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JUDICIAL REVIEW IN LATIN AMERICA

KEITH S. ROSENN*

A region of chronic political instability¹ and short-lived constitutions² with a civil law tradition³ would appear most infertile soil for the seeds of *Marbury v. Madison*⁴ to take root. Yet all of the Latin American republics,⁵ with the exception of the Dominican Republic,⁶ provide for some form of judicial review. To be sure, in some Latin American countries

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¹ In the last forty-five years alone Latin American nations have had more than 100 successful *coups d'état*, as well as several times as many unsuccessful *coups*. The chronology and frequency of the successful ones are depicted in K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA*, Chap. II, Table I (in press).

² Calculating the number of constitutions which have been in force in Latin America is a perplexing task, for it is often difficult to tell whether a particular constitution was ever in force, or whether a constitution should be regarded merely as an amendment or as a new constitution. Moreover, previously abrogated constitutions are occasionally resuscitated. Professor Russell Fitzgibbon's latest count of constitutions which have been in force in the twenty Latin American republics totals 247, an average of more than twelve per country. R. FITZGIBBON, *LATIN AMERICAN CONSTITUTIONS: TEXTUAL CITATIONS* 3 (1974).

³ See generally J. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969).

⁴ 5 U.S. (1 Cranch) 137 (1803).

⁵ For the purposes of this article, "Latin American republics" is used to refer only to the twenty republics which traditionally make up the region known as Latin America: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

⁶ Judicial review was abolished in the Dominican Republic in the 1947 Constitution, though in practice Trujillo had effectively eliminated the institution long before. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 596 (1960). The present Constitution makes no attempt to revive the practice of judicial review.

Ecuador should perhaps be included with the Dominican Republic, but the constitutional situation in that country is confusing. Ecuador has historically confined the Supreme Court's power to declare laws unconstitutional to procedural defects in enactment or promulgation. Only the legislature has had the power to declare a statute unconstitutional for substantive reasons, a declaration which is functionally indistinguishable from repeal. G. BLANKSTEN, *ECUADOR: CONSTITUTIONS AND CAUDILLOS* 137-38 (1951). Ecuador's 1967 Constitution created a constitutional court, but its opinions declaring statutes unconstitutional were merely advisory. Arts. 219-22. In addition, the Supreme Court had the power to suspend, either on its own initiative or in response to petition, any law or decree considered unconstitutional on procedural or substantive grounds, pending submission to Congress for final decision. Art. 205(4). Article 257 stated explicitly that "Congress alone has the power to interpret the Constitution in an obligatory manner . . ." In 1970 President Velasco Ibarra promulgated several controversial decrees concerning tax and fiscal reform. When the court declared them unconstitutional, Velasco abrogated the 1967 Constitution, reformed the Supreme Court, and seized dictatorial powers. He also reinstated the 1946 Constitution. Velasco was ousted in February of 1972 by a military *coup*. See J. MARTZ, *ECUADOR: CONFLICTING POLITICAL CULTURE AND THE QUEST FOR PROGRESS* 80, 86-88 (1972). The military has reinstated the 1945 Constitution. Decreto Supremo No. 1 (1972).

such provisions have not been effectively implemented; however, in a sizeable number of these countries, judicial review constitutes an important component of the "law in action."

The procedures for judicial review of the constitutionality of laws and decrees display considerable diversity and ingenuity in adapting an Anglo-American legal institution⁷ to the demands of Latin American legal culture. This article will compare the variety of techniques of judicial review in the formal legal systems of Latin America, analyze the functioning of the most important of these techniques, and conclude with an attempt to explain the significance of judicial review in Latin America.

⁷ Judicial review is hardly an Anglo-American invention. There are several important historical analogues to judicial review in the civil law world. The ancient Athenians made it a crime to secure passage of a statute which contravened fundamental norms (an intriguing theory of criminality perhaps worthy of resuscitation), and Athenian judges were obligated to apply only those statutes consistent with higher law. The action to invalidate the statute was known as the *graphè paranómon*; it could be brought by any citizen at any time. 2 R. BONNER & G. SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* 290, 296-97 (1938); Radin, *The Judicial Review of Statutes in Continental Europe*, 41 W. VA. L.Q. 112-13 (1934).

During the twelfth century the Spanish kingdom of Aragón developed an intriguing institution known as the Justiciar (*Justicia*), embodied in the presiding judge of the king's highest court. The Justiciar was charged with the responsibility for protecting the populace from arbitrary or unlawful governmental actions, such as torture, illegal taxation, or secret trials and imprisonment, in violation of the *fueros*. The *fueros* were quasi-constitutional charters containing legal rights and privileges granted by the crown to various corporate groups or municipalities. Anyone who considered himself wrongfully apprehended for a crime or feared mistreatment from his jailors could apply to the Justiciar for a *manifestación*, a writ resembling habeas corpus. Issuance of the writ resulted in the prisoner's being held in a special prison until the Justiciar could determine the truth of the charge. The Justiciar also had the power to issue a *firma de derecho*, a combination stay and appeal, to protect the lives and property of applicants from illegal or "unconstitutional" (in the sense they violated a *fuero*) judgments. 1 R. MERRIMAN, *THE RISE OF THE SPANISH EMPIRE* 470 (1918). The office of the Justiciar reached the peak of its power and independence during the 15th century, when it became hereditary. Thereafter, its usefulness and prestige in curbing royal arbitrariness declined sharply. See R. GIESEY, *IF NOT, NOT: THE OATH OF THE ARAGONESE AND THE LEGENDARY LAWS OF THE SOBRARBE* 65-68 (1968). Its independence disappeared completely under Philip II when Antonio Pérez, the unfortunate occupant of the office, literally lost his head.

Judges of the French *Parlements*, particularly in Paris, for a comparatively short period preceding the French Revolution asserted the power to refuse to effectuate royal ordinances which the judges believed to violate fundamental law. F. OLIVIER-MARTIN, *HISTOIRE DU DROIT FRANCAIS DES ORIGINES À LA RÉVOLUTION* 541-552 (1948).

But these examples from civil law countries influenced the evolution of judicial review in Latin America little, if at all. Some Mexican writers claim that the seed of the Justiciar has flowered in the Mexican amparo, but the claim is highly dubious. See R. BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* 28-33 (1971). The judges of the French *Parlements* were bitter enemies of the French Revolution, and their misuse of office has left a legacy of hostility to judicial review that has not yet spent itself in France. And the *graphè paranómon* appears to have vanished without trace.

On the other hand, the influence of the United States experience with judicial review has been direct and substantial. E. VESCOVI, *EL PROCESO DE INCONSTITUCIONALIDAD DE LA LEY* 27(1967). Cf. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570 (1960).

I. CENTRALIZATION OF THE POWER OF JUDICIAL REVIEW:

THE CONSTITUTIONAL COURT VERSUS THE REGULAR JUDICIARY

A recent comparative analysis of judicial review by Mauro Cappelletti, one of Italy's most distinguished legal scholars, distinguishes between two broad types of judicial review: "decentralized" and "centralized."⁸ The decentralized system, whose prototype is found in the United States, entrusts the power to determine the constitutionality of legislation to the entire regular judiciary. The centralized system, whose prototype is delineated in the Austrian Constitution of 1920, restricts exercise of this power to a special constitutional court.

The two systems differ not only as to which courts exercise the power of judicial review, but also as to techniques for raising constitutional questions and effects produced by judicial determinations of unconstitutionality. The decentralized system restricts the exercise of judicial review to the determination of real, concrete cases tendered by the parties in the ordinary course of litigation ("review *incidenter*"). The centralized system, at least in its archetypal form, divorces judicial review from ordinary litigation, restricting presentation of constitutional issues to special, abstract proceedings brought by various governmental agencies directly before a constitutional court ("review *principaliter*").⁹

Under a centralized system, a judicial determination that a statute is unconstitutional has an *erga omnes* effect. The law is invalidated for everyone, just as if it had been abrogated by a subsequent statute.¹⁰ Under a decentralized system, the effect of a determination of unconstitutionality is more complex. Technically, a declaration of unconstitutionality has only an *inter partes* effect in a decentralized system, though the principle of *stare decisis* and the increasing popularity of class actions, as a practical matter, may give the decision an effect so widespread that it approaches being *erga omnes*.

Professor Cappelletti views the development of centralized judicial review as a response to essentially three difficulties which civil law countries have experienced in attempting to implement decentralized judicial review. First, the civil law countries have adhered more rigidly to the doctrine of the separation of powers. Declaring legislation unconstitutional is perceived as a political function and therefore unsuitable for the ordinary judiciary. Second, the civil law countries have not developed doctrine of *stare decisis*. Therefore, each person affected by an unconstitutional statute might have to bring his own action, creating numerous

⁸ M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 46 (1971).

⁹ *Id.* at 69.

¹⁰ *Id.* at 85.

opportunities for conflicting opinions. Third, the traditional civil law judiciary is unsuited to the exercise of the power of judicial review. Supreme courts in civil law countries tend to be large and unwieldy, with multiple divisions. Their membership usually consists of career judges, who lack broad political and policy-making experience. Moreover, these courts are handicapped procedurally by the lack of discretionary power to refuse to exercise jurisdiction.¹¹

But the great bulk of the Latin American countries fall into neither the centralized nor the decentralized camp. Rather, they are curious hybrids, reflecting the persistence of the United States model, the difficulties of implementing such a model in civil law countries, and the special difficulties of launching constitutionalism in the Latin American *ambiente*.

A. *The Locus of the Power of Judicial Review*

The decentralized practice of entrusting the power of judicial review to the entire regular judiciary is followed in only five Latin American nations: Argentina, Brazil, El Salvador, Venezuela, and, to a limited extent, Colombia.¹² Mexico is unique in conferring the power of judicial review

¹¹ *Id.* at 54-64.

¹² BRAZIL CONST. OF 1969, art. 116; *But see*, arts. 480-82 of Law No. 5869 of Jan. 11, 1973. EL SALVADOR CONST. OF 1962, arts. 81 and 95. The power of judicial review is implicit in the Argentine Constitution though explicit in the provincial constitutions. Eder, *supra* note 6, at 576. The Supreme Court has held that even justices of the peace have the power to declare laws unconstitutional. S. AMADEO, ARGENTINE CONSTITUTIONAL LAW 73 (1943).

Though Article 215(3) of Venezuela's 1961 Constitution may appear to confine the power of judicial review to the Supreme Court, Article 7 of the Code of Civil Procedure of 1916, which is still in force, directs the lower courts to pass on the constitutionality of legislation when the issue is raised in the course of litigation. *See* H. FIX ZAMUDIO, VEINTICINCO ANOS DE EVOLUCION DE LA JUSTICIA CONSTITUCIONAL 1940-1965 39 (1968).

Whether Colombia's lower ordinary courts can exercise the power of judicial review is not entirely clear, for Articles 214 and 215 of the Constitution of 1886 (as amended) seem to point in opposite directions.

Article 214 provides:

The guardianship of the integrity of the Constitution is entrusted to the Supreme Court. . . .

Article 215 provides:

In all cases of conflict between the Constitution and a law, preference shall be given to the constitutional provision.

Colombian constitutional scholars are split as to whether judicial review by the lower courts is constitutionally authorized. *See* L. SACHICA, CONSTITUCIONALISMO COLOMBIANO 134-135 (2d ed. 1966); 2 E. BOTERO, LAS CONSTITUCIONES COLOMBIANAS COMPARADAS 469-470 (1964).

