

4-13-2020

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Recommended Citation

Lalian, Samantha (2020) "Classifying Systems of Constitutional Review: A Context-Specific Analysis," *Indiana Journal of Constitutional Design*: Vol. 5 , Article 1.

Available at: <https://www.repository.law.indiana.edu/ijcd/vol5/iss1/1>

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Classifying Systems of Constitutional Review: A Context-Specific Analysis

SAMANTHA LALISAN*

“Access to the court is perhaps the most important ingredient in judicial power, because a party seeking to utilize judicial review as political insurance will only be able to do so if it can bring a case to court.”¹

INTRODUCTION

Europe’s experience with democratically elected fascist regimes leading to World War II is perhaps one of the most important developments for the establishment of new constitutional democracies. Post-war constitutional drafters sought to establish fundamental constitutional rights and to protect those rights through specialized constitutional courts.² Many of these new democracies entrenched first-, second-, and third-generation rights into the constitution and included provisions to allow individuals access, direct or indirect, to the constitutional court to protect their rights through adjudication. In the wave of constitutionalism in post-war Europe, constitutional courts were “seen as protecting democracy.”³

One of the attractions of specialized constitutional courts,⁴ as opposed to the American model of constitutional review in which any court can decide questions of constitutionality,⁵ is the implied elevation and importance of the constitution. That is, by creating a special body that

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¹ ANDREW HARDING, PETER LEYLAND, & TANIA GROPPI, CONSTITUTIONAL COURTS: FORMS, FUNCTIONS AND PRACTICE IN COMPARATIVE PERSPECTIVE IN CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 20 (Andrew Harding & Peter Leyland eds., 2009).

² Enrique Guillén López, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L. REV. 529, 530 (2008) (“These countries simultaneously reintroduced constitutional democracy . . . [t]he constitutional courts in these concentrated-control systems are considered fundamental to the political stability of their respective constitutions because they were, to a large extent, responsible for the social acceptance of these texts.”).

³ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 2 (2003).

⁴ Constitutional courts are specialized courts with “authority to adjudicate questions of constitutional interpretation or to review legislation” and that are separate from the judiciary. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1672 (2004); ALEC STONE SWEET, CONSTITUTIONAL COURTS, OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 2 (2012). The founding intellectual ancestor of constitutional courts is Hans Kelsen, the first Chief Justice and designer of the Austrian Constitutional Court. *Id.*

⁵ Constitutional Courts emerged more than a century after the American model of constitutional review was established. See Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT’L J. CON. L. 44 (2007).

adjudicates questions of constitutionality, the constitution is seen as distinct and important. However, if the constitutional review occurs at all levels, there is a risk of “dragging the prestige of the constitution down to the level of the adjudicators in the public eye.”⁶

Interestingly, developments in Latin American constitutional adjudication have brought the constitution down to the level of the adjudicators while maintaining the courts’ prestige.⁷ Latin American countries have largely adopted constitutional courts, but with their own twist. The region is a mosaic. Almost all countries in the region have adopted, not only the European constitutional court model, but have also incorporated aspects of the American model in their judiciary.⁸ For instance, although constitutional courts are largely considered a centralized model of constitutional review, several Latin American countries have adopted the centralized model with aspects of the decentralized model and, accordingly, allow ordinary courts to hear cases on constitutional questions. Furthermore, the prestige of the constitution and that of constitutional courts has, arguably, been upheld as citizens have increasingly used provisions that permit direct access to the constitutional court to protect their fundamental rights.⁹

The mixture of the American and European models of constitutional review has undoubtedly created difficulties when trying to categorize the countries into types of constitutional review.¹⁰ The traditional mode of classification relies substantially on the European model of

⁶ *Id.* at 10.

⁷ See generally Justin O. Frosini & Lucio Pegoraro, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification*, 3 J. COMP. L. 39 (2008).

⁸ See generally Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 J. DEMOCRACY 125, 128 (“There is no single, incontrovertibly best way to structure a constitutional court. Constitutional courts vary among themselves.”).

⁹ For example, the Colombian Constitutional Court issued 1,340 tutela action decisions in 2000. Colombian Constitutional Court, Statistics 1992–2018, <http://www.corteconstitucional.gov.co/relatoria/estadisticas.php>.

¹⁰ See Frosini & Pegoraro, *supra* note 7, at 39 (“Attempting to classify the constitutional adjudication systems in Latin America is by no means an easy task given the ‘creativity’ that has been used in developing them. Very rich and diverse approaches have been taken and one would commit a gross generalization if one were to talk of a ‘Latin American model of constitutional justice.’”).

constitutional review as the starting point and, thereby, does not accurately capture constitutional review in Latin American countries. A quick survey of “classified” Latin American countries tends to produce the limited and pervasive category of “mixed.”¹¹ Indeed, the traditional classification parameters understandably focus on jurisdictional dichotomies as the salient point of comparison as European constitutional courts are most easily distinguished in this manner, but grossly over-generalize for the purposes of Latin American constitutional court classification.¹²

Modern constitutional drafters and advisors increasingly use judicial review classifications and the current model for classification does not accurately capture constitutional review in Latin America. This paper proposes context-specific classification that can accurately capture constitutional review in the Latin American region. Specifically, this paper argues that the context-specific analysis suggests that the more salient point of classification in Latin America is that of access mechanisms to constitutional courts. As such, the paper proceeds in four parts: Part I examines the traditional model of classification in Europe and focuses on the Spanish and German direct access mechanisms. Part II explores the mosaic Latin America with a particular focus on the Colombian, Brazilian, and Mexican direct access mechanisms. Part III argues that a context-specific analysis that starts categorizing judicial review with Latin America draws out access to constitutional courts and objects of review as the most salient point for classification. The Part also considers how European countries would be classified in light of the Latin American classifications. Finally, Part IV contemplates lessons for future classification in light of the importance of context-specific analyses.

¹¹ See, e.g., European Commission for Democracy Through Law, Study on Individual Access to Constitutional Justice, CDL-AD (2010) 039 rev., at 7 (2011) [hereinafter Venice Commission].

¹² Cf. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL LEGAL STUD. 173, 175–76 (2009) (“More attention needs to be paid to the role of courts in the troubled or partial democracies that are the norm in much of the developing world, including Latin America. It is in new democracies, after all, that scholars can observe the birth of institutions such as constitutional courts.”).

