1-1-1998

Mexico: The Case for Creation of a National Court of Human Rights

Nauhcatzin T. Bravo-Aguilar
University of Georgia School of Law

MEXICO: THE CASE FOR CREATION OF A NATIONAL COURT OF HUMAN RIGHTS

Nauhcatzin Tonatiuh Bravo - Aguilar

The University of Georgia

Alexander Campbell King Law Library

MEXICO: THE CASE FOR CREATION OF A NATIONAL COURT OF HUMAN RIGHTS

by

NAUHCATZIN TONATIUH BRAVO-AGUILAR

JD, Universidad de Guadalajara, 1995

A Thesis Submitted to the Graduate Faculty of the

University of Georgia in Partial Fulfillment

of the

Requirement for the Degree

MASTER OF LAWS

ATHENS, GEORGIA
1998

MEXICO: THE CASE FOR CREATION OF A NATIONAL COURT OF HUMAN RIGHTS

by

NAUHCATZIN TONATIUH BRAVO-AGUILAR

Approved:

Major Professor — Date 26 May 1998

Chairman, Reading Committee — Date 29 May 1998

Approved:

Graduate Dean

June 5, 1998

Date

Table of Contents

Introduction

The constant violation of human rights in Mexico has proven to be the government's means to remain in power, to threaten the media, and, ironically, to establish its own National Commission for the Protection of Human Rights. In addition, the judiciary does not have the power to fully protect the human rights included in the constitution, and the individuals only have the *Amparo* suit to seek relief against violations of their rights. However, the *Amparo* is an instrument that does not allow courts to declare null unconstitutional laws or to protect social and political rights.

As a remedy for the violation of human rights in my country, I propose the creation of a National Court of Human Rights based on a study of the legal systems of other countries, specifically the United States and Germany. One of the principal aims of this work will be to scrutinize the legal systems of these countries to establish which legal characteristics of those systems Mexico may borrow in order to enhance the protection of Human Rights within its borders.

In Chapter One, I will first compare the human rights that the Constitution of the United States, the German Basic Law, and the Constitution of Mexico grant to people in each of these countries. This comparison will be accompanied by a general background of each of these constitutions to better understand their nature. Once I establish what

kind of guarantees the citizens of these countries have, I will then proceed to analyze how these rights are protected in each of the countries.

Although the United States and Mexico do not share the same kind of legal system, the rights protected by the constitutions of these countries are similar. In fact, I could even go so far as to say that the Mexican constitution is perhaps more precise in the enumeration of these rights. Moreover, the number of human rights protected by the Mexican constitution is greater than that of the United States constitution. However, the protection of these rights is quite different. This difference resides in the power and prestige that the judicial branch has in the United States.

In Chapter Two, I will study how the Supreme Court of the United States has secured fundamental rights throughout its history. I will also refer to the important role that the American institution of judicial review has played in this regard. The use of judicial review to protect human rights has become of relevant importance not only in America but in Europe as well. In fact, the protection of human rights by constitutional review has been the second major justification for the use of this legal instrument in Europe.

Therefore, while explaining how the German Constitutional Court, or Bundesverfassungsgerich, protects human rights, I will review the applicability of this institution by this Court, which possesses a concentrated model of judicial review. This model, different from the American model of diffuse judicial review, permits that judicial review be exercised only by specialized courts that have been expressly created to decide constitutional issues.

Chapter Two also contains a description of the two instruments that deal with the protection of human rights in the framework of the Mexican constitution: the A*mparo* proceeding, and the *Comisión Nacional de Derechos Humanos* (the National Commission for the Protection of Human Rights). The *Amparo* suit is the main legal institution to protect human rights in Mexico, having evolved along with the Mexican judiciary throughout history.

In Chapter Three, I will compare the German model of concentrated judicial review with the U.S system of diffuse judicial review, which authorizes all courts to consider the constitutionality of legislation. This comparison will help to decide what characteristics are best for the establishment of a Mexican National Court of Human Rights. In the U.S. legal system, for instance, judicial review has been a main instrument not only to secure the rights of the people but also to expand the meaning of the rights granted by the constitution

In the same chapter, within the context of proposing the creation of the National Court of Human Rights, I will first analyze the most recent reforms to the Mexican judicial branch to establish the extent to which they help in the protection of human rights. Then I give some final considerations regarding the weakness of the *Amparo* trial concerning the protection of individual guarantees in Mexico. Subsequently, I give the reasons that support the creation of the National Court of Human rights in Mexico. Finally, I discuss some general considerations regarding what such a Court could offer.

Chapter I

A. Human Rights in the Constitution of the United States

1. The Bill of Rights

Under the Constitution of the United States, human rights appear principally in the first ten amendments, the so-called Bill of Rights, and in the Thirteen, Fourteenth and Fifteen Amendments. Originally the Bill of Rights provided protection for the individual only against actions of the national government.[1] However, the Fourteenth Amendment, by the due process clause, expanded the interpretation, and then the debate concerning the scope of the Bill of Rights established that it protected individuals even against actions of the states.[2]

The first ten amendments comprise what is known as the Bill of Rights.[3] To discuss these rights in the Constitution of the United States is to mention rights and freedoms such as the freedom of speech and press, freedom of religion, the right of

---

[1] 2 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW, THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS, 51(1995). *See also* M. GLENN ABERNATHY & BARBARA A. PERRY, CIVIL LIBERTIES UNDER THE CONSTITUTION, 16 (1993). *See also* C. HERMAN PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES, 5 (1984).

[2] WILLIAM B. LOCKHART ET AL, CONSTITUTIONAL RIGHTS AND LIBERTIES, CASES-COMMENTS-QUESTIONS, 120 (7 Th ed. 1991). *See also* PRITCHETT, *supra* note 1, at 13, 14 & 15. *See also,* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW, 805 (3 Rd ed. 1996). *See also* William J. Brannan, Jr, *The Bill of Rights and the States, in* THE EVOLVING CONSTITUTION, 254, 254-255 (Norman Dorsen ed., 1989).

Although the process by which the Court has incorporated most of the rights guaranteed in the first eight amendments applicable to the states is important for this work, I will not discuss this issue in this chapter. This important point is the subject of Chapter II.

assembly, the right to a jury trial, the right to counsel, the right to confront accusers, the right to be free from self-incrimination, the protection against double jeopardy, and the freedom from-cruel and unusual punishments.[4] The Ninth Amendment establishes that the enumeration of rights in the constitution does not deny people the enjoyment of other rights retained by them.[5] The Tenth Amendment deals primarily with the rights delegated to the states rather than individuals rights and thus does not have further relevance to this work.[6]

These are guarantees enumerated within the first ten Amendments or the Bill of Rights. However, there are other provisions in the Constitution which affect civil rights. For example, Article I, section 9 establishes the Privilege of the Writ of Habeas Corpus, which may be suspended only in extraordinary circumstances.[7] Moreover, the third paragraph of section 9 of Article I states that "no Bill of Attainder or ex post facto Law shall be passed."[8] In addition, section 10 of Article I bans states from passing any bill of attainder, any ex post facto law, or any law impairing the obligation of contracts.[9]

The Thirteenth Amendment, section I, forbids slavery and involuntary servitude "except as a punishment for crime. . ."[10] Section 1 of the Fourteenth Amendment

---

[3] PRITCHETT, *supra* note 1, at 3 & 4.
[4] U.S. CONST. amends. I-VIII.
[5] U.S. CONST. amend. IX "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
[6] U.S. CONST. amend. X "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
[7] U.S. CONST. art. I § 9 ". . . The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."
[8] Id.
[9] U.S. CONST. art. I § 10 "No States shall. . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . ." *See also* PRITCHETT, *supra* note 1, at 5 & 6.
[10] U.S. CONST. amend. XIII § 1 "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."[11] The Fifteenth Amendment guarantees the right to vote to all citizens of the United States no matter what their race, color, or previous condition of servitude.[12]

2. Privileges and Immunities

Article IV, section 2, of the Constitution of the United States contains a Privileges and Immunities Clause just as the Fourteenth Amendment does in section 1.[13] This double inclusion of what may seem the same clause had a great importance for the history of constitutional law and for the evolution of the protection of the rights in the United States.[14] For this reason I will make further comments concerning the meaning of the two clauses.

---

[11] U.S. CONST. amend. XIV § 1.

[12] U.S. CONST. amend. XV § 1 "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[13] U.S. CONST. art. I V § 2 reads as follow: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."
U.S. CONST. amend. XIV § 1 establishes that ". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . ."

[14] STONE, *supra* note 2 at 797. *See also* PRITCHETT, *supra* note 1, at 10 & 11.(Commenting the important role of the Fourteenth Amendment to secure the rights guaranteed by the Thirteenth and Fifteenth Amendments. He also affirms that the basic motivation of Congress to enact the Fourteenth Amendment was to protect the rights of the "newly freed blacks, to establish constitutional guarantees that would be effective when, as ultimately would happen, military control was withdrawn from the Southern states.") *See also* LOCKHART, *supra* note 2, at 71. (Pointing out that the sole enactment of the Thirteenth Amendment to forbid slavery and involuntary servitude did not produce the fruits of freedom due to the "Black Codes" and other repressive measures) *See also* Brannan, *supra* note 2, at 254 & 255.

As early as 1823, in the *Corfield v. Coryell* case,[15] the Circuit Court for the District of Pennsylvania handled for the first time a question concerning the meaning and scope of the Privileges and Immunities Clause of Article IV, section 2.[16] In the case, a vessel from Philadelphia was seized by New Jersey authorities after it was found racking and collecting oysters from the oyster beds in a cove of the Maurice River.[17] The counsel of the plaintiff objected to the New Jersey act under which the vessel was seized and which included among its provision a section forbidding the gathering of oysters in any of the waters of the State to any person who was not an actual inhabitant and resident of New Jersey.[18] In the objection, the plaintiff's counsel claimed that this section of the New Jersey act was in contradiction to Article IV, section 2 of the constitution of the United States by denying to the citizens of other states the rights and privileges enjoyed by those of New Jersey.[19]

Justice Bushrod Washington, in delivering the opinion of the court, held as inadmissible that the proposition of the counsel regarding the application of the Privileges and Immunities clause to the present case.[20] He remarked the importance of protecting State's common goods, such as fish, clams and oysters, against a general use which could exhaust them.[21]

---

[15] Corfield v. Coryell, 6 F. Cas. No. 3230, 546, 546 (1823)
[16] Id. at 551.
[17] Id. at 546.
[18] Id. at 550.
[19] Id. at 549.
[20] Id. at 552 Justice Washington held that ". . .we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens. . ."
[21] Id. Justice Washington stressed that taking oysters in New Jersey was an exclusive right reserved by the State to its citizens. Moreover, as it has been shown, this was a matter of property "vested in certain individuals or in the state." So that, in his opinion "it would be going quite too far to construe the grant of

Corfield is a leading case on the Privileges and Immunities clause of Article IV, section 2, and its significance is not merely because of the final opinion of the issue in the case but also because of the definition Justice Washington gave to the clause in question.[22] He stated that the privileges and immunities under Article IV, section 2, are rights whose nature is fundamental; "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign."[23] He then listed general aspects of those rights which are fundamental by nature and are "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[24]

It is remarkable that Justice Washington never examined the Bill of Rights or any other precepts in the constitution to establish what the Privileges and Immunities clause of Article IV, section 2 could mean.[25] He preferred to infer that the clause established a nation-wide set of standards based on fundamental rights for all states and then to widen the interpretation of Privileges and Immunities clause of Article IV, section 2.[26] This position, which was developed and applied during the civil war period, was called the

---

privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states. . ."

[22] STONE, *supra* note 2 at 797.

[23] Corfield v. Coryell, 6 F. Cas. 546, 551 (1823).

[24] Id. at 552 Justice Washington mentioned those rights which are fundamental by nature under the following general heads: "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . ."

[25] STONE, *supra* note 2 at 797. *See also* PRITCHETT, *supra* note 1, at 6-7.

[26] PRITCHETT, *supra* note 1, at 7. *See also* ROSSUM, *supra* note 1, at 56 & 96.

"old Republican view" and had great importance in the enactment of the Fourteenth Amendment.[27]

Another interpretation with regard to the Privileges and Immunities clause of Article IV, section 2 is that the words of this Article do not mean to create a set of rights for the citizens of the States.[28] Thus, according to the words in Article IV, section 2, it strictly means that Citizens going from State A to State B should be entitled to the same rights enjoyed by the those Citizens of State B.[29]

Fifty years after the decision of *Corfield,* and four years after the enactment of the Fourteenth Amendment[30], the *Slaughter-House cases* called the attention of the Supreme Court.[31] The issue in the case was a statute passed by the Louisiana legislature granting to the Crescent City Live-Stock Landing and Slaughter House Company the exclusive privilege of operating the slaughter-house business in the New Orleans area.[32] The company was required by the statute to allow any person to land and slaughter animals in its facilities at state-regulated prices.[33]

---

[27] PRITCHETT, *supra* note 1, at 7 & 11-12. (Justice Washington's position, "as developed and applied into the Civil War period, Croskey calls the 'old Republican view' of the privileges and immunities clause a part of the 'common faith of that party.'") But *See also* ROSSUM, *supra* note 1, at 56. (Commenting that several proponents of the Fourteenth Amendment approvingly noted that, in the *Corfield* case, Justice Bushrod Washington had offered a broad interpretation of privileges and immunities as including those protections which "belong, of right, to the citizens of all free governments.")

[28] STONE, *supra* note 2 at 797. *See also* PRITCHETT, *supra* note 1, at 7.

[29] Id.

[30] U.S. CONST. amend. XIV (The Fourteenth Amendment was ratified July 9, 1868). *See also* LOCKHART, *supra* note 2 at 71. Authors refer to particular matters concerning the background in which the Fourteenth Amendment was approved and ratified.

[31] *Slaughter-House Cases*, 83 U.S. 36 (1872)

[32] Id. at 38 & 39.

[33] Id. at 39, 41 & 42. Section Three of the Act deals with the costs for landing steamships at the wharves of the company; the prices to pay to land animals at the wharves; and the prices for keeping the animals each and every day at the company's facilities. Section Five makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Section Seven of the statute deals with the fees to be paid by "all persons slaughtering or causing to be slaughtered, cattle or other animals in said slaughter-houses..."