North American scholars report that constitutional questions can be raised in ordinary litigation before all courts, but that this method is seldom used because of the ready availability of the popular action, discussed *infra*, notes 89-91 and the text thereto. Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia: Nature and Evolution of the Present System*, 23 SO. CALIF. L. REV. 484, 485-486 (1950); Eder, *supra* note 6, at 591. Colombia also differs from the other decentralized countries in that the power

on the entire federal judiciary, but denying such power to the state judiciary.¹³

The centralized model has only one adherent. Several countries have experimented with special constitutional tribunals,¹⁴ but only Guatemala currently entrusts to a constitutional court exclusive jurisdiction to determine the constitutionality of legislation.¹⁵

The majority of the Latin American countries fall between the two models. Eight countries—Bolivia, Chile, Costa Rica, Haiti, Honduras, Panama, Paraguay, and Uruguay—have lodged the power of judicial review exclusively in the highest court of the ordinary judiciary.¹⁶ However, actual exercise of that power is virtually non-existent in Bolivia, Haiti, Honduras, and Paraguay.

to declare governmental decrees unconstitutional has been lodged exclusively in the Administrative Tribunals. CONST. OF 1886, art. 216.

¹³ J. GRANT, *EL CONTROL JURISDICCIONAL DE LA CONSTITUCIONALIDAD DE LAS LEYES* 56-57 (1963).

¹⁴ From 1940 to 1959 Cuba had a court, known as the Tribunal of Social and Constitutional Guarantees, which rendered advisory opinions on constitutional questions and decided constitutional issues referred to it by the ordinary courts. This Tribunal (actually a division of the regular Supreme Court), as well as the principle of judicial review, were formally retained by Castro's revolutionary regime. *Ley Fundamental de la República*, arts. 152(d) and 160 (1959). However, in practice, no semblance of judicial review remains. See AREA HANDBOOK FOR CUBA 217-19, 421-24 (1971).

The Allende régime created a constitutional court in Chile in 1970 to facilitate implantation of a socialist regime by constitutional means. (Law of Jan. 23, 1970, No. 17,284, subsequently incorporated into the Chilean Constitution as articles 78a-c). The constitutional court consisted of five ministers, three appointed by the President and two by the Supreme Court. The constitutional court was to determine, *inter alia*, the constitutionality of bills submitted to Congress and decrees with the force of law issued by the President. Dispositions declared unconstitutional by the Court could not be made law, and those declared constitutional by the Court could not later be declared unconstitutional by the Supreme Court.

After Allende's ill-fated régime was overthrown in September, 1973, the governing military junta disbanded the Chilean Constitutional Court on the ground that it was no longer needed. 7 LATIN AMERICA 368 (1973).

Ecuador created a "constitutional court" for the first time in 1945, but its powers to declare laws unconstitutional were severely circumscribed. In 1946 this tribunal was more appropriately retitled the Council of State. See FIX ZAMUDIO, *supra* note 12, at 49. From 1967 to 1970 this tribunal was again called a constitutional court, though it lacked the powers normally associated with such a court. Presumably the 1972 reinstatement of the 1945 Constitution has revived the 1945 "Constitutional court." See note 6 *supra*.

¹⁵ Guatemala's constitutional court, a creation of the 1965 Constitution, deviates from the classic centralized model to the extent that its membership is drawn from the ordinary judiciary. The constitutional court is made up of twelve judges: five drawn from the Supreme Court and seven from two lower courts. Actions to declare a statute unconstitutional may be brought by the Council of State, the Bar Association, the Public Ministry, or a person aggrieved by the statute (provided the person is represented by at least ten practicing lawyers. GUATEMALA CONST. OF 1965, arts. 262-65.

¹⁶ BOLIVIA CONST. OF 1967, art. 127(5); CHILE CONST. OF 1925, art. 86; COLOMBIA CONST. OF 1886, art. 214; COSTA RICA CONST. OF 1949, art. 10; HAITI CONST. OF 1964, art. 121; HONDURAS CONST. OF 1965, arts. 234 and 235; PANAMA CONST. OF 1972, art. 188; PARAGUAY CONST. OF 1967, art. 200; URUGUAY CONST. OF 1967, arts. 256 and 257; VENEZUELA CONST. OF 1961, art. 215(3).

B. *Effect of a Judicial Determination of Unconstitutionality*

The effect of a judicial determination that a law or decree is unconstitutional varies considerably throughout Latin America. In four countries, Chile, Honduras, Paraguay, and Uruguay, the constitution specifically provides that a judicial declaration with regard to constitutionality operates *inter partes* only.¹⁷ In Costa Rica, Guatemala, and Panama, on the other hand, the constitution specifically provides that a judicial declaration of unconstitutionality has an *erga omnes* effect.¹⁸

In other Latin American countries the matter is more complex. In Argentina, as in the United States, a judicial declaration that a statute is unconstitutional is technically binding only upon the parties to the case.¹⁹ But the Argentines have developed a doctrine of *stare decisis* in constitutional matters; the inferior courts are expected to adhere to all decisions of the Supreme Court on constitutional matters.²⁰ Hence, a decision by the Argentine Supreme Court with respect to facial constitutionality tends to have an *erga omnes* effect.

In Mexican constitutional litigation a judicial determination of the unconstitutionality of a statute affects only the parties. Indeed, the constitution specifically withholds from the judiciary the power to make a general declaration that a statute is unconstitutional.²¹ But five consecutive decisions of the Supreme Court or Collegiate Circuit Courts establish a case law rule (*jurisprudencia*), which is binding upon the courts in future litigation.²² Hence, as in Argentina judicial decisions that technically operate only *inter partes* can have more widespread effects.

In Brazil, El Salvador and Venezuela the effect of a judicial determination of unconstitutionality depends upon the procedure employed. In

¹⁷ CHILE CONST. OF 1925, art. 86; HONDURAS CONST. OF 1965, art. 237; PARAGUAY CONST. OF 1972, art. 200; URUGUAY CONST. OF 1967, art. 259.

¹⁸ COSTA RICA CONST. OF 1949, art. 10; GUATEMALA CONST. OF 1965, arts. 264 and 265; PANAMA CONST. OF 1972, art. 188.

¹⁹ Lopez v. De Pedro, 248 Fallos 702 (1960); Anibal Abalos v. Provincia de Mendoza, 255 Fallos 262, 263; 1963-IV J. A. 221 (1963). This is not true, however, in four of the provinces, Chaco, Santiago del Estero, Neuquen and Río Negro, whose constitutions give their high courts power to nullify unconstitutional laws. See H. FIX ZAMUDIO, *supra* note 12, at 31-32.

²⁰ 1 S. V. LINARES QUINTANA, DERECHO CONSTITUCIONAL E INSTITUCIONES POLITICAS 666-68 (1970). Article 95 of the Peronist Constitution, in force in Argentina from 1949 to 1956, provided: "[T]he interpretation which the Court of Justice [Supreme Court] gives to the articles of the Constitution . . . shall be applied obligatorily by the national and provincial courts." See generally C. AYARRAGARAY, EFECTOS DE LA DECLARACION DE INCONSTITUCIONALIDAD (1955).

There are, however, occasional examples in the case law in which lower courts have expressly refused to follow the Argentine Supreme Court's constitutional decisions. E.g., Administración Gral. de Vialidad Nacional v. Fojtícova de Feith, 108 La Ley 685 (Fed. Cham. App. La Plata *en banc* 1962).

²¹ MEXICO CONST. OF 1917, art. 107 (II) (amended 1968).

²² Mexican Ley de Amparo, arts. 192-194 (as amended, 1968).

all three countries a determination of constitutionality in ordinary litigation operates only *inter partes*.²³ But in Brazil the Senate has been constitutionally obligated to suspend, either in whole or in part, laws and decrees which have been declared unconstitutional by final decision of the Brazilian Supreme Federal Tribunal.²⁴ Moreover, since 1964 the Supreme Federal Tribunal has laid down a series of case law rules called *Súmulas*, which are binding upon the lower courts.²⁵ Since the rules enshrined in the *Súmula* are generally followed, a decision of the Supreme Federal Tribunal has an effect analogous to *stare decisis*.

Brazil, El Salvador, and Venezuela also have specialized procedures through which an original action can be brought directly before the nation's highest court to challenge the constitutionality of a statute on its face. Called a representation (*representação*) in Brazil and a popular action (*acción popular*) in El Salvador and Venezuela, these procedures permit the supreme court to invalidate a statute with *erga omnes* effects.²⁶ The representation and the popular action, which is also used in Colombia and Panama, are discussed in greater detail *infra*.²⁷

II. PROCEDURES FOR RAISING CONSTITUTIONAL QUESTIONS

Early drafters of Latin American constitutions were quick to include a plethora of individual guarantees and rights within the ambit of constitutional protection, but slow to develop techniques by which these guarantees and rights could be implemented. Initially, perhaps, it was hoped that merely setting out these rights in the constitution would be sufficient to secure them from abuse,²⁸ but subsequent events in most countries made it soon apparent that such thinking was hopelessly idealistic.

²³ Brazil: LOUREIRO JUNIOR, O CONTROLE DA CONSTITUCIONALIDADE DAS LEIS 116 (1957); El Salvador. 2 R. GALLARDO, LAS CONSTITUCIONES DE EL SALVADOR 189-90 (1961); Venezuela: Eder, *supra* note 6, at 611.

²⁴ Article 42 (VII) of Brazil's 1969 Constitution provides:

It is incumbent upon the Federal Senate to suspend the execution, wholly or in part, of any law or decree declared unconstitutional by final decision of the Supreme Federal Tribunal.

This measure gives the Senate "the task of rendering inoperative, *erga omnes*, the laws and norms which the Judiciary refrains from applying, *in casu*, because of the defect of unconstitutionality." Vote of Minister Oswaldo Trigueiro in *Engenharia Souza e Barker Ltda. v. Senado Federal*, RMS 16.512, 38 *Revista Trimestral de Jurisprudência* [hereinafter cited as R.T.J.] 5, 10 (Sup. Fed. Trib. 1966). The origins of this provision are traced in LOUREIRO JUNIOR, *supra* note 23 at 118-24.

²⁵ Generally, the Supreme Federal Tribunal will not enter a rule of law into the *Súmula* until the Tribunal has decided an issue the same way several times in succession.

²⁶ Only in Venezuela is a statute invalidated by the popular action considered void *ab initio*. In Brazil, Colombia, El Salvador, and Panama a statute invalidated by representation or popular action is treated as if it had been repealed. Eder, *supra*, note 6 at 610-12.

²⁷ See notes 89-99 *infra* and the text thereto.

²⁸ Fix Zamudio, *Latin American Procedures for the Protection of the Individual*, 9 J. INT'L COMM'N JURISTS 60-61 (1968).

A. Proliferation and Evolution of Habeas Corpus

1. The Brazilian Experience

The first procedural device for the protection of constitutional rights and liberties to be utilized in the new Latin American republics was habeas corpus, borrowed from the British by Brazil in its 1830 Penal Code.²⁹ Before long Brazilians were stretching habeas corpus to cover threats to personal liberty as well as actual restraints.³⁰ By 1891 the Brazilian concept of habeas corpus had evolved into a considerably more versatile and potent procedure for preserving constitutional guarantees and writs than its Anglo-American forbear. Article 72(22) of the Constitution of 1891, Brazil's first republican constitution, provided:

Habeas corpus shall lie whenever an individual suffers, or is in imminent danger of suffering, violence or coercion through illegality or abuse of power.

"Illegality" was interpreted to include unconstitutionality, which made habeas corpus a favorite technique for challenging the constitutionality of statutes and decrees. This popularity was largely the result of the rapid, summary procedure employed in habeas corpus actions. Though constitutional questions could be raised in ordinary litigation, the slow pace of such suits sharply limited their utility in protecting individual rights.