I. THE TRADITIONAL CLASSIFICATORY LENS

Difference in jurisdiction is the conventional dichotomy that has been used to classify constitutional adjudication. The main distinction in jurisdiction is whether the country has a “centralized” or “decentralized” system of adjudication. The United States is typically identified as the primary example of “decentralized” review because the United States Supreme Court does not have exclusive jurisdiction over cases regarding constitutional questions. Instead, all American courts may hear cases that involve constitutional questions, and the Supreme Court can hear appeals of those cases. In contrast, a centralized system for constitutional review means that only a specialized court may hear cases regarding constitutional questions.¹³ Indeed, the founding intellectual ancestor of constitutional courts, Hans Kelsen, stated that constitutional courts are specialized courts with “authority to adjudicate questions of constitutional interpretation or to review legislation” and that are separate from the judiciary system.¹⁴

The focus on jurisdiction to classify constitutional courts in European countries has been largely successful.¹⁵ After the establishment of the Austrian Constitutional Court in 1920, several countries copied it and by the 1970s nearly all Central and Eastern European countries had established a constitutional court.¹⁶ Interestingly, these constitutional courts were established following a period of authoritarian rule because the existing courts were perceived as “unable to

¹³ It should also be noted that whether a country has a centralized or decentralized system is also related to whether the country has a common or civil law system. Civil law systems tend to have a centralized system of review and thus constitutional courts. *See* Garlicki, *supra* note 5, at 44.

¹⁴ Harding, Leyland, Groppi, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective* 4, *in* *Constitutional Courts: A Comparative Study* (Andrew Harding & Peter Leyland, eds. 2009); ANDREW HARDING, *CONSTITUTION BRIEF: THE FUNDAMENTALS OF CONSTITUTIONAL COURTS*, INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE 1 (2017). For example, the Spanish Constitution even lists the Constitutional Court separately from ordinary judicial functions. *See* Spanish Const. Parts VI and IX.

¹⁵ Constitutional scholars have argued that some European countries should be considered “hybrid” rather than centralized. For example, it is argued that Italy is a “hybrid” system because it does not conform to the Kelsenian model for constitutional review as ordinary judges may petition the Constitutional Court. *See* Frosini and Pegora, *supra* note 7, at 42.

¹⁶ *See* Venice Commission, *supra* note 11, at 12.

offer adequate guarantees of structural independence and intellectual assertiveness.”¹⁷ Globally, since 1980, 66 systems have adopted some form of judicial review and 47 specifically adopted a centralized model of review.¹⁸ The following examines access and jurisdiction in the Spanish and German constitutional courts.

A. *Spanish Constitutional Review*

The Spanish Constitutional Court played a central role in the country’s period of transition (*La Transición*) to democracy following the end of the Franco dictatorship (1939).¹⁹ Indeed, the framers of the Constitution created the Court to be the “supreme interpreter of the Constitution” with jurisdiction over the entire country.²⁰

The Constitution mandates that the Constitutional Court guarantee the supremacy of the Constitution through its judicial processes, namely: appeals challenging the constitutionality of legislation and questions of constitutionality referred by ordinary courts. Specifically, the Court has jurisdiction over conflicts of jurisdiction between self-governing communities and the state,²¹ appeals regarding provisions adopted by self-governing communities,²² and, importantly, individual appeals for protection (*recurso de amparo*).²³

Amparo is one of the main powers accorded to the Constitutional Court. It allows individuals to seek protection of their constitutional rights against violations by legislation,

¹⁷ Garlicki, *supra* note 5, at 45.

¹⁸ Tom Ginsburg, *Economic Analysis and the Design of Constitutional Court*, 3 THEORETICAL INQUIRIES L. 49, 57 (2002).

¹⁹ Violeta Ruiz Almendral, Brief on the Remedy for the Protection of Individual Rights before the Spanish Constitutional Court (recurso de amparo), VENICE COMMISSION 3 (May 13, 2015), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2015\)009-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)009-e).

²⁰ Organic Law 2/1979 on the Constitutional Court, art. 1; *see also* Spanish Const. art. 161; Lopez, *supra* note 2, at 540.

²¹ Spanish Const. art 161(1)(c).

²² *Id.* art 161(2).

²³ *Id.* art 161(1)(b).

omissions, actions by public officials, and judicial decisions by lodging a complaint with the Court.²⁴ The scope of the procedural protection is quite broad:

The appeal for constitutional protection shall be available in accordance with the provisions of this Law, against violations and freedoms referred to in the previous paragraph resulting from provisions, legal enactments, omissions or flagrantly illegal actions (*via de hecho*) by public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as by their officials or agents.²⁵

The right to file an appeal for protection with the Constitutional Court requires that the individual seeking protection first exhaust all judicial remedies available because the ordinary courts are considered the “first guarantors in the legal system.”²⁶ In practice, the Constitutional Court is a “special court of appeals”²⁷ when non-constitutional and ordinary legal means could not repair the violated fundamental rights.²⁸ For example, if an administrative decision is challenged, the petitioner must exhaust all ordinary legal means through the predetermined administrative channels before filing an amparo action before the Constitutional Court.²⁹ In addition, the petition must provide “notification or certificate of the [lower court] decision that terminated the judicial or administrative proceedings.”³⁰ Furthermore, the appellate function of the Constitutional Court has complicated its independent relationship from ordinary judicial functions. Specifically, the

²⁴ *Id.* art. 162. There are three types of amparo: appeals against parliamentary decisions, against governmental and agency decisions, and against judicial decisions. Constitutional Court of Spain, Amparo (Appeal for Constitutional Protection of Fundamental Rights), <https://www.tribunalconstitucional.es/en/tribunal/Composicion-Organizacion/competencias/Paginas/04-Recurso-de-amparo.aspx>; Tribunal Constitucional at 4 <http://www.tribunalconstitucional.es/en/jurisprudencia/InformacionRelevante/Folleto-divulgativo-EN.PDF>.

²⁵ Organic Law 2/1979 on the Constitutional Court, art. 41.2

²⁶ Tribunal Constitucional de Espana, 26 Cuestiones Basicas sobre el Recurso de Amparo Constitucional 9 (2018); *see also* Almendral, *supra* note 19, at 5.

