judicial action. For this reason several scholars refer to centralized systems that allow this rather as “mixed” (*e.g.* Germany, Spain, and Italy). In fact, however, not even the first system to ever adopt the centralized model (*i.e.* Austria 1920-1934) limited this constitutional review to acts of Parliament. See Kelsen, *supra* note 24, at 58.

<sup>48</sup> RAZ, *supra* note 23, at 213-4.

fundamental rights are actually “rights,” this means that someone is legally bound to their enforcement despite a careless legislative, a negligent administration, an arbitrary trial judge, or a combination of all of these.<sup>49</sup> It is only reasonable to expect that a constitutional court alone cannot fulfill all the obligations resulting from these entitlements and, therefore, to conclude that the system has to rely on the ordinary jurisdiction for that matter.<sup>50</sup>

Related and equally mistaken is the idea surrounding the distribution of judicial competences in systems with specialized constitutional jurisdiction. It is frequently affirmed that the distribution of tasks between ordinary and constitutional courts in this model is given by the application, respectively, of ordinary and constitutional law.<sup>51</sup> The fact is that ordinary courts apply constitutional law no less than constitutional courts interpret ordinary law provisions.<sup>52</sup> For this reason, additional criteria apply when distinguishing constitutional and ordinary judicial review. Since constitutional supremacy binds every authority without regard, lower courts must also safeguard fundamental rights as part of their judicial activities. Constitutional primacy is implemented in centralized systems mainly through the general obligation of courts to interpret ordinary laws “*in conformity with the constitution*”<sup>53</sup> and—if such interpretation is not possible—through deferral to the constitutional court. It is also true, however, that “insofar as ordinary law is explicated constitutionally, especially through fundamental rights, the lower courts are functionally also constitutional courts.”<sup>54</sup> Stated differently, lower courts can confront at the outset any act of authority with a constitutional rule related to fundamental rights.<sup>55</sup> Nevertheless, the fact that fundamental rights en-

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<sup>49</sup> See DWORKIN, *supra* note 23, at 27. (“For individuals have powers under the rights conception that they do not have under the rule book conception. They have the power to demand, as individuals, a fresh adjudication of their rights. If their rights are recognised by a court, these rights will be enforced in spite of the fact that no parliament had the time or the will to enforce them.”)

<sup>50</sup> See Markus Kenntner, *Das BVerfG als subsidiärer Superrevisor?*, 58 NEUE JURISTISCHE WOCHENSCHRIFT 785, 786 (2005); Kelsen, *supra* note 24, at 59. Even though this statement sounds at first glance like a *de facto* argument, in its essence it derives from the theoretical impossibility to institutionalize a further obligation in order to review all the acts of the constitutional reviewer. See COSSIO, *supra* note 27, at 180-1.

<sup>51</sup> E.g., Héctor Fix-Zamudio, *Louis Favoreu, Les Courts Constitutionnelles*, 60 BOLETÍN MEXICANO DE DERECHO COMPARADO 1005, 1006 (1987). By “ordinary law” it is meant here every legal rule which is not part of the constitution or a product of constitutional interpretation. This includes statutes (federal or local), regulations, delegated legislation, and even international covenants.

<sup>52</sup> See Hoffmann-Riem, *supra* note 22, at 181-2.

<sup>53</sup> See KOMMERS, *supra* note 31, at 51. The “constitution” here includes the constitutional interpretation that the constitutional court has established in its judgments.

<sup>54</sup> Hoffmann-Riem, *supra* note 22, at 188 (author’s translation).

<sup>55</sup> A fairly good example of this ‘direct effect’ of the constitution is the collision of fundamental rights carried out by ordinary courts in Germany. See *id.*

forcement is a shared responsibility has an important implication: the only relatively straightforward delimitation of these duties between lower and constitutional courts is given apropos the declaration of invalidity of acts of Parliament.<sup>56</sup> As a matter of fact most systems that follow the continental European model assume that the validity of the constitution can be reinforced by granting *individuals as such* the prospect of enforcing fundamental rights—additionally to the ordinary mechanisms of appeal—through a specific constitutional judicial procedure.<sup>57</sup> It is both practically and theoretically impossible for a constitutional court, however, to review every single action of the State. As the constitutional jurisdiction “cannot and should not be a super jurisdiction of appeals,”<sup>58</sup> more complex criteria are needed to allocate these constitutional responsibilities when the validity of legislation is not at stake.

Particularly in systems following the continental European model—but not exclusively on them—the constitutional jurisdiction’s ability to review lower court judgments upon individual challenge has led to the development of further doctrinal standards. They intend to distinguish ordinary from (formally) constitutional issues involving fundamental rights.<sup>59</sup> These standards can either be established directly in the constitutional procedural law or “self-imposed” by the judiciary through constitutional interpretation. They distribute the tasks among lower and constitutional courts based rather on the *role* that each kind of court plays—in view of its specific operational capabilities and status in the constitutional order—in reinforcing the validity of the constitution.<sup>60</sup> On one hand, the enforcement of fundamental rights is assumed first and foremost as a duty of lower courts which are empowered for such purpose within the ordinary procedures. These courts are therefore granted with powers either to “disapply” legislation (in diffused systems) or to refer to the constitutional court (in concentrated ones). The specialized constitutional mechanism, on the other hand, serves principally an *exemplary func-*

<sup>56</sup> The problem of delimitation of duties in regards to administrative action whose statutory grounds are not contested is said to be solved by the usual requirement “to exhaust all legal remedies.” See ROLAND FLEURY, *VERFASSUNGSPROZESSRECHT* 64 (Köln-M, Carl Haymanns Verlag, 7th ed. 2007). However, this does not really solve the problem of distribution of tasks between ordinary administrative courts and the constitutional court. See Kelsen, *supra* note 24, at 67.

<sup>57</sup> See Alfonso Herrera García, *El recurso de amparo en el modelo kelseniano de control constitucional ¿un elemento atípico?*, in 1 *EL JUICIO DE AMPARO. A 160 AÑOS DE LA PRIMERA SENTENCIA* 601 (Manuel González Oropeza & Eduardo Ferrer-MacGregor eds., IIJ-UNAM, 2011). E.g., the German *Verfassungsbeschwerde* and the Spanish *recurso de amparo*. While they can be compared to some extent with the American writ of *habeas corpus*, these are general mechanisms of constitutional protection which are not limited to basic rights in the criminal procedure.

<sup>58</sup> Kennntner, *supra* note 50, at 786 (author’s translation).

<sup>59</sup> For a critique to the formulas used so far by the German BVerfG see Wolfgang Roth, *Die Überprüfung fachgerichtlicher Urteile durch das Bundesverfassungsgericht und die Entscheidung über die Annahme einer Verfassungsbeschwerde*, 121 *ARCHIV DES ÖFFENTLICHEN RECHTS* 544, 548-52 (1996).

<sup>60</sup> See Hoffmann-Riem, *supra* note 22, at 178; HEUN, *supra* note 38, at 12-6.

tion —comparable to that of a lighthouse<sup>61</sup>— given the authority conferred to the decisions issued by the constitutional jurisdiction: The constitutional interpretation achieves general validity either through the doctrine of *stare decisis* or through the “force of statute” effects of the constitutional judgment.<sup>62</sup> Even when a case is deemed unconstitutional on its merits, this is not considered a subsidiary review whose main purpose is to correct the mistakes of the lower court.<sup>63</sup> Firstly, the constitutional jurisdiction enjoys rejection powers that are highly discretionary. The mere individual challenge is not sufficient to compel the court to carry out the review.<sup>64</sup> Secondly, if the case is ultimately admitted for revision, the revision is subject to strict deference rules to the activity of lower courts. The specialized constitutional procedure is thus usually limited to a “comprehensibility” review.<sup>65</sup> Roughly speaking, this means that as long as the lower court’s conclusion is comprehensible or reasonable within the acknowledged techniques of interpretation (*i.e.* not arbitrary) the original decision will be affirmed. Irrespective of whether the constitutional jurisdiction would have rather favored another interpretative method —and thus reached a different outcome— a comprehensible ordinary judgment stays untouched.

Ignorance of these assertions risks minimizing the essential role that the ordinary judiciary plays in any system that aims at fulfilling the Rule-of-law. As shown below, this oversight might lead to expect from the constitutional jurisdiction results that it cannot possibly achieve. Put differently, it might mislead law makers to look for solutions in order to improve the justice system where these are not to be found.

### III. THE MEXICAN SYSTEM BETWEEN TWO MODELS (1847-2011)

Constitutional review in Mexico since as early as the second half of the 19<sup>th</sup> century has been primarily a function of the judiciary.<sup>66</sup> In reality, the Mexican system has fluctuated between the American and the continental European models without becoming either one completely. The Mexican system initially adopted structures and procedures that —with notable differences regarding the rules to attain consistency in the application of the law— were clearly inspired by the American model. As the Mexican system

<sup>61</sup> See Hoffmann-Riem, *supra* note 22, at 176.

<sup>62</sup> See *id.* at 179; JACKSON & TUSHNET, *supra* note 33, at 458.

<sup>63</sup> See Kenntner, *supra* note 50, at 786.

<sup>64</sup> See SCHLAICH & KORIOTH, *supra* note 28, at 128-9; KOMMERS, *supra* note 31, at 51-2. See, e.g., Gesetz über das Bundesverfassungsgericht [BVerfGG] [German Federal Constitutional Court Act], §93 (d), cl. 1; Rules of the Supreme Court of the United States, pt. III, rule 10.

<sup>65</sup> See Hoffmann-Riem, *supra* note 22, at 187; 28 U.S.C. § 2254 (d) (2006).

<sup>66</sup> Before 1847 constitutional review was carried out mostly by political organs. See Cossio, *supra* note 27, at 42.

evolved, several mechanisms typical of the continental European model were introduced. Even though these additions operated mainly within an American-based structure, by the early 21<sup>st</sup> century the influence of European constitutionalism on Mexican rules was so noticeable that the Mexican Supreme Court was regarded—at least in the official discourse—as a “genuine constitutional court” in the sense of the continental European paradigm.<sup>67</sup> This drifting between models, however, did not turn the Mexican system into a “best of all worlds” solution. Quite the contrary, it resulted in an almost unintelligible hybrid in which lower courts have been steadily limited in playing any significant role in constitutional review. Stated differently, since only the federal courts in Mexico have been entitled—predominantly through the constitutional writ of *Amparo*—to evaluate the constitutionality of law, the so-called “evolution” of Mexican constitutional review implied a constant expansion in the size, authority and budget of federal tribunals. While the addition of some European-based mechanisms to the powers of the Supreme Court boosted this trend, lower courts have progressively become mere bureaucratic facilities which add little value in the enforcement of constitutional rules. The outcome is an intricate system of constitutional review that relies excessively on the federal judiciary and—in what is the other side of the same coin—fosters unequal treatment before the law.

### 1. *American Influence on Mexican Judicial Review (1847-1987)*

American-based features within the Mexican system of constitutional review are not hard to disentangle. Even though Mexico has never belonged to the common law tradition, from the very beginning of its independent existence the country has basically followed the judicial model developed by its northern neighbor. Since the enactment of the first Mexican Constitution in 1824, ordinary judicial activities were divided between federal and state courts that coexisted all over the country<sup>68</sup> and—just like in the United States—these federal and state tribunals represented separate judicial spheres responsible for adjudicating controversies arising under either federal or state law, respectively.<sup>69</sup> Given that this federalist arrangement of the courts was basically reiterated both in the Constitution of 1857—where constitutional

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<sup>67</sup> E.g., Mariano Azuela Güitrón, *La Suprema Corte de Justicia de México, genuino tribunal constitucional*, 2 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 39, 39-40 (2002).