The plaintiffs, in error, argued that among other things, the statute was in contradiction of the Fourteenth Amendment of the Constitution of the United States because "the States must not weaken nor destroy" the privileges and immunities that derived from the Fourteenth Amendment of the constitution in behalf "of freemen."[34] To reach this point, they argued that the Privileges or Immunities clause appearing in the Amendment in question was a tie between the United States and every citizen, and that said tie was to secure his or her privileges and immunities against any abridgment by State authority.[35]

While delivering the opinion of the Court, Justice Samuel F. Miller stressed the fact that the Court was called upon for the first time to give construction to the Fourteenth Amendment, among others.[36] Thus, he started by separating the unique concept included in the amendment, pointing out that the first section of this amendment clearly established not only a citizenship of the United States but also a citizenship of the States.[37] This double citizenship, he said, was found indeed under the first section of the Fourteenth Amendment, which establishes that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."[38]

Justice Miller then took from the context of the amendment the concept that the sole condition of being a citizen of the United States did not imply citizenship of a

---

[34] Id. at 54.
[35] Id. at 53. This argument was strongly related to that of citizenship. The plaintiffs in error understood the Fourteenth Amendment as giving a sole citizenship protected by the Constitution of the United States and which could not be infringed by any State disposition.
[36] Id. at 67.
[37] Id. at 72.
[38] Id. at 73.

particular State. According to his reading of the amendment it is enough to be born or naturalized in the United States to be a citizen of the Union, but to be a citizen of a state involves a further element: residence in that state.[39] In addition, Justice Miller reproduced the words in the first section of the Fourteenth Amendment to find that it established only the privileges and immunities of the citizens of the United States but did not speak of those of citizens of the several states.[40]

After this consideration, he asserted that the plaintiffs' argument was incorrect since it rested on the assumption that the statute abridged the privileges and immunities of citizens of the United States.[41] Justice Miller reasoned against the plaintiffs' position giving the following argument:

> *The language is, 'No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the words citizen of the State should be left out when it is so carefully used, and used in contradiction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.*[42]

Justice Miller finally dismissed the argument of the plaintiffs based on the Privileges and Immunities clause of the first section of the Fourteenth Amendment on the grounds that the rights which they invoked were not privileges and immunities of citizens

---

[39] Id. at 74. Justice Miller stated the "not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalised in the United States to be a citizen of the Union."

[40] Id.

[41] Id.

[42] Id.

of the United States but rather privileges and immunities which belonged to citizens of the States and then left to the States for security and protection.[43]

The dissenting opinions of this case gave a completely different interpretation of the Privileges or Immunities clause of the Fourteenth Amendment and a rich set of considerations regarding its meaning.[44] However, I will not discuss those considerations because the Court has consistently adhered to Justice Miller's opinion and, in consequence, it has never invalidated state legislation under the Privileges and Immunities clause of the Fourteenth Amendment. [45]

B. Human Rights in the Political Constitution of the Mexican United States

1. The first Article of the Political Constitution of the Mexican United Stated

The first twenty-nine articles of the Mexican constitution refer expressly to the human rights of persons in Mexico.[46] Chapter One of the First Title of the constitution

---

[43] Id. at 75, 76, 77, 78 & 79. *See also* LOCKHART, *supra* note 2, at 72-76 for comments concerning this case. *See also* STONE, *supra* note 2 at 801-804 for some notes and consideration to the case. *See also* PRITCHETT, *supra* note 1, at 167 giving some historical background and side effects of this case in other matters. *See also* JOSEPH A. MELUSKY & WHITHMAN H. RIDGWAY, THE BILL OF RIGHTS: OUR WRITTEN LEGACY, 29-33 (1993). *See also* ABERNATHY, *supra* note 1, at 24 giving some comments regarding the decision of the case.

[44] Slaughter-House Cases, 83 U.S. 36, 83-130 (1872).

[45] LOCKHART, *supra* note 2, at 75. *See also* STONE, *supra* note 2, at 804. *See also* GERALD GUNTHER, CONSTITUTIONAL LAW, 408 (12 Th ed. 1991).

[46] CONSTITUCION DE LOS ESTADOS UNIDOS MEXICANOS, chapter one, first title. *See also*, LOPEZ SOSA, LA LUCHA POR EL PODER POLITICO EN MEXICO, 115-117 (1994). *See also*, HECTOR FIX-ZAMUDIO, JUICIO DE AMPARO, 56-57 (1964) *See also*, SERAFIN ORTIZ-RAMIREZ, DERECHO CONSTITUCIONAL MEXICANO, 533-576 (1961). *See also*, IGNACIO BURGOA, LAS GARANTIAS INDIVIDUALES, 169-170 (1967). (Pondering whether the individual guarantees that the Mexican constitution protects are only included in the first twenty-nine articles or these individual guarantees extend to other articles of the constitution). *See also*, ALFONSO NORIEGA-C., LA NATURALEZA DE LAS GARANTIAS INDIVIDUALES EN LA CONSTITUCION DE 1917,

embraces these twenty-nine articles and is called *De Las Garantias Individuales* or Individual Guaranties.[47] The first Article of this Chapter which is also the first Article in the constitution establishes that "every person in the Mexican United States shall enjoy the guarantees granted by this constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided."[48]

The content of this article has been the center of innumerable discussions, always comparing it to the first article of the Mexican Constitution of 1857, which established that "the Mexican people recognize that the rights of man are the basis and the object of social institutions. Consequently, they declare that all the laws and all the authorities of the country must respect and maintain the guarantees which the present constitution grants."[49]

I will not discourse at any length in regard to this point. However, as the Federal Constitution of 1857 was the principal point of reference for the drafters of the Political Constitution of the Mexican United States of 1917, it is important to remark the impact that the Constitution of 1857 had in the construction of what individuals guarantees would be in the current constitution. The Federal Constitution of 1857, as it is known,

---

41-50 (1967). (Principally discussing the adoption of the juridical positivist position of the framers of the 1917 constitution while drafting chapter one, first title). *See also,* FELIPE TENA RAMIREZ, DERECHO CONSTITUCIONAL MEXICANO, 22 (1968).

[47] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, first title, chapter one.

[48] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, first title, chapter one.art. 1.

[49] CONSTITUCION DE LA REPUBLICA MEXICANA DE 1857, first title, § 1, Art. 1. *See also* IGNACIO BURGOA, EL JUICIO DE AMPARO, 124, 129-132 (1977). *See also* Jose Natividad-Macias, *Alcance y Efectividad de las Garantias Individiales, in* CINCUENTA DISCURSOS DOCTRINALES EN EL CONGRESO CONSTITUYENTE DE LA REVOLUCION MEXICANA 1916-1917 53, 57-58 (Gobierno del Estado de Queretaro, Instituto Nacional de estudios Historicos de la Revolucion Mexicana, Secretaria de Gobernacion ed., 1992) *See also* ORTIZ-RAMIREZ, *supra* note 46, at 529. *See also* BURGOA, *supra* note 46, at 149 & 274. *See also* THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857 (Supp. 1917). *See also* NORIEGA-C, *supra* note 46, at 20-39.

established in its first article the doctrines that gave sense to the protection of human rights in that constitution.[50]

This article set up a hybrid of two doctrines that emerged from the Universal Declaration of the Rights of Man: Individualism and Liberalism.[51] The first part of the article expressly introduced these doctrines, which, although they prevailed at the time, gave a range of primacy to the individual and his rights.[52] It said as follows: "The Mexican people recognize that the rights of man are the basis and the object of social institutions . . ."[53] According to this, Human Rights were the basis of the legal system and of the State itself. The State was to observe and respect human rights that by nature belonged to the individual.[54]

The second part of this article reads as follow: "Consequently they (the Mexicans) declare that all the laws and all the authorities of the country must respect and maintain the guarantees which the present constitution grants."[55] As noted here, the constitution also granted guarantees that were specified in the first twenty-nine articles of the Federal Constitution of 1857.[56] This article then contained both concepts; first, the rights of man

---

[50] BURGOA, *supra* note 46, at 129 & 130. *See also* ORTIZ-RAMIREZ, *supra* note 46, at 536. *See also* BURGOA, *supra* note 49, at 124, 129, 130 & 131. *See also* NORIEGA-C, *supra* note 46, at 19-39. *See also* Natividad-Macias, *supra* note 49, at 57.

[51] BURGOA, *supra* note 46, at 129, 130, 131, 132, & 133. *See also* ORTIZ-RAMIREZ, *supra* note 46, at 536. *See also* BURGOA, *supra* note 49, at 123, 124, 125, 126, 127, 128, & 129.

[52] BURGOA, *supra* note 46, at 129. (Giving details about these doctrines). *See also* ORTIZ-RAMIREZ, *supra* note 46, at 536. *See also* BURGOA, *supra* note 49, at 123.

[53] CONSTITUCION DE LA REPUBLICA MEXICANA DE 1857, first title, § 1, Art. 1.

[54] BURGOA, *supra* note 46, at 131. *See also*, Natividad-Macias, *supra* note 49, at 57.

[55] CONSTITUCION DE LA REPUBLICA MEXICANA DE 1857, first title, § 1, Art. 1.

[56] Id. Section I of the First Title of the Constitution was called *"Of the Rights of Man"* and was composed of twenty nine articles.

in the first part of the article and second, the guarantees granted by the constitution in the second part.[57]

The first of them was of dogmatic character with a strong tendency toward the Doctrine of Naturalism since these rights were ascribed to a natural character and even to rights given by the Creator.[58] Although the constitution did not detail the rights of man, it carefully enumerated the guarantees that it granted in its first twenty-nine articles.[59] Some of the guarantees were based on the fundamental rights of man. However, other guarantees did not correspond to the rights-of-man concept, which finds its essence in the Doctrine of Naturalism. They found a basis in what is called "the rights of the citizen," which were part of the Universal Declaration of Rights of Man. In other words, they

---

[57] Id. Article One said:

> The Mexican people recognize that the rights of man are the basis and the object of social institutions. Consequently they declare that all the laws and all the authorities must respect and maintain the guarantees which the present constitution grants.

[58] BURGOA, *supra* note 46, at 130. *See also*, FRANCISCO ZARCO, HISTORIA DEL CONGRESO CONSTITUYENTE DE 1857 21, (1987) (Ignacio Ramirez, a drafter of the Constitution of 1857, stated that the rights were not born from the law, that they existed earlier than any law, and that the man was born possessing them. He remarked that the right to live among others existed by itself and that nobody had ever thought it was necessary to have a law to allow children and men to feed and live.) *See also* Natividad-Macias, *supra* note 49, at 57. (While amending Article One of the Constitution of 1857, Natividad-Macias, a drafter of the Constitution of 1917, invoked this article adding the word "natural" to its wording. He then enunciated Article One as follow: " . . .the 'natural' rights of man are the basis and the object of social institutions." Although the word "natural" was not in fact inserted in the article, the concept was in the mind of the men of that time. Natividad-Macias critiqued this article because it constituted for him a contradiction. The contradiction he found in this provision was that while "the rights of man" were the basis and abject of social institutions, they could be suspended in given cases according to Article 29. I think that this contradiction never existed since Article 29 of the constitution of 1857 established that it could "have the power to suspend. . . the *guarantees granted by this constitution.*" However, it never mentioned that it could have the power to suspend "the rights of man," which were mentioned but not described in the first part of Article One.)

[59] CONSTITUCION DE LA REPUBLICA MEXICANA DE 1857, first title, § 1, Art. 1. *See also* BURGOA, *supra* note 46, at 130.

expressed the idea that the individual has pre-determined rights not because he is a human being but because he is a member of society.[60]

In contrast to Article One of the Federal Constitution of 1857, the first article of the current Mexican Constitution only establishes that all individuals in the Mexican United States will enjoy the guarantees that membership in society grants.[61] The rights of man are neither mentioned nor contemplated as "the basis and object of the State."[62] Although this particularity has created different interpretations and opinions with regard to the juridical doctrine adopted by the drafters of the Political Constitution of Mexico, the fact is that they did confirm them.[63]

Thus, for Ignacio Burgoa, a notable Mexican scholar, the change in the wording of the Article One of the Constitution of 1857 also means a change of doctrine. This change, he says, constitutes a shift from the Doctrine of Individualism to the Theory of Rousseau. This theory establishes, in general terms, that the guarantees enjoyed by

---

[60] BURGOA, *supra* note 46, at 131 & 132. *See also* ZARCO, *supra* note 58, at 23 & 24. *See also* LOPEZ SOSA, *supra* note 46, at 115. (Lopez-Sosa comments that human rights are historically contained in the Universal Declaration of Rights of Man and the Rights of Citizens.)

[61] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, first title, chapter one.art. 1

> Every Person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided.

[62] Id. *See also* CONSTITUCION DE LA REPUBLICA MEXICANA DE 1857, first title, § 1, Art. 1. *See also* BURGOA, *supra* note 46, at 133. *See also* BURGOA, *supra* note 49, at 129 & 130. *See also* THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857 (Supp. 1917). *See also* ORTIZ-RAMIREZ, *supra* note 46, at 536.

[63] LOPEZ SOSA, *supra* note 46, at 115. But *See also* BURGOA, *supra* note 46, at 133. (Burgoa comments that although the drafters recognised that men as such possess human rights, these rights were guaranteed by the constitution itself. However, he also comments that the reform to the content of Article one of the Constitution of 1857 does not constitute a rejection of the "rights of man.") *See also* BURGOA, *supra* note 49, at 130 & 131.(Here, Burgoa comments that in the juridical regime instituted in the constitution of 1917 converge different kinds of systems. The *liberal-individualist* is among them, being this which is found in several individual guarantees.) *See also*, Natividad-Macias, *supra* note 49, at 57. (Natividad-Macias, an renowned drafter of the present Mexican constitution, stressed that the right to live is a fundamental one

people before the public authority are given to them by the society itself, which constitutes the national sovereignty. So, to conform to this society, people give their personal rights up and, later, these rights are restored to the individual, but as a concession granted by the will of the society. This sovereignty is the supreme element of the nation, above which any power may exist and under which all owe submission.[64]

However, during the debates to reform Article One of the Constitution of 1857, Natividad-Macias, a renowned drafter of the Constitution of 1917, said that the changes of this article were due to the uncountable problems that it raised in the federal judicial system, and that it was better to depart from disruptive philosophical postures that only confused people.[65]

Jorge Carpizo, another well known Mexican scholar, states that the reforms to Article One of the Constitution of 1857 does not constitute any change of theory. The only difference, he says, is that the current Article One of the Mexican Constitution does not mention the source of the guarantees. He also comments that although other authors consider that this reform set up the Doctrine of Positivism in our constitution, he sustains the belief that the theory included in this article is that which has always been part of the Mexican constitutionalism: a man has rights for the sole reason that he exists.[66]

Thus, despite this polemic interpretation to the meaning of the first article of the current Mexican constitution, we can assure that human rights are well contemplated in this body of laws. The reforms to Article One of the Constitution of 1857 were not in

---

and one that every human being has. He said that this right includes the satisfaction of all the natural necessities of the individual.)

[64] BURGOA, *supra* note 46, at 133. *See also* BURGOA, *supra* note 49, at 130.

[65] Natividad-Macias, *supra* note 49, at 57.

detriment of the protection of human rights in Mexico. On the contrary, this article has been seen throughout the history of the Mexican constitutionalism not only as setting guarantees granted by the constitution, but recognizing also rights to which all human being are entitled.

2. The Catalogue of Individual Guarantees

The catalogue of Individual Guarantees under the Mexican constitution starts precisely with the first article of the constitution, to which I have already made reference. However, it is important to remark that this article sets up the principle of equality in the constitution, which makes it possible to extend the power of the human rights protection not only to every Mexican but also to any person in Mexico regardless of his or her particular condition.[67]

Under this guarantee of equality, any person in Mexico may invoke the protection of the guarantees granted by the constitution, no matter his or her color, sex, race, legal status, particular condition in his/her home-country (ex. slavery), religion, etc. The sole fact of being within the territory of the Mexican United States makes all persons equal before the law.[68]

---

[66] DICCIONARIO JURIDICO MEXICANO, INSTITUTO DE INVESTIGACIONES JURIDICAS, 1516 & 1517 (6th ed.1993) [Hereinafter DICCIONARIO JURIDICO] *See also* LOPEZ SOSA, supra note 46, at 115.