²⁷ Victor Ferreres Comella, *The Spanish Constitutional Court: Time for Reforms*, 3 J. COMP. L. 22, 29 (2008); Constitutional Court of Spain, Amparo, <https://www.tribunalconstitucional.es/en/tribunal/Composicion-Organizacion/competencias/Paginas/04-Recurso-de-amparo.aspx>.

²⁸ *See* Tribunal Constitucional de Espana, 26 Cuestiones Basicas sobre el Recurso de Amparo Constitucional 9 (2018).

²⁹ Organic Law 2/1979 on the Constitutional Court, art. 43; Tribunal Constitucional, Conferencia de Tribunales Constitucionales Europeos: Ponencias Españolas 418 (2007), <https://www.tribunalconstitucional.es/en/publicaciones/Publicaciones/Coedicion-TCEuropeos.pdf>.

³⁰ Organic Law 2/1979 on the Constitutional Court, art. 49(2).

Court may only question whether there was an infringement of a fundamental right in the case, rather than whether the ordinary court correctly decided the case on a factual and legal basis. These murky lines between what the ordinary court decides and what the Constitutional Court may consider have been cause for confusion.³¹

In addition to the exhaustion requirement and considering the dangers of overburdening the Court,³² petitioners must demonstrate the “special constitutional relevance” (*especial transcendencia constitucional*) of his or her claim.³³ That is, the violation of a constitutional right is not enough to justify an amparo appeal before the Constitutional Court, the appeal must also have a special significance. The Court determines the appeals’ significance with regard to “its relevance for the interpretation and application of the Constitution, or for the effectiveness thereof, and for determining the content of scope of fundamental rights.”³⁴

B. German Constitutional Review

Modeled after the Austrian Constitutional Court in the 1920s, the German Constitutional Court was the first established specialized constitutional court in postwar Europe and was meant to be the most important judicial instrument that would uphold the superiority of the new German Constitution, the Basic Law.³⁵ Following the Austrian model, the German Court exercises centralized review which means that it is the only body that interprets the Basic Law.³⁶ While its

³¹ Comella, *supra* note 27, at 30. However, “from a procedural perspective, it has never been possible to provide for a truly genuine separation of jurisdictions; in almost all countries that decided to establish a separate constitutional court, this court’s powers eventually intervened in some areas traditionally controlled” by other courts. Garlicki, *supra* note 5, at 47.

³² See TRIBUNAL CONSTITUCIONAL, CONFERENCIA DE TRIBUNALES CONSTITUCIONALES EUROPEOS: PONENCIAS ESPAÑOLAS 418 (2007), <https://www.tribunalconstitucional.es/en/publicaciones/Publicaciones/Coedicion-TCEuropeos.pdf>.

³³ Organic Law 2/1979 on the Constitutional Court, art. 50.

³⁴ Organic Law 2/1979 on the Constitutional Court, art. 50.

³⁵ Garlicki, *supra* note 5, at 50.

³⁶ German Const. art. 93(1)(1).

predecessor under the Weimar Republic, the Staatsgerichtshof, was only granted jurisdiction to resolve federal disputes, the new Constitutional Court was given broad competence to hear disputes between the Lander and the federal government, cases regarding the constitutionality of legislation, disputes between federal organs, and individual constitutional complaints.³⁷

The Basic Law did not include a constitutionally guaranteed right of direct access to the Constitutional Court (via the constitutional complaint or *verfassungsbeschwerde*) until 1968 as a constitutional amendment.³⁸ Now, this form of complaint is likely the most popular access mechanism in the Court as over 6,000 constitutional complaints are filed every year.³⁹ In fact, over 95% of the Court's proceedings are hearings on constitutional complaints. Any natural or legal person may lodge a constitutional complaint in the Constitutional Court "stating that their fundamental rights or certain rights that are equivalent to fundamental rights have been violated by German public authority."⁴⁰ Indeed, the complaint is meant to be "an extraordinary remedy open to the citizen with which he [or she] may challenge public interference in his basic constitutional rights."⁴¹ In practice, however, the requirements leading up to the filing of the complaint undermine the notion of an extraordinary remedy.

³⁷ Stefan Oeter, *Federal Republic of Germany*, in A GLOBAL DIALOGUE ON FEDERALISM: LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 149 (Katy LeRoy & Cheryl Saunders eds., 2006).

³⁸ Before the constitutional amendment, the German government passed the Federal Constitutional Court Act of 1951 to allow for constitutional complaints. WERNER HEUN, CONSTITUTIONAL SYSTEMS OF THE WORLD: THE CONSTITUTION OF GERMANY 173 (2011).

³⁹ See Constitutional Complaint, The Federal Constitutional Court, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html.

⁴⁰ Constitutional Complaint, The Federal Constitutional Court, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html. "Public authority" has been interpreted to mean direct and indirect state authority by legislative, executive, and judicial powers. See ALFRED RINKEN, THE FEDERAL CONSTITUTIONAL COURT AND THE GERMAN POLITICAL SYSTEM IN CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT (Ralf Rogowski & Thomas Gawron eds., 2002).

⁴¹ Rinken, *supra* note 40, at 66.

The Court has actively applied procedural requirements to permit flexibility in granting and restricting access. Although anyone may file a constitutional complaint against a public authority, the act of public authority must have had some legal effect that led to a legal violation of the complainant's fundamental rights. For instance, a constitutional complaint filed against a foreign policy decision that has no domestic legal effect on the complainant does not satisfy this requirement.⁴² The constitutional complaint must also affect the complainant "individually, presently and directly with regard to his or her fundamental rights."⁴³ Lastly, the constitutional complaint is only admissible before the Court once all other legal remedies are exhausted.⁴⁴

Importantly, this exhaustion requirement highlights the relationship, and potential tension, between the ordinary courts and the Constitutional Court. To satisfy the exhaustion requirement, the petitioner must seek non-constitutional legal avenues in the ordinary courts and appeal unfavorable rulings within the ordinary courts.⁴⁵ In other words, the ordinary courts do not hear the constitutional issues in a case and are limited to interpret non-constitutional law. However, if there is an underlying fundamental rights question in a case before the ordinary court, the court must take the rights issue into account.⁴⁶ In practice, the petitioner must raise all motions in the proceedings before the ordinary courts. For example, if the petitioner does not raise an objection on the taking of evidence before the ordinary courts, she cannot raise this issue in her constitutional

⁴² HEUN, *supra* note 37, at 174.