<sup>68</sup> See EMILIO RABASA, HISTORIA DE LAS CONSTITUCIONES MEXICANAS 25 (Mexico, IJ-UNAM, 2nd ed. 2000).

<sup>69</sup> In contrast, in continental European systems that embrace judicial federalism, the bulk of both federal and state controversies are usually solved—in trial and appeal—within the state judicial subsystem. Consequently, in continental Europe the federal courts usually do not have “original jurisdiction” and are rather courts of final appeal. See KOMMERS, *supra* note 31, at 3.



review became exclusively judicial— as well as in the current Constitution enacted in 1917, the judicial structure in which the Mexican rules of constitutional scrutiny for the most part have developed is clearly American.<sup>70</sup> Ever since constitutional review became a judicial task in Mexico, the Mexican legal system only partially adopted the rules of the “diffused” American model. Stated differently, while the powers of constitutional review were given to the judiciary, they were not given to all courts but rather only to federal courts (*Poder Judicial de la Federación*). Moreover, these federal courts could only carry out constitutional review within a specialized procedure known as *Juicio de Amparo*.<sup>71</sup> Based on the European notion regarding the role of legislators that still prevailed in Mexico during the 19<sup>th</sup> century,<sup>72</sup> the Constitution of 1857 channeled constitutional review exclusively through a specialized constitutional writ instead of making it part of ordinary federal or local judicial procedures.<sup>73</sup>

Ironically, the specialized writ on which the Mexican system based constitutional review was also significantly inspired by the American legal tradition.<sup>74</sup> The generations of scholars who have long venerated the originality of the Mexican *Amparo notwithstanding*,<sup>75</sup> a clear evaluation shows that this writ

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<sup>70</sup> See RABASA, *supra* note 68, at 25. The ephemeral yet important constitutional reforms made in 1847—which introduced judicial review into the Mexican system to coexist with the political mechanisms of constitutional scrutiny that were valid at that time—did not alter the judicial structure adopted by the Constitution of 1824. *See id.* at 56-8.

<sup>71</sup> There was a theoretical possibility for the Supreme Court to carry out constitutional scrutiny outside *Amparo* by solving the controversies between states or between the Union and the states. *See* Mex. CONST. art. 98 (enacted 1857, repealed 1917). However, this mechanism did not play any significant role in the Mexican system of the time. *See* COSSÍO, *supra* note 27, at 41. The federal courts that traditionally have enjoyed constitutional review powers in Mexico—as they have had either original or appellate jurisdiction on *Amparo*—are the District Courts, the Three-Judge Panel Circuit Courts, and the Supreme Court. Other courts within the Federal Judicial Power—such as Unitary Circuit Courts or the Federal Electoral Court—and courts of federal jurisdiction which organically belong to the Executive Power—such as the Federal Administrative Court or the Federal Labour Court—did not enjoy until recently, given the kind of procedures that they usually solve, powers of constitutional scrutiny.

<sup>72</sup> Mexico is, after all, a country of the civil law tradition. *See* COSSÍO, *supra* note 27, at 26.

<sup>73</sup> *See id.* at 30-1. Nonetheless, the great mistrust in the authorities of the states was certainly also decisive for such a choice. While in one of the drafts of this constitutional text the jurisdiction on *Amparo* was actually conferred not only to courts within the federal judiciary but also to those of the states, the final text banned the local judiciaries from performing any kind of constitutional control. In my opinion, such a proposal to include state judiciaries on these tasks was not as absurd as it has been often described by Mexican legal scholarship. *Contra, e.g.*, RABASA, *supra* note 68, at 77.

<sup>74</sup> *See* Jesús Ángel Arroyo Moreno, *El origen del juicio de amparo*, in LA GÉNESIS DE LOS DERECHOS HUMANOS EN MÉXICO 43, 55-9 (Margarita Moreno-Bonett & María González eds., IJJ-UNAM, 2006).

<sup>75</sup> *E.g.*, Héctor Fix-Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 306, (1979).

was actually an adaptation of the American writ of *habeas corpus* to the 19th century Mexican legal system. Whereas *habeas corpus* had developed mainly as a common law mechanism to avoid arbitrary imprisonment in England (*i.e.* the courts of the King's Bench were empowered to issue the order regardless of written legislation providing for it),<sup>76</sup> its American version had features which were rather attractive for system that —albeit interested first and foremost in legally protecting constitutional rights— had inherited its consistency rules from the civil law tradition. Although *habeas corpus* was still essentially a common law injunction in the US at the local level and therefore did not require written legislation to be issued by a state court,<sup>77</sup> the writ faced more restrictions at the federal level. The so-called “Article III courts —including the Supreme Court— were powerless to issue common law writs of *habeas corpus*, and could only act pursuant to express statutory jurisdiction.”<sup>78</sup> Put differently, the writ of *habeas corpus* —through which the American *federal* judiciary safeguarded the constitutional liberty of detainees— was a procedure sanctioned by Congress.<sup>79</sup> Perhaps more important for the Mexican system of constitutional review, however, was the *inter partes* effects of the decisions where the courts in the US declared the invalidity of statutes. The creators of the Mexican constitutional writ saw in the American system —or rather in Tocqueville's description of it— an acceptable solution to overcome the “Separation of Powers” issue that would arise if a court determined that a law was unconstitutional.<sup>80</sup> It is certainly not a coincidence that both jurists who are acknowledged as the architects of the writ of *Amparo* —Manuel Rejón<sup>81</sup> and

<sup>76</sup> See Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARVARD LAW REVIEW 941 (2011).

<sup>77</sup> See Dallin H. Oaks, *Habeas Corpus in the States 1776-1865*, 32 UNIVERSITY OF CHICAGO LAW REVIEW 243, 248-9 (1965).

<sup>78</sup> Vladeck, *supra* note 76, at 980.

<sup>79</sup> See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

<sup>80</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 92 (George Lawrence trans., Harper & Row Publishers, 1966) (“If the [American] judges had been able to attack laws in a general and theoretical way, if they could have taken the initiative and censored legislation, they would have played a prominent part on the political scene; a judge who had become the champion or the adversary of a party would have stirred all the passions dividing the country to take part in the struggle. But when a judge attacks a law in the course of an obscure argument in a particular case, he partly hides the importance of his attack from the public observation. His decision is just intended to affect some private interest; only by chance does the law find itself harmed. Moreover, the law thus censured is not abolished; its moral force is diminished, but its physical effect is not suspended. It is only gradually, under repeated judicial blows, that it finally succumbs.”). His work was frequently cited in the *Amparo* debates. See Arroyo, *supra* note 74, at 57. As mentioned already, the *inter partes* rule does not apply to the decisions of the US Supreme Court. See JACKSON & TUSHNET, *supra* note 33, at 458.

<sup>81</sup> He introduced *Amparo* at the state level within his proposal for the Constitution of Yucatán in 1840. See José Enrique Capetillo Trejo, *La Constitución yucateca de 1841 y la reforma constitucional en las entidades federativas*, in DERECHO CONSTITUCIONAL ESTATAL 473, 478-81 (Francisco de

Mariano Otero<sup>82</sup>—made explicit reference to how in American law the individual effects of a constitutional decision prevented the courts from becoming legislators and, accordingly, adopted the *inter partes* rule in their proposals.<sup>83</sup>

The system established by the Constitution of 1857 was based on at least two fundamental misconceptions of the American system that came to influence the subsequent evolution of the Mexican rules of constitutional review. First, even if one accepts the claim that a specialized judicial procedure was needed to safeguard constitutional rights and obligated Mexico to adopt an institution that “in North-America... [had] produced the best effects,”<sup>84</sup> the concentration of this procedure solely within the federal judiciary hints at a misconstrued—or in any case incomplete—picture of the American legal system of that time. While it is undeniable that in the United States the federal courts had habeas corpus jurisdiction, this jurisdiction was so restricted<sup>85</sup> that nearly all habeas corpus litigation took place in state courts.<sup>86</sup> When Mexico granted exclusive jurisdiction on *Amparo* to federal courts<sup>87</sup> in effect ban-

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Andrea ed., Mexico, IJ-UNAM, 2001). While Rejón also participated in the debates that gave way to the federal constitutional reforms of 1847 and there he explicitly suggested local court involvement in constitutional scrutiny, he abandoned the discussions abruptly and his ideas were only partially adopted. *See id.*

<sup>82</sup> He is considered the main developer of *Amparo* at the national level. As part of the group in charge of the federal constitutional amendments of 1847, he presented a famous dissenting opinion against the majority's conclusions. *See* Mariano Otero, *Voto Particular*, in SUPREMA CORTE DE JUSTICIA DE LA NACIÓN [S.C.J.N.] [Supreme Court], LA SUPREMA CORTE DE JUSTICIA, SUS LEYES Y SUS HOMBRES 127 (Mexico, 1985). His arguments caused the majority to reconsider and Otero's proposals—including a combined system of constitutional scrutiny to be carried out both by judicial and political organs—were approved almost word for word as constitutional amendments. *See* RABASA, *supra* note 68, at 56.

<sup>83</sup> *See, e.g.*, Arroyo, *supra* note 74, at 57-9. This is also the reason why the *inter partes* effects of *Amparo* judgments are commonly—yet misleadingly—called the “Otero formula.” *See* Cossío, *supra* note 27, at 31-2.

<sup>84</sup> Otero, *supra* note 82, at 137 (author's translation).

<sup>85</sup> At the time the Mexican *Amparo* was created the federal writ of habeas corpus in the United States was not effective to review convictions. *See* Rex Collings Jr., *Habeas Corpus for Convicts*, 40 CALIFORNIA LAW REVIEW 335, 351 (1952). Whereas in 1867—after the American Civil War—the federal writ was extended by Congress to those *detainees* held in custody by the states, as of the 1940s the so-called “Warren Court” broadened the scope of federal habeas corpus also to *convicts* under state law. *See, among many, Waley v. Johnston*, 316 U.S. 101 (1942); *Brown v. Allen*, 344 US 443 (1953).

<sup>86</sup> *See* Oaks, *supra* note 77, at 246. As a matter of fact state courts issued habeas corpus writs against federal jailers on a regular basis until this was banned by the Supreme Court in 1859. *See* Vladeck, *supra* note 76, at 981-2.

<sup>87</sup> The monopoly of the federal judiciary on *Amparo* jurisdiction can be traced back to Otero's proposal from 1847: “I still have not found a solid reason against this way of putting the rights of man under the aegis of the general power, but those [reasons] which have made me decide in favour of it are not few... because of this I have not vacillated in proposing Congress to elevate greatly the Federal Judicial Power, giving it the right to protect all the inhabitants

ning state courts from any serious involvement in constitutional review,<sup>88</sup> the Mexican rules completely overlooked the fact that—at least as far as the protection of individual constitutional rights is concerned—the much admired American system heavily relied (and still does) on the activity of state judges. The mechanisms through which the American model attained consistency in constitutional interpretation throughout the different courts of the country went equally unnoticed by the Mexican framers of 1857. Fixated on the “advantages” that the *inter partes* effects in American constitutional decisions could bring vis-à-vis “Separation of Powers,” the Mexican deliberations disregarded the precept of binding precedent that served as a basis for common law.<sup>89</sup> The later establishment of an *inter partes* procedure like *Amparo* as practically the only available mechanism of constitutional review—deliberately excluding other procedures that could have made up for the lack of *stare decisis* doctrine in Mexico<sup>90</sup>—instead served to fragment the Mexican legal order.<sup>91</sup> This situation institutionalized at the outset a system that fostered unequal treatment under the same constitution.