[67] ORTIZ-RAMIREZ, *supra* note 46, at 536. *See also* BURGOA, *supra* note 46, at 269. *See also* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 1.

[68] ORTIZ-RAMIREZ, *supra* note 46, at 536. *See also* BURGOA, *supra* note 46, at 269 & 270. *See also* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 1.

Human rights in the Mexican constitution contemplates both individual and social guarantees.[69] The classification of them is not a strict one due to the fact that every guarantee could be placed in any of the different categories.[70] The most common classification regards the following division: Guarantees of Equality, Guarantees of Liberty, and Guarantees of Juridical Security.[71] There are other classifications slightly different from this one, but they do not change the essence of the classification mentioned above.[72]

The Guarantees of Equality are contained in the articles 1, 2, 3, 4, 12 and 13.[73] To discuss these guarantees is to mention the right which is established for everyone to enjoy the guarantees granted by the constitution (art. 1); the right to be free from slavery (art. 2); the right to equality under the law regardless of sex (art. 4); the prohibition of titles of nobility, prerogatives or hereditary honors (art. 12); the prohibition of privileges or enjoyment emoluments others than those given in compensation for public services and which are set by law (art. 13); and the prohibition to be judged by privative laws or special tribunals (art.13).[74]

---

[69] DICCIONARIO JURIDICO, *supra* note 56, at 1516

[70] Id.

[71] Id. *See also* LOPEZ SOSA, supra note 46, at 116.

[72] BURGOA, *supra* note 46, at 269 & 173 & 174. (Burgoa set up the following classification of the guarantees: Guarantees of Equality, Guarantees of Liberty, Guarantees of Property, and Guarantees of Judicial Security.) *See also* ORTIZ-RAMIREZ, *supra* note 46, at 536. (Ortiz-Ramirez states that the guarantees are classified as follows: Guarantees of Equality, Guarantees of Liberty, Rights as Guarantees, Natural and Political Rights guaranteed by Treaties and Covenants, and Guarantees of Judicial Security.)

[73] LOPEZ SOSA, *supra* note 46, at 116. *See also* DICCIONARIO JURIDICO, *supra* note 56, at 1516.

[74] DICCIONARIO JURIDICO, *supra* note 56, at 1517. *See also* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, first title, chapter one. arts. 1, 2, 3, 4, 12, & 13. *See also* BURGOA, *supra* note 46, at 269-303. *See also* ORTIZ-RAMIREZ, *supra* note 46, at 534-543.

The Guarantees of Liberty appear in the articles 4, 5, 6, 7, 9, 10, 11, 15, 16, 22, and 24.[75] They are divided into three categories: liberties of the human person, liberties of the civic person, and liberties of the social person.[76] The liberties of the human person may be split in Corporeal Liberties and Abstract Liberties [77]. Corporeal Liberties provide the liberty to choose freely the number of family members (art. 4); liberty to work (art.5); freedom from involuntary servitude (art. 5); nullity of contracts, covenants, or agreements against the human dignity (art. 5); the right to bear arms at home for protection and legitimate defense (art. 10); freedom of transit (art. 11); and abolition of the death penalty except in the circumstances that the constitution establishes (art. 22).[78] Abstract Liberties involve the freedom to think (art. 6); the right to information (art. 6); the freedom of writing and publishing writings (art. 7); freedom of religion (art. 24); and the right of privacy (art. 16).[79]

The Liberties of the Civic Person encompass the right of peacefully presenting petition to an authority or protest against any act (art.9); and the prohibition against extraditing political offenders (art. 15).[80] The Liberties of the Social Person include the right to assemble or associate peaceably, but only Mexican citizens may do so to take part in political affairs of the country (art. 9).[81]

---

[75] DICCIONARIO JURIDICO, *supra* note 56, at 1516. *See also* LOPEZ SOSA, *supra* note 46, at 116. *See also* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, first title, chapter one. arts. 4, 5, 6, 7, 9, 10, 11, 15, 16, 22, & 24.

[76] DICCIONARIO JURIDICO, *supra* note 56, at 1517. *See also* LOPEZ SOSA, *supra* note 46, at 116.

[77] Id.

[78] Id.

[79] Id.

[80] Id.

[81] Id. *See also* ORTIZ-RAMIREZ, *supra* note 46, at 544-560. (Although the classification of guarantees that this author offers is not exactly the same than as what I am considering, the appreciation he has for the guarantees of liberties are very similar to those that I already mentioned in this work.) *See also* BURGOA, *supra* note 46, at 305-433.

The Guarantees of Judicial Security are specified in the articles 8, 14, 16, 17, 18, 19, 20, 21, 22, and 23.[82] Article 8 establishes the right of petition and the right to receive a reply in writing by the authority to whom the petition is addressed. Article 14 prohibits the retroactive effect of law; establishes the essential formalities of procedure; establishes the principle of legality; and forbids the imposition of penalties by mere analogy or by prior evidence in criminal cases. Article 16 sets up the principle of competent authority; requires a written order issued by a judicial authority, which must state the legal grounds and the justification to molest any individual in his/her person, family, domicile, papers, or possessions; requires an order of arrest prior to any detention. Article 17 abolishes imprisonment for debts of a purely civil nature; requires that the administration of justice be efficient and rapid; and states that none may take the law by his/her own hands. Article 18 permits arrest only for offenses punishable by imprisonment. Article 19 establishes that any detention may exceed three days without a formal order of commitment. Article 20 contains the guarantees of the accused in any criminal process. Article 21 establishes that the prosecution of offenses pertain only to the public minister and the judicial police. Article 22 prohibits any punishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property, and any other unusual or extreme penalties. Article 23 states that criminal trials may have no more than three instances.[83]

---

[82] LOPEZ SOSA, *supra* note 46, at 116 & 117. *See also* DICCIONARIO JURIDICO, *supra* note 56, at 1517.
[83] LOPEZ SOSA, *supra* note 46, at 116 & 117. *See also* DICCIONARIO JURIDICO, *supra* note 56, at 1517 & 1518. *See also* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, First Title, Chapter One, arts. 8, 14, 16, 17, 18, 19, 20, 21, 22, and 23.

As mentioned above, the Social Guarantees are the other group of human rights protected by this constitution. These guarantees appear in the Articles 3, 27, 28, and 123.[84] So, although most of the individual guarantees appear in Chapter One of the First Title of the constitution, one of the social guarantees appears in Article 123.[85]

In contrast to the Individual Guarantees, the Social ones require an action by the State. Thus, the government has the duty to provide for a minimum standard of education and economic status for even the poorest social groups of the country.[86] These guarantees are designed to protect the individual as a member of the society. Thus, Article 3 deals with education; Article 27 deals with agrarian matters; Article 28 sets up the regulations for ownership of land; and Article 123 covers labor issues.[87]

C. Human Rights in the German Basic Law.

1. The Origin of the Basic Law

The current German constitution, or Basic Law, poses a set of human rights drawn upon the experience of former constitutions and upon the devastating aftermath of World

---

[84]. DICCIONARIO JURIDICO, *supra* note 56, at 1518. *See also* LOPEZ SOSA, *supra* note 46, at 117.

[85] BURGOA, *supra* note 46, at 170. (Writing about the extension of the individual guarantees in the constitution, Burgoa questions if we should assume that all the guarantees that the constitution grants are contained only in Chapter One of the First Title of the Constitution. In response of this, he refers to a famous Mexican jurist, Ignacio L. Vallarta, who answered this question stating that the concept of individual guarantees in the constitution was not restrictive. It means, he said, that we should not identify the term of Individual Guarantees with the first 29 article of the constitution. On the contrary, we should find individual guarantees in any precept that carries in its essence this concept and complements then those first twenty-nine Articles.) *See also* DICCIONARIO JURIDICO, *supra* note 56, at 1518. *See also* LOPEZ SOSA, *supra* note 46, at 117.

[86] DICCIONARIO JURIDICO, *supra* note 56, at 1518. *See also* LOPEZ SOSA, *supra* note 46, at 117.

[87] Id.

War II.[88] The Frankfurt and Weimar Constitutions, which were antecedent of the Basic Law (*Grundgesetz*), did not give a predominant role to human rights in the constitutional order.[89] Moreover, during World War II, Germany gave a crude lesson of human rights violations that the rest of the world would not overlook.[90]

Once the unconditional surrender of Germany came up on May 8, 1945, the defeated Germany as well as its capital, Berlin, were divided by the Allies into four zones of occupation: the northwestern to the United Kingdom, the western to France , the southwestern to the United States, and the eastern to Russia.[91] The de-Nazification, re-education, and demilitarization of Germany were the principal aims of the Allies, who agreed at the Yalta conference of 1945 that the "dismemberment" of Germany was

---

[88] Christian Starck, *Constitutional Definition and Protection of Rights and Freedoms in,* 37 RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 19, 20 (Christian Starck ed., 1987); Eibe H. Riedel, *Assertion and Protection of Human Rights in International Treaties and their Impact in the Basic Law, in* 37 RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW , *supra*, at 197, 198. *See also*, Klaus Stern, *General Assessment of the Basic Law - A German View in,* 14 GERMAN AND ITS BASIC LAW 17, 29 (Paul Kirchhof & Donald P. Kommers eds. 1993); Kurt Sontheimer, *Principles of Human Dignity in the Federal Republic in*, 14 GERMAN AND ITS BASIC LAW, *supra*, at 213, 213 & 214. *See also*, Georg Ress, *The Constitution and the Requirements of Democracy in,* 49 NEW CHALLENGES TO THE GERMAN BASIC LAW 111, 115, 116, & 117. (Christian Starck ed. 1991). *See also*, Donald P. Kommers, *Basic Rights and Constitutional Review in,* POLITICS AND GOVERNMENT IN GERMANY, 1944-1994 297, 297 & 298 (Carl-Christph Schweitzer et al eds. 1995). *See also,* Günter Dürig, *An Introduction to the Basic Law of the Federal Republic of Germany in,* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 11, 12 & 13; 15 & 16 (Ulrich Karpen ed. 1988).

[89] Stern, *supra* note 88, at 29. *See also* Starck, *supra* note 88, at 20. (Starck comments that the formulation of human rights into the current German constitution "drew upon the fundamental rights of the Frankfurter Reich Constitution of 1849 [which was never put into effect], the Weimar Reich Constitution of 1919 and the draft of the Universal Declaration of Human Rights of the United Nations.") *See also* ELMAR M. HUCKO, THE DEMOCRATIC TRADITION, FOUR GERMAN CONSTITUTIONS 62-77 (1987). *See also* Durig, *supra* note 88, at 13. (Durig states that in early times, including Weimar, "human rights were only valid subject to the law; today the laws are only valid subject to the basic rights.")

[90] HUCKO, *supra* note 89, at 62. (Millions of people were killed during World War II. Among them were over five million Germans and twenty million Russians. Poland lost over twenty percent of its population and the Jewish population was persecuted and massively killed all over Europe.)

[91] Id. *See also* JONATHAN OSMOND, GERMAN REUNIFICATION: A REFERENCE GUIDE AND COMENTARY at xiv, (1992). *See also* Robert Spencer, *The Origins of the Federal Republic of Germany in,* POLITICS AND GOVERNMENT IN GERMANY, *supra* note 88, at 7 & 8.

necessary for future peace and security.[92] However, agreements among the Allies would not work for a long time. France strongly opposed propositions of Great Britain, the United States, and Russia to treat Germany as a single economic unit with certain essential administrative departments to deal with communications, trade, finance, industry, and transportation.[93] In addition, disagreements specially regarding reparations that Germany was supposed to make "in kind" to cover Allied losses led to a progressive bitterness over the borders of the occupied zone.[94] Antagonism between the East and the West culminated on the well-known Cold War between the Soviet Union and the West. This fact contributed to speeding up both the cooperation between Great Britain and the United States to release West Germany from being a vanquished and politically disenfranchised country and led to the establishment of the self-proclaimed German Democratic Republic in the Soviet Zone on October 7, 1949.[95]

The Marshall Plan came about in 1948 to introduce a social market economy between the American and the British zones, providing the basis on which West Germany could move towards prosperity and political reconstruction.[96] However, the critical step in this process would be taken in the London Conference, where the three Western Allies and the Benelux states moved toward the creation of a West German state by reducing the existing differences between the defeated and the winners.[97]

As a result of this conference, the military governors established the minister-presidents of the *Länder* in Frankfurt, who were authorized to draft a constitution and to

---

[92] Spencer, *supra* note 91, at 1 & 2. *See also* HUCKO, *supra* note 89, at 62.
[93] Spencer, *supra* note 91, at 2.
[94] Id.
[95] Id. *See also* HUCKO, *supra* note 89, at 63.
[96] HUCKO, *supra* note 89, at 64 & 65. *See also* Spencer, *supra* note 91, at 4.

take up the proposals of the London Conference.[98] They then considered that in order to stress the provisional character of the founding of a West German state, a "Parliamentary Council" would be elected instead of a constituent assembly, and that the document drafted by this Council would be called Basic Law rather than a constitution.[99]

The debates were difficult and moved slowly because of the particular character of the Parliamentary Council and to the presence of the Military Governors and their interventions, which led to conflicts on many occasions.[100] The final draft of the Basic Law was adopted by the Parliamentary Council on May 8, 1949, was published in the *Bundesgesetzblatt* on May 23, 1949, and entered into force that same day.[101]

The Basic Law recognizes its provisional character in Article 146, which was amended after the peaceful revolution of the German Democratic Republic on November 9, 1989.[102] After its revolution, the East German State called for general elections on Mach 18, 1990, and the first democratic parliament of East Germany decided on August 23, 1990, to accede to the Federal Republic of Germany, which took place on October 3, 1990.[103]

---

[97] HUCKO, *supra* note 89, at 65. *See also* Spencer, *supra* note 91, at 4.
[98] Id.
[99] Id. *See also* Ress, *supra* note 88, at 113.
[100] HUCKO, *supra* note 89, at 67.
[101] Spencer, *supra* note 91, at 5. *See also* HUCKO, *supra* note 89, at 67
[102] Ress, *supra* note 88, at 113 & 114. *See also* F.R.G. CONST. art. 146, *in* The Constitution of the Federal Republic of Germany 306 (Ulrich Karpen ed. 1988). Art. 146 before amendment: "This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force." *See also* F.R.G. CONST. art. 146 (amended by Unification Treaty of 31 August 1990 and the Federal statute 23 September 1990) *in* Federal Law Gazette II [Hereinafter F.G.R. CONST.] "This Basic Law, which is valid for the entire German people following the achievement of the unity and freedom of Germany, shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force."
[103] Ress, *supra* note 88, at 114. *See also* OSMOND, *supra* note 91, at 21-89 for further historical background of the revolution of East Germany and its final integration to the Federal Republic of Germany.