By the 1920's habeas corpus suits were being brought to protect the exercise of virtually every constitutional right. Brazilian judges granted writs of habeas corpus to protect freedom of speech and assembly, as well as political and electoral rights.³¹ The writ was even granted to permit minors to participate in carnival.³²

The flood of habeas corpus cases began to overwhelm the Brazilian courts. In 1926 a constitutional amendment cut back habeas corpus jurisdiction to cases in which there was actual or imminently threatened interference with an individual's power to come and go.³³ But despite this reform, Brazilian courts tend to construe their habeas corpus jurisdiction quite broadly.³⁴

²⁹ Eder, *Habeas Corpus Disembodied: The Latin American Experience*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 463, 465 (K. Nadelmann et al. eds. 1961).

³⁰ *Id.* at 466-69.

³¹ *Id.*

³² *Id.* at 468.

³³ *Id.* at 469.

³⁴ *E.g.*, Vieira Netto, H.C. No. 45.232, 44 R.T.J. 322 (Sup. Fed. Trib. 1968) (granting habeas corpus against an order of a military judge suspending petitioners from practicing their professions); Helena Sidou, H.C. No. 40.828, 65 R.T.J. 97 (Sup. Fed. Trib. 1973) (denying

2. The Peruvian Experience

The writ of habeas corpus has undergone even greater expansion in Peru. Until 1916 habeas corpus in Peru was restricted to cases of illegal confinement of individuals, and no summary procedure existed to protect other constitutional rights.³⁵ Rather than create alternative procedures like mandamus or injunction, the drafters of Peru's 1916 "Abolition of Preventive Detention Law" decided to push the Brazilian experience one step further and expand habeas corpus to protect all individual constitutional guarantees.³⁶ The 1920 Constitution restricted habeas corpus to the ambit of personal liberty, but the concept of an expanded habeas corpus was revived by Article 69 of the 1933 Constitution which provides:

All individual and social rights recognized by the Constitution shall be protected by the action of habeas corpus.

The result has been well summarized by Professor Cooper:

Habeas Corpus in the Peruvian legal system . . . now combines, although as yet imperfectly, much of the character of the Juicio de Amparo of Mexico and the Mandato de Seguridad of Brasil [sic]. Legislative and judicial interpretation of its nature has given it at least some of the characteristics of the English remedies of Certiorari and Mandamus, with the merest hint of the Injunction for good measure.³⁷

Thus, habeas corpus has been utilized in Peru for such diverse purposes as preventing the closing of a publisher³⁸ or challenging the fairness of an expropriation award pursuant to the Agrarian Reform Law.³⁹

Like the Brazilians, the Peruvians found it awkward to use the summary procedure of habeas corpus to protect all individual rights.⁴⁰ But the Peruvians did not develop a new procedural institution like the Brazilian writ of security, discussed *infra*.⁴¹ Instead they subdivided habeas corpus into two separate procedures: (1) personal liberty, which has con-

habeas corpus to a model who sought assurance that she would not be prosecuted for going topless at the beach).

³⁵ D. GARCIA BELAUNDE, *EL HABEAS CORPUS INTERPRETADO* 11 (1971); Cooper, *Habeas Corpus in the Peruvian Legal System*, 31 *REVISTA DE DERECHO Y CIENCIAS POLITICAS* 297, 312 (1967).

³⁶ Law No. 2223 of 1916, arts. 7 and 8.

³⁷ Cooper, *supra* note 35, at 332.

³⁸ RT, No. 132, July 21, 1934, at 181-82, reprinted in D. GARCIA BELAUNDE, *supra* note 35, at 306-07.

³⁹ RJP No. 263, December, 1965, at 1483-89, reprinted in D. GARCIA BELAUNDE, *supra* note 35, at 307-11.

⁴⁰ All habeas corpus suits had to be brought before the criminal courts until 1968. D. GARCIA BELAUNDE, *supra* note 35, at 13.

⁴¹ See notes 48-51 and the text thereto.

tinued as a summary procedure before the criminal courts; and (2) other constitutional guarantees, which are provided a somewhat less summary procedure in the civil courts.⁴²

One important difference between the Brazilian and Peruvian habeas corpus is the effect of the court's determination of unconstitutionality. In Brazil the writ can be used to challenge the constitutionality of a law on its face, and courts occasionally have declared statutes unconstitutional in habeas corpus proceedings.⁴³ While Peruvian courts may have this power, they have never exercised it. Habeas corpus has been used in Peru only to invalidate application of a statute or decree to a specific case.⁴⁴

Today, habeas corpus in its traditional sense, sometimes called *amparo de la libertad personal* or *recurso de amparo de la libertad* is said to be expressly or implicitly guaranteed in the constitutions of all the Latin American republics.⁴⁵ However, enshrinement in the constitution does not always signify observance in practice. Instances in which Latin American governments have failed to honor the privilege of habeas corpus are legion.⁴⁶ Indeed, in certain Latin American countries habeas corpus is more often than not constitutionally suspended by invocation of a state of siege.⁴⁷

⁴² Decree-Law No. 17,083 of October 24, 1968.

⁴³ *E.g.*, Vieira Netto, H.C. No. 54,232, 44 R.T.J. 322 (Sup. Fed. Trib. 1968).

⁴⁴ Furnish, *The Hierarchy of Peruvian Laws: Context for Law and Development*, 19 AM. J. COMP. L. 91, 101-104 (1971).

⁴⁵ Fix Zamudio, note 28 *supra*, at 67.

⁴⁶ *See, e.g.*, Cooper, *Habeas Corpus in Peru: Myth and Reality*, 20 CLV. ST. L. REV. 603 (1971), who candidly asserts:

In fact, as a protection of basic human rights, the elaborate structure described is quite useless and habeas corpus, in itself, is of no practical value as a guarantee against arbitrary detention and procedural irregularities, however grave

Thousands of ordinary persons accused of common crimes are regularly kept for quite long periods in police detention without being placed at the disposition of the investigating magistrate in flat defiance of the law. This is the usual, indeed, the invariable practice, in the case of minor criminals, a fact readily verifiable by direct enquiry. *Id.* at 608.

⁴⁷ In the case of Manuel Rodríguez, 138 La Ley 770 (Fed. Cham. of Apps. of La Plata, 1st Sala 1970), Judge Aramburú's opinion observed that in Argentina:

From September 6, 1930, up to the present date, a person could have been detained for 17 years, five months, and 18 days, for during that period, the state of siege, as well as other more serious measures (like the Conintes Plan, the state of internal war, martial law, etc.) was decreed no less than 11 times. On three of these occasions, it was extended for several years in succession (1941/1945; 1951/1955; and 1958/1963). . . . A person born on September 6, 1930, . . . could have been incarcerated for approximately 45 per cent of his total existence. During all this time said person would have lacked all protection. *Id.* at 774-75.

A prime example of the abuse of the state of siege is Paraguay, where a state of siege has been almost continuously in effect since 1947 and has permitted the Stroessner regime to rule dictatorially since 1954. For a formal condemnation of this tactic by the Paraguayan Bar Association, *see* 28 BULL. INT'L COMM'N JURISTS 51 (1966). *See generally*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS OF THE OAS, PRELIMINARY STUDY OF THE STATE OF SIEGE AND THE PROTECTION OF HUMAN RIGHTS IN THE AMERICAS (1963).

B. *The Brazilian Writ of Security*

Several years of living with the more restricted form of habeas corpus established by the 1926 constitutional amendment, discussed *supra*, convinced many Brazilian lawyers that a summary procedure was needed to protect constitutional rights which could no longer be fitted within the ambit of habeas. Thus a new procedural institution, the writ of security (*mandado de segurança*), was created in 1934. It combines into a single writ the effective characteristics of the Anglo-American writs of prohibition, injunction, mandamus, and quo warranto. The writ of security will lie to protect any "clear and certain right unprotected by habeas corpus, irrespective of the authority responsible for the illegality or the abuse of power."⁴⁸

The writ of security embodies three essential procedural advantages that have made it a highly useful check on the activities of public authorities:

(1) It can function as an affirmative or negative injunction, compelling an authority to perform or cease performing a particular act. Previously, the courts lacked the power to nullify administrative acts; an action for damages was ordinarily the only remedy.⁴⁹

(2) It is a summary action that takes preference on court calendars over all other actions except habeas corpus. (In theory, only 20 days should elapse from the filing of the action to the date of decision, though in practice this period is usually closer to three months.)

(3) The court may issue a preliminary injunction or restraining order to preserve the status quo. Since the opportunities for delay in ordinary litigation are numerous, such a stay is frequently of crucial importance.

Unlike the Brazilian writ of habeas corpus, the writ of security cannot be used to attack the constitutionality of a law on its face.⁵⁰ After a writ of security is conceded, the law simply may not be enforced against the party that sought the writ, nor against similarly situated parties who may have joined in the suit with him. Non-parties must bring their own writs of security if the administrative authorities persist in applying the law to them. However, if the Supreme Federal Tribunal sends to the Federal Senate a copy of its decision conceding a writ of security because a law or decree is unconstitutional, the Senate has the constitutional obligation to suspend execution of such law or decree.⁵¹

⁴⁸ BRAZIL CONST. OF 1969, art. 153 (21).

⁴⁹ Buzaid, "*Juicio de amparo*" e *Mandado de Segurança*, 56 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO 172, 218 (1961).

⁵⁰ *Súmula* No. 266 states: "The writ of security will not lie against a law in the abstract."

⁵¹ See note 22, *supra*. The thorny question of the extent of judicial power if the Senate

C. *The Mexican Amparo*

Judicial protection of constitutional rights developed quite differently in Mexico. Its Constitution of 1836 established a curious organ of government called the *Supremo Poder Conservador* (Supreme Conserving Power) as guardian of the constitution. Comprised of five members elected by the Senate, the Supremo Poder Conservador was granted the power to nullify any law, executive act, or Supreme Court decision that contravened the constitution. It was also granted the power under certain circumstances to suspend the Supreme Court and Congress. In the event of revolution, the Supremo Poder Conservador was responsible for re-establishing the constitutional order. But the Supremo Poder Conservador lacked its own army and could legally act only if requested to do so by one of the three branches of government. It was called to action only four times, none of which involved a defense of constitutional provisions.⁵²

No further progress towards implementing a remedy to protect constitutional rights occurred until adoption of a new constitution in 1857. The sharp contrast between the success of judicial review in the United States and the failure to safeguard the constitution in Mexico convinced the constitutional drafting committee that preservation of constitutional rights was best entrusted to the judiciary. There was, however, considerable debate about how the judiciary should protect the constitution. Rather than adopt the model of the United States, the Mexicans created an original legal institution called *amparo* (literally, support or protection), a summary proceeding in the federal courts for protecting any constitutional right. The framers of the 1857 Constitution sought to minimize the political or legislative aspects of judicial review by providing:

The judgment [in amparo] shall only affect private individuals, being limited to according them the relief and protection pleaded for in the particular case, without making any general declaration as to law or act on which the complaint is based.⁵³

The hope was that with amparo operating in this fashion, "constitutional issues would cease to be incitements to insurrection."⁵⁴

refuses to comply arose recently in the case of *Engenharia Souza e Barker Ltda. v. Senado Federal*, 38 R.T.J. 5 (Sup. Fed. Trib. 1966). There the Senate had suspended only part of a state statute declared unconstitutional by the Supreme Federal Tribunal. The Tribunal resolved its dilemma by treating a petition for a writ of security as a representation action (the Procura or General obligingly lent his approval) and abrogated the offending statute on its own. See notes 96-99 *infra* and the text thereto for a discussion of the Brazilian representation.

⁵² R. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT 6, 9 (1971).

⁵³ MEXICO CONST. OF 1857, art. 102.

⁵⁴ R. BAKER, *supra* note 52, at 36.