After *Amparo* was left as the only available mechanism of constitutional review within the Mexican system, this constitutional writ started—so to speak—to adjust to the Mexican reality. It began to develop, understandably, substantive and procedural rules of its own.<sup>92</sup> Nonetheless, the Mexican legal

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of the Republic in the enjoyment of the rights assured to them by the Constitution and the Constitutional Laws, against every attack of the executive or the legislative, whether from the states or from the Union.” Otero, *supra* note 82, at 131-7 (author’s translation). His ideas in this regard—unlike those concerning constitutional review by political organs—were retaken by those who enacted the Mexican Constitution of 1857. See RABASA, *supra* note 68, at 77.

<sup>88</sup> There were in fact several interesting proposals at the time that would have granted state courts some jurisdiction on the writ of *Amparo*. E.g., compare Arroyo, *supra* note 74, at 59; Ponciano Arriaga & others, *Proyecto de Constitución Política de la República Mexicana (16 de Junio de 1856)*, in SUPREMA CORTE DE JUSTICIA DE LA NACIÓN [S.C.J.N.] [Supreme Court], *supra* note 82, at 165-6 with Mex. CONST. art. 101 (enacted 1857, repealed 1917).

<sup>89</sup> See *supra* section II. Cf. JACKSON & TUSHNET, *supra* note 33, at 458.

<sup>90</sup> Two of these mechanisms were contained in Otero’s proposal from 1847. They included—parallel to judicial review through *Amparo*—the constitutional review of state legislation by the federal Congress and, conversely, of federal statutes by state legislatures. See Otero, *supra* note 82, at 140. While these mechanisms coexisted with judicial review for a few years, the Constitution of 1857 completely eliminated them from the Mexican system. See, e.g., COSSÍO, *supra* note 27, at 31-2; RABASA, *supra* note 68, at 77.

<sup>91</sup> See COSSÍO, *supra* note 27, at 42.

<sup>92</sup> This is most probably where the veneration to the “originality” of the Mexican writ comes from. Some of the better known principles ruling the *Amparo* procedure include the following: relativity of judgments (i.e. *inter partes* or *relatividad*); standing to the offended party only (*parte agraviada*); decisions based exclusively on the complaint (*estricto derecho*); exhaustion of ordinary legal remedies (*definitividad*), and statutory continuation (*prosecución*). The literature concerning this writ is abundant, quite technical, and frequently specialized into the particularities that have developed within each sub-subject of the constitutional mechanism. For a succinct account of *Amparo* in English see Fix-Zamudio, *supra* note 75.

system continued to follow for decades the evolution of American legal institutions and tried to use them as a prototype — albeit with major differences. While most of the specific rules of *Amparo* were defined largely through the continuous amendments that took place during the second half of the 19<sup>th</sup> century,<sup>93</sup> many of these changes — particularly those regarding the acts open to review, but also some concerning the rules to attain consistency in constitutional interpretation — were still based on what Mexican legislators assumed to be the trend in the United States. For instance, both the antebellum judgment in *Martin v. Hunter's Lessee*<sup>94</sup> as well as the misinformed belief that American laws granted federal courts habeas corpus jurisdiction to state prisoners,<sup>95</sup> contributed in Mexico to the extension of *Amparo* to challenge judgments.<sup>96</sup> Consequently, a mechanism that was originally conceived to protect individuals solely from executive or legislative power<sup>97</sup> was rapidly widened to include judiciary acts.<sup>98</sup> Since *Amparo* was not restricted — as American habeas corpus was — to safeguard individual liberty and Mexican local courts lacked any jurisdiction for constitutional review,<sup>99</sup> the decision to include judgments as part of *Amparo* opened the gate to the establishment of a hierarchy between federal and state courts for non-criminal issues. This subsequently gave way to the use of the writ as an ordinary mechanism in civil appeals.<sup>100</sup> Not sur-

<sup>93</sup> During the validity of the Constitution of 1857 — which despite several interruptions due to foreign invasions lasted until the outburst of the Mexican Revolution in 1910 — statutes regulating *Amparo* were enacted in 1861, 1869, 1882, 1897, and 1908. Most of the rules developed during this period outlived the Constitution and are still valid today. See Cossío, *supra* note 27, at 34-7.

<sup>94</sup> *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

<sup>95</sup> See JOSÉ BARRAGÁN, PROCESO DE DISCUSIÓN DE LA LEY DE AMPARO DE 1869, 189-90 (Mexico, IJJ-UNAM, 1987). It is very unlikely those who rooted for the American model in the Mexican Congress of 1869 — Mariscal and Velasco — were aware of their American counterpart granting the federal courts habeas corpus jurisdiction over state prisoners' claims just two years before through the Habeas Corpus Act of 1867. Still, this authority was exercised in the United States only for "jurisdictional challenges" until the 1940s. See Vladeck, *supra* note 76, at 946.

<sup>96</sup> Even though in January 1869 — after a long and heated debate — legislation had explicitly made the writ inadmissible to challenge acts of the judiciary, in July of that same year the Supreme Court admitted and granted in a controversial ruling — without even invalidating the respective statute — the first *Amparo* against a judgment of the Superior Court of Sinaloa. This view finally prevailed and the "judicial *Amparo*" was allowed explicitly in the statute of 1882. See Manuel González Oropeza, *Protection in Judicial Business: The Case of Miguel Vega*, 3 MEXICAN LAW REVIEW (2005), available at <http://info8.juridicas.unam.mx/cont/mlawr/3/arc/arc6.htm> (last visited May 31, 2012).

<sup>97</sup> See Otero, *supra* note 82, at 137.

<sup>98</sup> See Ley de Amparo [L.A.] [Amparo Law], as amended, art. 8, Diario Oficial de la Federación [D.O.], 14 de Diciembre de 1882 (Mex.).

<sup>99</sup> An exception was introduced in 1882 to allow for state courts to issue some provisional injunctions in *Amparo* when there was no federal court in the district where the violation had taken place. See *id.* art. 4.

<sup>100</sup> See José Luis Soberanes, *Surgimiento del Amparo Judicial*, in 2 EL JUICIO DE AMPARO. A 160

prisingly, it was also during this period that Mexican federal legislators gave up on their resistance towards legal precedent and developed the concept of *Jurisprudencia*.<sup>101</sup> In contrast to the *stare decisis* doctrine that inspired this idea, however, this interpretation (decided by the Mexican Supreme Court) had to be repeated several times to achieve authoritative force and become binding.<sup>102</sup>

While it is remarkable that the rules of constitutional review which were developed even before the outburst of the Mexican Revolution (1910-1917) outlived this difficult period, it is perhaps more astonishing that they remained essentially the same for almost another century.<sup>103</sup> Indeed, the continuous adjustments carried out in Mexico after the enactment of the Constitution of 1917 and throughout most of the 20<sup>th</sup> century mostly involved the redistribution of *Amparo* jurisdiction among the federal courts.<sup>104</sup> Notably, they did not include greater participation of state courts in the direct enforcement of the Constitution nor did they represent any significant change to the “*Amparo*-centered” system that had emerged during the previous judicial regime.<sup>105</sup> In order to deal with the enormous caseloads that resulted from such an expansive *Amparo* policy, the Mexican Supreme Court had already by 1934 been divided into four specialized chambers (*i.e.* civil, criminal, administrative, and labor) and the number of associate Justices had doubled.<sup>106</sup> Since the effects of this internal reorganization were barely noticeable in the face of increased backlogs in the Supreme Court, the Mexican Congress in 1951 decided to rely once again on the American experience. Inspired by the reform that had created the United States Courts of Appeals sixty years earlier— Mexican

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AÑOS DE LA PRIMERA SENTENCIA 465, 475-9 (Manuel González Oropeza & Eduardo Ferrer-MacGregor eds., IJ-UNAM, 2011).

<sup>101</sup> See José María Serna, *The Concept of Jurisprudencia in Mexican Law*, 2 MEXICAN LAW REVIEW 131, 132-3 (2009).

<sup>102</sup> See *id.* at 133.

<sup>103</sup> Even though the Mexican Senate was reinstated in 1872 and this organ was granted some sort of constitutional control, by that time *Amparo* had already consolidated as the only mechanism of review and this new possibility had in fact very few practical applications. See Cossío, *supra* note 27, at 51-3.

<sup>104</sup> Within the 70 years that followed its enactment, Article 107 of the Mexican Constitution—the article regulating the writ of *Amparo*—was amended in 1951, 1962, 1967, 1974 (twice), 1975, 1979, 1986 and 1987. See *id.* at 87.

<sup>105</sup> See *id.* at 86-8.

<sup>106</sup> After the incorporation of the so-called social rights to the Mexican Constitution of 1917, the Supreme Court had jurisdiction through *Amparo* practically against any act of any authority in the system. While on the one hand it had original jurisdiction on the one-instance writ (*Amparo directo*) against ordinary civil and criminal judgments, on the other hand it enjoyed appellate jurisdiction on the two-instance writ (*Amparo indirecto*) that was filed against legislative and/or administrative acts—including the quasi-judicial decisions of administrative and labor courts—before the federal District Courts. See Héctor Fix-Zamudio, *Ochenta años de evolución constitucional del juicio de amparo mexicano*, in OCHENTA AÑOS DE VIDA CONSTITUCIONAL EN MÉXICO 371, 376 (Jaime García ed., IJ-UNAM, 1998).



legislators established the federal Three-Judge Panel Circuit Courts (*Tribunales Colegiados de Circuito*).<sup>107</sup> Initially six for the whole country, the so-called *Colegiados* were assigned to take over—in a scheme that brings to mind the American writ of *certiorari*—*Amparo* cases of lesser significance that had quickly overwhelmed the Supreme Court.<sup>108</sup> As one might expect of procedural rules that remain essentially unchanged, however, the number of *Amparo* writs filed did not drop at all; during the following years these new federal courts rapidly increased both in number and authority.<sup>109</sup> Meanwhile, state courts—just like any other court not dealing with *Amparo* cases—were explicitly banned from any kind of constitutional interpretation within their ordinary activities.<sup>110</sup>

## 2. A “Turn” towards Continental Europe (1987-2011)

While it is commonly assumed that the failure to reduce backlogs in the federal judiciary led the Mexican system to change its orientation and transform the Mexican Supreme Court in 1987 into a specialized constitutional court,<sup>111</sup> the amendments enacted that year did not radically alter the trend already started with the creation of the Three-Judge Panel Circuit Courts. To be precise, what was officially praised as a new system of responsibilities for the Supreme Court “that would restore (*sic*) its status as the *sole* and supreme interpreter of the constitution”<sup>112</sup> represented in fact the mere transfer of most of the court’s *Amparo* jurisdiction—original and appellate—to the already large and growing number of *Colegiados*.<sup>113</sup> As the Supreme Court only

<sup>107</sup> See *id.* at 386.

<sup>108</sup> After a series of intricate formulas that initially distributed *Amparo* jurisdiction between the Supreme Court and the Three-Judge Panel Circuit Courts depending on whether the alleged violations were, respectively, substantive or procedural, in 1968 the basic criterion of distribution surrounded the economic or social relevance of the specific *Amparo*. See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended October 25, 1967, art. 107, V-IX, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). Additionally, the administrative chamber of the Supreme Court could take over cases discretionally. See Ley de Amparo [L.A.] [Amparo Law], as amended, art. 84, I (c), Diario Oficial de la Federación [D.O.], 30 de Abril de 1968 (Mex.).

<sup>109</sup> By 1986 there were already 35 federal Three-Judge Panel Courts distributed in 18 circuits. See Fix-Zamudio, *supra* note 106, at 395.

<sup>110</sup> See David García Sarubbi, *Federalism and Constitutional Review in Mexico and the United States*, 4 MEXICAN LAW REVIEW 35, 42 (2011).

<sup>111</sup> E.g., Fix-Zamudio, *supra* note 106, at 394-395.

<sup>112</sup> MIGUEL DE LA MADRID, FIFTH STATE OF THE NATION REPORT TO THE MEXICAN CONGRESS 29 (Mexico, Office of the President, 1987) (emphasis added). This document uses explicitly the wording “Constitutional court.” See *id.* at 28.