⁴³ Constitutional Complaint, The Federal Constitutional Court, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html; *see also*, Gianluca Gentili, *A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America*, 29 PENN ST. INT'L L. REV. 719–20 (2011).

⁴⁴ German Const. art. 94(2); HEUN, *supra* note 37, at 175; Rinken, *supra* note 40, at 67. For example, in a 2012 case, the Court found that the applicant did not fulfill the exhaustion requirement because she did not seek recourse in lower courts. GER-2017-2-012 available at:

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

⁴⁵ OLIVER KLEIN, FCC RELATION TO GERMAN ORDINARY COURTS 2; Federal Constitutional Court Act § 90(2), http://www.gesetze-im-internet.de/bverfgg/_90.html.

⁴⁶ *See* KLEIN, *supra* note 45, at 4 (using the example of a person's right to life and physical integrity).

complaint.⁴⁷ Furthermore, the petitioner must appeal her case all the way to the federal courts, which are considered the “supreme ordinary courts.”⁴⁸

If a constitutional complaint is subsequently filed with the Constitutional Court, the Court may only review constitutional questions, not the federal courts’ interpretation or application of non-constitutional law. Indeed, the Court is limited to reviewing only whether the review in the ordinary courts’ ruling follows the Constitution.⁴⁹ Consequently, if the Court finds that the Basic Law was violated, it may reverse the ordinary court decision, void a law, and remand the case to the competent ordinary court.⁵⁰ Lastly, not all complaints are admitted to the Court for decision. If the complaint is found to be of general constitutional significance, or it appears necessary to avoid a grave disadvantage, then it will be admitted for decision.⁵¹

The requirements for filing a *recurso de amparo* in Spain and *verfassungsbeschwerde* in Germany are arguably to ensure that the courts can adequately fulfill their judicial functions without being overburdened⁵² and to filter out frivolous complaints. This is of course an important mechanism as other democracies have largely struggled to ensure timely adjudication and a functioning judiciary.⁵³ The German and Spanish constitutional courts are similar in jurisdiction (centralized) review and access (constitutional complaint), and that jurisdiction classification

⁴⁷ *Id.*

⁴⁸ *Id.* at 2–3.

⁴⁹ *Id.* at 4.

⁵⁰ Federal Constitutional Court, Constitutional Complaint, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html.

⁵¹ Federal Constitutional Court Act § 90(2).

⁵² Rinken, *supra* note 40, at 68 (“Ironically, the main problem with the [German] constitutional complaint procedure lies in its success! . . . The sheer number of constitutional complaints submitted has added to the [Constitutional] Court’s notorious workload – to the point at which its ability to fulfill its judicial function was threatened.”); *see also* Alec Stone Sweet, Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation), Faculty Scholarship Series, Paper 84, 87 (stating that the full constitutional complaint appeals in Spain and Germany “comprise, by far, the largest class of complaints”).

⁵³ *See, e.g.*, India Supreme Court Judges: Democracy is in Danger, BBC NEWS (Jan. 12, 2018), <https://www.bbc.com/news/world-asia-india-42660391>.

suffices to adequately categorize several European countries.⁵⁴ However, jurisdiction alone is insufficient to categorize Latin America.

II. THE MOSAIC LATIN AMERICA

If the traditional dichotomy of classifying constitutional review based on jurisdiction were used in Latin America, then all countries in that region would be classified as “hybrid” as they all, to some degree or another, have no clear pure decentralized or centralized system.⁵⁵ Indeed, the diversity in constitutional review in the region is not adequately captured by the traditional dichotomy. The following section examines jurisdiction and access in Colombia, Brazil, and Mexico to demonstrate the inadequacy of using jurisdiction, rather than access, to categorize Latin American countries and suggests that access is a better method for classification to classify European and Latin American countries.

A. *Brazilian Constitutional Review*

Heavily inspired by the American model of judicial review, the 1891 Republican Constitution first established a decentralized system of review with a Supreme Court, rather than a constitutional court.⁵⁶ Interestingly, the American influence on Brazilian judicial review was evident even when the country was under a monarchy. In 1889, the last Brazilian Emperor, Dom Pedro II said:

Carefully study the organization of the Supreme Court of Justice of Washington. It seems to me that the secret of the good functioning of the North American Constitution lies in the functions of its Supreme Court . . . and I believe that if we could create a tribunal like the North American one and confer to it the attributions of the moderator power of our Constitution, the latter would benefit.⁵⁷

⁵⁴ Most European countries have centralized systems. (refer to Venice Commission list and list out all EU countries for impact).

⁵⁵ Frosini & Pegora, *supra* note 7, at 42.

⁵⁶ Conrado Hubner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT'L L. 449, 444–45 (2005).

⁵⁷ Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUD. L. REV. 99, 104 (2006).

However, by 1965, aspects of centralized review were adopted, and judicial review became more “mixed,” rather than strictly decentralized.⁵⁸ Specifically, the Writ of Representation, which granted the Attorney General exclusive standing in the Supreme Court to challenge the constitutionality of legislation abstractly, began the centralization of review in Brazil.⁵⁹ The Writ was later expanded to include additional actors that could directly petition the Court.⁶⁰

The main function of the Court is to “guard and interpret the Constitution”⁶¹ and thereby decide matters regarding questions of constitutionality. The mixed nature of judicial review has resulted in a wide range of procedural paths by which citizens and legal and political entities can raise questions of constitutionality of the acts of public authority.⁶² For example, true to the centralized aspects of the system, the Court engages in abstract review through four types of procedures: the challenge of breach of fundamental precept, direct challenge of unconstitutionality, declaratory action of constitutionality, and direct challenge of unconstitutionality by omission.⁶³ These access mechanisms may generally only be used by public officials and are typical of the model of centralized review that Kelsen advocated.⁶⁴

Importantly, the diffuse aspects of Brazilian judicial review are most clearly demonstrated in the access mechanisms that are constitutionally granted to individual citizens: habeas corpus, *mandado de segurança* (writ of security), habeas data, *mandado de injunção*, *ação popular* and

⁵⁸ See Justice José Antonio Dias Toffoli, *The Evolving Role of Brazil’s Supreme Court*, BRAZIL INSTITUTE (2016), https://www.wilsoncenter.org/sites/default/files/bi_rule_of_law-toffoli_finalv2.pdf.