2. Legal Influence affecting Human Rights in the Basic Law

It is important to consider the environment that gave birth to the origin of the Basic Law to understand the principal concerns that the drafters had while enacting it. However, it is of even of greater importance for this work to signal the legal influence that the drafters of the Basic Law considered necessary to insert in this body of law in order to protect individuals. As stated above, Germany faced a terrible international condemnation for committing a gross violations of human right during World War II. The founding fathers of the Basic Law were not only aware of this problem, but they also had to consider that the Nazis had gained power and had ignored constitutional provisions precisely because of the weakness of the Weimar Constitution of 1919.[104]

If the Weimar National Assembly had failed to secure the kind of government that they did, the Parliamentary Council would not take that risk and, instead, would follow the Western, democratic constitutional states as models to prevent this problem.[105] The Parliamentary Council in Germany headed a new appraisal of the individual as a member of society, and by doing so the framers of the Basic Law, with the acquiescence of the Allied Western Powers, enacted fundamental principles, being specially attentive to the protection of the freedom of individual citizens.[106]

Moreover, the Parliamentary Council considered that the failure of the Weimar Constitution was due primarily to two factors: first, the exceedingly mighty position of the president within the Weimar Constitution; and second, the thoroughly democratic but

---

[104] Ress, *supra* note 88, at 115.
[105] Stern, *supra* note 88, at 18.
[106] Riedel, *supra* note 88, at 198.

rather formalistic approach of the constitution, which left fundamental rights meaningless as part of this notion of mere legality .[107]

Thus, the Basic Law was embodied with a strong sense of democracy by weakening the power of the president; by giving a more prevalent role to the Chancellor; and by making safe the constitutional values against the respective parliamentary majority.[108] The last point is especially remarkable since human dignity and fundamental individual rights are among the most important values of the Basic Law.[109]

Finally, we should mention that although the Weimar Constitution of 1919 had an extraordinary chapter of rights, it did not give to them the priority that the Parliamentary Council gave to these rights in the Basic Law.[110] Moreover, the international constitutionalist cooperation that Germany received from the Western Allies after World War II was vital to securing a democratic/bound government respectful of fundamental rights.[111] So, although the Parliamentary Council worked out the shaping of the Basic Law as a purely German affair, we cannot ignore that Western Allies prescribed essential guidelines that gave life to one of the most reliable legal systems on the world.[112]

---

[107] Ress, *supra* note 88, at 116. ("The President [Reichspräsident] was elected directly by the people, had the power to appoint and dismiss the chancellor [Reichskanzler], dissolve Parliament and had far-reaching emergency powers. He could even avoid Parliament and initiate a plebiscite on an act of Parliament." Moreover "the Constitution of Weimar did not propose any absolute values or ideas. Every possible issue was at the whim of the majority, if only that majority had been formed correctly.")

[108] Id. (Now, the President [Reichspräsident] is not elected directly by the people, is not commander in Chief, does not appoint the Chancellor, may not dissolve the Parliament, and does not posses emergency powers. The Chancellor [Reichskanzler] is now elected by the Parliament, enjoys greater powers under the Basic Law, and is "the political engine in the context of the parliamentary majority.")

[109] Id. *See also* F.R.G. CONST. arts. 1 & 2-19

[110] Kommers, *supra* note 88, at 297.

[111] Jost Delbrück, *Human Rights and International Constitutional Cooperation in,* 49 NEW CHALENGES TO THE GERMAN BASIC LAW, *supra* note 88, at 191, 201 & 202.

[112] Id. *See also* David Ponte, *PNUD: la confianza en la justicia mexicana, de las mas bajas*, LA JORNADA, Octubre, 9, 1997, at 1.

3. Basic Rights in the Basic Law

The chapter of Basic Rights, which appears at the very beginning of the German Constitution, is an impressive set of human rights.[113] Section 1 of Article 1 of the constitution, and of this chapter, sets up the protection and inviolability of human dignity, whose protection is the duty of all state authority.[114] Section 2 characterizes human rights as the "basis of the State," the highest and the most predominant principle of the constitution.[115] Section 3 of this article establishes the direct effect of human right, binding the legislature, the executive, and the judiciary.[116]

Section 1 of Article 2 settles the general right of liberty, which could be divided into several branches such as freedom of faith and creed, freedom of assembly, and freedom of expression.[117] This is the right of everybody to freely develop his/her personality so long as she/he does not "violate the rights of others or offend against the

---

[113] Kommers, *supra* note 88, at 297. *See also* Ulrich Karpen, *Application of the Basic Law in,* 23 MAIN PRINCIPLES OF THE GERMAN BASIC LAW 55, 56 (Christian Starck ed., 1983). *See also* Sontheimer, *supra* note 88, at 213.

[114] Kommers, *supra* note 88, at 297. *See also* F.R.G. CONST. art. 1.

[115] Dürig, *supra* note 88, at 13. *See also* Starck, *supra* note 88, at 22 (Saying that the Basic Law recognizes fundamental rights which have evolved from natural law origins). *See also* Ress, *supra* note 88, at 117 (Reaffirming that Article One possesses one of the main and most important values of the Basic Law. The others are contained in Articles 2-19 [Human Rights], and in Article 20 [The fundamental organizational principles of the State and its basic objectives and structure]). *See also* DONALD P. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY, A STUDY OF THE FEDERAL CONSTITUTIONAL COURT, 216 (Sage Series on Politics and the Legal Order, vol. 5, 1976)

[116] Ress, *supra* note 88, at 117. *See also* Dürig, *supra* note 88, at 13 (Stressing that two thing are of particular importance in paragraph 3: first, the character of directly valid law that human rights enjoy; and second, the binding effect of these rights over the legislature, executive, and judiciary). *See also* Riedel, *supra* note 88, at 200 (Showing the discrepancy existing between "Contractualist" and "Naturalist" when they interpret the usage of the term "human rights" in the Basic Law. Special reference is giving to the interpretation of Article 1 and its three paragraphs by these two groups).

[117] Dürig, *supra* note 88, at 13. *See also* KOMMERS, *supra* note 115, at 216 (Quoting from the Basic Law the limitations to the freedom of expression.).

constitutional order or the moral code."[118] Section 2 of this article guarantees the right to life, the inviolability of the person, and the inviolable freedom of the individual.[119]

Equality before the law is guaranteed in Article 3, which expressly establishes this principle in section one.[120] The last two sections describe at some extent the meaning of this principle: section 2 (Men and women shall have equal rights) and section 3 (No one may be prejudiced or favored because of sex, parentage, race, language, homeland and origin, faith, or religion or political opinion).[121]

Article 4, sections 1 and 2, secure a classical human right: religious liberty, which consists of the inviolable freedom of faith, of creed, and of conscience.[122] Rooted in the liberty of conscience, section 3 of this article gives to the individual the subjective right of refusing military service in war.[123] Article 5, section 1, guarantees in a broad sense the freedom of speech, which is another classical human right.[124] This right embraces a whole arrangement of diverse features of the freedom of speech such as freedom of information, freedom of the press, freedom of film, and freedom of the broadcasting

---

[118] Kommers, *supra* note 88, at 298. *See also* F.R.G. CONST. arts. 2 sec. 1.
[119] F.R.G. CONST. arts. 2 sec. 2.
[120] F.R.G. CONST. arts. 3 sec. 1.
[121] Dürig, *supra* note 88, at 14. *See also* Volkmar Götz, *Legislative and Executive Power under the Constitutional Requirements entailed in the Principle of the Rule of Law in,* 49 NEW CHALLENGES TO THE GERMAN BASIC LAW, *supra* note 88, at 141, 155, 156 & 158. *See also* F.R.G. CONST. art. 3 sec. 1 & 2.
[122] Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines in,* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 88, at 45, 47. *See also* F.R.G. CONST. art. 4 sec. 1 & 2.
[123] Goerlich, *supra* note 122, at 48. *See also* Starck, *supra* note 88, at 20 *See also* F.R.G. CONST. art. 4 sec. 3.
[124] Goerlich, *supra* note 122, at 47. *See also* Ress, *supra* note 88, at 119. *See also* F.R.G. CONST. art. 5, sec. 1. *See also* Starck, *supra* note 88, at 20.(Mentioning the right to unrestricted information from generally accessible sources, which appears also in section 1 of Article 5). *See also* Kommers, *supra* note 88, at 298 (Quoting from Article 5 section 2 in what circumstances the freedom of expression may be limited).

media.[125] Section 3 of this article regards art, science, research, and teaching as free; however, teaching is not released from loyalty to the constitution.[126]

Article 6 guarantees "special protection" by the State to the marriage and family, and the right of the parents to care for their children and direct their upbringing.[127] In addition, it secures the well-being of children and mothers, and equalizes the rights of legitimate and illegitimate children.[128] Article 7 discusses education and religion, the requirements to be fulfilled by private institutions, and the role that the state plays in this field.[129]

Article 8 guarantees one of the rights of the citizens included in the Basic Law: the right of assembly,[130]which "may be restricted by or pursuant to law" in regard to open-air meetings.[131] Freedom of Association is secured in Article 9, and is considered a classical human right.[132] This right guarantees freedom to "form trading and limited companies and company amalgamations (groups, holding companies)."[133] In addition, Article 9 promotes the right of all German people to associate freely; however, activities

---

[125] Ress, *supra* note 88, at 120 (Indicating also that Article 5 is "an example of the perception of fundamental rights as 'institutional guarantees.' Not only must the State refrain from interference [defensive, subjective character], it must also actively support free press as an institution.")

[126] F.R.G. CONST. art.5 sec. 3. *See also* Kommers, *supra* note 88, at 298.

[127] F.R.G. CONST. art.6 sec. 1 & 2. *See also* Starck, *supra* note 88, at 46 & 47 (Setting special considerations regarding section 2 of Article 6, and public benefits by the state as regulations directly related to human rights). *See also* KOMMERS, , *supra* note 115, at 216.

[128] F.R.G. CONST. art. 6 sec. 3, 4, & 5.

[129] F.R.G. CONST. art. 7. *See also* Riedel, *supra* note 88, at 205. (Indicating that the institutional guarantee of education facilities is a "fully applicable legal standard that may be tested in the courts.")

[130] F.R.G. CONST. art. 8 sec. 1. *See also* Goerlich, *supra* note 122, at 47. See also Ress, *supra* note 88, at 119. (Stating that the freedom of assembly is one of the relevant provisions of the Basic law promoting democracy in Germany.) *See also* Riedel, *supra* note 88, at 205.

[131] F.R.G. CONST. art. 8 sec. 2.

[132] F.R.G. CONST. art. 9. *See also* Goerlich, *supra* note 122, at 47. *See also* Riedel, *supra* note 88, at 205. (Talking about the workable character of this right before the courts.) *See also* Ress, *supra* note 88, at 119. (Indicating that the right of association is one of the relevant articles of the German constitution contributing to democracy in Germany.)

"directed against the constitutional order or the concept of international understanding are prohibited."[134]

Article 10 holds that the right to "privacy of letters, post, and telecommunications shall be inviolable."[135] This right may be restricted only pursuant to a statute.[136] Freedom of Movement is secured by Article 11, which may be restricted only by or pursuant to law.[137] This right is considered a citizen's right.[138]

Article 12 guarantees the rights to choose an occupation and forbids any compelled activity "except within the framework of a traditional compulsory public service which applies generally and equally to all."[139] This article contains not only the right to choose trade or profession freely but also the State's duty to ensure the effective fulfillment of this right.[140] This right is seen as one of the social and economic rights that the Basic Law includes.[141] Article 12a covers liability to military and other services.[142]

Inviolability of home is a right secured by Article 13, which allows searches only after an order is issued by a judge, or by other organs as provided by law "in the case of

---

[133] Fritz Ossenbühl, *Economy and Occupational Rights in*, 14 GERMAN AND ITS BASIC LAW, *supra* note 88, at 251, 252.
[134] KOMMERS, *supra* note 115, at 216. *See also* Kommers, *supra* note 88, at 298. *See also* F.R.G. CONST. art. 9 sec. 2.
[135] F.R.G. CONST. art. 10 sec. 1.
[136] F.R.G. CONST. art. 10 sec. 2.
[137] F.R.G. CONST. art. 11 sec. 1 & 2. *See also* Dürig, *supra* note 88, at 13. (Stating that most of the aspects of life are influenced by a special right of freedom expressly mentioned in the Basic Law, and that Article 11, for instance, deals with one of these freedoms. This Article "deals with the freedom of movement through the federal territory and the right to take up residence in the Federal Republic of Germany.") *See also* Ossenbühl, *supra* note 133, at 252. (Stating that the freedom contained in Article 11 also guarantees "the free choice of a business location in the Federal Republic.")
[138] Goerlich, *supra* note 122, at 47.
[139] F.R.G. CONST. art. 12 sec. 1 & 2. *See also* Starck *supra* note 88, at 20. *See also* Riedel, *supra* note 88, at 205. *See also* Ossenbühl, *supra* note 133, at 252. (While talking about the constitutional position of the "freedom of the entrepreneur," he stresses that even though the Basic law does not mention expressly this right, freedom of trade and freedom of occupation, contained in Article 12, are the main basis of this.)
[140] Riedel, *supra* note 88, at 205.
[141] KOMMERS, *supra* note 115, at 215 & 216.

danger in delay."[143] The right of inviolability of home is considered one of the classical human rights in the Basic Law.[144] Article 14 guarantees the rights to property and of inheritance,[145] and is also regarded as a classical one.[146] This article contains also the right to acquire property and the right to establish a will.[147]

The right of German people to enjoy their citizenship is guaranteed by Article 16, and may be restricted only pursuant to law.[148] The extradition of any German is forbidden by this article, which also establishes that right of asylum for those persecuted for political reasons.[149] The Right of Petition, another classical human right,[150] is secured by Article 17 of the Basic Law.[151]

According to Article 18, freedoms of expression, the press, assembly, teaching, and association may be forfeited if they are used "to attack the free democratic basic order."[152] Article 19 prohibits any interference with the essence of a basic right and establishes the capacity of individuals to enforce their rights in courts of law.[153] This capacity of the individuals to enforce their rights opens the doors of the court to this

---

[142] F.R.G. CONST. art. 12a.
[143] F.R.G. CONST. art. 13 sec. 1 & 2.
[144] Goerlich, *supra* note 122, at 47.
[145] F.R.G. CONST. art. 14.
[146] Goerlich, *supra* note 122, at 47.
[147] Otto Kimminich, *Property Rights in,* 37 RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW , *supra* note 88, at 75, 81. (Indicating that German constitutional theory distinguishes between fundamental rights and institutional rights The fundamental rights are already mentioned in the text. The institutional guarantees are private property and inheritance.)
[148] F.R.G. CONST. art. 16 sec 1.
[149] F.R.G. CONST. art. 16 sec 2. *See also* Starck *supra* note 88, at 20. *See also* Goerlich, *supra* note 122, at 48. (Giving further details concerning the interpretation of this Article.)
[150] Goerlich, *supra* note 122, at 47.
[151] F.R.G. CONST. art. 17.
[152] F.R.G. CONST. art. 18. *See also* Kommers, *supra* note 88, at 298. *See also* KOMMERS, *supra* note 115, at 216.
[153] F.R.G. CONST. art. 19 sec. 2 & 4. *See also* Stern, *supra* note 88, at 30. See also *See also* Starck *supra* note 88, at 20. (Dealing with the binding force of the Basic law and the role of section 2 of Article 19 to secure "the essential content of the fundamental rights.")

impressive system of rights, and , therefore, section 4 of Article 19 has been called "the culmination of the constitutional state."[154]

There are other rights not included in the first chapter of Basic Law in despite of the fact that their essence makes them fundamental.[155] Among them are "the privileges of the deputies (Art. 37, 46, 47, 48), the rights of the political parties (Art. 21), the equality of all Germans (Art. 33), the independence of the courts (Art. 97), the right to be heard in a properly constituted court, and the banning of retrospective punishment or multiple convictions for the same crime (Art. 103), protection in case of illegal imprisonment (Art. 104), and the right of religious communities (Art. 140)."[156]

---

[154] Dürig, *supra* note 88, at 14. *See also* F.R.G. CONST. art. 19 sec. 4.
[155] HUCKO, *supra* note 89, at 70.
[156] Id.