<sup>113</sup> In contrast to the United States—where lower federal courts are established by Congress—the number and distribution of inferior federal courts in Mexico can be determined by the federal judiciary itself since 1987. See HÉCTOR FIX-FIERRO & HÉCTOR FIX-ZAMUDIO,



kept appellate jurisdiction on *Amparo* writs in which the constitutional validity of general laws had been challenged,<sup>114</sup> many commentators concluded that the court was mainly taking on the functions of a constitutional court. None of these adjustments regarding the writ of *Amparo*, however, actually represented a continental European review mechanism. Most importantly, none of them touched upon the roots of the caseload problem either. For instance, Mexican state courts were not empowered to review the constitutional validity of any ordinary statute by means of a “referral” procedure. Neither could they directly refuse to apply any general law already found unconstitutional by the federal judiciary’s *Jurisprudencia*. In addition, these amendments did not include any real deference rule for the *Amparo* judges to the activity of lower courts. The interpretation of ordinary law decided by non-federal courts within ordinary adjudication could therefore easily be turned into a constitutional dispute. In sum, it is clear that the initial characterization of the Mexican Supreme Court as a “constitutional court” in the late 1980s was misinformed, as it did not involve any intention — either structurally or procedurally — to adopt the continental European model of constitutional review.<sup>115</sup>

The Mexican government’s discourse regarding a specialized constitutional court — already quite popular in other Latin-American countries<sup>116</sup> — quickly extended to Mexican scholarship as well. Suddenly well-known legal scholars and practitioners began to favor the adoption of the continental European model and described Mexican judicial reform as a process headed inevitably in that direction.<sup>117</sup> This understanding — whether accurate or not — significantly shaped the evolution of the Mexican system. Indeed, a series of constitutional amendments approved in 1994 gave the Supreme Court a pair of mechanisms that were characteristic of European constitutional courts.<sup>118</sup> In conjunction with a significant reduction in the number of associ-

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EL CONSEJO DE LA JUDICATURA (IIJ-UNAM, 1996), available at <http://www.bibliojuridica.org/libros/libro.htm?l=86> (last visited May 31, 2012).

<sup>114</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended August, 10, 1987, Art. 107, VIII, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.); Constitución Política de los Estados Unidos Mexicanos [Const.], as amended October 25, 1967, art. 107, IX, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). The Supreme Court, however, could still take on discretionally a “transcendental case” whose original jurisdiction corresponded in principle to the Three-Judge Panel Circuit Courts. See Lucio Cabrera, *La Jurisprudencia de la Suprema Corte de Justicia y aspectos de sus facultades discrecionales*, in 1 DERECHO CONSTITUCIONAL COMPARADO MÉXICO-ESTADOS UNIDOS 477, 482-484 (James Frank Smith ed., IIJ-UNAM, 1990).

<sup>115</sup> See Cossío, *supra* note 27, at 105-6.

<sup>116</sup> See Héctor Fix-Zamudio, *Los tribunales y salas constitucionales en América Latina*, in ESTUDIOS EN HOMENAJE A DON SANTIAGO BARAJAS MONTES DE OCA 59 (IIJ-UNAM, 1995).

<sup>117</sup> E.g., Héctor Fix-Zamudio, *La reforma en el derecho de Amparo*, in ENSAYOS SOBRE EL DERECHO DE AMPARO 479, 502 (Miguel López Ruiz ed., IIJ-UNAM, 1993).

<sup>118</sup> See “Decreto por el que se declaran reformados diversos artículos de la Constitución

ate Justices,<sup>119</sup> these reforms gave the Supreme Court exclusive jurisdiction on “abstract constitutional review” of statutes (*acciones de inconstitucionalidad*)<sup>120</sup> as well as on a wide range of controversies between elected bodies (*controversias constitucionales*).<sup>121</sup> These procedures nonetheless entailed significant variations from the European model which bore heavily on the consistency of constitutional interpretation throughout the whole Mexican system; particularly with respect to the enforcement of fundamental constitutional rights. Even though both of these new mechanisms empowered the Supreme Court to invalidate with effects *erga omnes* unconstitutional statutes and thereby expel laws from the legal system, a qualified majority of *eight* Justices out of eleven was necessary.<sup>122</sup> Whatever its official purpose,<sup>123</sup> this majority requirement implicitly made the constitutional validity of a general rule depend on the nature of the challenging entity and, consequently, created a somewhat artificial distinction between constitutional review of legislation within the Supreme Court. In

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Política de los Estados Unidos Mexicanos” [Decree to amend several articles of the Mexican Constitution] [hereinafter *Reforma Constitucional 1994*], Diario Oficial de la Federación [D.O.], 31 de diciembre de 1994, Primera Sección, pp. 2-11 (Mex.).

<sup>119</sup> By means of this reform the Supreme Court returned to its original configuration of eleven members. See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended December 31, 1994, Art. 94, Diario Oficial de la Federación, Art. 94 (Mex.).

<sup>120</sup> The so-called “abstract constitutional review” (*abstrakte Normenkontrolle*) is the procedure by which certain political bodies (e.g. the Senate, a minority in Parliament, the state government, a state Parliament, etcetera) have the ability to challenge at the constitutional court the validity of laws before—or irrespective of—their application. See Stone Sweet, *supra* note 2, at 224. The procedure introduced in Mexico included not only statutes but also other kinds of general norms such as regulations. See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended December 31, 1994, Art. 105, II, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>121</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended December 31, 1994, Art. 105, I, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). While this mechanism already existed as a normative possibility of constitutional review since the Constitution of 1857 and was retaken almost in the same terms by the framers of 1917, its limited wording had resulted in a lack of practical application. See JOSÉ RAMÓN COSSÍO, *LA CONTROVERSIA CONSTITUCIONAL* 108-11 (Mexico, Porrúa, 2008).

<sup>122</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended December 31, 1994, Art. 105, I-II, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>123</sup> The statement of legislative intent of President Zedillo did not give any argument to justify the need for a qualified majority for such a decision to achieve *erga omnes* effects. While the original bill actually envisaged a majority of nine Justices, the Senate reduced it to eight arguing the need for the new mechanisms to be “viable.” See “Decreto que reforma y adiciona diversos artículos de la Constitución Política de los Estados Unidos Mexicanos” [Decree to amend and add several articles to the Mexican Constitution], Diario de los Debates del Senado [Senate’s Congressional Record], LVI Legislatura, Año I, Primer Periodo Ordinario, Diario 14, Diciembre 16 de 1994, (Mex.), available at [http://www.senado.gob.mx/index.php?ver=sp&mn=3&sm=3&lg=LVI\\_I&id=303](http://www.senado.gob.mx/index.php?ver=sp&mn=3&sm=3&lg=LVI_I&id=303) (last visited May 31, 2012).

other words, a statute challenged on identical grounds before the same Justices could be considered both unconstitutional and constitutional depending on whether the suit is brought by an individual in *Amparo* or by an agency in a procedure of “abstract constitutional review.” Aside from the evident problem this poses for legal predictability, it misrepresents the European model as well as perverts the exemplary or guiding function that—as mentioned above—specialized constitutional mechanisms should play in the enforcement of fundamental rights.<sup>124</sup>

Even though the Supreme Court already had discretion to take over jurisdiction on any *Amparo* case that corresponded to the federal Three-Judge Panel Circuit Courts<sup>125</sup> and could exercise—in “proper constitutional questions”—additional appellate jurisdiction regarding their judgments (*Amparo directo en revisión*),<sup>126</sup> the Mexican Congress assumed that a further increase of the Supreme Court’s control over its own docket would allow it “to perform its constitutional court function more efficiently.”<sup>127</sup> As a consequence, the 1994 reforms also entitled the Supreme Court to delegate—through general rules (*acuerdos generales*) issued by the court sitting *en banc*—its *Amparo* jurisdiction to the Three-Judge Panel Circuit Courts on all cases dealing with issues in which *Jurisprudencia* (*i.e.* binding precedent) had already been established.<sup>128</sup> The authority to delegate jurisdiction was soon extended to other *Amparo* disputes. This was allowed if the Supreme Court considered—regardless of the existence of binding precedent—that it facilitated “a better administration of justice.”<sup>129</sup> It is clear nonetheless that these powers did not represent discretionary rejection powers like those granted in other countries to the constitutional jurisdiction when ordinary judgments are challenged for alleged fundamental rights violations.<sup>130</sup> In fact, the quasi-legislative abilities of the

<sup>124</sup> See *supra* section II. Cf. Hoffmann-Riem, *supra* note 22, at 189.

<sup>125</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended August 10, 1987, Art. 107, VIII, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>126</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended October 25, 1967, Art. 107, IX, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>127</sup> “Decreto que reforma y adiciona diversos artículos de la Constitución Política de los Estados Unidos Mexicanos” [Decree to amend and add several articles to the Mexican Constitution], Diario de los Debates del Senado [Senate’s Congressional Record], LVI Legislatura, Año I, Primer Periodo Ordinario, Diario 14, Diciembre 16 de 1994, (Mex.) (author’s translation).

<sup>128</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended December 31, 1994, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>129</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], as amended June 11, 1999, Art. 94, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) (author’s translation). Whereas these amendments were argued again under the discourse of the specialized constitutional court, the Senate mentioned that the idea was rather inspired by the American writ of *certiorari*. See COSSÍO, *supra* note 27, at 115-116.

<sup>130</sup> Cf. KOMMERS, *supra* note 31, at 51-52.

Mexican Supreme Court to transfer its *Amparo* jurisdiction to the *Colegiados* implied instead that all individual claims alleging the violation of a constitutional right were to be solved by a constitutional authority in the formal sense. In this way, the idea that ordinary jurisdiction had no role in constitutional interpretation was reinforced. So was, implicitly, the notion that the mere filing of an *Amparo* by an individual should be sufficient to compel the constitutional court to deliver a judgment.<sup>131</sup> Furthermore, the writ of *Amparo*—whose regulation had not experienced significant transformation<sup>132</sup>—continued to be the only mechanism by which individuals could challenge directly the constitutional validity of any act.<sup>133</sup> As the Supreme Court could already influence the amount and specialization of lower federal courts,<sup>134</sup> these delegation powers contributed to boost the *Amparo* caseloads and the exponential growth of the federal judiciary. It was certainly not a coincidence that just during the 15 years following the introduction of these arrangements the number of *Colegiados* increased by 137%.<sup>135</sup>

While it is evident that the Mexican system's "turn" towards the continental European model did not represent a complete transformation but rather a selective adoption of a few mechanisms, this somewhat ideological change of direction in Mexico's constitutional review paradigm undoubtedly helped question—though not eliminate—several myths that had been built around the writ of *Amparo*. In the beginning of the 21<sup>st</sup> century—as the idea of the constitutional court became widespread within Mexican jurisprudence—more scholars and practitioners started to insist on the need for a major transformation of this writ as well.<sup>136</sup> This in turn resulted in a series of reform proposals endorsed by the Supreme Court<sup>137</sup> which aimed at "modernizing

<sup>131</sup> Cf. SCHLAICH & KORIOTH, *supra* note 28, at 128-129.

<sup>132</sup> See Fix-Zamudio, *supra* note 106, at 407.

<sup>133</sup> See García Sarubbi, *supra* note 110, at 42.