The Mexican amparo is a very complex institution with many facets. Sometimes it is used as a writ of habeas corpus or injunction; at other times it resembles a declaratory judgment of unconstitutionality or an appeal. Like the Brazilian writ of security, the amparo is designed as a speedy remedy. The petition can be rather informal. A personal appearance by the plaintiff or his representative, or in an emergency, even a phone call or telegram to the judge, will suffice. The judge then makes a preliminary examination of the petition to see that it is in order and notifies the responsible authority, requesting justification for the act and setting the time and place for a hearing within thirty days. Although the judge is supposed to act within twenty-four hours after receiving the petition, and the authority should justify its action within five days, in practice these brief time limits tend to be rather elastic.⁵⁵

The courts are strictly confined to the allegations of the petition. If a party alleges that a statute is unconstitutional on one ground, and the court believes that the law can be held unconstitutional only on another theory not set out in the petition, the court must deny the amparo. However, deficiencies in particular petitions can be liberally corrected, such as those concerning penal, labor, or agrarian matters, where the petitioner is likely to be uneducated and ill-advised.

The Mexican amparo resembles the Brazilian writ of security with regard to suspension of the challenged act. The Law of Amparo gives a judge the power to issue a temporary injunction or stay whenever execution of the challenged act may result in an injury that will be difficult or impossible to repair. In certain circumstances the amparo petitioner must provide a bond or suitable guarantee against damages resulting from issuance of the stay. However, the respondent may be able to avert the requested stay by posting a counterbond.

Unlike the writ of security, the amparo will normally not lie against discretionary governmental acts for an abuse of discretion. Recent case law has begun to develop such a concept, but the doctrine is still in its incipency.⁵⁶

There are really several different types of amparo. For our purposes, it will suffice to subdivide amparo into two basic components: the legality amparo and the constitutional amparo.

1. The Legality Amparo (*Amparo de la Legalidad*)

Article 14 of the Mexican Constitution of 1857 gave rise to the legal-

⁵⁵ Fix Zamudio, *Síntesis del Derecho de Amparo*, in INSTITUTO DE DERECHO COMPARADO, I PANORAMA DEL DERECHO MEXICANO 105, 135 (1965).

⁵⁶ See Fix Zamudio, *Judicial Protection of the Individual Against the Executive in Mexico*, 2 GERICHTSCHUTZ GEGEN DIE EXEKUTIVE 713, 750-51 (H. Mosler ed. 1970).

ity amparo. It contained a clause modeled after the due process clause of the fifth amendment to the Constitution of the United States: "No one can be judged or sentenced except by laws passed prior to the fact and exactly applied to it, by the tribunal that has previously established the law." Before long this clause was being interpreted as establishing a constitutional right to have the laws of the country correctly applied to one's case. The Mexican Supreme Court began to review state court decisions via amparo whenever there was a contention that a court had misapplied the law.

The Supreme Court's practice engendered considerable debate. Not only did it open the floodgates to Supreme Court review of almost every case, but it practically eliminated the power of the state courts to interpret state law. Every question of state law was readily convertible into a federal constitutional question.

In the 1917 Constitutional Convention judicial abuses of article 14 were criticized, but the new version of that article contained the following clause: "In civil suits the final judgment shall be according to the letter or the juridical interpretation of the law; in the absence of the latter it shall be based on the general principles of law." Read literally, this clause would appear to reaffirm a constitutional right to have all decisions made correctly, in accord with the law, and that is precisely how the Mexican Supreme Court has read it. Thus, the Court has continued to exercise the power to review state court decisions whether or not they involve "federal questions." Article 14 is a means of appealing, by way of direct amparo, from the state courts to the Supreme Court in almost any case. (The form remains that of an original action, but it is in effect an appeal.)

This kind of amparo is known as the "legality amparo," or the *amparo de la legalidad*, and its effect is to centralize the interpretation of all laws, state and federal, in the Supreme Court. While the interpretation of facts is left with the state courts, every question of law is convertible into a federal constitutional question.

The legality amparo may be either "direct" or "indirect." One who feels that the final decision of a state or federal court incorrectly applied the law to his case may institute an amparo action directly before an appropriate chamber of the Supreme Court or the nearest Collegiate Circuit Court, depending on the severity of the sentence, the importance of the issue, or the monetary amount in conflict.

Indirect amparo may be brought against all other forms of illegal or unfair acts of governmental authorities. This type of amparo is generally brought to compel or prevent actions of nonjudicial governmental agents,

such as prosecutors, police, or public administrators, though an indirect amparo may be brought against a judge to challenge an unconstitutional or unlawful act separate from the trial, such as issuance of an arrest warrant. Instead of bringing the amparo action directly before a chamber of the Supreme Court, a complainant in an indirect amparo suit must first bring his action before a federal district court. The district court's decision may then be appealed to the Supreme Court or a Collegiate Circuit Court.

2. The Constitutional Amparo (*Amparo contra Leyes*)

The constitutionality of certain laws, including executive decrees with the force of law, may be challenged on their face by means of a constitutional amparo brought in the federal district courts. In contradistinction to the legality amparo, where the issue is the correctness of the interpretation or application of the law to the plaintiff's case, the constitutional amparo is an attack on the law itself. Indispensable parties to the suit are the President or Governor who signed the law, the legislature that enacted it, and the departments that administer it. Only laws said to be "self-executing" may be challenged by the constitutional amparo. In general, laws are considered "self-executing" when their promulgation alone, without any specific implementing act or application, requires immediate, detrimental compliance with their terms, or when they delineate a specific group to which their terms apply, *e.g.*, an act imposing a tax on bachelors.⁵⁷

3. The Volume of Mexican Amparo Litigation

The legality amparo has been largely responsible for an enormous backlog of cases in the Mexican federal courts. The large number of amparo actions brought each year is striking.⁵⁸ As early as 1919 the Supreme Court's backlog exceeded 2,000, and within four years it had increased more than fivefold to 12,072 cases. The initial approach to dealing with this ever-increasing backlog was mathematical—division and addition. A 1928 reform divided the Supreme Court into three chambers (civil, criminal, and administrative), and increased the number of judges from eleven to sixteen. A 1934 reform added a fourth chamber (labor), and increased the number of judges to twenty-one. But despite these reforms, by 1946 the Supreme Court's backlog had grown to 27,000 cases.⁵⁹ Further reforms were necessary in 1967, when substantial por-

⁵⁷ See R. BAKER, *supra* note 52, at 166-73.

⁵⁸ From December 1969 to December 1970 more than 53,000 new amparo complaints were filed in the federal district courts alone.

⁵⁹ Tena Ramírez, *La Reforma de 1968, en Materia Administrativa, al Poder Judicial de la Federación*, 1968 EL FORO, 55. 56 (1968).

tions of the Supreme Court's backlog, which exceeded 20,000, were transferred to Collegiate Circuit Courts.⁶⁰

There is also a substantial backlog of constitutional amparo cases. As a result of amendments to the Law of Amparo made in 1958, the Supreme Court was required to hear *en banc* all appeals involving the constitutional amparo. The motivation for this measure appears to have been the government's displeasure over the substantial amount of fiscal and economic legislation that had been held unconstitutional by the Administrative Chamber of the Supreme Court. Since the Supreme Court had a backlog of more than two thousand constitutional amparos and had decided only eighteen of them in 1958, the result has been nearly interminable delay in reaching final judgment.⁶¹

D. *The Argentine Amparo*

Prior to 1957 the Argentine courts afforded no generalized injunctive relief against unconstitutional official action. The constitutionality of laws and decrees could be challenged during the ordinary course of litigation, but this procedure was often lengthy, arduous, and expensive.⁶² The writ of habeas corpus, known as the *recurso de amparo de la libertad*, gave fairly rapid protection against illegal or arbitrary restraints on physical liberty; however, there was no comparable remedy for speedy protection of other constitutional rights. Aware of the dramatic expansion of the writ of habeas corpus in nearby Brazil and of the extraordinary versatility of the Mexican writ of amparo, Argentine lawyers quite naturally attempted to utilize habeas corpus as a summary procedure to prevent denial of other constitutional rights. But the Argentine Supreme Court refused to permit such an expansion. In 1933 in the *Bertotto* case,⁶³ where a publisher sought habeas corpus to compel the postal authorities to accept his newspaper for mailing, the Supreme Court declared:

The reform of 1951 tried a somewhat different approach to the problem. Part of the Supreme Court's amparo jurisdiction was transferred to multi-judge circuit courts, whose decisions were non-appealable. A temporary Auxiliary Chamber, composed of five supernumerary judges, was set up to decide cases until the backlog was eliminated. While these measures reduced the backlog initially, by 1964 the Supreme Court was once again more than 10,000 behind.

⁶⁰ See Schwarz, *The Mexican Writ of Amparo: An Extraordinary Remedy Against Official Abuse of Individual Rights*, pt. II, 11 PUBLIC AFFAIRS REPORT (1970). Another feature of the 1967 reforms was the establishment of an Auxiliary Chamber whose judges could substitute for absent regular judges, as well as whittle away at the backlog.

⁶¹ R. BAKER, *supra* note 52, at 72-73.

⁶² See Bielsa, *Jurisdictional Protection and Other Remedies Against the Illegal Exercise or Abuse of Administrative Authority*, U. N., REMEDIES AGAINST THE ABUSE OF ADMINISTRATIVE AUTHORITY—SELECTED STUDIES 33, 57-60 (1964).

⁶³ 41 J.A. at 554 (1933).

Neither in the letter, spirit, nor constitutional tradition of the institution of habeas corpus does one find any basis for applying it to liberty of property, commerce, industry, teaching, [or] transport of correspondence⁶⁴

Subsequent attempts to expand habeas corpus prior to 1957 also came to naught.⁶⁵

After Perón's ouster in 1955, the Supreme Court was ready to reconsider this position. The Perón dictatorship had virtually emasculated the court, impeaching all but one of its members in 1947.⁶⁶ When Perón was overthrown, General Lonardi's provisional government promptly replaced Perón's obsequious appointees to the Court with jurists of independent stature. It is probable that many years of living under a regime in which arbitrary governmental action was commonplace convinced the new judges of the necessity of a quick and effective judicial remedy to guard against the recurrence of such abuses. Beginning with the *Siri* case,⁶⁷ the Argentine Supreme Court set about fashioning such a remedy.

Like the Mexican amparo and the Brazilian writ of security, the Argentine amparo is a summary remedy that presupposes a patent violation of the complainant's constitutional right. If there is a serious unresolved issue of fact, amparo will not lie.⁶⁸ And, like the Anglo-American injunction, amparo will not lie if there is an adequate remedy at law.⁶⁹ Though as a general rule, amparo is not the proper procedure to have a law or decree declared unconstitutional, the Argentine Supreme Court has recently carved out an exception where the statute or decree is manifestly unconstitutional.⁷⁰

The Argentine amparo differs from the Mexican amparo and the Brazilian writ of security in several significant respects. The Argentine amparo is much more an extraordinary remedy than the Mexican or Brazilian procedures. In contrast to the Mexican and Brazilian high courts, which hear several thousand amparo and several hundred writ of security cases each year respectively, the Argentine Supreme Court decided an

⁶⁴ *Id.* at 559.

⁶⁵ See G. BIDART CAMPOS, *REGIMEN LEGAL Y JURISPRUDENCIAL DEL AMPARO* 46-53 (1968).

⁶⁶ See generally Leonhard, *The 1946 Purge of the Argentine Supreme Court of Justice*, 17 *INTER-AM. ECON. AFFAIRS* 73 (Spring 1964).

⁶⁷ 239 Fallos 459, 1958-II J.A. 476 (1957).

⁶⁸ The Argentines borrowed the Brazilian writ of security's requirement that the plaintiff have a certain and incontestable right. However, in practice there have been situations in which a mere legitimate interest has sufficed. G. BIDART CAMPOS, *supra* note 65, at 317-18.

⁶⁹ Pampinella, 1961-II J.A. 62, 102 La Ley 312 (Fed. Chamb. of the Cap., Cont.-Admin. Div. 1959).