⁵⁹ Abstract review means that the case is not tied to a particular set of case facts and there is no actual conflict. Santa Cruz Oliveira, *supra* note 57, at 106; Mendes, *supra* note 56, at 455.

⁶⁰ Santa Cruz Oliveira, *supra* note 57, at 107.

⁶¹ For a discussion on the *Supremo Tribunal Federal’s* role as a rights protector, see Diana Kapiszewski, *Power Broker, Policy Maker, or Rights Protector? The Brazilian Supremo Tribunal Federal in Transition in COURTS IN LATIN AMERICA* (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

⁶² Toffoli, *supra* note 58, at 3.

⁶³ Brazilian Federal Supreme Court, *About the Court: Judicial Review*, http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120199.

⁶⁴ See Toffoli, *supra* note 58, at 3.

ação civil publica.⁶⁵ The *mandado de segurança*, perhaps the most expansive access mechanism, is a form of direct access and decentralized review as it may be filed before ordinary courts and the Supreme Court for constitutional review. The writ is meant to protect rights that are “liquid and certain”⁶⁶ and not protected under habeas corpus “when the party responsible for the illegality or abuse of power is a public authority or a [government] agent.”⁶⁷ The writ has preferential status on the courts’ docket and the judge must make a decision within thirty days of filing.⁶⁸ In practice, the writ is used to obtain a preliminary injunction that will suspend the challenged act or procedure until the case is decided.⁶⁹ The Supreme Court hears, directly, petitions on writs of security that challenge acts by the President, Executive Committees of the Chamber of Deputies and the Federal Senate, the Tribunal of Accounts of the Union, Procurator-General, and the Supreme Court.⁷⁰ The Supreme Court also hears ordinary appeals of writs of security that were originally decided and denied by the Superior Tribunals.⁷¹

⁶⁵ Brazilian Federal Supreme Court, About the Court: Diffuse Constitutional Control, http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=123036.

⁶⁶ Brazilian Const. art 5(LXIX). The “liquid and certain” requirement means that “the petitioner’s right must be manifestly clear on the basis of documents attached to the petition, unless a needed document is in the hands of the respondent authority.” Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009, 1024 (2011).

⁶⁷ Constituição Federal art. 5(LXIX) (Braz.) (“Conceder-se-á mandado de segurança para proteger direito líquido e certo, não amparado por habeas-corpus ou habeas-data, quando o responsável pela ilegalidade ou abuso de poder por autoridade pública ou agente de pessoa jurídica no exercício de atribuições do poder público”). (Trans: “A writ of security (mandado de segurança) shall be issued to protect a liquid and certain right not protected by habeas corpus or habeas data, when the party responsible for the illegality or abuse of power is a public authority or an agent of a legal entity performing governmental duties” Notably, the mandado de segurança cannot be used against individuals.”) See Allan R. Brewer-Carías, *Leyes de Amparo de América Latina: Con un Estudio Preliminar sobre El Amparo en el Derecho Constitucional Comparado Latinoamericano* 57 (Editorial Jurídica Venezolana Internacional, 2016) (“el mandado de segurança solo se puede intentar contra el Estado y no contra personas individuales, se considera que el estado mismo o sus dependencias no pueden intentar el recurso.”).

⁶⁸ Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009, 1025 (2011).

⁶⁹ *Id.* See generally Anyda Marchant, *Brazilian Writ of Security (Mandado de Segunranca) and Its Relationship to the Extraordinary Remedies of the Anglo-American Common Law: An Object Lesson in Latin American Law Making*, 19 TUL. L. REV. 213 (1944).

⁷⁰ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102(I)(d) (Braz.).

⁷¹ *Id.* art. 102(II)(a); see also Law Library of Congress, Brazil: Legal Research Guide – The Judicial Branch, https://www.loc.gov/law/help/legal-research-guide/brazil-judicial-branch2_2011-005662_RPT.pdf.

B. Colombian Judicial Review

Often called the “constitutional watch guard” and “guardian of constitutional rights,” the Colombia Constitutional Court was created in 1991 when the country’s new Constitution was ratified amid issues of rampant violence, an overly powerful president, and government failure to protect individual rights.⁷² Unlike the gradual development of the Brazilian system from a purely decentralized system to a mixed system, Colombia adopted a mixed system of review from the very beginning.⁷³ Specifically, the Colombian Constitution mixes a Constitutional Court, which is typical in centralized systems, with a decentralized form of judicial review, the *acción de tutela*.

Acción de tutela is a preferential and summary procedure lodged by an individual seeking immediate protection of her fundamental constitutional rights.⁷⁴ The Constitution states that “[e]very individual may claim legal protection before the judge, at any time or place” and the Court must address the tutela action within ten days of the request.⁷⁵ However, the action may only be lodged “when the affected party does not have access to other means of judicial defense, except when [it] is used as a temporary device to avoid irreversible harm.”⁷⁶

Tutela actions are heard in three stages. The tutela first goes to an ordinary court with the possibility for appeal to a higher-ranking judge within the same judiciary.⁷⁷ The appellate and trial court decisions are automatically sent to the Constitutional Court, which has discretion to select the cases it wants to review (“a certiorari-like discretionary power”).⁷⁸ The cases are selected by a

⁷² Schor, *supra* note 12, at 186.

⁷³ Frosini & Pegora, *supra* note 7, at 45.

⁷⁴ Colombian Constitution art. 86. A note for consistency, as is typical in the Latin American mosaic, Colombia refers to *recurso de amparo* as *acción de tutela*. See Juan Carlos Rodríguez-Raga, *Strategic Deference in the Colombian Constitutional Court, 1992-2006*, in *COURTS IN LATIN AMERICA* 81, 82 (Gretchen Helmke & Julio Ríos-Figueiroa eds., 2011).