<sup>134</sup> While the organ responsible for the administration of the federal judiciary is—also since 1994—the Federal Judicial Council (*Consejo de la Judicatura Federal*), one of its seven members is the Chief Justice of the Supreme Court itself and three more are appointed by the Supreme Court sitting *en banc*. See FIX-FIERRO & FIX-ZAMUDIO, *supra* note 113. Furthermore, a qualified majority of the court can overrule the council's decisions. See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, June 11, 1999, art. 100, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>135</sup> Whereas in 1994 there were 83 Three-Judge Panel Circuit Courts distributed in 23 federal circuits, in 2009 there were 195 of these courts distributed in 31 federal circuits. See CONSEJO DE LA JUDICATURA FEDERAL [Federal Judicial Council], ATLAS JURISDICCIONAL 2009: CONFORMACIÓN DE DISTRITOS Y CIRCUITOS JUDICIALES FEDERALES 8 (Mexico, 2009).

<sup>136</sup> E.g., ARTURO ZALDÍVAR, HACIA UNA NUEVA LEY DE AMPARO 2-13 (IIJ-UNAM, 2002).

<sup>137</sup> In 1999 the Supreme Court had appointed a commission of academics and practitioners to elaborate a draft for a new *Amparo* bill. In 2001 the commission's proposal was fundamentally approved by the court and it was sent—as the judiciary lacked initiative right—to the other two federal powers. However, it was not until 2004 that a group of senators actually introduced the court's draft as a bill. See COSSÍO, *supra* note 27, at 118.

and enabling it [*Amparo*] to become once again an effective instrument for the protection of fundamental rights.”<sup>138</sup> Though it took several years for these specific suggestions to have an impact on the agenda of Mexican legislators,<sup>139</sup> they established the basis for modifications to *Amparo* which—in light of the highly regarded “Constitutional Reform on Human Rights”—were finally enacted in June 2011.<sup>140</sup> These constitutional amendments—as well as the writ’s regulations currently being discussed by Congress<sup>141</sup>—are largely based on proposals that had been sponsored by the Supreme Court a decade earlier.<sup>142</sup> These adjustments widened specifically the *Amparo*’s scope of protection to International Human Rights Law;<sup>143</sup> extended its object of scrutiny to challenge omissions;<sup>144</sup> broadened the concept of standing to those with an “individual or collective legitimate interest”;<sup>145</sup> redefined the criteria to issue temporary injunctions;<sup>146</sup> and—in writs against ordinary final judgments—compelled the *Colegiados* to solve every claim contained in the constitutional submission (*i.e.*, not to remand the decision to the lower court immediately

<sup>138</sup> ZALDÍVAR, *supra* note 136, at 10 (author’s translation).

<sup>139</sup> See COSSIO, *supra* note 27, at 118; “Dictamen de las Comisiones Unidas de Puntos Constitucionales; y de Estudios Legislativos, el que contiene proyecto de decreto por el que se reforman, adicionan y derogan diversas disposiciones de los artículos 94, 100, 103, 104 y 107 de la Constitución Política de los Estados Unidos Mexicanos” [Opinion of the Constitutional and Legislative Congressional Committees to the decree to amend, add, and derogate several provisions of articles 94, 100, 103, 104, and 107 of the Mexican Constitution] [hereinafter *Dictamen de reforma constitucional en Amparo*], Gaceta del Senado [Senate’s Gazette], 10 de Diciembre de 2009, Tomo I, pp. 66-97 (Mex.).

<sup>140</sup> See *Reforma constitucional en Amparo 2011*, *supra* note 3; *Reforma constitucional en Derechos Humanos*, *supra* note 3. Compare ZALDÍVAR, *supra* note 136, at 10-13 (a summary of the Supreme Court’s draft of 2001) with “Iniciativa de los senadores Manlio Fabio Beltrones Rivera, Jesús Murillo Karam, Fernando Castro Trenti y Pedro Joaquín Coldwell, del grupo parlamentario del Partido Revolucionario Institucional, la que contiene proyecto de decreto por el que se reforman y adicionan los artículos 94, 100, 103, 107 y 112 de la Constitución Política de los Estados Unidos Mexicanos” [Bill of senators from the Institutional Revolutionary Party to amend articles 94, 100, 103, 107, and 112 of the Mexican Constitution] [hereinafter *Iniciativa de reforma constitucional en Amparo*], Gaceta del Senado [Senate’s Gazette], 19 de Marzo de 2009, Tomo I, pp. 80-99 (Mex.) (the senators’ bill that resulted in the constitutional amendments of June 6, 2011).

<sup>141</sup> See “Dictamen de las Comisiones Unidas de Gobernación; de Justicia; y de Estudios Legislativos, Segunda, el que contiene proyecto de decreto por el que se expide la Ley de Amparo” [Opinion of the Government, Justice, and Legislative Congressional Committees to the decree to enact the Amparo Law] [hereinafter *Dictamen de Reforma a Ley de Amparo*], Gaceta del Senado [Senate’s Gazette], 6 de Octubre de 2011, Tomo II, pp. 221-395 (Mex.).

<sup>142</sup> See *id.* at 229.

<sup>143</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 103, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>144</sup> See *id.*

<sup>145</sup> *Id.*, art. 107, I (author’s translation).

<sup>146</sup> See *id.*, art. 107, X.

after having detected the first violation).<sup>147</sup> Furthermore, the Supreme Court was empowered —once more under the constitutional court rationale<sup>148</sup>— to declare with *erga omnes* effects (*i.e.*, binding upon everyone in the legal system) the unconstitutionality of statutes challenged in *Amparo* procedures. In order for this general declaration to actually take place, however, the norm in question cannot be related to tax law; *Jurisprudencia* must have already been established (*i.e.*, it cannot occur with one judgment); and —as it was stipulated already for procedures of “abstract constitutional review” of statutes and for controversies between legislative bodies— a qualified majority of eight Justices is required.<sup>149</sup>

As one can notice, the evolution of the Mexican system of constitutional review not only steadily excluded lower courts from any direct involvement in constitutional interpretation and, consequently, in the enforcement of fundamental rights.<sup>150</sup> It also increasingly depended for these activities on a complicated arrangement of specialized procedures. Mainly because its rules of constitutional review give differentiated treatment to mechanisms that all the same define the constitutional validity of general norms, the Mexican legal system resulted in an “exception regime.” Stated bluntly, it became a system that fosters unequal treatment before the law.<sup>151</sup> Even though the recently enacted constitutional amendments to *Amparo* will probably speed up this procedure, they do not contain any measure that will reverse the trend of specialized constitutional jurisdiction progressively becoming a “super jurisdiction of appeals” that solves ordinary legal disputes.<sup>152</sup> While the new constitutional rules did not include a mechanism that authorizes ordinary courts to carry

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<sup>147</sup> See *Id.* art. 107, III (a). This new requirement aimed at reducing the length of ordinary procedures. For a succinct explanation of the specific reasons that led to this change see ZALDÍVAR, *supra* note 136, at 129-33.

<sup>148</sup> See *Iniciativa de Reforma Constitucional en Amparo*, *supra* note 140, at 81.

<sup>149</sup> See *Constitución Política de los Estados Unidos Mexicanos* [Const.], *as amended*, art. 107, II, *Diario Oficial de la Federación* [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>150</sup> See García Sarubbi, *supra* note 110, at 42.

<sup>151</sup> This criticism applies both to the different treatment of the same statute within two constitutional procedures (*i.e.* *Amparo* and abstract control of norms) as well as to the differentiation of unconstitutional tax laws from other unconstitutional laws.

<sup>152</sup> Cf. Kenntner, *supra* note 50, at 786 (author’s translation). Whereas for reasons that had more to do with judicial federalism than with the enforcement of fundamental rights, the senators’ bill that proposed the constitutional amendments to *Amparo* explicitly addressed this problem. They originally suggested —naming several examples from centralized systems of constitutional review— the establishment of discretionary rejection powers for the Three-Judge Panel Circuit Courts in order to limit the filing of *Amparo directo* against judgments of state supreme courts. See *Iniciativa de reforma constitucional en Amparo*, *supra* note 140, at 82-9. Nonetheless, specifically that part of the proposal was rejected by the congressional commissions in charge of giving the first opinion to the draft and, consequently, it was removed from the bill. See *Dictamen de reforma constitucional en Amparo*, *supra* note 139, at 79-80. (“...however, these commissions do not share the proposal contained in the bill in the sense of limiting in some cases



out constitutional review directly within ordinary procedures (*i.e.*, a “referral” right), they did reduce the already meager deference of Amparo judges to ordinary tribunals. With the excuse that these constitutional procedures took way too long,<sup>153</sup> the new rules of Amparo curtailed even more lower courts’ authority as final arbiters of ordinary legal disputes.<sup>154</sup> In addition, the creation of new federal bodies called “*Plenos de Circuito*” —or Circuits *en banc*<sup>155</sup>— will hopefully solve potential contradictions between the different federal courts of a same circuit.<sup>156</sup> This measure, nonetheless, also hints towards a system in which the federal judiciary —ironically under the discourse of judicial decentralization<sup>157</sup>— will more and more determine through Amparo the meaning of state laws. In sum, these changes did not alter the prevailing notion of the role that specialized constitutional procedures should play in the enforcement of fundamental rights. They did not foster the exemplary function of the constitutional jurisdiction with respect to fundamental rights protection.<sup>158</sup>

After continuous reforms Mexico in 2011 still departed substantially from any of the two consolidated models of constitutional review that —at different periods and for different reasons— officially served as its inspiration. The Mexican legal system steadily demanded from the specialized constitutional courts results which they could not possibly deliver. By doing so, it jeopardized the effective enforcement of fundamental rights in the country. As shown below, however, those were not the last relevant changes to the system.

#### IV. THE *VIARIOS FILE 912/2010* AND THE INCORPORATION OF DIFFUSED CONSTITUTIONAL REVIEW IN MEXICO

Within days after the approval of the “Constitutional Reform on Human Rights” —and of the long-awaited modification of the writ of *Amparo*— the Supreme Court gave an additional twist to the Mexican system of constitutional review. As mentioned above, on July 14, 2011 the court reached a decision that introduced diffused constitutional review onto the Mexican legal system. Though technically not a legal judgment, the Supreme Court’s resolution in *Expediente Varios 912/2010*<sup>159</sup> explicitly authorized all Mexican judges

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the admissibility of amparo directo (*sic*), setting as admission criteria [the cases’] *importance* and *transcendence*.” (Author’s translation, emphasis on the original.)

<sup>153</sup> See ZALDÍVAR, *supra* note 136, at 129.

<sup>154</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 107, III, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

<sup>155</sup> See *id.* art. 94.

<sup>156</sup> See *id.* art. 107, XIII.

<sup>157</sup> See *Iniciativa de reforma constitucional en Amparo*, *supra* note 140, at 93-4; Cossío, *supra* note 8, at A18.

<sup>158</sup> See *supra* section II. Cf. Hoffmann-Riem, *supra* note 22, at 176.

<sup>159</sup> Expediente Varios 912/2010, *supra* note 1, at 51.



to “disapply” legislation if they considered —*ex officio* within their ordinary activities of adjudication— that such laws violated the human rights granted by the Constitution and/or the international covenants ratified by Mexico.<sup>160</sup> Since a significant part of this decision was grounded on the new wording of Article 1 of the Constitution,<sup>161</sup> the Supreme Court’s conclusions were regarded almost undisputedly by Mexican academics as a welcome follow-up to the recently approved constitutional amendments.<sup>162</sup> The quasi-judicial incorporation of diffused review into the legal system was instantly celebrated by scholars and practitioners as a necessary step towards the effective enforcement of fundamental rights in Mexico.<sup>163</sup> A more careful analysis, both of the legal context in which this particular verdict was reached and the immediate consequences that followed the court’s decision, shows that the initial euphoria was in fact unjustified. Since this resolution introduced even more exceptions into an already inconsistent scheme, the resulting system of constitutional review —described by the Mexican Supreme Court as “concentrated on one part and diffused on the other”<sup>164</sup>— threatened legal predictability and thus the nation’s Rule-of-law. Since the Supreme Court’s decision did not affect in any way the dependence position that the Mexican legal system had built upon the constitutional writ of *Amparo* the benefits of this supposed empowerment of lower courts to enforce fundamental rights were only apparent.