⁷⁰ J. Carlos Outon, 267 Fallos 215, 1967-II J.A. 369 (1967).

average of only 22.5 cases per year from 1957 to 1969.⁷¹ Unlike the Mexican amparo, which is frequently utilized as a substitute for appeal, the Argentine amparo will not lie against judicial actions.⁷² Nor will the Argentine amparo lie to challenge the validity of taxes,⁷³ whereas such challenges constitute a substantial part of Mexican amparo and Brazilian writ of security cases.

Only in one respect is the coverage of the Argentine amparo significantly broader than that of the Mexican amparo and the Brazilian writ of security. The Argentine amparo can be used to challenge the actions of private parties;⁷⁴ the Mexican and Brazilian remedies contain a limitation analogous to the "state action" requirement of the fourteenth amendment to the United States Constitution.⁷⁵

E. Proliferation of Amparo

A number of Latin American countries besides Mexico and Argentina have adopted the amparo as a device for protecting constitutional guaran-

⁷¹ Calculated from data in Vocos Conesa, *La Demanda de Amparo en la Jurisprudencia de la Corte Suprema Nacional*, 1969 RESENAS J.A. 790.

⁷² G. BIDART CAMPOS, *supra* note 65, at 261-64.

⁷³ Aserradero Clipper, S.R.L., 249 Fallos 221, 1961-II J.A. 108 (1961).

⁷⁴ Samuel Kor, S.R.L., 241 Fallos 291, 1958-II J.A. 216 (1958). The military government attempted to bar such amparo actions when it promulgated a statute codifying the law of amparo. Law No. 16.986 of October 18, 1966. However, the courts have not been willing to concede that the legislature has the power to curtail the constitutional remedy of amparo and have continued to grant amparo against the acts of private parties like labor unions. *E.g.*, Diaz Colodrero, 1967-II J.A. 356 (Nat'l Cham. Appls. of Peace of the Fed. Cap. 1966).

The omission with respect to acts of private individuals in Law 16.986 was partially rectified in the federal Civil and Commercial Procedural Code, Law No. 17.454 of September 1967. Article 321 expressly provides for amparo against acts or omissions of individuals which injure constitutionally protected rights. However, this procedural code does not apply to the provincial courts, nor does it apply to certain specialized federal tribunals, such as the labor courts, criminal courts, or those which deal with crimes against the economy. G. BIDART CAMPOS, *supra* note 65, at 109-10, 115-17. For a general discussion of the implications of Laws 16.986 and 17.454, see Note, *The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina*, 31 OHIO ST. L.J. 831 (1970).

⁷⁵ Mexican *Ley de Amparo*, art. 73; Brazilian Law No. 1.533 of Dec. 31, 1951, art. 1.

The Mexican amparo has a peculiar feature that is in some respects inconsistent with this "state action" limitation. In certain cases the complainant in an amparo suit can be the government. Article 9 of the Mexican *Ley de Amparo* provides:

Official juridical entities may request amparo against the conduct of functionaries or representatives who determine the laws when the complained of act or law affects [the complainants'] patrimonial interests.

Thus, the Labor Chamber of the Mexican Supreme Court has sustained the right of the government to bring an amparo suit against awards of the Tribunal of Arbitration dealing with public employees. *Apéndice de Jurisprudencia de la Suprema Corte*, Tesis 451 at 875. Similarly, the Supreme Court has held that the government may request amparo against adverse judgments in nationalization or expropriation matters. *Apéndice de Jurisprudencia de la Suprema Corte*, Tesis 450 at 872-74. Amparo's functioning as a substitute for appeal results in this incongruous reversal of normal roles in which the defendant is really the private party, although technically a court is named as the defendant.

tees.⁷⁶ In Costa Rica,⁷⁷ El Salvador,⁷⁸ and Panama,⁷⁹ amparo functions as a summary remedy to protect individual constitutional rights which are not protected by habeas corpus. Venezuela should perhaps be included within this grouping, but the present state of its law with respect to amparo is confusing.⁸⁰

In Honduras⁸¹ and Guatemala⁸² amparo serves a dual function: (1) as a summary remedy to protect individual rights not protected by habeas corpus, and (2) as a means of securing a speedy judicial declaration that a law or regulation does not apply to the plaintiff due to its unconstitutionality.

As a matter of form, the Nicaraguan amparo is closest to the Mexican amparo,⁸³ theoretically serving the functions of habeas corpus, protection of individual rights other than physical liberty, and challenging unconsti-

⁷⁶ The procedural idiosyncracies of amparo in the various Latin American countries are described in Camargo, *The Right to Judicial Protection: "Amparo" and Other Latin American Remedies for the Protection of Human Rights*, 3 *LAWYER OF THE AMERICAS* 191, 211-16 (1971); Fix Zamudio, *Latin American Procedures for the Protection of the Individual*, 9 *J. INT'L COMM'N JURISTS* 60, 77-86 (1968); J. OTHON SIDOU, *DO MANDADO DE SEGURANCA* 131-78 (3d ed. 1969). The multiplicity of usages ascribed to amparo in the Hispanic-American legal lexicon is explored in Fix Zamudio, *Diversos Significados Juridicos del Amparo en el Derecho Iberoamericano*, 18 *BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO* 119 (1965).

⁷⁷ COSTA RICA CONST. OF 1949, art. 48; regulated by *Ley de Amparo*, Law No. 1161 of June 2, 1950, as modified August 9, 1952.

⁷⁸ EL SALVADOR CONST. OF 1962, art. 221; *Ley de Procedimientos Constitucionales* of Jan. 14, 1960, arts. 12-18.

⁷⁹ PANAMA CONST. OF 1972, art. 49; regulated by *Ley sobre Recursos Constitucionales y de Garantía*, Law No. 46 of Nov. 24, 1956. Of all the amparo statutes, this is the most summary. The respondent authority is required to inform the court of its position within two hours after notification of the complaint and to suspend execution of the impugned act immediately. Arts. 48 and 49. Decision is to be rendered within two days. Art. 52.

⁸⁰ VENEZUELA CONST. OF 1961, art. 49 (III) provides:

The courts shall protect (*amparán*) every inhabitant of the Republic in the enjoyment and exercise of the rights and guaranties established by the Constitution, in conformance with the law (*ley*). The procedure shall be brief and summary, and the proper judge shall have the power to restore immediately the infringed juridical situation.

Unfortunately, the legislature has never passed implementing legislation. When in 1962 a litigant sought amparo, the Superior Court held that it had no power to concede amparo in the absence of implementing legislation. Gutiérrez y Gutiérrez, 5 *JURISPRUDENCIA VENEZOLANA* 165 (1962). Seven years later, the same court reversed itself and granted amparo despite the absence of a regulatory statute. Manuel Beja Núñez en solicitud de Recurso de Amparo, 22 *JURISPRUDENCIA VENEZOLANA* 39 (1969). See also Procurador General de la República en Recurso de Amparo a Favor de F. Wyack, 30 *JURISPRUDENCIA VENEZOLANA* 466 (Sup. Ct. 1971).

⁸¹ HONDURAS CONST. OF 1965, art. 58; *Ley Constitucional de Amparo* of April 14, 1936.

⁸² GUATEMALA CONST. OF 1965, arts. 78-84; *Ley Constitucional de Amparo, habeas corpus, y constitucionalidad* of April 28, 1966.

⁸³ See González Pérez, *El Proceso de Amparo en Méjico y Nicaragua*, 5 *REVISTA DE ADMINISTRACION PUBLICA* 297 (1954).

tutional laws or decrees.⁸⁴ Nicaragua also, in theory, permits amparo to challenge the constitutionality of a law on its face.⁸⁵

Three other Latin American countries adopted the amparo, at least as a matter of form, in 1967: Bolivia,⁸⁶ Paraguay,⁸⁷ and Ecuador.⁸⁸

F. *The Popular Action*

In 1910 Colombia instituted an extraordinarily simple procedure called the "popular action" (*acción popular*).⁸⁹ It permits any citizen (defined loosely by the case law to include corporations and even aliens), without regard to personal stake in the outcome or exhaustion of administrative remedies, to bring an action challenging the constitutionality of any law on its face directly before the Colombian Supreme Court by filing a simple written statement setting forth the asserted conflict between the law and the constitution. The Procurator General must then file an opinion within 30 days; however, since the popular action is not considered an adversary proceeding, the Procurator's role is more analogous to an *amicus curiae* than to a respondent.

The action goes directly to the constitutional chamber of the Supreme Court for an opinion and statement, which must be rendered within thirty days. No briefs or oral arguments are presented, and the action takes preference on the Court's calendar. The Supreme Court sits *en banc*, exercising original and exclusive jurisdiction. The Court is not limited to the complainant's theory of the case; if it believes the law unconstitutional for reasons other than those set out in the complaint, the Court has the duty to invalidate the law. If the law is declared unconstitutional, the Court's decision has an *erga omnes* effect. However, technically this does not mean the law is annulled or that rights acquired under the law are invalidated. It simply means that the law cannot be enforced against anyone. The Court's decision is nonappealable and cannot be reviewed in any later proceeding.⁹⁰

The popular action before the Colombian Supreme Court is limited

⁸⁴ *Ley de Amparo* of Nov. 6, 1950, which, according to article 323 of the Constitution of 1950 (amended 1962), is a constitutional law. This Nicaraguan statute is peculiar in that it considers habeas corpus as part of amparo, yet on occasion refers to the institution of habeas corpus.

⁸⁵ *Ley de Amparo* of Nov. 6, 1950, art. 5.

⁸⁶ BOLIVIA CONST. OF 1967, art. 19.

⁸⁷ PARAGUAY CONST. OF 1967, art. 77.

⁸⁸ ECUADOR CONST. OF 1967, art. 28(15).

⁸⁹ COLOMBIA CONST. OF 1886 (as amended), art. 214(2). See Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia: Nature and Evolution of the Present System*, 23 S. CAL. L. REV. 484, 499-504 (1950).

⁹⁰ L. SACHICA, CONSTITUCIONALISMO COLOMBIANO 124-29 (2d ed. 1966).

to challenge of any public law or decree-law in force. Regulatory or administrative decrees or acts must be challenged before the Council of State, the highest administrative court.⁹¹

With slight modifications the popular action has spread to El Salvador, Panama, and Venezuela.⁹² From 1931 until 1959 Cuba permitted the popular action, but required a petition signed by twenty-five citizens instead of an individual complaint.⁹³ Peru provides for a popular action to challenge the constitutionality of governmental decrees and regulations (but not laws); however, the Peruvian courts have not permitted its use.⁹⁴ Brazil permits a popular action for the sole purpose of "annulling acts injurious to the patrimony of public entities."⁹⁵

G. *The Brazilian Representation*

Brazil has a procedure for challenging directly before the nation's highest court the constitutionality of any statute on its face.⁹⁶ Called a "representation", this action has been used primarily as a check on the actions of state legislatures and governors rather than to protect the constitutional rights of individuals. Originally, this direct action was limited to challenging state statutes which offended the principles of a republican

⁹¹ The Supreme Court has been roundly criticized for carving out two limitations on its broad jurisdictional grant: (1) laws approving treaties may not be challenged by popular action, (2) nor will the Court inquire into the procedural formalities with which a law was passed. F. DEPAULA PEREZ, *DERECHO CONSTITUCIONAL COLOMBIANO* 446-49 (5th ed. 1962). However, in comparison with practice in other countries, these limitations upon the exercise of the power of judicial review seem quite minor. Consequently, one would imagine that the Supreme Court has been overwhelmed with popular actions, but apparently this has not been the case. The two-volume work of NESTOR PINEDA, *JURISPRUDENCIA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA* (1963), which purports to collect all of the constitutional decisions of the Supreme Court sitting *en banc* from 1910 through 1962, contains only 329 cases. Three of these cases deal with permission for the Executive to leave the country, twenty-five deal with proposed legislation that has been vetoed by the President on constitutional grounds. Of the 301 popular actions, the Colombian Supreme Court avoided reaching the merits in seventy-six. In 100 of the some 225 popular actions decided on the merits, the Court declared the challenged legislation unenforceable (*inexequible*), either in whole or in part. A review of the cases involving contract claims appears in Grant, "Contract Clause" Litigation in Colombia: A Comparative Study in Judicial Review, 42 AM. POL. SCI. REV. 1103 (1948).