⁷⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

⁷⁶ *Id.*

⁷⁷ MANUEL JOSE CEPEDA ESPINOSA & DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES* 13 (2017)

⁷⁸ *Id.*; see also ALLAN R. BREWER-CARÍAS, *LEYES DE AMPARO DE AMÉRICA LATINA* 43.

rotating panel of two Constitutional Court judges and the selected cases are heard by panels of three judges.⁷⁹ It is important to note, however, that although the Constitutional Court may hear tutela actions from lower courts, legislation passed in 1991 has ensured that the action not be used as a substitute for an appeal by prohibiting its use to challenge judicial decisions.⁸⁰ The Court has interpreted this restriction to apply only when the individual can apply to other judicial procedures for expedient protection of their constitutional rights.⁸¹

C. Mexican Judicial Review

The 1994 constitutional reforms led by then President Ernest Zedillo began the Mexico Supreme Courts' transformation into an institution that protects the supremacy of the Constitution. Indeed, during much of the twentieth century, the Mexican Court functioned under the thumb of “dictator-presidents” and was not, in any sense, an independent institution.⁸² The 1994 reforms, like the Brazilian Supreme Court, mixed the European and American judicial review systems.⁸³ Instead of a constitutional court with centralized review, the Mexican system includes both centralized and diffuse review.

Generally, the Constitution assigns the Supreme Court competence to hear cases on issues between federal organs and states, constitutionality of legislation, and constitutional complaints lodged by individuals. The individual complaint, or *juicio de amparo*,⁸⁴ are requests for protection

⁷⁹ See ESPINOSA & LANDAU, *supra* note 77, at 13.

⁸⁰ Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659, 684 (1992).

⁸¹ *Id.* at 684.

⁸² Schor, *supra* note 12, at 178.

⁸³ Dale Beck Furnish, *Judicial Review in Mexico*, 7 SW. J. L. & TRADE AM. 235, 244–45 (2000).

⁸⁴ “Amparo is an extraordinary recourse in the Mexican justice system, with no equivalent in the common law tradition.” Bruce Zagaris, *The Amparo Process in Mexico*, 6 U.S.-MEX. L.J. 61, 62 (1998). It has been adopted by several countries and created by Mexico lawyers Manuel Crescencio Rejón and Mariano Otero. The status of this legal recourse has even been acknowledged as fundamental for rights protection in the United Nations Declaration of Universal Human Rights. SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, QUE ES EL PODER JUDICIAL DE LA FEDERACIÓN? 40, https://www.scjn.gob.mx/sites/default/files/material_didactico/2016-11/Que-PJF.pdf. In addition, the American Convention on Human Rights states: “Every person has a right to a simple and expedient recourse or

from “[l]aws or acts issued by the authority, or omissions committed by the authority, which infringe the fundamental rights recognized and protected by [the] Constitution.”⁸⁵ There are direct and indirect amparo actions. Indirect amparos begin in district court, with the option to appeal to a higher court, and are brought against non-judicial government agents (i.e. police, public administrators) to challenge, among other things, federal or local laws, international treaties, regulations, and decrees.⁸⁶ Direct amparos are initiated in the Collegiate Circuit Courts, but may be brought directly to the Supreme Court, and challenge final judgments in lower, labor, and administrative courts.⁸⁷ There are five types of specific amparo actions: amparo as a defense of individual rights, amparo against laws, amparo questioning the legality of judicial decisions, administrative amparo, and amparo for agrarian matters.⁸⁸

For the purposes of this paper, the *amparo contra leyes*, amparo against laws is most salient as it involves individuals, rather than government entities, seeking constitutional review. It allows the individual seeking protection to request the suspension of laws that violate his or her fundamental rights, including “deprivation of life, personal liberty, deportations or banishment, and extradition.”⁸⁹ In order to lodge a complaint, the individual must show that the existence of the law she is challenging violates individual guarantees and is materially prejudicial to her interests, and the law must be in force at the time of the alleged injury.⁹⁰ The complaint is first

any other effective remedy before judges or competent tribunals, which protects them against acts that violate their fundamental rights recognized by the Constitution.” (“*Toda persona tiene derecho a un recurso sencillo y rápido o a cualquier otro recurso efectivo ante los jueces o tribunals competentes, que la ampare contra actos que violen sus derechos fundamentales reconocidos por la Constitución.*”). Inter-American Commission on Human Rights, Organization of American States, Art. 25 (1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

⁸⁵ Constitución Política de los Estados Unidos Mexicanos, art. 103, Diario Oficial de la Federación [DOF] 1917, 2015 (“Por normas generales, actos o omisiones de la autoridad que violen los derechos humanos reconocidos y las garantías otorgadas para su protección por esta Constitución.”).

⁸⁶ See SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, *supra* note 84, at 46.

⁸⁷ *Id.* at 48.

⁸⁸ See Zagaris, *supra* note 84, at 61–68.

⁸⁹ *Id.* at 61–62.

⁹⁰ *Id.* at 62.

lodged in federal district court with the option of appeals. Lastly, and importantly, the Court has held that the individual filing an amparo against laws does not need to fulfill an exhaustion requirement, which would require her to seek ordinary remedies, because the individual would have to use the remedies afforded by the very law she is challenging on a constitutional basis.⁹¹

III. A CONTEXT-SPECIFIC LENS

Latin American constitutional review presents a unique challenge when trying to classify the diverse system. The confluence of American and European influence on Latin American judicial review has made the region notoriously difficult to neatly classify.⁹² On the one hand, the traditional classifications, as demonstrated through judicial review in Spain and Germany, are generally necessary to provide standard classifications. However, the classification in the context of Latin America makes the traditional use of jurisdiction too oversimplified. Indeed, if the above examples of Brazil, Colombia, and Mexico were classified according to jurisdiction, each would be listed as “mixed.” This oversimplification pushes against the attempt to avoid, on the other hand, classifications that are too detailed.

Interestingly, the countries discussed in the previous Part seem to adopt contradictory aspects of both the American and European models of constitutional adjudication that have worked to produce some of the most active, rights protecting constitutional courts in the world.⁹³ Given the creativity in Latin America and the inadequacy of the traditional classification of jurisdiction,

⁹¹ *Id.* at 64; *see also* SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, *supra* note 84, at 43 (explaining that the exhaustion requirement is not necessary when the individual is “affected by an authoritarian act that lacks foundation” or in cases regarding deprivation of life, deportation or exile, or other acts in Article 22 of the Constitution).