### 1. The “Judicial” Incorporation of Diffused Review

Procedurally speaking, the Supreme Court’s resolution authorizing diffused constitutional review goes back to an international judgment issued in

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<sup>160</sup> See *id.* at 75. While this complicated resolution included different majority constellations depending on each of the multiple issues that were dealt with, the specific decision concerning the introduction of diffused control into the Mexican system was only approved by a majority of seven Justices. See *id.* at 77-8.

<sup>161</sup> See *id.* at 68-9. The new constitutional wording is the following: “Article 1. In the United Mexican States all the persons will (*sic*) enjoy the human rights acknowledged in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, whose enjoyment cannot be encroached or suspended but in the cases and under the circumstances that this Constitution establishes.

The norms related to human rights will be interpreted in conformity with this Constitution and with the international treaties on the subject favouring at all times the widest protection to the persons.

All the authorities, *within the framework of their competences*, have the obligation to promote, respect, protect and guarantee human rights in conformity with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State shall prevent, investigate, punish and repair the violations to human rights, *in the terms the law establishes...*” (Author’s translation, emphasis added).

<sup>162</sup> E.g., Héctor Fix-Zamudio, *Las reformas constitucionales mexicanas de junio de 2011 y sus efectos en el sistema interamericano de derechos humanos*, in 1 EL JUICIO DE AMPARO, *supra* note 57, at 462.

<sup>163</sup> E.g., *id.* at 471; Cossío, *supra* note 8, at A18. But see Roldán Xopa, *supra* note 6.

<sup>164</sup> *Expediente Varios 912/2010*, *supra* note 1, at 70 (author’s translation).

2009 by the Inter-American Court of Human Rights on the case of *Radilla Pacheco v. Mexico*.<sup>165</sup> This case dealt with the forced disappearance of Rosendo Radilla Pacheco by members of the Mexican Army in the state of Guerrero in 1974. Almost 35 years later —after a long and complicated trek before domestic and international tribunals by Mr. Radilla’s relatives— the Mexican State was found internationally responsible for multiple violations to the American Convention of Human Rights as well as the Inter-American Convention on Forced Disappearance of Persons. In a nutshell, Mexico was found accountable for the use of military jurisdiction to hinder the swift prosecution of crimes of a non-military nature.<sup>166</sup> Accordingly, the Inter-American Court ordered the Mexican State to carry out several activities —including specific amendments to its internal regulation— as a form of reparation to the victims.<sup>167</sup> Not long after the international judgment was published in the official domestic journal, the Mexican Supreme Court took the initiative and opened a rather uncommon procedure to help determine whether the international verdict contained specific obligations for the Mexican federal judiciary.<sup>168</sup> The Supreme Court concluded not only that *Radilla* required that the federal judiciary undertake certain actions, but also that these obligations included more than just the specific measures ordered in the operative paragraphs of the international judgment. According to the Mexican Supreme Court the obligations to the federal judiciary could be deduced also from the Inter-American Court’s reasoning to the case.<sup>169</sup> As the Inter-American Court had held in one of its considerations that “*the Judiciary shall exercise a ‘control of conventionality’ ex officio between domestic regulations and the American Convention [of Human Rights], evidently within the framework of its respective competences and the corresponding procedural regulations,*”<sup>170</sup> a majority of the Supreme Court Justices gathered from this statement —interpreted in conjunction with the new wording of the Mexican Constitution that had been approved in June 2011<sup>171</sup>— an obligation to authorize every court in the country to strike down

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<sup>165</sup> *Radilla-Pacheco v. Mexico*, *supra* note 4.

<sup>166</sup> All crimes that imply violations of human rights are considered of a non-military nature. *See id.* at 82.

<sup>167</sup> *See id.* at 91-105.

<sup>168</sup> The issue was brought up originally in May 2010 by the Chief Justice of the Supreme Court as a consultation to the court sitting *en banc*. *See Expediente Varios 912/2010*, *supra* note 1, at 51.

<sup>169</sup> The opinion holding that alleged obligations could be deduced from the international judgment as a whole and not only from its operative paragraphs was shared by eight of the court’s Justices and had been decided already in September 2010. *See id.* at 52. Nonetheless, the full resolution with the extent of these obligations was voted by the Supreme Court only after the “Constitutional Reform on Human Rights” had already been approved. *See id.* at 64-5.

<sup>170</sup> *Radilla-Pacheco v. Mexico*, *supra* note 4, at 95 (emphasis added).

<sup>171</sup> *See Expediente Varios 912/2010*, *supra* note 1, at 69-71; Fix-Zamudio, *supra* note 162, at 470-1.

unconstitutional and/or “unconventional” legislation. This unusual conclusion received widespread academic and media support for it was valued as an important “adjustment towards judicial decentralization.”<sup>172</sup>

No matter how inconvenient someone might have considered the traditional exclusion of lower Mexican courts from any constitutional review, it is highly debatable whether the Supreme Court’s switch represents a necessary legal conclusion from the amendments to Article 1 of the Constitution or —what appears even more difficult— from *Radilla*. Even if one accepts that a constitutional court should be able to declare on its own initiative (*i.e.* outside of a legal procedure) the model of constitutional scrutiny that a country has to follow,<sup>173</sup> the truth is that neither the constitutional reforms nor considerations of the Inter-American Court on *Radilla* support the diffused model. On the contrary, it is fairly clear that the new wording of Article 1 binds all Mexican authorities to protect and guarantee human rights “*within the framework of their competences*.”<sup>174</sup> The constitutional amendments of Amparo that were enacted simultaneously did not contain —as mentioned above<sup>175</sup>— any specific competence adjustment in order to reduce the Mexican system’s reliance on the specialized constitutional mechanisms or on the federal judiciary.<sup>176</sup> If the amendments lacked any modification of competences regarding the existing mechanisms of constitutional review, then it appears rather problematic to justify such a radical change of model on the basis of the constitutional reform.<sup>177</sup> A similar objection applies to the Mexican Supreme Court’s reading of *Radilla*. While an obligation is nowhere to be found in that judgment —not even implicitly— that requires the Mexican State to establish

<sup>172</sup> Cossío, *supra* note 8, at A18 (author’s translation).

<sup>173</sup> This was precisely one of the reasons for three Justices to vote against the majority’s opinion. See, e.g., *Expediente Varios 912/2010*, *supra* note 1, at 110-1 (Justice Pardo Rebolledo, dissenting).

<sup>174</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, art. 1, Diario Oficial de la Federación [D.O.], 10 de Junio de 2011 (Mex.). (Author’s translation.) A full transcription of the paragraph is provided at *supra* note 161.

<sup>175</sup> See *supra* section III. 2.

<sup>176</sup> What is more, the few proposals that —to some extent— could have been interpreted this way were deliberately eliminated from the bill. See *Iniciativa de reforma constitucional en Amparo*, *supra* note 140, at 82-9; Dictamen de reforma constitucional en Amparo, *supra* note 139, at 79-80.

<sup>177</sup> See *Expediente Varios 912/2010*, *supra* note 1, at 93-4 (Justice Aguirre Anguiano, dissenting). This is independent of the fact that the constitutional amendments also introduced in the same paragraph an explicit duty for the State “to prevent, investigate, punish, and repair the violations to human rights, *in the terms the law establishes*.” Mex. Const. Art. 1. (Author’s translation, emphasis added). This requirement for a regulatory legislation has been rather understood only related to State liability (*i.e.* damages) and not to the rules of constitutional scrutiny. See *Reforma constitucional en Derechos Humanos*, *supra* note 3, at 5. Still, the fact that after the amendments regulatory legislation is required for pecuniary reparation does not mean that such legislation is now unnecessary when it comes to the specific mechanisms to grant relief.

a diffused or decentralized system of constitutional review,<sup>178</sup> the Inter-American Court unambiguously held that the “conventionality review” between domestic regulations and the American Convention of Human Rights was to be carried out by the judiciary “*evidently within the framework of its respective competences and the corresponding procedural regulations.*”<sup>179</sup>

This paragraph of the international judgment—which was rather an *obiter dictum* remark in matters of military jurisdiction<sup>180</sup>—was taken completely out of context to justify diffused review. As mentioned, *Radilla* dealt with the illegitimate use of Mexican military tribunals to prevent the swift prosecution of crimes of a non-military nature. The Inter-American Court held that cases dealing with human rights violations should only be heard in civilian courts. The international court considered that Mexican regulations that transferred criminal proceedings in relation to the “forced disappearance of persons” to military courts in detriment of the victim’s rights violated two international conventions.<sup>181</sup> In line with the Inter-American Court’s opinion, the “unconventional” domestic provisions that should have never been applied by the Mexican judiciary were those that transferred such cases to the military courts. The only domestic regulations that could have been subject to further adjustment based on this paragraph<sup>182</sup> were—at the most—Article 57 of the Code of Military Justice and Article 10 of the Amparo Law.<sup>183</sup> The former gave military courts jurisdiction over non-military crimes when the perpetrator was a member of the Mexican armed forces; the latter (apparently) prevented the victims of such crimes from challenging—for being contrary to the American Convention—the allocation of military jurisdiction through the writ of *Amparo*.<sup>184</sup> The fact that—for better or for worse—con-

<sup>178</sup> *Contra, e.g., Iniciativa de Ley de Control Difuso, supra* note 16, at 107.

<sup>179</sup> *See Radilla-Pacheco v. Mexico, supra* note 4, at 95.

<sup>180</sup> *See id.* at 94-6. *Obiter dictum* (or plainly dictum) is a statement that—albeit included in the body of the court’s opinion—is not an essential part of the court’s decision. In systems that are based on judicial precedent it is therefore not considered to be an argument binding for further cases. *See WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND THE LEGAL SYSTEM OF THE UNITED STATES* 67-8 (St. Paul, Thomson/West, 4th ed. 2006).

<sup>181</sup> *See Radilla-Pacheco v. Mexico, supra* note 4, at 75-82.

<sup>182</sup> This statement of course does not pretend to imply in any way that the respective amendments should be a task of the Supreme Court.

<sup>183</sup> *See Radilla-Pacheco v. Mexico, supra* note 4, at 75-82. The references to the Federal Criminal Code within the judgment were made in regard to the material definition of the crime “forced disappearance of persons”. *See id.* at 88-91.

<sup>184</sup> The Inter-American Court was not categorical on this regard. While it concluded that the writ of *Amparo* was in this case not an effective mechanism to challenge military jurisdiction—which constituted a violation of Article 25 (1) of the American Convention—the court did not censor explicitly the rules that led to this lack of effectiveness. *See id.* at 82-4. The judgment’s reasoning suggests that the *Amparo* writ through which *Radilla*’s daughter had challenged the allocation of jurisdiction to military courts failed because Article 10 of the valid Amparo Law banned victims to file this writ on issues that did not relate directly to the repara-

stitutional and conventional review of statutes in Mexico was concentrated in the specialized procedures before the federal judiciary was however never depicted as a violation. Put differently, the model of constitutional review was never described as the reason for which the cases dealing with human rights violations ended up at military courts. At no time did the Inter-American Court deem the Mexican constitutional review system contrary *per se* to any applicable convention. It is nonetheless surprising that the Mexican Supreme Court went on to overrule its own *Jurisprudencia* (i.e. precedent) regarding the system of constitutional review<sup>185</sup> based on an international judgment that had barely anything to do with the system as such.