⁹² EL SALVADOR CONST. OF 1962, art. 96; PANAMA CONST. OF 1972, art. 188; VENEZUELA CONST. OF 1961, art. 215 (3, 4). (Though not clearly set out in these constitutional provisions, the popular action has long been part of Venezuelan constitutional practice.) See I P. PINEDA LEON, *LECCIONES ELEMENTALES DE DERECHO PROCESAL CIVIL* 33 (2d ed. 1964); H. FIX ZAMUDIO, *supra* note 12, at 76.

⁹³ Camargo, *supra* note 76, at 199. Camargo erroneously states that the popular action was suppressed in Cuba's Fundamental Law of 1959. The popular action was formally preserved in Article 172(b) of the Fundamental Law; however, in practice it has disappeared along with the entire institution of judicial review.

⁹⁴ Furnish, *supra* note 44, at 107-10.

⁹⁵ BRAZIL CONST. OF 1969, art. 153(31); regulated by Law No. 4.717 of June 29, 1965.

⁹⁶ BRAZIL CONST. OF 1969, art. 119(1).

form of government.⁹⁷ Only in December, 1965, as a result of a suggestion made by Victor Nunes Leal, then a member of the Supreme Federal Tribunal, was the representation expanded to permit challenge of "any federal or state law or normative act"⁹⁸

The representation still differs from the popular action in one important respect: standing. The popular action can be brought by any citizen, but the representation can be instituted only by the Procurator General.⁹⁹ But the Procurator General is selected by the President, who, since 1964, has been selected by the military. The constitutionality of laws and acts which the military does not want challenged must be tested by some procedure other than the representation.

H. *Anticipatory Judicial Review*

In addition to the popular action and judicial review during the course of ordinary litigation, Colombia has utilized a third technique to permit the judiciary to insure the constitutionality of legislation. Whenever a bill has been passed over a presidential veto based on the ground that the bill, either in whole or in part, is unconstitutional, the bill is sent directly to the Supreme Court for resolution of the constitutional issues. The Court must render its decision within six days after receipt of an opinion from the Procurator General. Only if the Court sustains the bill's constitutionality may it be promulgated as law. This technique of anticipatory judicial review was first introduced into Colombia in the Constitution of 1886, which borrowed the idea from the Ecuadorian Constitutions of 1869

⁹⁷ The 1946 Constitution authorized the federal government to intervene in state activities, *inter alia*, to assure observance of the following principles: (1) republican form of government; (2) independence and harmony of powers; (3) temporary nature of elective offices (which are limited to the terms of corresponding federal officers); (4) prohibition of governors and mayors immediately succeeding themselves; (5) municipal autonomy; (6) rendering of administrative accounts; (7) guarantees of the judicial power. Art. 7 (VII). Article 8 empowered the Procurator General to submit to the Supreme Federal Tribunal any state act which he deemed offensive to the above constitutional principles.

⁹⁸ CONST. amend. XVI.

The representation is similar to a nineteenth century Colombian system of judicial review, set out in COLOMBIA CONST. OF 1863, art. 72, which provided:

The Supreme Court shall suspend, by unanimous vote, on petition of the Procurator General or of any citizen, the enforcement of the legislative acts of the state assemblies, insofar as they may be contrary to the Constitution or laws of the Union, reporting in each case to the Senate so that the latter may decide definitively as to the nullity or validity of said acts.

⁹⁹ Citizens may petition the Procurator General to institute a representation, but if he refuses to do so, they have no recourse. *M.D.B. v. Procurador-Geral da República, Reclamação No. 849, 59 R.T.J. 333 (Sup. Fed. Trib. en banc 1971).*

and 1878.¹⁰⁰ The procedure is also presently employed by Costa Rica, Ecuador, and Venezuela.¹⁰¹

From 1970 to 1973 a variant of the Colombian form of anticipatory judicial review was in force in Chile. The Constitutional Court, created in 1970, was empowered to determine, prior to their becoming law, the constitutionality of bills submitted to Congress and decrees with the force of law issued by the president.¹⁰² Those bills and decrees legitimated by the Constitutional Court could not later be declared unconstitutional by the Supreme Court, and those invalidated by the Constitutional Court could not become law.¹⁰³

I. *Review by Special Jurisdictions*

Though strictly speaking not part of judicial review, there are several special jurisdictions operating in Latin America independently or semi-independently of the regular judiciary that afford considerable protection against arbitrary or illegal government action. Two such special jurisdictions bear mentioning: (1) administrative tribunals, and (2) Chile's *Contraloría General*.

1. Administrative Tribunals

Several countries, most notably Colombia and Uruguay, have adopted the French system of establishing separate administrative tribunals, called *Tribunales de lo Contencioso Administrativo*. In Uruguay the administrative tribunals have the power to confirm, suspend or annul arbitrary or illegal administrative acts, though they lack the power to modify such acts. Nor do they have the power to award damages; such redress must be sought in the regular courts.¹⁰⁴

In Colombia, however, the administrative courts can award damages or modify an administrative act, as well as annul, confirm, or suspend it. Colombia's administrative court structure is highly developed, with its own code, and generally offers much speedier relief than the ordinary courts.¹⁰⁵ The highest administrative court is the Council of State, the

¹⁰⁰ Grant, *Judicial Review by Executive Reference Prior to Promulgation: The Colombian Experience*, 21 S. CAL. L. REV. 154, 155 (1948).

¹⁰¹ COSTA RICA CONST. OF 1949 (amended 1963), art. 128 (a two-thirds vote is necessary to reject a bill on constitutional grounds); ECUADOR CONST. OF 1946, art. 67, as amended CONST. OF 1967, art. 151; VENEZUELA CONST. OF 1961, art. 173.

¹⁰² Note 14 *supra*.

¹⁰³ CHILE CONST. OF 1925, art. 78(c) (amended July 1971).

¹⁰⁴ URUGUAY CONST. OF 1967, arts. 307-13; Vescovi, *La Protección Procesal de la Garantías Individuales en América Latina*, 18 REVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES 218, 230-31 (1967).

¹⁰⁵ E. SARRIA, *DERECHO ADMINISTRATIVO* 346-64 (4th ed. 1962).

government's supreme consultative body, which exercises both judicial and executive functions. Since it is often difficult to determine whether a case should be heard by the regular or administrative courts, Colombia has found it necessary to set up a Conflicts Court to resolve such jurisdictional disputes.¹⁰⁶

2. Chile's Contraloría General

Chile has a unique administrative-judicial agency called the *Contraloría General* (Office of the Comptroller General). Created originally in 1927 to serve as watchdog of the nation's budget, the *Contraloría* has evolved into a presidential watchdog, which passes on the legality and constitutionality of all presidential decrees executing laws, or which involve the collection or disbursement of public funds or administrative personnel. However, rejected decrees may, in certain instances, be reissued by a process called a "decree of insistence," signed by all members of the Cabinet.¹⁰⁷

III. THE SIGNIFICANCE OF JUDICIAL REVIEW IN LATIN AMERICA: AN EXERCISE IN DIALECTIC

Is judicial review in Latin America an institution that exists only in constitutional and procedural texts, or is it a meaningful part of the "law in action"? What functions does judicial review perform in Latin America and how effectively does it perform them? Do Latin American courts actually prevent unconstitutional actions in matters deemed "important" to the executive?

The answers to these and related questions are facile only for countries like Haiti or Paraguay, where few would claim that judicial review exists in fact. But for most Latin American countries the answers to such questions are varied and complex, as the following dialogue suggests.

Q—Isn't it senseless to talk about judicial review in Latin America? This is a region where lawyers, with good reason, quip: "Constitutions, like virgins, are born to be violated." Effective judicial review presupposes an independent judiciary, an institution conspicuously absent from Latin America.

A—Judicial independence is highly relative. One cannot assert that courts are simply independent or nonindependent. Not even the United

¹⁰⁶ S. WURFEL, *FOREIGN ENTERPRISE IN COLOMBIA: LAWS AND POLICIES* 289-91 (1965). The variation in administrative court structure is described in H. CLAGETT, *ADMINISTRATION OF JUSTICE IN LATIN AMERICA* 59-75 (1952).

¹⁰⁷ F. GIL, *THE POLITICAL SYSTEM OF CHILE* 97-99 (1966); C. GEBWITZ, *ELEMENTOS DE DERECHO CONSTITUCIONAL CHILENO* 541-49 (1963).

States Supreme Court, which is generally considered a model of judicial independence, can ignore political realities for long and survive intact. The United States Supreme Court has had to back off from confrontations with the political authorities many times.

Q—For example?

A—*Ex parte McCordle*¹⁰⁸ and *Korematsu v. United States*¹⁰⁹ are two cases which leap quickly to mind. And you recall F.D.R.'s famous "court-packing plan," which produced the notorious "switch in time that saved nine."¹¹⁰

Q—But surely no Latin American judiciary enjoys the kind of political independence enjoyed by the United States judiciary. Can you imagine a Latin American court daring to decide cases like the Pentagon Papers¹¹¹ or Steel Seizure¹¹² against the government?

A—I can imagine an Argentine or Brazilian court doing so. The courts of these countries have regularly displayed considerable independence. Even during *de facto* military regimes, the Argentine and Brazilian high courts have not hesitated to declare unconstitutional measures important to the military governments then in power.¹¹³ The exercise of the power of judicial review in this fashion after a military *coup d'état* strikes me as requiring greater courage and independence than that displayed by the United States Supreme Court in the Pentagon Papers and Steel Seizure cases.

Q—But look what has happened to the Argentine and Brazilian courts! Since 1945 the Argentine Supreme Court has been impeached *en masse* once,¹¹⁴ summarily dismissed *en masse* twice,¹¹⁵ and has re-

¹⁰⁸ 74 U.S. (7 Wall.) 506 (1868).

¹⁰⁹ 323 U.S. 214 (1944).

¹¹⁰ See R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); 1 P. FREUND et al., *CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS* 243-44 (2d ed. 1961); Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 *YALE L. J.* 791 (1952).

¹¹¹ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

¹¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹¹³ *E.g.*, in 1945 the Argentine Supreme Court invalidated three decrees of the *de facto* Perón government: one had changed the eminent domain valuation procedure (38 *La Ley* 87), a second had established a new court (38 *La Ley* 50), and the third had ordered the transfer of a federal judge (38 *La Ley* 53).

After the *coup* of March 31, 1964, the Brazilian Supreme Federal Tribunal ordered released on habeas corpus such notorious enemies of the revolt as Francisco Julião, leader of the Peasant Leagues in the Northeast, HC 42.560, 36 R.T.J. 565 (Sup. Fed. Trib. 1965); Miguel Arraes de Alencar, former Governor of the State of Pernambuco, HC 42.108, 32 R.T.J. 614 (Sup. Fed. Trib. 1965); José Parsifal Barroso, former Governor of the State of Ceará, HC 41.609, 34 R.T.J. 351 (Sup. Fed. Trib. 1964); and Mauro Borges, former Governor of the State of Goiás, HC 41.296, 33 R.T.J. 590 (Sup. Fed. Trib. 1964).