Chapter II

In this chapter, this author will review the existing mechanisms and institutions devoted to the protection of Constitutional Rights in the United States, Mexico and Germany. Judicial review of legislative acts is cover at some extent in this chapter, particularly in the section concerning the legal institutions protecting human right in Mexico. Judicial review of executive acts was left out of the scope of this paper. In this chapter, the review of these institutions and mechanisms is more descriptive than critical. A more critical approach about them is made in the next chapter, specially with regard to the Mexican judiciary.

A. Mechanisms for the Protection of Individual Rights in the U.S. Legal System

1. Due Process

In this section, this author will talk about the Fourteenth Amendment Due Process Clause, and limits on state action. However, the same rules generally apply to the Federal Government via the Fifth Amendment.[157] The Due Process Clause of the Fourteen

[157] U.S. CONST. amend. V.

Amendment provides that "no state shall deprive any person of life, liberty, or property, without due process of law. . . ."[158]

(a) Liberty and Property Interest

During the early 1970s the Supreme Court decided that many kinds of government benefits formerly conceived to be simple privileges rather than rights were in fact interests in liberty or property, which could therefore not be taken without procedural due process. The major case launching the modern procedural due process was *Goldberg v. Kelly.*[159]

In *Goldberg*, the Court decided that a welfare recipient's interest in continued receipt of welfare benefits was a "statutory entitlement" that amounted to property within the meaning of the due process clause. The Court decided that a welfare recipient must be given an evidentiary hearing before his benefits may be terminated. In this context, welfare payments were not mere kindness, but were a right protected by the Constitution against arbitrary withdrawal.[160]

At first it was difficult to determine where this road might lead, but now it appears that the Court engages in a two-steps analysis. First, the question initially is whether there is any "liberty" or "property" implicated that justified a triggering of procedural due

---

[158] U.S. CONST. amend. XIV.
[159] GUNTHER, *supra* note 45, at 584-585. *See also Goldberg v. Kelly,* 397 U.S. 254 (1970).
[160] Id. *See also* STONE, *supra* note 2 at 145.

process; and second, the question of what process is due, which is commonly reached only if the first step bears a positive response.[161]

Board of Regents v. Roth[162] as well as most major cases that follow involve public employees issues because they constructed most of the doctrinal modernization in the denotation of "liberty" and "property" and because they symbolize the recent "Court's methodology in a single functional context."[163] In this case, *Roth*, hired for a one-year contract at Wisconsin State University-Oshkosh, was informed without explanation that he would not be rehired for the following year.[164]

In *Roth,* the Court reaffirmed that the "wooden distinction" between "rights" and "privileges" has fully and finally been rejected as parameters governing the applicability of procedural due process.[165] The Court also stressed that the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.[166] The Court did not find a property interest on the part of the plaintiff because a person claiming a property interest must have more than an unilateral expectation of it. He or she must have a legitimate claim of entitlement to it.[167]

The Court held that whether or not such a legitimate entitlement to the property interest existed was to be defined by existing rules or understandings that stem from an

---

[161] GUNTHER, *supra* note 45, at 585.
[162] *Board of Regents v. Roth*, 408 U.S. 564 (1972)
[163] GUNTHER, *supra* note 45, at 585.
[164] STONE, *supra* note 2 at 1049. (Roth was employed for a one year term as assistant professor at Wisconsin State University. Under state law, he did not have tenure. The president of the university informed Roth that he would not be rehired; no explanation was given for the decision, and there was no opportunity to challenge it. Roth alleged that the failure to hold a hearing violated the due process clause. The Court rejected Roth's claim)
[165] STONE, *supra* note 2 at 1049.

independent source such as state law.[168] In this case, the rationale of the Court also emphasized that to determinate whether due process requirements apply in the first place, it was not necessary to look to the weight , but to the nature of the interest at stake.[169]

However, *Perry v. Sindermann,*[170] a companion case to *Roth,* brought about a contrasting Supreme Court decision. *Sindermann* was a professor at Odesa Junior College whose contract, like Roth's, was not renewed. *Sindermann* demanded that Odesa had in fact a tenure program. The College had established in a faculty guide that, notwithstanding the lack of an existent tenure system, it "wishes each faculty member to feel that he has permanent tenure so long as his teaching services are satisfactory and as long as he displays a cooperative attitude."[171]

The Court held that *Sindermann*'s allegations raised a genuine issue because his interest in continued employment at Odesa Junior College, though not secured by a formal contract, was secured by a no less biding understanding fostered by the college administration.[172] The plaintiff was entitled to a full trial court on the alleged infringement of his First Amendment right.[173]

Bishop v. Wood[174] apparently established the possibility that when granting a benefit, government is free to conditioning an employee's removal on compliance with certain specified procedures, which at the same time do not allow that property interest

---

[166] GUNTHER, *supra* note 45, at 586.
[167] Id. at 587. *See also* STONE, *supra* note 2 at 1050
[168] Id.
[169] STONE, *supra* note 2 at 1049.
[170] *Perry v. Sindermann,* 408 U.S. 593 (1972).
[171] STONE, *supra* note 2 at 1050-1051.
[172] Id.
[173] GUNTHER, *supra* note 45, at 587.
[174] Bishop v. Wood, 426 U.S. 341 (1976).

arises.[175] In this case, the City Manager of Marion, North Carolina, ended the petitioner's employment as a policemen without providing him a hearing to learn the sufficiency of the cause of his discharge. Petitioner brought suit, contending that since he was classified as "permanent employee" he had a constitutional right to a pre-termination hearing. During pretrial discovery, he was informed that he had been discharged for insubordination, "causing low morale," and "conduct unsuited to an officer."[176]

While examining the state-law issue, the Court dismissed the plaintiff's property claim, arguing that according to the U.S. District Court's interpretation of a city ordinance, the petitioner had held his position "at the will and pleasure of the city."[177] The city ordinance provides that a permanent employee may be dismissed if he fails to perform work up the standards of his classification, or if he is negligent, inefficient, or unfit to perform his duties.[178]

The Court held that according to the District Court ruling, under applicable North Carolina precedents, the ordinance did not constituted an expectation of continued public employment, and that the ruling of this court did not interpret the ordinance as creating such an expectation.[179]

The plaintiff also argued that this dismissal violated his interest in liberty since the reason given for the discharge were so serious that they stigmatized his reputation, and those reasons also were false.[180] However, the Court rejected these allegations on the grounds that such reasons were never stated publicly until after the lawsuit started, and

---

[175] GUNTHER, *supra* note 45, at 590.
[176] Id.
[177] Id. at 591.
[178] Id. at 590.
[179] Id. at 590-591.

that a "contrary holding would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake."[181]

By comparing the *Perry v. Sidermann* decision and the *Bishop* case, it seems that the sources of constitutionally-protected "property" interests were considerable narrowed. While in *Perry v. Siderman* the Court held that an unwritten understanding to secure a *de facto* tenure might be binding, in *Bishop* the Court decided that only a statute or contract could be enough to originate a Fourteenth Amendment interest.

If *Bishop* then narrowed the protected "property" interest, *Paul v. Davis*[182] did so with the definition of the constitutionally-protected "liberty" interest.[183] Davis had been arrested on a shoplifting charge, petitioner police officials circulated a "flyer" to local merchants of the area designating him an "active shoplifter." When the shoplifting charges were dismissed, Davis sued the local police under a federal civil rights law, claiming that the action had deprived him of his constitutional interest in reputation.[184]

At least two important features may be distinguished from *Paul* and *Davis*. First, the Court dismissed Davis' claim, arguing that the "words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interest that may be protected by state law."[185] Second, the majority view in Paul seems to have been motivated largely by institutional concerns, including the fear of excessive Court interference in the administration of state

---

[180] Id. at 590.
[181] Id. at 591.
[182] *Paul v. Davis,* 424 U.S. 693 (1976).
[183] GUNTHER, *supra* note 45, at 594. *See also* STONE, *supra* note 2 at 1057.
[184] Id.
[185] GUNTHER, *supra* note 45, at 595.

programs and the fear of allowing the Constitution to absorb state tort law, making it enforceable in the federal courts.[186]

However, this narrower definition of "liberty" and "property" has not taken place in all contexts. For instance, in the school environment , the Court has rendered surprising readings to these terms.[187] In *Goss v. Lopez*, the Court afforded an informal hearing to high school students threatened with brief disciplinary suspension.[188]

The Court found a property interest because state law established that students may be suspended only for misconduct. In the Court's appraisal, this provision constituted a lawful claims of entitlement to a public education.[189] Having created the public school system, the state had created an entitlement that it could not terminate without due process.[190]

The point of convergence of this subchapter has been on the question of fixing the limits of constitutionally protected "liberty" and "property" for procedural due process purposes. However, once the Court bring to an end that a constitutionally defended "liberty" and "property" interest has been impaired, the issue is to establish what process is due.[191]

In *Mathews v. Eldridge*,[192] the Court settled the approach that has become the predominant one for deciding what process is due.[193] Eldridge had perceived disability benefits since 1968. After considering Eldridge's reply to a set of questions about his

---

[186] Id. at 596-597. *See also* STONE, *supra* note 2 at 1057.
[187] GUNTHER, *supra* note 45, at 598.
[188] Id.
[189] STONE, *supra* note 2 at 1057
[190] GUNTHER, *supra* note 45, at 598.
[191] Id. at 599.
[192] *Mathews v. Eldridge,* 424 U.S. 319 (1976).

condition, reports from Eldridge's physician and a psychiatric consultant, and Eldridge's files, the pertinent state agency made a tentative determination that Eldridge's disability had ceased. Eldridge was so informed, given a statement of reasons, and offered an opportunity to offer a written replication. He did so, confronting the agency's decision, but benefits were nevertheless finished. Eldridge then claimed that this procedure violated the Due Process Clause.[194]

In holding that disability benefits could be terminated without a prior evidentiary hearing, the Court reached agreement on a general balancing formula governing the identification of the procedural guarantees appropriate to a particular circumstance.[195] Said formula or test is sometimes called one of balancing or "cost-benefit" analysis, and requires consideration of three distinct factors.[196] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entitle."[197]

---

[193] GUNTHER, *supra* note 45, at 599.
[194] STONE, *supra* note 2 at 1059.
[195] Id.
[196] STONE, *supra* note 2 at 1064.
[197] GUNTHER, *supra* note 45, at 599-600. *See also* STONE, *supra* note 2 at 1064-1065.

(b) The Due Process Revolution

The most rapid expansion of the meaning of due process took place in the decade of 1960's. The Supreme Court, led by Chief Justice Warren, emphatically applied the guarantees of the Fourth, Fifth, Sixth, and Eight Amendment against state action.[198]

In *Elkins v. United States*,[199] the Court forbade federal agents to use evidence seized illegally by state agents.[200] In this case, the Court finally repudiated the "silver platter" doctrine, which consisted on that Federal Agents could utilize evidence obtained by state agents through unreasonable search and seizure, if that evidence was seized without federal cooperation and was turned over to the federal officials.[201]

In 1961, the Court demanded the exclusion of illegally obtained evidence from state trials in *Mapp v. Ohio*.[202] In this case, suspecting that a criminal was hiding in a house, Cleveland police broke in the door and searched the whole place without a warrant. A storage space containing obscene materials was found there and the resident was then tried and convicted for possession of obscene materials.[203] The Court held that allowing use of illegally obtained evidence tended to destroy the whole system of constitutional restraints on which the liberties of the people rest.[204]

Two years later, in *Gideon v. Wainwright*,[205] the Court held that all persons accused with serious crimes in state court were assured the assistance of an attorney, who

---

[198] WITT *supra* note 159, at 383.
[199] Elkins v United States, 364 U.S. 206 (1960).
[200] WITT *supra* note 159, at 383.
[201] Id. at 538-539.
[202] Id. at 384. *See also* GUNTHER, *supra* note 45, at 422. *See also Mapp v. Ohio*, 367 U.S. 643(1961).
[203] WITT *supra* note 159, at 539.
[204] Id.
[205] *Gideon v. Wainwright,* 372 U.S. 335 (1963).

would be appointed by the court and paid by the state, if necessary.[206] Gideon was an indigent, tried and convicted in a Florida state court of a felony. He requested and was denied a court appointed attorney. The judge based his refusal on the fact that Gideon's crime was not a capital one. Gideon asked a federal court to declare his five-year sentence invalid because it was obtained in violation of his constitutional right of counsel.[207]

Finally, the Supreme Court consented to hear Gideon's case and held that the assistance of counsel was so fundamental that the Fourteenth Amendment Due Process Clause expanded the Sixth Amendment protection to state defendants.[208] The Court stated that any person held into court, who is too poor to hire a lawyer, cannot be assured a impartial trial unless counsel is afforded to him.[209]

In *Malloy v. Hogan*,[210] the Court held in 1964 that state suspects, like federal suspects, are protected against being forced to incriminate themselves.[211] Few constitutional guarantees have arisen as much controversy as the Fifth Amendment right not to be forced to incriminate oneself. One important feature of this guarantee is the right to remain silent when accused, and to refuse to testify in one's own defense.[212]

In 1965, the Court decided that due process demanded from the states to afford a defendant with the right to confront and cross-examine persons who testified against

---

[206] WITT *supra* note 159, at 384.
[207] Id. at 561.
[208] Id. *See also* GUNTHER, *supra* note 45, at 420-422.
[209] Id.
[210] *Malloy v. Hogan*, 378 U.S. 1 (1964).
[211] WITT *supra* note 159, at 384. *See also* GUNTHER, *supra* note 45, at 422. *See also* LOCKHART, *supra* note 2, at 134.
[212] WITT *supra* note 159, at 339

him.[213] *Pointer v. Texas*[214] involved a trial in which a state prosecutor tried to utilize the reproduction of a witness's testimony seized at a preliminary hearing, where he was not subject to cross-examination. The prosecutor had made no effort to secure the personal appearance of the witness at trial and the Court threw out that evidence.[215]

In 1967, in *Klopfer v. North Carolina*,[216] the Court held that the Due Process Clause required protection of the petitioner to speedy trial against abridgment by the states.[217] In this case the Court struck down a North Carolina statute that permitted limitless inactivity of a criminal prosecution without dismissal of the indictment. The defendant would enjoy liberty, but the prosecutor could reinstate the case any time judge agreed such action to be apropos.[218]

The Court held that this procedure "clearly denies the petitioner the right to speedy trial which we hold is guaranteed to him by the Sixth Amendment. . . . . We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."[219]

The next year, in *Duncan v. Louisiana*,[220] the Court held that the commitment of the Nation to the right of jury trial in serious criminal cases as a shielding against

---

[213] Id. at 384. *See also* GUNTHER, *supra* note 45, at 422. *See also* LOCKHART, *supra* note 2, at 127.
[214] *Pointer v. Texas*, 380 U.S. 400 (1965).
[215] WITT *supra* note 159, at 531.
[216] *Klopfer v. North Carolina*, 386 U.S. 213 (1967)
[217] WITT *supra* note 159, at 384. *See also* GUNTHER, *supra* note 45, at 422.
[218] WITT *supra* note 159, at 530.
[219] Id.
[220] *Duncan v. Louisiana*, 391 U.S. 145 (1968).

capricious law enforcement qualifies for protection under Fourteenth Amendment Due Process Clause, and "must therefore be respected by the states."[221]

The test applied for the Court to determine whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment consists mostly on three questions. First, "whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Second, "whether it is basic in our system of jurisprudence." And third, "whether it is a fundamental right, essential to a fair trial."[222]

Providing an accused with the right to be tried by a jury in criminal cases, the Court noted, is necessary to prevent oppression by the government. Jury trial not only protects the defendant against the "corrupt or overzealous prosecutor," but it also guards him against "the compliant, biased, or eccentric judge."[223]

Finally, in 1969, the Court applied the ban on double jeopardy to state criminal proceedings in *Benton v. Maryland* [224] In its last decision under Chief justice Earl Warren, the Court in this case decided that the double jeopardy clause applied to the states through the due process guarantee of the Fourteenth Amendment.[225]

Prior to the 1960s there were frequent proposals that, even if a particular guarantee of the Bill of Rights was incorporated in the Due Process clause of the

---

[221] GUNTHER, *supra* note 45, at 126. *See also* STONE, *supra* note 2 at 810-811. *See also* WITT *supra* note 159, at 530. *See also* LOCKHART, *supra* note 2, at 127.
[222] STONE, *supra* note 2 at 811. *See also* GUNTHER, *supra* note 45, at 422.
[223] LOCKHART, *supra* note 2, at 126.
[224] WITT *supra* note 159, at 384. *See also* Benton v. Maryland, 395U.S. 784 (1969). *See also* STONE, *supra* note 2 at 811-812.
[225] WITT *supra* note 159, at 566.