## 2. The Nuevo León Judgment and the Bill on Diffused Control

The Supreme Court's resolution on *Expediente Varios 912/2010* had not even been officially published before a lower Mexican court carried out diffused constitutional review for the first time specifically based on that decision. Due to the state in which the case originated, this controversial verdict was soon branded by academia as the *Nuevo León* judgment. Indeed, on August 8, 2011 a state court of criminal appeals in the city of Monterrey established within an ordinary proceeding that article 224, part V, of the Criminal Code for the State of Nuevo León<sup>186</sup> violated "the human right to penal legality (*sic*) established in Article 14, paragraph 3, of the Federal Constitution."<sup>187</sup> In short, the local appellate judge deemed the state criminal code unconstitutional as it delegated the power to define a criminal offence to an authority different from the legislative.<sup>188</sup> The case dealt with the trial

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tion of the damage. *See id.* at 82-3. The final dismissal of the *Amparo en revisión* filed by Radilla's daughter against this military allocation was nonetheless based exclusively on the grounds that this issue had already been resolved by the same Three-Judge Panel Circuit Court in a former "conflict of jurisdiction" (i.e. in an ordinary federal appeal that was filed independently by the military prosecutor against the initial referral of the case to military courts). *See id.* at 83. If that previous "conflict of jurisdiction" was of a non-constitutional nature, then the final dismissal of the *Amparo* filed by Radilla's daughter was evidently a mistake from the corresponding Three-Judge Panel Circuit Court and thus not necessarily a legislative flaw. It was perhaps for this reason that the Inter-American Court did not make further reference to the *Amparo* Law in the operative paragraphs of the judgment. *See id.* at 105-7.

<sup>185</sup> *See Expediente Varios 912/2010, supra* note 1, at 76-7.

<sup>186</sup> For a full transcription of this article in this paper see *supra* note 11.

<sup>187</sup> *See* "TOCA Penal Artículo 43/11," *supra* note 9, at 22; Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* February 19, 2005, art. 14, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). ("...In criminal trials it is forbidden, either through analogical reasoning or even through majority of reason, to determine a penalty which is not established by a statute that is exactly applicable to the respective felony...") (Author's translation.)

<sup>188</sup> *See* "TOCA Penal Artículo 43/11," *supra* note 9, at 23-4; BOHLANDER, *supra* note 12, at 18-27.

of two local police officers who had been arrested while apparently reporting on military activities to unidentified members of organized crime. The policemen had allegedly used their cell phones to inform others of the exact position of a naval convoy in direct violation of an internal police directive that prohibited the use of non-official communications equipment while on duty.<sup>189</sup> As the state criminal code penalized any public servant related to the procurement and administration of justice who “[did] not comply with an order issued and legally notified by his/her superior official, without a lawful reason to do so,”<sup>190</sup> the state prosecutor indicted the suspects and requested that they be tried.<sup>191</sup> On appeal, however, the state judge ruled that such provision gave to the administrative authorities the power to establish a criminal offence which, pursuant to the Mexican Constitution, corresponded solely to the legislature.<sup>192</sup> Since the unconstitutionality of the article implied that it should not be applied to this specific case, the appellate judge held that the two defendants could not be further prosecuted and ordered their immediate release.<sup>193</sup>

Had it been delivered within a coherent diffused system of constitutional review, *Nuevo León* could have represented the paragon of the Rule-of-law. Regardless of its conclusions,<sup>194</sup> this case would have evidenced a legal system in which constitutional law prevailed over all other jurisdictions; where basic rights were enforced despite statutes that may encroach upon them.<sup>195</sup> In Mexico, however —already crammed with forced distinctions about constitutional scrutiny— the case revealed the importance of mechanisms to ensure the consistency of constitutional interpretation; specifically with respect to the enforcement of fundamental rights. To be precise, *Nuevo León* involved an undeniably constitutional question that was decided “diffusely” by the highest criminal court of a state. For this reason, the case should have been able to be further reviewed by the final arbiter of the constitution (*i.e.*, by the Mexican Supreme Court).<sup>196</sup> If the final arbiter’s interpretation would have been in accord with that of the state court —or if it would have decided not to admit the case for review— the corresponding verdict should have become a precedent binding for every other court within that state.<sup>197</sup> Instead, within the mixed

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<sup>189</sup> See *id.* at 3-5.

<sup>190</sup> Código Penal para el Estado de Nuevo León [Nuevo León St. Crim. Code.], as amended, Art. 224, Periódico Oficial del Estado de Nuevo León [Nuevo León Official Journal], 29 de Enero de 1997, V (Mex.) (author’s translation).

<sup>191</sup> See “TOCA Penal Artículo 43/11,” *supra* note 9, at 8.

<sup>192</sup> See *id.* at 24.

<sup>193</sup> See *id.* at 29-30.

<sup>194</sup> As mentioned above, these are still being debated and are more a task for criminal law scholars. See Roldán Xopa, *supra* note 6.

<sup>195</sup> Cf. DWORKIN, *supra* note 23, at 27.

<sup>196</sup> Cf., e.g., 28 U.S.C. § 1257 (2006).

<sup>197</sup> Cf. JACKSON & TUSHNET, *supra* note 33, at 458.



system introduced by *Expediente Varios 912/2010*,<sup>198</sup> the verdict in *Nuevo León* exemplified both unequal treatment before the law and impunity. First, the case showed that there were no adequate mechanisms to provide for all other individuals convicted or accused pursuant to an article held unconstitutional to be released from prison.<sup>199</sup> If the article was indeed contrary to the Constitution, such a general measure would have not only been fair from an equality point of view. It would have also reinforced the supreme character of the constitutional guidelines in the Mexican legal system.<sup>200</sup> On the other hand, *Nuevo León* showed that the novel hybrid system did not allow for a hypothetically “flawed” invalidation to be corrected by the constitutional jurisdiction either. Stated differently, a potentially mistaken declaration of unconstitutionality carried out *ex officio* by merely one state judge<sup>201</sup> could not be overturned by the specialized constitutional courts. Since the felony for which the suspects were accused did not have a victim (who might have challenged the verdict) and state prosecutors lack standing within *Amparo* procedures, the constitutional interpretation of *Nuevo León* was not subject to any further review.<sup>202</sup> If *Nuevo León*’s interpretation of the Constitution was actually mistaken, then the State was wrongfully affected in its ability to punish crimes effectively.

It was apparently this last impression —at a time when Mexican legal institutions have been seriously threatened by organized crime and substantial financial and human resources have been invested in the so-called “War on Drugs”— that led to immediate legislative action with regard to the new system of constitutional review. On October 26, 2011 a group of senators from the three major political parties in Mexico presented a bill intended “to regulate the exercise of diffused control.”<sup>203</sup> The senators are obviously concerned about the possibility of letting guilty offenders get away rather than the prospect of individuals being imprisoned pursuant to an article held unconstitutional by a court of law. Their intention is that whenever a lower court deems a law unconstitutional or “unconventional” —and therefore refuses to apply it to the controversy at hand— the decision against the validity of such law can be further reviewed by a federal Three-Judge Panel Circuit Court. The proposed bill specifically proposes a mechanism that permits the federal Attorney General (*Procurador General de la República*) to challenge —at

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<sup>198</sup> See *Expediente Varios 912/2010*, *supra* note 1, at 70.

<sup>199</sup> Whereas those affected could have probably filed a writ of *Amparo*, this mechanism —as it has been explained with some detail above— falls within the exclusive jurisdiction of federal judges who might or might not share the state court’s interpretation.

<sup>200</sup> Cf. Hoffmann-Riem, *supra* note 22, at 179.

<sup>201</sup> See “TOCA Penal Artículo 43/11,” *supra* note 9, at 20.

<sup>202</sup> Still, if there would have been a victim, such *Amparo* would have probably been dismissed on the grounds of Article 10 of the *Amparo* Law. As mentioned before, this rule bans the victims of a crime to file *Amparo* when the challenged decision does not relate directly to the reparation of the damage. See the explanation given at *supra* note 184 of this paper.

<sup>203</sup> See *Iniciativa de Ley de Control Difuso*, *supra* note 16, at 111 (author’s translation).



his or her discretion— any decision in which a lower court carries out diffused constitutional review.<sup>204</sup> Since ordinary judgments do not take formal effect until the *Colegiado* confirms the invalidity of the general norm—or the federal Attorney General refuses to challenge the verdict<sup>205</sup>— the final decision will always depend on a federal body. This proposal is currently being discussed in Senate committees. Since it receives support from the nation's three major parties, the bill will probably be approved and become law within this legislative period. Clearly, this proposed “regulation on diffused constitutional review” will in effect open the gate to federal review of all judgments<sup>206</sup> that could not have been formerly challenged before the federal judiciary.

If one of the reasons for integrating diffused constitutional review into the Mexican system—and what led to its overwhelming approval by legal scholars— was the decentralization of Mexican justice,<sup>207</sup> then the target was clearly missed. Indeed, the Supreme Court's attempt to decentralize constitutional interpretation among state judiciaries will result, ironically, in even more dependency on the federal judiciary. In other words, if nearly every lower court ruling could be challenged through the writ of *Amparo*; and those few cases that could not be challenged before (*e.g.*, *Nuevo León*) will now inevitably wind up before a federal body; then the integration of diffused review into the Mexican system would represent a strengthening of judicial centralization. If one adds to this the fact that the latest constitutional reforms on *Amparo* do not modify in any way the dominating role of this writ in the Mexican system, then one thing becomes evident: The integration of diffused review in Mexico contributed to make the intervention of federal *Colegiados* more of a rule than an exception. It is clear that even after the “Constitutional Reform on Human Rights” the trend in Mexico is still to rely increasingly on constitutional jurisdiction for tasks that in both the American and continental European models correspond primarily to lower courts. Putting aside the fact that the use of constitutional jurisdiction as a “subsidiary super jurisdiction of appeals” for fundamental rights' violations is doomed to failure right from the start,<sup>208</sup> then an additional distinction regarding constitutional interpretation further complicates the Mexican system's capacity to provide legal predictability.<sup>209</sup> The constitutional interpretation carried out by a Three-Judge Panel

<sup>204</sup> See *id.* at 112 (Art. 5 of the bill).

<sup>205</sup> See *id.* (Art. 6 of the bill).

<sup>206</sup> These judgments are in any case a minority given the all-inclusive nature of *Amparo directo*. See COSSIO, *supra* note 27, at 179.

<sup>207</sup> *E.g.*, COSSIO, *supra* note 8, at A18; Fix-Zamudio, *supra* note 162, at 471.

<sup>208</sup> Cf. Kenntner, *supra* note 50, at 786.

<sup>209</sup> So far this work has referred to the different treatment to constitutional control of general norms when the Supreme Court solves an *Amparo* by a qualified majority of eight votes; when the same court solves an *Amparo* by just a simple majority; when it solves a mechanism of abstract control of norms, and when it solves an *Amparo* related to tax law. See *supra* Section III.2.