⁹² Frosini and Pegora, *supra* note 7, at 39 (“Attempting to classify the constitutional adjudication systems in Latin America is by no means an easy task given the ‘creativity’ that has been used in developing them.”); Venice Commission, *supra* note 11, at 4 (“Many countries have a mixed system.”).

⁹³ ALEC STONE SWEET, CONSTITUTIONAL COURTS, OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 5 (2012).

this paper argues that methods of access for constitutional review should be used to more accurately distinguish review in Europe and Latin America.⁹⁴ However, a context-specific analysis looking only at constitutional review in Latin American is also necessary to better categorize the region and, specifically, this paper argues that the most comprehensive way to categorize the region is by focusing on the Supreme or Constitutional Court's objects of review.

As was demonstrated in the previous section, the use of jurisdiction to classify review is too broad to adequately classify Latin American systems. While the German and Spanish Constitutional Courts may be fairly classified as centralized,⁹⁵ the Latin American countries examined in this paper cannot. The Brazilian Supreme Court, Colombian Constitutional Court, and Mexican Supreme Courts have all adopted aspects of both centralized and decentralized review. Instead of adopting a constitutional court with strictly centralized review, as envisioned by Kelsen, Brazil established a Supreme Court that performs the functions of a European constitutional court by allowing only government and political entities to request abstract review of legislation through various procedures while also permitting constitutional review in cases lodged by individuals through the writ of security in the lower courts. In addition, although the Colombian Constitutional Court was established with purely decentralized review, it gradually adopted aspects of centralized review. Indeed, the very combination of a constitutional court with the procedural protection of tutela actions itself demonstrates the mixed nature of the court. Specifically, constitutional courts, such as the German example, are meant to exercise sole review over constitutional matters and the tutela action by its nature permits constitutional review in the

⁹⁴ See generally Frosini & Pegora, *supra* note 7, at 43 (“With the global spread of constitutional adjudication the question is whether one should maintain the classic dichotomy . . . or whether other elements should be taken into consideration in order to classify systems of constitutional review. With regard to Latin America we believe the latter to be necessary.”).

⁹⁵ In Spain and Germany, only the Constitutional Court is able to hear and assess questions of constitutionality, whereas in Latin America, both the ordinary courts and the Supreme or Constitutional Courts can assess questions on constitutionality. See Venice Commission, *supra* note 11, at 62.

lower courts. The Mexican Supreme Court, and its unique and expansive use of *amparo*, resembles the Brazilian Supreme Court's mixed nature. That is, establishing a Supreme Court with procedures (centralized review) that are typically allocated to constitutional courts while also maintaining decentralized review. Given this diversity within Latin American judicial review, the use of jurisdiction to classify the region (centralized v. decentralized review) is not a meaningful point of comparison.

Instead, methods of access should be used to facilitate a better classification that captures the European and Latin American models of constitutional review without resorting to the typical "mixed" category. For example, a point of distinction to emphasize with regard to access is with which court a petitioner may file a *constitutional* complaint. If she can only file the constitutional complaint with the Supreme or Constitutional Court, then that country system is a closed system of review. The Spanish and German Constitutional Courts are closed systems because the petitioner can only have her constitutional questions addressed in the Constitutional Court. Importantly, her general case may begin in ordinary courts because of exhaustion requirements in which she must use all non-constitutional legal remedies available, but the constitutional questions raised through *amparo* or *verfassungsbeschwerde* can only be heard the Constitutional Court.⁹⁶ On the other hand, if the petitioner can file the *constitutional* complaint with any court, not only the Supreme or Constitutional Court, then that country system is an *open* system of review. This is typically the case in Latin America where the petitioner can file a *mandado de segurança*, *tutela*, or *amparo* in ordinary courts and the Supreme or Constitutional Court.⁹⁷ This dichotomy of

⁹⁶ See *supra* Parts 1(A) and (B).

⁹⁷ *But cf.* Gianluca Gentili, *A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court*, 29 PENN. ST. INT'L L. REV. 705, 714 (2011) (explaining that there are a few exceptions to this generalization: "[O]nly the systems of *amparo* adopted in Costa Rica, El Salvador and Nicaragua—granting direct access only to the country's constitutional and supreme court—can properly be compared to those established in Europe and to a system of individual constitutional complaint").

whether a system of access is closed or open arguably expands on the traditional centralized or decentralized dichotomy without resorting to a “mixed category.”

Although the access dichotomy facilitates better classification regarding differences between the European and Latin American systems, it does not demonstrate the diversity within Latin America itself. For example, there are generally three paths of access with a court: writ of amparo (protection of fundamental rights and freedoms), writ of habeas corpus (personal freedom), and writ of habeas data (freedom of information). All three are extraordinary judicial remedies that are the hallmark of Latin American constitutional protection of human rights.⁹⁸ Indeed, nearly all Latin American countries have established the three judicial remedies⁹⁹ and the only exceptions are Chile, Costa Rica, the Dominican Republic, and Uruguay who have not adopted habeas data.¹⁰⁰ Despite the well-placed emphasis on these access mechanisms in the region, categorizing Latin American countries based on access mechanisms does not draw out any meaningful differences because almost all of the countries in the region have adopted all of the access mechanisms.

A classification that focuses exclusively on Latin American constitutional review should emphasize, not jurisdiction or access, but the Supreme or Constitutional Courts’ object of review. Specifically, whether the Court can hear cases questioning the constitutionality of statute laws, decrees, regulations, ordinances, charters of associations or trade unions, or international treaties. Surprisingly, despite near uniformity in several countries on mechanisms of access, there is a lot of diversity with regard to the types of cases the Court can hear. For example, the Brazilian,

⁹⁸ ALLAN R. BREWER-CARÍAS, *LEGISLACIÓN: ENSAYO DE SÍNTESIS COMPARATIVA SOBRE EL RÉGIMEN DEL AMPARO EN LA LEGISLACIÓN LATINOAMERICANA*; *see also* ALLAN R. BREWER-CARÍAS, *LEYES DE AMPARO DE AMÉRICA LATINA: CON UN ESTUDIO PRELIMINAR SOBRE EL AMPARO EN EL DERECHO CONSTITUCIONAL COMPARADO LATINOAMERICANO*, (Editorial Jurídica Venezolana Internacional, 2016) (“[L]a acción de amparo se dispone para la protección de los derechos consagrados en las Constituciones, independientemente de si además regulados en las leyes.”).