Fourteenth Amendment, it did not indispensably add-on to the states in the identical form as it did to the federal government.[226] However, by the 1960s, the Court was determined to apply the guarantees of the Bill of Rights that were selectively incorporated in the Due Process clause of the Fourteenth Amendment to the states precisely in the same form as they applied to the federal government.[227]

2. The Obligatory or Discretionary Power of the Supreme Court

The appellate jurisdiction of the Supreme Court is so large that this Court has been allowed to judge as to whether it would receive an appeal, basing its decision on the importance of the involved question.[228] As a result, the appellate jurisdiction of the Supreme Court is both mandatory and discretionary, being the latter the most significant in the number of cases reviewed.[229]

In deciding whether to receive a case for review, the Supreme Court has significant discretion , subject only to the controls dictated by the Constitution and Congress.[230] Original jurisdiction means the right of the Supreme Court to hear a case before any other court does. Appellate jurisdiction is the right to review the decision of

---

[226] STONE, *supra* note 2 at 812.
[227] Id.
[228] ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW, 140 (1ST ed. 1989). See also JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT AT WORK, 71 (2nd ed. 1997). (hereinafter BISKUPIC & WITT)
[229] BREWER-CARIAS, *supra* note 228, at 140.
[230] BISKUPIC & WITT, *supra* note 228, at 71. (Quoting Article III, Section 2, of the Constitution, which states "In all Cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction. In all other Cases . . . the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, which such Exceptions, and under such Regulations as the Congress shall make." *See also* U.S. CONST. art. III § 2. *See also* BREWER-CARIAS,

lower courts.[231] Commonly, only a handful of original jurisdiction cases are filed each term because the great majority of cases reaching the Supreme Court are appeals from rulings of the lower courts.[232]

Due to the limited and less important nature of the original jurisdiction of the Supreme Court, it is clear that the most meaningful activity of the Supreme Court is carried out through its appellate jurisdiction in which it works as the court of last resort.[233] In this regard, especially in the field of constitutional issues, the Supreme Court emerges as the most significant tribunal in the American system with a great appellate jurisdiction arranged by Congress to guarantee a final, authoritative, and uniform interpretation of the Constitution and of the laws and treaties of the United States.[234]

The main reform with respect to the appellate jurisdiction of the Supreme Court was taken by the 1925 Judiciary Act.[235] After the enactment of said Act, the Supreme Court had broad discretion to determine for itself what cases it would hear. Since Congress in 1988 practically removed the Court's compulsory jurisdiction through which it was obliged to hear most appeals, that discretion has been nearly limitless.[236]

---

supra note 228, at 139. *See also* DAVID M. O'BRIEN, STORM CENTER, THE SUPREME COURT IN AMERICAN POLITICS , 207 (3rd ed. 1993)

[231] BISKUPIC & WITT, supra note 228, at 71.

[232] Id. *See also* BREWER-CARIAS, *supra* note 228, at 139. *See also* O'BRIEN, *supra note* 230, at 207. (Commenting that "the Court today has only about ten cases each term coming on original jurisdiction . Most involve states suing each other over land and water rights, and they tend to be rather complex and carried out for several terms before they are finally decided.")

[233] BREWER-CARIAS, *supra* note 228, at 139.

[234] Id. *See also* STONE, *supra* note 2 at 145. *See also* GUNTHER, *supra* note 45, at 40-47.

[235] Id. *See also* BISKUPIC & WITT, *supra note* 228, at 71. *See also* O'BRIEN, *supra note* 230, at 207

[236] BISKUPIC & WITT, *supra note* 228, at 71. *See also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL, 179-180 (1992) (Stating that before the Judiciary Act of 1925, which broadened the Court's discretionary jurisdiction, appeals amounted to 80 percent of the docket and petitions for *certiorari* less than 20 percent. "Today virtually 99 percent of the docket comes on *certiorari*.")

This discretionary power to decide the cases to be heard by the Court has modified the character of the Supreme Court as a furthest appellate tribunal or an ordinary judicial body.[237] The Supreme Court has become a "Court of Special Resort for the settlement only of such questions as it deems to involve a substantial public concern, rather than the concerns only of private persons as such."[238]

(a) *Certiorari* and Appeals

The jurisdiction of the Supreme Court, for constitutional purposes, is placed in Article III. However, Congress has never given litigants right of entry to the Court in all cases for which Article III furnish permission. The commanding provisions are established in 28 U.S.C. §§ 1251-1257.[239] These provisions authorized two main methods to reach the Supreme Court. The first, cast aside in 1988 except for rare cases, is through an appeal; the second is through *certiorari*.[240]

The mandatory jurisdiction of the Supreme Court is the appellate jurisdiction, which is exercised when the right of appeal is granted to a party to bring a case before this Court.[241] In the relatively few cases to come to the Supreme Court by means of appeal, the appellant must file a jurisdictional statement justifying why his or her case qualifies for review and why the Court should confer it a hearing.[242] Obligatory or

---

[237] BREWER-CARIAS, *supra* note 228, at 141.
[238] Id.
[239] STONE, *supra* note 2 at 145
[240] Id. *See also* BISKUPIC & WITT, *supra note* 228, at 71. *See also* BREWER-CARIAS, *supra note* 228, at 141.
[241] BREWER-CARIAS, *supra note* 228, at 141. *See also* STONE, *supra* note 2 at 145.
[242] BISKUPIC & WITT, *supra note* 228, at 71

mandatory appellate jurisdiction is restricted to the following cases, all related to constitutional justice:

- Cases in which a federal court of appeal has held a state statute to be null and void as antagonistic to the Constitution, treaties or laws of the United States.[243]
- Cases in which a federal court of appeal has held a state statute to be unconstitutional, so long as the federal government is a party.[244]
- Cases in which a State Supreme Court has drawn into dispute the validity of a treaty or statute of the United States [Act of Congress] and the judgment is against its cogency.[245]
- Cases judged by special three-judge federal district courts, bearing in main that this kind of court must be established through the expansion of the federal district court where ordinarily only one judge sits to attend the case, when a proceeding is brought into to enjoin either a federal or state statute on the basis of its constitutionality.[246]
- Cases in which a State Supreme Court has drawn into consideration the validity of a statute of any state on the grounds of its being contrary to the Constitution, treaties or law of the United States, and the decision is in favor of its validity.[247]

---

[243] BREWER-CARIAS, *supra note* 228, at 141. *See also* ROBERT L. STERN ET AL, SUPREME COURT PRACTICE, 403 (6TH ed. 1986). *See also* 28 U.S. Code, 1254, 2.
[244] BREWER-CARIAS, *supra note* 228, at 141. *See also* STERN, supra note 243, at 402. *See also* 28 U.S. Code, 1252.
[245] BREWER-CARIAS, *supra note* 228, at 141. *See also* STERN, *supra* note 243, at 403. *See also* 28 U.S. Code, 1257, 2.
[246] BREWER-CARIAS, *supra note* 228, at 14. See also 28 U.S. Code, 1253, 2281, 2282, 2284.
[247] BREWER-CARIAS, *supra note* 228, at 141. *See also* STERN, supra note 243, at 403. See also 28 U.S. Code, 1257, 2.

This right to appeal and the mandatory appellate jurisdiction of the Supreme Court is confined to important constitutional problems.[248] In all other cases the Supreme Court is allowed to examine all the decisions of the federal courts of appeals, of the specialized federal courts, and all the decisions of the State Supreme Courts concerning questions of federal law. This jurisdiction is a discretionary one when the applicant is for a petition for a writ of *certiorari*.[249]

The principal difference between the *certiorari* and the appeal methods is that the Supreme Court enjoys total discretion to grant a request for a writ of *certiorari*, but is under an obligation to receive and decide a case that arrives to it on appeal.[250] Cases in which there is no an established right of appeal and where the mandatory appellate jurisdiction of the Supreme Court is not set up can reach this Court as petitions for *certiorari*.[251]

In petitioning for a writ of *certiorari*, a litigant who has lost a case in the lower court sets out the reasons why the Supreme Court should review his or her case.[252] This method of seeking review by the Supreme Court is expressly established in the following cases:

---

[248] BREWER-CARIAS, *supra note* 228, at 141.
[249] Id.
[250] BISKUPIC & WITT, *supra note* 228, at 71. BREWER-CARIAS, *supra note* 228, at 142.
[251] BREWER-CARIAS, *supra note* 228, at 142.
[252] BISKUPIC & WITT, *supra note* 228, at 71.

- Cases decided by the federal court of appeals, granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.[253]
- Cases decided in the Court of Claims granted on petition of the United States or the claimant.[254]
- Cases decided in the Court of Customs and Patent Appeals.[255]
- Cases decided by the Supreme Court of the states where the validity of a treaty or statute of the United States is drawn into question or where the validity of a state statute is drawn into question of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under he Constitution, Treaties or statutes of, or commission held or authority exercised under the United States.[256]

According to the Supreme Court's Rule No. 17, in all these cases when referring to the considerations governing review on *certiorari* . . . "a review on writ of *certiorari* is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."[257] The same Rule 17 arranges the *certiorari* considerations into a list of three basic factors that might prompt the Supreme Court to

---

[253] BREWER-CARIAS, *supra note* 228, at 142. *See also* 28 U.S. Code, 1254, 1.
[254] BREWER-CARIAS, *supra note* 228, at 142. *See also* 28 U.S. Code, 1255, 1.
[255] BREWER-CARIAS, *supra note* 228, at 142. *See also* 28 U.S. Code, 1256.
[256] BREWER-CARIAS, *supra note* 228, at 142. *See also* 28 U.S. Code, 1257, 3.
[257] BREWER-CARIAS, *supra note* 228, at 142. *See also* STERN, *supra* note 243, at 195

grant *certiorari* even though without controlling nor fully measuring the Court's discretion, as follows:

> *1. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a State court of last resort; or has so far departed from the accepted and usual curse of judicial proceedings or has far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision;*
>
> *2. When a State court of last resort has decided a federal question in a way in conflict with the decision of another State court of last resort or a federal court of appeal;*
>
> *3. When a State court or a federal court of appeals has decided an important question of federal law which has not been , but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.*[258]

However, any enumeration of factors that may trigger the review of a given case by the Supreme Court can be temeritous because the justices can also change their minds once the writ has been granted, disposing of the writ by dismissing it as "improvidently granted."[259] They do so when developments concerning the legal affectation of a case occur after *certiorari* is granted, or when briefs or oral argument make the case look quite different from the way it appeared in the more limited certiorari petition.[260]

The use of "improvidently granted" or DIG "escape" has provoked criticisms to the discretionary power of the Supreme Court. For instance, when the Supreme Court, immediately after *Brown v. Board of Education*,[261] after hearing oral argument in a case

---

[258] STERN, *supra* note 243, at 403. *See also* BREWER-CARIAS, *supra note* 228, at 142. *See also* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM; DATA, DECISIONS & DEVELOPMENTS, 53 (1994). *See also* STONE, *supra* note 2 at 145. *See also* BISKUPIC & WITT, *supra note* 228, at 72. *See also* STHEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM,158 (1987).

[259] WASBY , *supra* note 258, at 159

[260] Id. at 159

[261] *Brown v. Board of Education,* 347 U.S. 483.

involving discrimination by a cemetery association, dividing evenly, and receiving a request for rehearing, dismissed certiorari to evade deciding this case.[262]

By practice, *certiorari* is conferred by a vote of at least four justices, the "rule of four" that is also applicable to decisions to "note probable jurisdiction" in appeals.[263] The "rule of four is a rule developed by the Supreme Court to guide the exercise of its discretionary power.[264] A fundamental feature of this rule is that once this rule has been fulfilled, the justices who objected to review, if they compose a five-judge majority, should not go around and discard the case, and all should take part in deciding it on the merits.[265]

In short, *certiorari* is granted by the Supreme Court in order to promote uniformity and consistency in federal law. Special factors such as those mentioned above may prompt the granting of certiorari by the this Court; however, review may be granted on the basis of other factors, or denied even in the event that one or more of the already mentioned circumstances are present.[266] The discretion of the Supreme Court is not restricted, and it is the significance of the problem and the public interest noticed by the Court in a particular case, which leads the Supreme Court to grant *certiorari* and to review some cases.[267]

---

[262] WASBY , supra note 258, at 159.
[263] Id.
[264] Id. *See also* BISKUPIC & WITT, *supra note* 228, at 72.
[265] WASBY , *supra* note 258, at 159. (This rule brings about some problems, for instance, when considering that the Federal Employer Liability Act (FELA) cases should not have been granted *certiorari,* Justice Frankfurter refused to participate in deciding them. "Had all justices followed his practice, the "rule of four" would be the "rule of five.")
[266] BREWER-CARIAS, *supra* note 228, at 142.
[267] Id.

3. The Role of the District Courts and the Courts of Appeals in Protecting Constitutional Rights

(a) District Courts

Hierarchically, the federal courts enjoy a three-tiered system: trial or courts of first instance, inferior or intermediate courts of appeals, and a Supreme Court.[268] The federal district courts decide the greater part of cases received in the federal system.[269] These courts are precisely the primary trial courts of general jurisdiction for the federal system.[270]

The jurisdiction of these courts stretches out to many types of conflicts: "civil and criminal cases arising out of the laws of the United States; controversies between citizens of different states; cases in which the United States is a plaintiff or defendant; *habeas corpus* proceedings; and cases rising out of federal civil rights litigation originating from violations by state officers of the constitutional rights of the plaintiff seeking damages or other relief."[271]

The federal district courts try the vast majority of cases heard in the federal system and most district court decisions are final.[272] These courts are the only federal ones in which attorneys examine and cross-examine witness. Subsequent appeals of the trial court will focus on correcting errors but the factual record is established at this level.