Circuit Court may only become *Jurisprudencia* in case of unanimous ruling.<sup>210</sup> This prevents the constitutional interpretation decided by lower courts from spreading to the rest of the legal system: as long as only a simple majority within the Colegiado (*i.e.*, two judges) affirms the lower court's decision, this interpretation will not become binding upon the courts of the circuit.<sup>211</sup>

In sum, the integration of diffused constitutional review into the “*Amparo*-centered” Mexican legal system creates even more fragmentation and uncertainty. The system still fosters the creation of multiple regimes under the same Constitution: There will be, on the one hand, unconstitutional laws still applying to the many who cannot afford to bring a legal suit; and there will be, on the other hand, perfectly constitutional laws not applying to the few who manage to convince a judge of their invalidity. For that same reason, the system can neither wholly protect fundamental rights nor facilitate the rule of constitutional law. Whereas predictability serves as the basis of any legal system congruent with the Rule-of-law,<sup>212</sup> Mexican constitutional review does not seem to be moving in that direction either. Though impossible to analyze in this work, specific reform solutions are needed to make of the Mexican system a coherent one. The ideas just presented give a good basis to think about some of the measures that law makers should be considering. These might include the modification of *Amparo* procedures to turn the writ exclusively into a mechanism for “arbitrariness control” like other more consolidated systems do. The measures could also include the establishment of discretionary rejection powers in *Amparo directo* when filed against judgments of the supreme courts of the states. This would reduce the caseload of federal courts while empowering local judiciaries. There are also a few ideas regarding the consistency in the constitutional interpretation that should be considered. For instance, to establish the same majority requirement to all the Supreme Court judgments —regardless of the procedure in which a judicial decision is taken— could be a step forward against artificial differentiations in constitutional review of statutes. Both the inclusion of unconstitutional tax legislation as subject to the Supreme Court's *erga omnes* or universal decisions and the recognition of constitutional interpretation as binding (*i.e.* the establishment of *Jurisprudencia*) as of the first judgment are also steps in that direction. If “diffused” constitutional review is eventually confirmed by the federal Congress, the so-called *Amparo* “*contra leyes*” (against statutes) should be

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<sup>210</sup> See Ley de Amparo [L.A.] [Amparo Law], as amended, art. 193, Diario Oficial de la Federación [D.O.], 24 de Junio de 2011 (Mex.); *Dictamen de Reforma a Ley de Amparo*, *supra* note 141, at 365 (Art. 224 of the new bill).

<sup>211</sup> Even though there is a procedure to denounce two contradictory interpretations called *contradicción de tesis*, the decision that solves the contradiction cannot have effects within the specific controversies that generated them. See Ley de Amparo [L.A.] [Amparo Law] as amended, art. 197, Diario Oficial de la Federación [D.O.], 24 de Junio de 2011 (Mex.); *Dictamen de Reforma a Ley de Amparo*, *supra* note 141, at 366 (art. 226, paragraph 3, of the new bill).

<sup>212</sup> See, *e.g.*, Raz, *supra* note 23, at 213-4.

eliminated and the state's highest court's decisions regarding the constitutionality of a federal or local statute may only be challenged by individuals before the Supreme Court. In sum, any analysis of these and other proposals should be realized keeping in mind always that rights conferred by a constitution are aimed for everyone and not just a few. If the constitutional rights of individuals cannot be judicially enforced, then these are not really "rights". Similarly, if rights are not universal, then they should not be called "fundamental".

## V. CONCLUSIONS

Regardless of the chosen model of constitutional review, the bulk of judicial constitutional scrutiny concerning fundamental rights should be carried out by lower courts empowered for such purpose within ordinary adjudication procedures. Correspondingly, the procedural rules should guarantee that the interpretation of the few leading cases that are reviewed by the constitutional jurisdiction impact the rest of the legal system. For predictability sake it is necessary to be aware of the different consistency rules surrounding constitutional review of statutes in the American and the continental European models. To focus exclusively on this aspect, however, could be misleading when conceptualizing the enforcement of fundamental rights. Once these are taken into consideration, it becomes clear that constitutional scrutiny may not be either wholly monopolized by a specialized constitutional tribunal nor channeled through ordinary adjudicatory procedures only. The distribution of fundamental rights' issues between ordinary and constitutional jurisdiction in both models is therefore a functional one. It is based rather on the role that each kind of court plays—in view of its specific operational capabilities and status in the constitutional order—in reinforcing the validity of the Constitution. Stated differently, constitutional scrutiny concerning fundamental rights is in the first place a task for lower courts empowered for such purpose within ordinary adjudicatory procedures. Depending on the model of constitutional review, this lower court empowerment is implemented either by granting courts a "referral" right or by conferring them the power to "disapply" laws directly. The specialized constitutional procedures, on the other hand, serve rather an exemplary function given the authority conferred to the decisions of a constitutional court. The interpretation decided by the constitutional jurisdiction has general validity either through "force of statute" effects in the judgment or through the doctrine of *stare decisis*. Even though constitutional jurisdiction deals with individual cases on their merits, which could lead to the subsequent overruling of ordinary judgments, constitutional review of judgments is not considered a subsidiary revision or an appeal. Its main purpose is not to correct the mistakes of a lower court in the application of ordinary laws. First, the mere challenge of an ordinary judgment by an individual is never sufficient to compel the constitutional tribunals to carry out a review.

Second, if the case is ultimately admitted for revision, the review process is subject to strict deference rules towards the ordinary courts. This means that such analysis is usually limited to a “comprehensibility” review.

The system established in Mexico during the second half of the 19<sup>th</sup> century had at least two fundamental misconceptions of the American system that would mark the subsequent evolution of the Mexican rules of constitutional scrutiny. This misunderstanding fostered, from the very beginning, an excessive dependency on the federal judiciary for the enforcement of fundamental rights. It also led to the fragmentation of the constitutional order. It is undeniable that in the United States the federal courts at that time had habeas corpus jurisdiction. This jurisdiction, however, was so restricted that actually almost all of the habeas corpus litigation took place before the state judiciaries. In Mexico the jurisdiction on *Amparo* was given exclusively to courts within the federal judiciary and, conversely, state courts were implicitly banned from any serious involvement in constitutional review. With this choice the Mexican framers overlooked completely that—at least regarding the protection of constitutional rights—the much admired American system relied heavily (and still does) on state judges. What is more, the mechanisms through which the American model attained consistency in constitutional interpretation throughout the different courts of the land went equally unnoticed by the Mexican framers of that time. Fixated on the “advantages” that the *inter partes* effects in American constitutional decisions could bring vis-à-vis “Separation of Powers,” the Mexican deliberations disregarded the rules of binding precedent that served as a basis for common law. The subsequent establishment of an *inter partes* procedure like the writ of *Amparo* as practically the only mechanism of constitutional review—deliberately excluding other procedures that could have made up for the lack of *stare decisis* doctrine in Mexico—brought therefore fragmentation to the Mexican legal order. It also institutionalized at the outset a system that fostered unequal treatment under the same constitution. Whereas the multiple conditions set to the *Jurisprudencia* limited its capacity to compensate for this fragmentation, the whole system fostered the dependence on the *Amparo* procedure. This caused an inconvenient overreliance on the federal judiciary for the enforcement of fundamental rights.

The so-called transformation of the Mexican Supreme Court into an “authentic constitutional court” during the last years of the 20<sup>th</sup> century did not represent the adoption of the continental European model of constitutional review but rather the selective incorporation of a few of its mechanisms to the existing judicial structures. While these changes boosted even further the number of federal courts and the Mexican system’s dependency on the *Amparo* procedure for fundamental rights’ enforcement, they also generated artificial differentiations in regards to the constitutional interpretation of statutes which gave way to an “exception regime”. This change of direction in the Mexican system towards a specialized constitutional court represented, on one hand, the transfer of most of the Supreme Court’s *Amparo* jurisdic-

tion to federal Three-Judge Panel Circuit Courts and, on the other, the incorporation of a few mechanisms typical of continental European systems. Lower Mexican courts, however, were not vested with a referral mechanism to question the constitutional validity of a statute within ordinary procedures, nor were they empowered to carry out the disapplication of general norms held unconstitutional by the federal judiciary's *Jurisprudencia*. Similarly, these amendments did not include any real deference rule for the *Amparo* judges as to the interpretation of ordinary law carried out by non-federal courts through ordinary adjudication. Not surprisingly, during the 15 years following the introduction of these arrangements the already significant number of Three-Judge Panel Circuit Courts increased more than twofold. Even though the Supreme Court was finally empowered to declare the unconstitutionality of statutes with binding effects to everyone (*i.e.*, with effects *erga omnes*), majority requirements and procedural exceptions created a somewhat artificial distinction between the constitutional review of legislation. Aside from the evident problem that this poses for legal predictability, it denotes a misrepresentation of the European model as well as the guiding function that a specialized constitutional jurisdiction normally plays in the enforcement of fundamental rights. The exclusion of unconstitutional statutes related to tax law from this general invalidation possibility—established within the latest reforms to the writ of *Amparo*—just confirms this Mexican trend of exceptions.

Aside from failing to decentralize the judicial system, the highly-praised integration of diffused constitutional review into the Mexican system resulted in a confusing arrangement that threatens legal predictability and the foundation of Rule-of-law. While this measure brings even more exceptions into a scheme that already lacked constitutional review consistency rules, the dominating nature of the current *Amparo* rules render this so-called empowerment of lower courts merely an illusion and useless in reinforcing constitutional law. No matter how pointless one might have considered the traditional exclusion of Mexican lower courts from constitutional review, it was highly questionable for a constitutional court to have declared *on its own initiative* the model of constitutional scrutiny that a country should follow. Even if one accepts that the Supreme Court could have such ability outside of a strictly adjudication procedure (*i.e.*, outside of a legal controversy), neither the longed-for “Constitutional Reform on Human Rights” nor the arguments of the Inter-American Court of Human Rights on *Radilla* supports the diffused model conclusion. Contrary to what is sustained by the Supreme Court's majority in the resolution on *Expediente Varios 912/2010*, the constitutional reform—for better or for worse—actually reinforced the Mexican system's reliance on specialized constitutional mechanisms. Similarly, it is highly debatable that the international judgment could generate specific obligations outside of its operative paragraphs and, furthermore, that the actions to undertake should be responsibility of the Supreme Court. Even supposing this could be the case, *Radilla* did not consider the Mexican system of constitutional review—

concentrated through specialized mechanisms before the federal judiciary—per se as a violation to any of the applicable conventions. On the other hand, the “judicial” incorporation of diffused review opened the gate for any ordinary court—federal or state, judge-panel or unitary—to invalidate unconstitutional statutes. The existing rules of constitutional scrutiny, however, did not give the possibility of such interpretation to spread to the rest of the legal system. The rules do not provide for “correct” constitutional interpretation decided by lower courts to become binding precedent directly. Neither they provide for “incorrect” constitutional interpretation to be overturned by the constitutional jurisdiction). While this situation might be partially corrected if the bill recently presented by senators in October 2011 is finally approved, this will happen only at the expense of even greater dependence on the federal judiciary. The system, however, will still be an overly complex arrangement where constitutional interpretation can hardly impact the legal order as a whole. For this reason, Mexico will still have a system of constitutional review that fosters unequal treatment under the same Constitution.

Finally, fundamental rights are an essential element of the Rule-of-law insofar they allow predictability within the legal realm. A legal system whose procedural rules cannot provide individuals with the certainty that the State will enforce his or her constitutional prerogatives cannot expect the law to successfully guide conduct. For this reason the enforcement of fundamental rights must be guaranteed in spite of a careless legislative, a negligent administration, an arbitrary trial judge, or a combination of all of the above.<sup>213</sup> Although a coherent system of constitutional review cannot guarantee that the law will be able to guide people’s conduct, an incoherent one certainly guarantees that it will not. A mix of constitutional review procedures based on elements from different legal traditions is not necessarily wrong (*e.g.*, the continental European model has more American influence than usually acknowledged).<sup>214</sup> What is clearly flawed is the belief that constitutional rules in favor of individuals should serve different purposes in different traditions. In other words, it is a mistake to act as if the fundamental rights conferred by a Constitution were for just a few and not universal. If a constitutional rule in benefit of an individual cannot be judicially enforced, then it should not be called a “right”. Similarly, if this “right” is not applicable for everyone, then it should not be called “fundamental”. At a time in which Mexican legal institutions are being severely challenged by organized crime and when the capacity of the Mexican State to enforce fundamental rights—both of victims and perpetrators—has been questioned, the call for a coherent system of constitutional review is more necessary than ever.

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<sup>213</sup> See DWORKIN, *supra* note 23, at 27.

<sup>214</sup> See MARCEL KAU, UNITED STATES SUPREME COURT UND BUNDESVERFASSUNGSGERICHT 1-2 (Heidelberg, Springer-Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2007).

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