⁹⁹ The specific countries are Argentina, Bolivia, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela. *See* Frosini & Pegora *supra* note 7, at 58.

¹⁰⁰ *Id.* at 57.

Colombian, and Mexican Supreme and Constitutional Courts may review the constitutionality of statutes¹⁰¹ and international treaties.¹⁰² However, the countries differ regarding review of decrees, regulations, ordinances, and charters of associations. Brazil permits the review of decrees¹⁰³ and regulation,¹⁰⁴ but not of ordinances and charters of association. The Colombian Constitutional Court, however, permits review of decrees,¹⁰⁵ but not of regulations, ordinances, or charters of association. Lastly, the Mexican Supreme Court cannot hear cases questioning the constitutionality of decrees, regulations, ordinances, or charters of association.¹⁰⁶ Interestingly, none of these countries permit review of ordinances or charters of associations.

Using the object of review method of classification to examine European countries highlights interesting similarities and differences with the Latin American examples. First, the German and Spanish Courts are similar to the Latin American country examples in that they can review the constitutionality of statutes¹⁰⁷ and international treaties.¹⁰⁸ However, more expansive than objects of review in Latin America, the German Court reviews charters of associations¹⁰⁹ and the Spanish Court reviews ordinances.¹¹⁰ Notably, none of the Latin American countries examined in this paper have the authority to review charters of associations or ordinances.

¹⁰¹ CONSTITUIÇÃO FEDERAL [C.F.] art. 102(I)(a) (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241(4); Constitución Política de los Estados Unidos Mexicanos, art 105(II), Diario Oficial de la Federación [DOF] 1917, 2015 (Mex.).

¹⁰² CONSTITUIÇÃO FEDERAL [C.F.] 102(III)(b) (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241(10); Constitución Política de los Estados Unidos Mexicanos, art. 105(II)(g) (Mex.).

¹⁰³ CONSTITUIÇÃO FEDERAL [C.F.] art. 102(III)(r) (Braz.).

¹⁰⁴ CONSTITUIÇÃO FEDERAL [C.F.] art. 102(III)(d) (Braz.).

¹⁰⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 214(6).

¹⁰⁶ See Frosini & Pegora, *supra* note 7, at 53.

¹⁰⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (Basic Law) art. 93(1)(1); CONSTITUCIÓN ESPAÑOLA, art 161(1)(a).

¹⁰⁸ German Act on the Federal Constitutional Court § 13(12); Spanish Organic Law 2/1979 art. 2(1)(e).

¹⁰⁹ German Act on the Federal Constitutional Court § 13(3a).

¹¹⁰ Spanish Organic Law 2/1979 art. 75. Interestingly, Argentina, Costa Rica, and Peru also permit more expanded constitutional review. Indeed, Costa Rica permits constitutional review of charters of associations. See Frosini & Pegora, *supra* note 7, at 53.

The object of review method of classification, while more detailed than the traditional jurisdiction or access dichotomy, shows differences between the European and Latin American systems and differences within the latter that would otherwise have been overlooked. Indeed, considering different methods of classification and moving away from the strict use of jurisdiction by engaging in a context-specific classification of a region allows for more accurate categorization that avoids the use of “mixed.”

IV. LESSONS FOR FUTURE CLASSIFICATION AND CONSTITUTION-MAKING

The use of jurisdiction to classify judicial review in Europe has typically provided a balance between using enough detail to draw out differences and using features that are broad enough to encompass several different types. Mauro Cappelletti, one of the first scholars to classify systems of judicial review into centralized or decentralized used the United States and Austrian Constitutional Court as model examples, respectively. However, the jurisdiction dichotomy becomes less sustainable as a feature for classification when several countries adopt systems that mix aspects of a centralized and decentralized system,¹¹¹ and when the feature does not facilitate meaningful comparative knowledge. For this reason, this paper argues that context-specific classifications that do not emphasize the feature of jurisdiction are necessary.

One important lesson that the context-specific analysis highlights, is the need to keep track of changes within a particular region. In Latin America, the traditional dichotomy of jurisdiction could have been a workable categorization when several countries were initially either centralized or decentralized. For example, the Brazilian system was first strictly decentralized and later adopted centralized features. However, the dichotomy is no longer a workable classification in

¹¹¹ For instance, some argue that Italy, Spain, and Germany are not purely centralized, but practice the “incidental model” of review. The incidental model “is a hybrid model that combines elements of both the US and Austrian models . . . of constitutional review.” Frosini and Pegora, *supra* note 7, at 41–42.

Latin America because of the gradual mixing within the region. The jurisdiction dichotomy could be workable in the European context as most countries have not mixed their systems of review to the extent that Latin American countries have. It is for this reason though, that the use of jurisdiction to compare across regions is difficult—it cannot take into consideration the developments of constitutional review in Latin America.

In addition, assuming that the stated goal of any taxonomy or classificatory scheme is to produce meaningful comparative knowledge, then the use of jurisdiction—and therefore non-context-specific categorization—is not a fruitful enterprise. That is, jurisdiction does not highlight salient differences and similarities between Latin American and European systems of constitutional review or within Latin America itself. Instead, as was argued in earlier parts of this paper, using the feature of access, whether open or closed, better distinguishes between the two regions. The lesson to draw from this is the need to frequently question what classificatory feature is best to highlight for particular regions. That is, whether to focus on features that are popular and similar in several countries, or features that are draw out fundamental differences.

Lastly, as a result of similarities within a region, in this case uniformity regarding access in Latin America, other features should be taken into consideration for constitutional review classification. In other words, there should be flexibility regarding which features of classification to emphasize. This paper argued that using the objects of review feature to classify Latin American countries is a better point of comparison because it highlights differences that would otherwise have been overlooked.

CONCLUSION

This paper has argued for context-specific classifications regarding constitutional review in order to highlight the differences of jurisdiction, access, and objects of constitutional review in

the constitutional or supreme courts of Latin America and Europe. The argument could also be applied more broadly to encompass any type of classification that does not accurately classify a country system. However, it is important to consider that a context-specific analysis may not always be best for comprehensively examining systems around the world. Indeed, comprehensive comparative knowledge is increasingly needed as more countries experiences constitutional reform moments. Nevertheless, classifications that take into consideration regional differences are still important in order to accurately categorize a system.