---

[268] SEGAL, *supra* note 236, at 166. *See also* O'BRIEN, *supra* note 230, at 209. *See also* BREWER-CARIAS, *supra* note 228, at 138.
[269] SEGAL, *supra* note 236, at 166.. .
[270] EPSTEIN, *supra* note 258, at 631-633. *See also* BREWER-CARIAS, *supra* note 228, at 138. *See also* WASBY , *supra* note 258, at 33.
[271] BREWER-CARIAS, *supra* note 228, at 138. *See also* WASBY , *supra* note 258, at 33-34.

Determining facts is a task that often falls to a jury, which consists of citizens from the society who serve as fair arbitrators of the facts and apply the law to the facts.[273]

The conclusive character of district court decisions is due to the fact that they are either not appealed, or if appealed, are settled prior to an appellate ruling, or, in the vast proportion of cases reviewed by the courts of appeals, they are sustained.[274] In addition, the fact that by no means all courts of appeals rulings are carried to the Supreme Court, which grant review to only a very small percentage of those cases seeking review,[275] makes final the great majority of district court decisions.[276]

Furthermore, appellate court review of district courts decisions is not uniform across the districts within each circuit or across subject matters; indeed court of appeals furnish "sustained supervision" of district court judgments "in only a few areas of public policy."[277] In part because district courts rulings on different subjects are appealed in differing proportions, appellate review is not necessarily focused so as to bring about uniformity on questions of federal law or protection of meaningful federal interests.[278]

---

[272] SEGAL, *supra* note 236, at 166.. *See also* WASBY , *supra* note 258, at 34
[273] ROBERT A. CARP & RONALD STIDHMAM, JUDICIAL PROCESS IN AMERICA, 42 (1989)
[274] WASBY , *supra* note 258, at 34.
[275] BISKUPIC & WITT, *supra* note 228, at 74. (Commenting that "the reduction of cases granted review and resulting in sogned opinions was dramatic into the 1990s: in October 1986 term the Court issued 145 opinions; in 1987, it issued139; in 1988, it issued 133; in 1989, it issued 129; in 1990, 112; in 1991, 107; in 1992, 107; in 1993, 84; in 1994, 82; in 1995, 75.")
[276] WASBY , *supra* note 258, at 34.
[277] Id.
[278] Id.

(b) The Courts of Appeals

Over the district courts are the United States courts of appeals, which are the general appellate courts for the federal judicial system.[279] These courts do not have original jurisdiction and are rigorously appellate tribunals, with very comprehensive jurisdiction derived from the fact that all decisions of the district courts may be appealed to them.[280]

In 1891, the United States court of appeals were established in their current form as a consequence of increased federal court case load and the recognition of the impracticality of having Supreme Court justices sit on circuit.[281] The creation of these courts began the tendency of furnishing the Supreme Court with the capability to decide which cases it would review.[282]

The court of appeals handle cases on all types of federal law and bring some degree of uniformity to national law, providing some oversight of activities once considered primarily local.[283] Each of the twelve regular courts of appeals has jurisdiction over a specific geographical region known as circuit, and appeals are commonly heard by panels of three appellate judges.[284]

---

[279] Id. BREWER-CARIAS, *supra* note 228, at 138.
[280]. WASBY , *supra* note 258, at 41. *See also* BREWER-CARIAS, *supra* note 228, at 138. *See also* SEGAL, *supra* note 236, at 167. *See also* EPSTEIN, *supra* note 258, at 632.
[281] WASBY , *supra* note 258, at 41.
[282] Id.
[283] Id.
[284] Id. at 42 ("There are now twelve U.S. Courts of Appeals - eleven numbered circuits and one for the District of Columbia - with general appellate jurisdiction, in addition to the specialized Court of Appeals for the Federal Circuit and a Temporary National Emergency Court of Appeals. Except for the District of Columbia Circuit, each court of appeals covers several states.") *See also* EPSTEIN, *supra* note 258, at 632.

Cases in the courts of appeals differ extensively in their complexity. Certain appeals are thought to be "frivolous," having little meaning and not raising new issues. Many other are routine, and still other appeals are "ritualistic," brought because of the litigants' demands even when the likelihood of reversal of the district court decision is low.[285]

Only a small number of cases include "nonconsensual" appeals "which raise major questions of public policy and upon which there is considerable disagreement."[286] Among the nonconsensual appeals may be those in which "issue transformation" has taken place in the court of appeals. Among those would be instances in which civil liberties problems were not an significant piece of the case at trial but became pivotal in the appeal.[287]

The Court of appeals must hear all cases brought to them.[288] Bearing in mind this fact, and the fact that very few cases are appealed to the Supreme Court, which rejects most certiorari petitions, the finality of decisions by these court is of particular importance.[289] For instance, in the Second, Fifth, and District of Columbia Circuits, only one out of five decisions was appealed, with the Supreme Court granting review to only one-tenth of those-leaving ninety eight percent of appeals court rulings as the final judicial statement.[290]

Due to the fact that most of the rulings of the United States courts of appeals are not disturbed, these courts "make national law," although "residual and regionally," and

---

[285] WASBY , *supra* note 258, at 44.
[286] Id.
[287] Id.
[288] Id.
[289] Id. *See also* BREWER-CARIAS, *supra* note 228, at 138.

the Supreme Court stands largely dependent on them to "enforce the supremacy and uniformity of national law," specially in those domains of law in which undisturbed cases have a tendency to cluster.[291]

However, the courts of appeals do not comprise a single institution for the creation of national policy.[292] Thus, the enforcement of "the supremacy and uniformity of national law" by courts of appeals is performed by twelve different courts that are marked by broad variety in their business and behavior.[293]

The interests and the values held by the members of appellate courts vary within a court and among diverse courts, and variances of orientation without doubt elucidate in part the divergent decisions reached in resembling cases by the appellate courts of different circuits.[294]

Although the courts of appeals are referred to as if they were a single policy-making body, the appellate court do acquire identifying personalities.[295] A major difference in policy making by the Supreme Court and by the courts of appeals is that the courts of appeals are more likely to make policy on a regional basis.[296] This regional diversity has leaded to think that "regionalization of appellate structures, for some subjects at last, may well spawn regional specialization and regionalized national law."[297]

When policy making is defined through the use of doctrinal analysis, it has been found that in the absence of clear Supreme Court standards, the courts of appeals played a

---

[290] WASBY , *supra* note 258, at 44.
[291] Id.
[292] JOHN B. GATES & CHARLES A. JOHNSON, THE AMERICAN COURTS, A CRITICAL ASSESSMENT, 52 (1991)
[293] Id.
[294] STEPHEN T. EARLY, JR., CONSTITUTIONAL COURTS OF THE UNITED STAES, 129 (1977).
[295] Id.
[296] CARP, *supra* note 273, at 38.

main role in the growth of desegregation policy outside the South.[298] The majority of pro-desegregation standards were embraced by a group of circuits including two from the East and two which include states from South and Midwest.[299] The less strict standards were adopted by the Far West's Ninth Circuit and the Midwestern Seventh. There were no certain patterns in the Third or the Tenth.[300]

Variances of interests and values within a court and among diverse appellate courts indeed produce divergent outcomes in resembling cases. For example, some decades ago, the Court of Appeals, Fifth Circuit, characterized those ideas connected to Southern democracy, particularly the areas of conventional opposition to organized labor.[301] Fifth Circuit's dispositions showed a strong bias against restraints dictated by a distant national government, specially against efforts of the National Labor Relation Board to interfere with free relations between management and workers.[302]

This problem has not escaped from the Supreme Court's attention, which in 1971 appointed a study group to determine what recommendations should be made to meet the increasing difficulties in giving adequate attention to each appeal.[303] In the so called Freud Report, the study group found that there was lacking uniformity of holdings on federal law because of disparate decisions made by the various circuits courts.[304]

---

[297] GATES, *supra* note 292, at 52.
[298] Id. at 53.
[299] GATES, *supra* note 292, at 53.
[300] Id. at 53-54.
[301] EARLY *supra* note 294, at 129.
[302] Id. (Commenting also that "through the 1930s this particular appellate court demonstrated an anti-New Deal, conservative economic and political philosophy of localism, individualism, governmental self restraint, and states' rights. Itseffective leader, Chief Judge Hutcheson, refused to follow the lead of the High Court when it implied a move to curb state power over licensing and censoring of motion pictures.")
[303] FRANNIE J. KLEIN, FEDERAL AND STATE COURT SYSTEMS-A GUIDE, 175, (1977).
[304] Id.

According to the results of the Freud Report, it was statistically demonstrated that the Supreme Court was unable to perform its function of unifying federal law and of resolving many important cases involving constitutional questions because of mounting cases in all federal courts resulting in appeals.[305]

One year later, in 1972, Congress created a Commission on the Revision of the Federal Court Appellate System. The commission found again that the real needs of the country for definitive adjudication of national issues were not being met, and that many important cases were not given plenary review by the Court due to the reduced number of cases it accepts for review.[306]

Both the Freud study group and the Commission on the Revision of the Federal Court Appellate System made several different recommendations to resolve this problem; however, both coincided in one suggestion. They proposed the creation of a National Court of Appeals "to assure that a social security claimant, a taxpayer, or a defendant in a criminal prosecution in Georgia is treated no differently than one in Oregon solely because of an accident in geography."[307] None of this studies' recommendations finally succeeded.[308]

Thus, in practice, the enforcement of "the supremacy and uniformity of national law" is still performed by the courts of appeals, which in the majority of the cases are more likely to make policy in the regional basis.[309] Although they are regarded as a

---

[305] Id. at 176.
[306] Id.
[307] Id. 176-178.
[308] Id.
[309] CARP, *supra* note 273, at 38.

single policy-making body, policy-making is in fact performed by twelve different courts that are marked by broad variety in their decisions in resembling cases.[310]

B. Mechanisms Protecting Constitutional Rights in the Mexican Legal System

At the present time, there are two instruments that deal with the protection of Human Rights in the Mexican legal system according to the Constitution: the *Amparo* trial, and the *Comisión Nacional de Derechos Humanos* (The National Commission for the Protection of Human Rights).[311] I will briefly review both of them in the chronological order they were inserted in the Mexican constitution.

1. Role of the Federal Courts and the *Amparo* Trial

The Amparo suit was originally created in 1840 by Manuel Cresencio Rejón to be inserted in the Yucatán State Constitution.[312] This institution was first introduced in the Mexican federal constitution in 1847 and was mainly proposed to protect individual

---

[310] GATES, *supra* note 292, at 52-

[311] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Title, Chapter Fourth, art. 103, § I, & art. 107. (With regard to the *Amparo* proceeding, Article 103, § I establishes that the Federal Tribunals shall resolve any controversy arising from laws or acts of the authority violating individual guarantees. Article 107 states that any controversy mentioned in Article 103 shall be subjected to the basis of the *Amparo* proceeding.)

[312] RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO, A STUDY OF THE AMPARO SUIT, 22 (1971). *See also* FIX-ZAMUDIO, *supra* note 46, at 373. *See also* BURGOA, *supra* note 49, at 115. *See also* Pedro Pablo Camargo, *The Claim of "Amaparo" in Mexico: Constitutional Protection of Human Rights, in* COMPARATIVE CONSTITUTIONAL LAW, MEXICO-UGANDA-UNITED SATES, CASES-ARTICLES-COMMENTS-QUESTIONS, 415 (Fletcher N. Baldwin, Jr. ed., 1974).

guarantees.[313] This instrument obtained its status as a constitutional institution by a proposal of Mariano Otero, who actively participated in the shaping of the *Actas de Reformas* of 1847, the name of this constitution.[314] Although the Rejón's concept of *Amparo* had much more reaching legal scope, the so-called *Mariano Otero Formula* was adopted to characterize the scope and limits of this suit.[315] Since the *Otero Formula* still characterizes the functioning of the *Amparo*, I will quote it in full:

> *The tribunals of the Federation will protect (amparán) any inhabitant of the Republic in the exercise of the rights granted to him by this Constitution and the constitutional laws, against any attack of the Legislative and Executive Powers, whether of the Federation or of the States, limiting themselves to affording protection in the special case to which the complaint refers, without making any general declaration as to the law or act on which the compliant is based.*[316]

The *Amparo* was definitively established in Articles 101 and 102 of the Federal Constitution of 1857.[317] But the consolidation of the *Amparo* needed to wait until the French intervention and the civil war were over. Thus, it was not until 1867 that this institution was used as a remedy similar to that of the habeas corpus against illegal arrests.[318] Later on, the Supreme Court used it to protect the due process of law clause included in Article 14 of the constitution, which is meant to be almost a replica of the

---

[313] FIX-ZAMUDIO, *supra* note 46, at 373 & 374. *See also* BURGOA, *supra* note 49, at 121. *See also* BAKER *supra* note 312, at 22. *See also*, Camargo, *supra* note 312, at 413.

[314] BAKER *supra* note 312, at 22. *See also* Camargo, *supra* note 312, at 416. *See also* FIX-ZAMUDIO, *supra* note 46, at 373. *See also* BURGOA, *supra* note 49, at 121-122.

[315] BAKER *supra* note 312, at 22. (Briefly noted, Rejón's intention for this institution was to confer to the Supreme Court the Power to exercise a general and inclusive power of constitutional defense, covering the organic sections as well as the bill of rights.) *See also* BURGOA, *supra* note 49, at 115. (Citing Juan Francisco Molina Solís, a prestigious historian, Burgoa points out that the Rejón' s concept of Amparo was more extensive and ample than the *Amparo* finally inserted in the Mexican constitution of 1857.)

[316] BAKER *supra* note 312, at 23. Camargo, *supra* note 312, at 416. *See also*, FIX-ZAMUDIO, *supra* note 46, at 373. *See also* BURGOA, *supra* note 49, at 121.

[317] FIX-ZAMUDIO, *supra* note 46, at 374. *See also* BURGOA, *supra* note 49, at 126, 127. *See also* Camargo, *supra* note 312, at 415. *See also* BAKER *supra* note 312, at 36.

[318] Camargo, *supra* note 312, at 416. *See also* BAKER *supra* note 312, at 22.

Fifth Amendment of the Constitution of the United States.[319] It was then that the *Amparo* became a system of control of legality and constitutionality by protecting not only the rights directly conferred by the constitution but also other rights established in secondary regulations.[320]

The current Mexican constitution, which was promulgated in 1917, expressly recognizes the ample affects of the control of legality, achieved by the Supreme Court through the *Amparo*.[321] The Constitution of 1917 displays the essential basis for this suit in its Articles 103 and 107.[322] The *Amparo* has experimented a vertiginous growth that has led it to fulfill numerous constitutional vacuums. The *Amparo* has satisfied needs as an extraordinary recourse of legality, as a recourse of cassation, as a writ of habeas corpus, as an indirect means of judicial review, and as an administrative jurisdiction.[323]

This vertiginous growth of the *Amparo* has made it a broad and a complex structure,[324] which I will review only in general terms. Mexican scholars have mainly

---

[319] Camargo, *supra* note 312, at 416. *See also* EMILIO RABASA, EL ARTICULO 14 Y EL JUICIO CONSTITUCIONAL, 3-9 (3rd ed. 1969).