¹¹⁴ In 1946 a Perón-dominated Congress impeached all but one of the members of the Ar-

signed *en masse* once.¹¹⁶ The Brazilian Supreme Federal Tribunal has been played like an accordion. The military arbitrarily expanded the size of the Tribunal in 1965 and contracted it in 1968.¹¹⁷ Moreover, everything connected with national security has been withdrawn from judicial review by military fiat.¹¹⁸

A—Appearances can be deceiving in changes of court personnel. The entire Peruvian Supreme Court was replaced by a military regime in 1968, yet the reconstituted Supreme Court appears to be more independent and able than its predecessor.¹¹⁹ There is no doubt that the 1957 dismissal of Perón's sycophantic appointees substantially improved the independence and quality of the Argentine Supreme Court.¹²⁰

Q—Still you would not deny that the independence of the Argentine and Brazilian courts has been sharply reduced by the extraconstitutional changes in government?

A—That evidence is by no means clear. After all, the constitutional remedy of amparo was devised by members of the Argentine Supreme Court appointed by the military regime that deposed Perón in 1955.¹²¹ The creation of the amparo was in large part a response to the constitutional abuses of Perón's constitutionally elected government. In 1967 a Supreme Court appointed by a *de facto* military regime courageously resisted an attempt by that regime to curtail

gentine Supreme Court. See generally Leonhard, *The 1946 Purge of the Argentine Supreme Court of Justice*, 17 INTER-AMER. ECON. AFFAIRS 73 (Spring 1964).

¹¹⁵ In 1957, following Perón's ouster, the Lonardi provisional government summarily cashiered the entire Supreme Court. This process was repeated in 1966 by the military government headed by General Onganía. See generally, INSTITUTO DE CIENCIA POLITICA, *LA REVOLUCION ARGENTINA* (1966).

¹¹⁶ Following the election of a Peronist regime in 1973, the entire Supreme Court resigned. The new regime promptly filled the vacancies with Peronistas. *La Prensa*, May 25, 1973, at 10, cols. 1-3; *La Prensa*, June 9, 1973, at 1, col. 4.

¹¹⁷ Pursuant to Article 6 of Institutional Act No. 2 of Oct. 27, 1965, the military regime expanded the number of ministers from 11 to 16. Pursuant to Institutional Act No. 5 of December 13, 1968, three ministers of the Supreme Federal Tribunal were compulsorily retired. The President of the Tribunal, Antônio Gonçalves de Oliveira resigned in protest. After another minister resigned because of age, Institutional Act No. 6 of February 1, 1969, reduced the number of ministers on the Tribunal from 16 to 11.

¹¹⁸ Institutional Act No. 5 suspended the writ of habeas corpus for all political crimes against national security, as well as crimes against the economic and social order or the popular economy. Institutional Act No. 6 eliminated ordinary appeals to the Supreme Federal Tribunal from decisions of the military tribunals in crime involving national security, as well as cutting back on the Tribunal's jurisdiction to hear appeals in cases denying the writ of security.

¹¹⁹ Furnish, *supra* note 44, at 109; Cooper, *Peru's "New Look" Judiciary*, 55 JUDICATURE 334, 337 (1972).

¹²⁰ For an account of the scandalous behavior of Perón's appointees to the Argentine Supreme Court, see Orgaz, *Poder Judicial*, in ARGENTINA 1930-1960, 124 (J. Paita ed. 1961).

¹²¹ See note 67 *supra* and the text thereto.

its amparo jurisdiction.¹²² The Court showed further evidence of its independence the following year by invalidating Law 17.642, which imposed certain duties on the Court in connection with impeachment tribunals for the provincial judiciary. Acting *sua sponte*, the Court unanimously issued an accord stating that it would not comply with the statute because it exceeded the powers of the military government and was "incompatible with the federal principle of government established in the National Constitution and recognized by the Statute of the Revolution. . . ."¹²³ Shortly thereafter, the Court directly confronted the Executive by declaring unconstitutional an executive decree closing down a periodical.¹²⁴ Indeed, one can make out a good case for the proposition that the Argentine Supreme Court has been more independent under *de facto* governments than under *de jure* governments in the past three decades.

The military government that seized power in 1964 in Brazil originally made no attempt to interfere with judicial independence. Only after the Supreme Federal Tribunal had freed by writ of habeas corpus a number of important "enemies of the Revolution"¹²⁵ and the Tribunal's President had publicly denounced the military regime¹²⁶ was the decision made to pack the Tribunal. Even then the government did not pack the Court with hacks; among the new appointees were Aliomar Baleeiro, a distinguished tax scholar, who two years ago publicly criticized the military government for failing to maintain the rule of law, and Adauto Lúcio Cardoso, who had resigned as President of the Congress in 1965 in protest against the Executive's quashing the mandates of six Representatives.

Packing and unpacking the Supreme Federal Tribunal has not completely compromised its independence. The Tribunal has invalidated portions of the military regime's draconic national security law¹²⁷ and freed numerous student radicals on habeas corpus in December of 1968, "a move that greatly upset many in the military."¹²⁸ Far more damaging to effective judicial review was the military's arbitrary withdrawal of jurisdiction from ordinary courts over cases involving po-

¹²² J. Carlos Outon y otros, 267 Fallos 215, 1967-II J.A. 369 (1967).

¹²³ 1968-II J.A. 118, 121 (1968).

¹²⁴ Sánchez Sorondo ("Azul y Blanco"), 1968-IV J.A. 56, 130 La Ley 450 (1968).

¹²⁵ See note 113 *supra*.

¹²⁶ He invited the military to return to their barracks and give the nation back its government. Reported in *Veja*, Dec. 18, 1968, at 23.

¹²⁷ *Vieira Netto*, H.C. No. 45.232, 44 R.T.J. 322 (1968).

¹²⁸ R. SCHNEIDER, *THE POLITICAL SYSTEM OF BRAZIL* 272 (1971).

litical rights and crimes against national security.¹²⁰ The judiciary had little choice but to go along, for this restriction had been imposed by "institutional acts," the functional equivalent of constitutional amendments. But as soon as a change in underlying constitutional provisions permitted reassertion of jurisdiction, the Brazilian Supreme Federal Tribunal displayed some of its traditional independence.¹²⁰

Q—Have *de facto* governments respected court decisions with which they disagreed?

A—In Argentina and Brazil the decisions of the highest courts have almost invariably been respected.¹²¹ However, decisions of the state and lower courts have not always been accorded similar treatment.¹²²

Q—Why should *de facto* regimes feel bound by a court decision declaring their actions unconstitutional?

A—Legitimation is as much a function of judicial review as invalidation, perhaps even more so.¹²³ Legitimacy has been in scarce supply in Latin America ever since Napoleon sought to place his brother Joseph on the Spanish throne.¹²⁴ A revolution or *golpe* exacerbates this chronic "crisis of legitimacy." In seeking to institutionalize a *golpe*, political leaders not infrequently seek to bolster their regime's legitimacy by judicial declaration. But a court that can only legitimate can confer considerably less legitimacy than a court that also has the power to invalidate. The Argentine Supreme Court

¹²⁰ See generally Carl, *Erosion of Constitutional Rights of Political Offenders in Brazil*, 12 VA. J. INT'L L. 157 (1972).

¹²⁰ For example, when the 1969 redraft of the 1967 Constitution restored the Supreme Federal Tribunal's jurisdiction to hear ordinary appeals from military tribunals in cases involving civilians accused of crimes against national security, the Supreme Federal Tribunal quickly exercised this jurisdiction to reverse the conviction of Caio Prado Júnior, an eminent Marxist economic historian, for violation of the National Security Law. R.O.C. No. 1.116, 59 R.T.J. 247 (1971).

¹²¹ There are only three cases in Brazilian legal history in which the executive openly defied a Supreme Federal Tribunal decision: the first occurred in 1911, the second in 1915, and the third in 1939. L. BITENCOURT, *O CONTROLE JURISDICONAL DA CONSTITUCIONALIDADE DAS LEIS* 136-38 (2d ed. 1968).

¹²² For example, in 1968 provincial courts in Santa Fe, Argentina, issued writs of amparo to protect the right of a committee on university reform to meet. The police ignored the amparo writs and assaulted a group at one of the banned meetings. Among the victims of the assault was a judge who had issued an amparo writ. The Supreme Court of the Province issued a declaration concerning the need to respect court orders. The federal government responded by intervening in the province to reorder the judiciary, whereupon the entire Santa Fe Supreme Court resigned. *Argentina: Subjection of the Judiciary*, 35 BULL. INT'L COMM'N JURISTS 13 (1968).

¹²³ C. BLACK, *THE PEOPLE AND THE COURT* 223 (1960).

¹²⁴ Morse, *The Heritage of Latin America*, in *THE FOUNDING OF NEW SOCIETIES* 123, 158 (L. Hartz ed. 1964). Professor Horowitz refers to illegitimacy as the norm in Latin America. *The Norm of Illegitimacy: The Political Sociology of Latin America*, in *LATIN AMERICAN RADICALISM* 3 (I. Horowitz et al. eds. 1969).

has developed the practice of issuing accords legitimating *de facto* governments in return for a promise by the leaders of the *golpe* to maintain the supremacy of the Constitution.¹³⁵

Q—But the Court's own legitimacy must stem from the Constitution. If a regime has come to power by violating the Constitution, what kind of legitimacy can the Court confer on that regime?

A—Perhaps in the final analysis a revolution must legitimate itself. But most Latin American *golpes* do not make drastic changes in the courts or the constitution. It is as if the constitution had a broad severability clause with respect to the provisions regulating elections and successions. Indeed, some Latin American constitutions even provide for their own survival in the event of a revolution.¹³⁶

Q—Don't the courts encourage political instability by sanctioning and legitimating governments which have come to power through extra-constitutional means?

A—You recall Judge Learned Hand's statement: ". . . [A] society so riven that the spirit of moderation is gone, no court *can* save; . . . a society where the spirit flourishes, no court *need* save; . . . a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."¹³⁷

Q—That statement should be viewed in light of Professor Hart's reply:

What the sentence assumes is that there are two kinds of societies—one kind, over here, in which the spirit of moderation flourishes, and another kind, over here, which is riven by dissension. Neither kind, Judge Hand says, can be helped very much by the courts. But, of course, that is not what societies are like A society is a something in process—in process of becoming. It has always within it, as ours does, seeds of dissension. And it has also within it forces making for moderation and mutual accommodation. The question—the relevant question—is whether the courts have a significant contribution to make in pushing . . . society in the direction of moderation—not by themselves; of course they can't save us by themselves; but in combination with other institutions.¹³⁸

A—The courts cannot prevent a *coup d'état*. A former member of the Brazilian Supreme Federal Tribunal made the point emphatically:

¹³⁵ *E.g.*, 158 Fallos 290 (1930), 196 Fallos 6 (1943), 82 *La Ley* 398 (1956). The Brazilian Supreme Federal Tribunal similarly recognized the *golpe* that originally brought Getúlio Vargas to power, 55 *Revista Forense* 359 (1930), but has not made this a regular practice.

¹³⁶ *E.g.*, MEXICO CONST. OF 1917, art. 136; VENEZUELA CONST. OF 1961, art. 250; HONDURAS CONST. OF 1957, art. 340.

¹³⁷ *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 172, 181 (I. Dilliard ed. 1952).

¹³⁸ *Comment*, in *GOVERNMENT UNDER LAW* 139, 140-41 (A. Sutherland ed. 1956).

Against a successful armed insurrection, only a more forceful counter-insurrection will be valid, and this cannot positively be made by the Supreme Court who would not be so naive as to quell an insurrection by means of a worthless declaration of principles. . . . Against the historical fatalism of military uprisings the Judicial Power is of no avail. This is the truth of the matter and it cannot be denied by such as seem to think that instead of an arsenal of Law books, the Supreme Court has an arsenal of shrapnels and torpedoes available.¹³⁹

By conditioning judicial recognition of a *de facto* regime upon its promise to respect constitutional guarantees the judiciary is doing all that it can to preserve juridical order during revolutionary chaos. No causal relation between the frequency of *golpes* in Argentina and the practice of the nation's Supreme Court in recognizing *de facto* regimes has ever been established.

Q—Isn't a court asking for trouble by pretending to be a *de jure* institution in a *de facto* regime? I can't think of a clearer example of what ought to be a non-justiciable political question than whether a revolutionary movement is in control of sufficient force to assure peace and order in the nation.

A—A court might be headed for even more trouble if it refused to treat a revolutionary government as the legitimate government of the nation.

Q—Have Latin American courts developed a "political question doctrine" to avoid potentially damaging conflicts with other branches of government?

A—Some Latin American courts have highly developed techniques for avoiding certain types of politically perilous questions. For example, except for passing on the validity of *de facto* regimes, Argentina's political question doctrine resembles that of the United States Supreme Court.¹⁴⁰ Brazil's political question doctrine appears slightly narrower than that of the United States,¹⁴¹ while Mexico's is much broader.¹⁴²

In addition, most courts treat questions arising from the suspension of constitutional guarantees during states of seige as nonre-

¹³⁹ Nelson Hungria, quoted in Basilio, *Judicial Power as a Guarantee of Individual Rights: Parallel Competence of the Legislative Power and the Judicial Power*, in INTER-AMER. BAR ASSOC., PROCEEDINGS OF THE TENTH CONFERENCE 205, 211 (1957).

¹⁴⁰ S. AMADEO, ARGENTINE CONSTITUTIONAL LAW 85 (1943).

¹⁴¹ See A. WALD, DO MANDADO DE SEGURANCA NA PRÁTICA JUDICIÁRIA 202-08 (3d ed. 1968).

¹⁴² Schwarz, *Judges Under the Shadow: Judicial Independence in the United States and Mexico*, 3 CAL. W. INT'L L. J. 260, 286 (1973).

viewable political questions.¹⁴³ Conflicts are also reduced by the lack of *erga omnes* effects attributable to most judicial declarations of unconstitutionality.¹⁴⁴

Q—Doesn't the ease with which constitutional guarantees can be suspended by invocation of the state of siege render much of Latin American constitutionalism illusory?

A—There is no denying that the state of siege is much used and much abused in many Latin American countries,¹⁴⁵ but this is by no means true for all of Latin America.¹⁴⁶

Q—Is there any empirical data to support the proposition that judicial review is an effective check on unconstitutional governmental action in Latin America?

A—A recent study of the Costa Rican amparo found that the Supreme Court granted the requested relief in 15.4 per cent of the 195 cases between 1950 and 1962.¹⁴⁷ Examination of the decisions of the Colombian Supreme Court reveals that the Court invalidated, either wholly or in part, the challenged law in 100 out of the 225 popular actions decided on the merits.¹⁴⁸ And a recent study of the Mexican amparo by González Casanova found that in cases in which the Mexican President has been named as a defendant, the courts granted the requested relief in a little more than 1200 (thirty-four per cent) of the 3700 cases.¹⁴⁹

Q—But do these statistics really tell us anything significant? How important were the challenged laws or acts to the government? How many of the cases involved the same law or act? How many of the

¹⁴³ C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 89 (1948). Although Argentine courts have refused to pass on the reasonableness of the declaration of siege, they have been gradually developing a willingness to review the reasonableness of particular acts of detention or closings of periodicals effectuated during a state of siege. See e.g., Ricardo Alberto Canovi, 278 Fallos 337 (1970); *Primera Plana v. Gobierno Nacional*, 7 J.A. 301 (Ser. Cont. 1970), 138 *La Ley* 464 (Sup. Ct. 1970).

¹⁴⁴ See notes 17-27 *supra* and the text thereto.

¹⁴⁵ See note 47 *supra* and the text thereto.

¹⁴⁶ The study by the Inter-American Commission on Human Rights reveals no record of a declaration of a state of siege during 1950-1960 in four Latin American countries: Mexico, Honduras, Panama, and Uruguay.

¹⁴⁷ E. GUIER, *SENTENCIAS DE AMPARO* 2 (1969).

¹⁴⁸ See 1 & 2 N. PINEDA, *JURISPRUDENCIA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA* (1963). According to this study, there were only 329 cases from 1910 through 1962 involving en banc constitutional decisions of the Colombian Supreme Court. Three dealt with permission of the executive to leave the country, and twenty-five concerned legislation vetoed on constitutional grounds. In seventy-six of the remaining popular actions, the Supreme Court avoided the merits.

¹⁴⁹ P. GONZALEZ CASANOVA, *DEMOCRACY IN MEXICO* 21-24 (1970).

challenges to important laws were ducked on procedural grounds? How many patently unconstitutional laws were sustained? How many statutes were rewritten through judicial interpretation to avoid constitutional difficulties?

A—These questions are impossible to answer without much more sophisticated data. Certainly the percentage of cases decided against the government alone fails to convey much of the flavor of judicial review and in some instances can be quite misleading. For example, Mexican presidents are automatically included as parties in all constitutional amparo actions. That the president was named as a party is simply a formality rather than an indication that the amparo involved a matter important to the government.

A more sophisticated analysis of Mexican data appears in Carl Schwarz's article, *Judges under the Shadow: Judicial Independence in the United States and Mexico*.¹⁵⁰ After noting that the Mexican Supreme Court has been granting amparo relief in roughly half its penal cases, Schwarz astutely observes that the Court's independence in criminal matters is a mixed bag. ". . . [T]he Penal Chamber, more readily than the Administrative Chamber, appears to withdraw to its 'passive virtues' when confronted with politically sensitive issues."¹⁵¹ Thus, when confronted with challenges to the constitutionality of the controversial "social dissolution" law or the confinement of hundreds of students without trial after civil disturbances in 1968, the Mexican Supreme Court and the lower courts denied amparo petitions.¹⁵²

On the other hand, in ordinary day-to-day Mexican criminal proceedings, there is much evidence that amparo proceedings provide a vitally important means for correcting errors and abuses.¹⁵³ And in areas such as challenges by small farmers to confiscatory actions of agrarian reform commissions, taxation, or rights of aliens, the Mexican courts have broadly upheld challenges to governmental arbitrariness.¹⁵⁴

Q—Isn't the flavor of judicial review in Mexico quite different from that of the United States, or even Argentina or Brazil?

A—The flavor is quite distinct. Rarely, if at all, have the Mexican federal courts used their amparo jurisdiction to fashion important sub-

¹⁵⁰ 3 CAL. W. INT'L L. J. 260 (1973).

¹⁵¹ *Id.* at 322-23.

¹⁵² *Id.* at 323-24.

¹⁵³ *Id.* at 325.

¹⁵⁴ *Id.* at 332.

stantive limitations upon governmental power such as the U.S. courts have done with due process, equal protection, or the commerce clause. Almost all of the case law rules (*jurisprudencia*) laid down by the Mexican Supreme Court deal with narrow, technical aspects of constitutional and statutory interpretation. Political realities and a more passive judicial tradition have precluded a creative, policy-making role for Mexican judges.¹⁵⁵

Q—The reputation of the Mexican judiciary for corruption is notorious.¹⁵⁶ How can one be confident that cases which appear to be examples of judicial independence are not simply the result of judicial corruption?

A—One cannot, except perhaps on the Supreme Court level. Of course, the problem of corruption is by no means limited to Mexico, or even Latin America. Recent investigations of the judiciary in parts of the United States have uncovered similar problems. Nevertheless, the problem appears to be more overt in certain Latin American countries. For example, the judicial system in Colombia practically broke down completely during the early 1960's because of corruption and inefficiency. Formal charges were filed against fourteen of the twenty members of the Supreme Court for failing to discharge their judicial responsibilities.¹⁵⁷ One simply has to look closely at individual cases.

Q—But even if one looks at specific cases involving matters obviously important to the government, it is difficult to reach any general conclusions about judicial independence and the effectiveness of judicial review. For example, take a recent Brazilian *cause célèbre* involving government censorship of the press. In 1971 a suit was brought by the MDB, the Brazilian opposition political party, to compel the Procurator General to institute a representation action challenging the constitutionality of a 1970 decree-law imposing prior censorship of books and periodicals. The Supreme Federal Tribunal denied the

¹⁵⁵ See R. Baker, *supra* note 7, at 253-54.

¹⁵⁶ Professor David Helfeld, former dean of the University of Puerto Rico Law School, candidly observed in a recent article:

A pervasive characteristic of the Mexican legal system is the extent of corruption. . . . Corruption starts at the federal level and permeates large segments of the political and judicial structure. Bribery, in the form of gift-giving, is part of the national political tradition, and only supreme-court justices are relatively immune to its effects. . . . The net effect of this pervasive corruption is that a significantly large number of cases are not judged on their own merits, short of a supreme-court decision. *Law and Politics in Mexico*, in ONE SPARK FROM HOLOCAUST: THE CRISIS IN LATIN AMERICA 81, 91 (E. Burnell ed. 1972).

¹⁵⁷ S. WURFEL, FOREIGN ENTERPRISE IN COLOMBIA: LAWS AND POLICIES 296-302 (1965).

requested relief,¹⁵⁸ which provoked the dramatic resignation of Aucto Cardoso, one of the ministers appointed by the military in 1965.¹⁵⁹

On the surface this case would seem to indicate that the Brazilian high court has been so cowed by the military that judicial review has become ineffective. But such an interpretation is much too simple. The decision turned on a procedural issue: whether the Procurator General had to institute a representation proceeding any time any person requested him to do so. Quite properly the Tribunal held that the representation was committed to the discretion of the Procurator General. This was consistent with previous decisions of the Tribunal.¹⁶⁰ And a contrary holding would have deprived the Tribunal of its "passive virtue"-type techniques for avoiding constitutional clashes,¹⁶¹ as well as the benefit of opinions by the lower courts. Nor did the Tribunal foreclose the possibility of eventual judicial review of the decree-law; this was simply left to ordinary proceedings or writ of security.¹⁶²

Q—Are there, then, any definite conclusions one can reach about judicial review in Latin America?

A—Perhaps only some tentative conclusions can be offered. Judicial review clearly functions as an important check upon unconstitutional governmental action in a number of Latin American countries, though in others it functions not at all. It is probably no accident that judicial review has been most important in the federal systems of Argentina, Brazil, and Mexico, for unchecked unconstitutional action by state or regional governments poses a serious threat to the continuation of a federal system. One very important role of judicial review is to ensure that state or provincial governments conform to the federal constitution.

¹⁵⁸ *MDB v. Procurador-Geral da República, Reclamação No. 349, 59 R.T.J. 333 (Sup. Fed. Trib. en banc 1971).*

¹⁵⁹ In resigning, Cardoso stated publicly:

I believe that with the present decision the direct action for the declaration of unconstitutionality is dead. In the conditions now prevailing in the country, no private party will dare contest the constitutionality of laws of a political nature. One can do that only through a representation via the Procurator General. And he has become the person who decides . . . whether the representation will proceed. This is the equivalent to making the Executive the judge of the constitutionality of the laws

Quoted in the *Estado de São Paulo*, March 11, 1971 at 1, cols. 2-4.

¹⁶⁰ *E.g., Engenharia Souza e Barker Ltda. v. Senado Federal, RMS 16.512, 38 R.T.J. 5, 20 (1966) (statement of Victor Nunes Leal, author of the proposal to expand representation).*

¹⁶¹ See generally Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40 (1961).

¹⁶² 38 *R.T.J.* at 350.

Judicial review is a fragile and sensitive institution. The Latin American experience shows the delicacy with which it must be exercised and the potentiality for disastrous conflicts that its exercise entails. The experience of Argentina and Brazil in particular suggests that courageous judges can make a substantial contribution in nudging governments of doubtful legitimacy towards greater commitment to underlying constitutional values, but that they are ultimately doomed to failure without clear societal commitment to the constitutions the courts are seeking to preserve.