[320] FIX-ZAMUDIO, *supra* note 46, at 374. (Noting that the "arbitrary" interpretation that the Supreme Court gave to Article 14 of the Federal Constitution of 1857 give birth to the principle of *garantia de la exacta aplicacion de la ley* [control of legality]. This principle of control of legality was mainly applied against resolutions of any judge in the country). *See also* Camargo, *supra* note 312, at 416. *See also* BURGOA, *supra* note 49, at 149.

[321] Camargo, *supra* note 312, at 416, 417.

[322] Id. at 417.

[323] Camargo, *supra* note 312, at 416. *See also* BAKER *supra* note 312, at 27. (Stating that this impressive growth of the *Amparo* has led Mexican publicists to try to discover its origin. Many of them consider that this institution relies on both the American common law and the European civil and common law traditions. The Amparo received European influence mostly from Spain. The Spain institutions commonly cited as precedent of the Amparo are the *cuatro procesos forales* and the court of *Justicia Mayor*. These institutions are of greater interest for an analysis of judicial controls, "although the rights they defended can hardly be considered constitutional in the modern sense." According to the author, the main source of Amparo must be found in the American institution of judicial review "transmitted to the Mexicans through Tocqueville's *Democracy in America"*).

[324] Camargo, *supra* note 312, at 418.

divided this extensive institution into five aspects.[325] First, the *Amparo* of Liberty is principally concerned with the protection of any person whose life, liberty, or integrity is threatened by an act of an authority.[326] This branch of the Amparo fulfils similar functions to the American Writ of Habeas Corpus, and consists of an exceptional, flexible and quick procedure, different from the procedures prescribed to protect other individual guarantees.[327]

This procedure can be submitted by the interested or by a third person, who may even be under-age, before a district judge, an ordinary judge, or any other judicial authority at any hour of the day or of the night.[328] Whether or not the judge is a district judge, he has the power to order the immediate suspension of the authority's activity that violates the individual guarantees, but he must send the proceedings to the district judge in order to start the trial formally.[329]

Second, the *Amparo* Against Laws tends to protect the supremacy of the Federal Constitution by invalidating, in the specific case, the legislative act pointed at as contrary to the constitution.[330] This kind of *Amparo* controls two forms of constitutional review of the laws: "the *action*, and the *recourse of unconstitutionality of Laws*."[331] The *action* offers to the petitioner the opportunity to impugn ordinary legislative dispositions when

---

[325] Id.
[326] DICCIONARIO JURIDICO, *supra* note 56, at 158.
[327] Id. *See also* Camargo, *supra* note 312, at 418. FIX-ZAMUDIO, *supra* note 46, at 377.
[328] DICCIONARIO JURIDICO, *supra* note 56, at 158. *See also* Camargo, *supra* note 312, at 419. *See also* FIX-ZAMUDIO, *supra* note 46, at 378.
[329] DICCIONARIO JURIDICO, *supra* note 56, at 158. *See also* Camargo, *supra* note 312, at 419. *See also* FIX-ZAMUDIO, *supra* note 46, at 378.
[330] DICCIONARIO JURIDICO, *supra* note 56, at 158. *See also* Camargo, *supra* note 312, at 420. *See also* FIX-ZAMUDIO, *supra* note 46, at 378.
[331] FIX-ZAMUDIO, *supra* note 46, at 378. *See also* Camargo, *supra* note 312, at 420.

he is affected in his basic rights, and such laws are contrary to the constitution.[332] The impugnment must be presented before a District Judge.[333]

The petitioner in this *action* may be a person directly or indirectly damaged by the first application of a legal disposition or by the authority applying that regulation.[334] Therefore, the parties of this *action* are the petitioner, the body which has passed the law, and/or the administrative authority which exercises or tries to exercise the law in a particular case.[335]

The *recourse of unconstitutionality of laws* allows the petitioner to apply this recourse in form of direct Amparo against sentences of ordinary judges. This is meant to take the form of a "*direct Amparo*" because it is directly submitted before the Supreme Court or the Circuit Tribunals.[336] The *recourse* is different from the *action* because the recourse is used to claim the revision of an ordinary judicial resolution, and the action is employed to ask the revision of the constitutionality of a law.[337]

This *recourse* was originally introduced by the jurisprudence of the Supreme Court to harmonize Articles 103[338] and 133[339] of the Federal Constitution. Thus, the Supreme Court centralized the constitutional review of laws in the Federal Judicial Branch without affecting the state courts' duty to execute the precepts of the Federal

---

[332] FIX-ZAMUDIO, *supra* note 46, at 379. *See also* Camargo, *supra* note 312, at 420.
[333] DICCIONARIO JURIDICO, *supra* note 56, at 159. *See also* FIX-ZAMUDIO, *supra* note 46, at 379.
[334] FIX-ZAMUDIO, *supra* note 46, at 379. *See also* Camargo, supra note 312, at 420.
[335] FIX-ZAMUDIO, *supra* note 46, at 379. (Stating that the decision of the District Judge may be subject to revision by the Supreme Court if the claimant considers it is necessary). *See also* Camargo, *supra* note 312 at 420.
[336] FIX-ZAMUDIO, *supra* note 46, at 380. (The *recourse of unconstitutionality of laws* has its basis in the Article 133 of the Constitution which states both that the Federal Constitution is the Supreme Law of the Union and that state judges are bound by the precepts of this Constitution). *See also* Camargo, *supra* note 312, at 420.
[337] FIX-ZAMUDIO, *supra* note 46, at 380.
[338] CONSTITUCION DE LOS ESTADOS UNIDOS MEXICANOS, Third Title, Chapter Fourth, article 103.

Constitution over the dispositions of the State Constitutions which may be in opposition to the Supreme Law.[340]

The third category of *Amparo* is known as the *Cassation-Amparo*, which has as its finality to examine the legality of definitive sentences dictated in civil, criminal, and administrative suits, and in labor arbitration.[341] This category of *Amparo* is regarded as the most important because it offers relief to legally injured people against definitive judgements that otherwise cannot be challenged through any ordinary recourse.[342]

This claim impugns the sentences when they violate the due process of law or the individual guarantees of the petitioner.[343] The *Cassation-Amparo* or *Judicial Amparo*, as it is also known, became alive in the Supreme Court jurisprudence with regard to Article 14 of the Constitution of 1857. The current Mexican constitution, promulgated in 1917, recognizes it in Article 14, which forbids the retroactivity of law and the deprivation of life, liberty, possessions, or rights without due process.[344]

The *Administrative Amparo* is the fourth category of *Amaparo* in the classification that this work undertakes. The *Administrative Amparo* is employed to defend the interest of private parties against acts of the Public Administration and also to challenge the judgement of the Federal Fiscal Tribunal, which, as an administrative facility of delegated

---

[339] CONSTITUCION DE LOS ESTADOS UNIDOS MEXICANOS, Seventh Title, Chapter Fourth, article 133.
[340] Camargo, *supra* note 312, at 421
[341] FIX-ZAMUDIO, *supra* note 46, at 381. *See also* Camargo, *supra* note 312, at 421
[342] DICCIONARIO JURIDICO, *supra* note 56, at 159. *See also* Camargo, *supra* note 312, at 422. (Stating that this kind of Amparo "is the most effective filter against the corruption and prevarication of ordinary judges").
[343] Camargo, *supra* note 312, at 422. *See also* FIX-ZAMUDIO, *supra* note 46, at 381-382.
[344] Camargo, *supra* note 312, at 422 (Commenting also that the Mexican *Cassation-Amparo* "is similar to the French cassation system, since it has also adopted the procedure of reexpedition, as follows: If the amparo is granted, the judge in the original suit is obligated to pronounce a new sentence or arbitration according to the guidelines established by the Supreme Court or by the Circuit Tribunals. In the Spanish

jurisdiction, has the capacity to deliver judgements on the cases submitted against decisions in fiscal and administrative controversies.[345]

The *administrative Amparo* is divided into two branches: first, this recourse is employed against definitive resolutions of the public administration when they affect the guarantees of an individual.[346] Under this concept, the *Amparo* has the role of litigious-administrative jurisdiction not expressly attributed to the judicial bodies nor to a mixed body.[347] Second, if the *Amparo* is submitted against sentences of the Federal Fiscal Tribunal, this *Amparo* then takes the form of an administrative-cassation. This proceeding is expedited by the affected revenue authority before the Supreme Court of Justice, and therefore, it is seen also as an direct administrative *Amparo*.[348]

The fifth branch of the *Amparo* proceeding comes in the form of an *Agrarian Amparo*, which has as its main purpose the establishment of particular rules to defend groups of organized peasants in accordance with the Mexican system of communal agrarian property.[349] This *Amparo* provides an exceptional procedure, which considerably reduces the process requirements for the peasants, and confers to federal judges the power to substitute the procedural legal mistakes that peasants may make while expeding a suit.[350] The base on which the *Agrarian Amparo* rests is that peasants

---

system, on the contrary, the cassation tribunal is the only one that has the power to dictate a new sentence"). See also FIX-ZAMUDIO, *supra* note 46, at 381.

[345] Camargo, *supra* note 312, at 422, 423. *See also* DICCIONARIO JURIDICO, *supra* note 56, at 159.

[346] FIX-ZAMUDIO, *supra* note 46, at 382. *See also* Camargo, *supra* note 312, at 423.

[347] FIX-ZAMUDIO, *supra* note 46, at 382

[348] Camargo, *supra* note 312, at 423. *See also* FIX-ZAMUDIO, *supra* note 46, at 383.

[349] Camargo, *supra* note 312, at 423. *See also* DICCIONARIO JURIDICO, *supra* note 56, at 159

[350] Id.

generally lack of the legal knowledge and economic capacity as to obtain adequate counseling.[351]

As stated above, this is a brief and general study of a legal instrument that has been brilliantly discussed by many prestigious legal scholars. Most of them have extensively written large volumes about aspects of the *Amparo*; however, one can always find that the classification of this institution is as variable as the many volumes in which it is discussed.

2. The National Commission of Human Rights (La Comisión Nacional de Derchos Humanos)

The first Mexican institution that resembled the National Commission of Human Rights was the *Dirección de Derechos Humanos*, an organism assigned to the Secretary of State during the presidency of Carlos Salinas de Gortari.[352] This *Dirección* was created in 1989 and was conceived to receive and resolve complaints.[353]

In 1990, the Federal Executive decreed the creation of a National Commission of Human Rights, which was also a dependent organism of the Secretary of State.[354] The creation of this new institution was a response to the growing number of complaints

---

[351] Camargo, *supra* note 312, at 423.

[352] Joss Luis López-Chavarría, *Nuevos Aspectos en el estudio de los Derechos Humanos, in* 84 BOLETIN MEXICANO DE DERECHO COMPARADO 1053, 1065 (Instituto de Investigaciones Juridicas, Universidad Autónoma de México ed. 1995). *See also* Hector Fix-Fierro, *Los Derechos Humanos entre Necesidad Moral y Contingencia Social, in* BOLETIN MEXICANO DE DERECHO COMPARADO 957, 969 footnote 42, *supra.*

[353] López-Chavarría, *supra* note 352, at 1066. *See also* Fix-Fierro *supra* note 352, at 970 footnote 42.

[354] López-Chavarría, *supra* note 352, at 1066. *See also* María del Pilar Hernández-Martínez, *México, las Reformas Constitucionales de 1992, in* 76 BOLETIN MEXICANO DE DERECHO COMPARADO 99, 104 (Instituto de Investigaciones Juridicas, Universidad Autónoma de México ed. 1993).

against human rights violations particularly since 1988.[355] Moreover, it is important to remember that by the end of the 1980s, the Federal Government and the Revolutionary Institutional Party were losing credence nationally and internationally because of the doubtful triumph of Carlos Salinas de Gortari in the national elections of 1988; therefore, it was imperative for the government to create an institution capable of restoring it some of its legitimacy.[356]

Some of the main features of this Commission were that its president was directly appointed by the Mexican President; that its competence did not include matters related to elections, labor, and jurisdiction; that its administrative process to accept a complaint was too exigent and formalist; and that its resolutions lacked of coercivility.[357]

The establishment of this Commission involved many kinds of problems and also raised much criticism by legal scholars and politicians.[358] Some of the problems that the Commission faced after it was installed were: first, the discrepancies between the functions that the decree and the regulation delegated to this organism; second, the failure of the decree to mention such essential aspects as the procedural rules to which claims should be subjected; third, the moral character on which the Commission based its resolutions; and fourth, the null knowledge of the functional role of such Commission by its creators.[359]

Moreover, the direct inherence of the Executive in the appointment of the president of the National Commission of Human Rights, and the executive character that

---

[355] Fix-Fierro *supra* note 352, at 966 (Arguing that this increase of human rights violations was due to the prosecution of drug dealers).
[356] Id.
[357] López-Chavarría, *supra* note 352, at 1066.
[358] Id.

the very institution had gave birth to criticism and distrust towards the Commission.[360] Although its beginnings were difficult, the Commission received 3400 denounces and resolved more than a half of them during its first year of existence.[361]

In response to this reality, in 1991 the Federal Executive announced that it would send an initiative to the Congress in order to propose the creation of a constitutional body to protect human rights in Mexico.[362] In 1992, this constitutional organism became a reality with the publication of a decree that amended Article 102 of the Federal Constitution.[363] Said article establishes in its incise B that:

> *the Congress of the Union and the state legislatures shall establish organisms responsible for the protection of the human rights granted by the Mexican legal order. Such organisms shall receive complains against administrative acts or omission of any authority, except those of the Federal Judicial Power. These organisms shall formulate autonomous public recommendations before the respective authority.*
> *These organisms shall not be competent with regard to matters related to elections, labor, or jurisdiction.*
> *The organism created by the Federal Congress shall review any disagreement regarding the recommendation, accord or omission of its equivalent state organism.*[364]

Thus, the 1991 National Commission of Human Rights inherited its name as the new constitutional organism for the protection of human rights in Mexico. This new National Commission of Human Rights also became a decentralized organism, which

---

[359] Id.
[360] Id.
[361] Emilio O. Rabasa, *Reforma al Artículo 102 Constitucional: Creación de la Comición Nacional de Derechos Humanos (CNDH), a Nivel Constitucional, in* 74 BOLETIN MEXICANO DE DERECHO COMPARADO 573, 574 (Instituto de Investigaciones Juridicas, Universidad Autónoma de México ed. 1992). *See also* Hernández-Martínez, *supra* note 354, at 104 (Commenting that regardless the short period that this Commission lasted, its work was valuable).
[362] López-Chavarría, *supra* note 352, at 1067.
[363] Hector Fix-Fierro, *La Reforma al Articulo 102 de la Constitucion, in* BOLETIN MEXICANO DE DERECHO COMPARADO 223, 223 (Instituto de Investigaciones Juridicas, Universidad Autónoma de México ed. 1993).
[364] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Title, Chapter Fourth, art. 102, § B.

enjoys its own legal status and budget.[365] It was meant to guarantee that its functionaries would work freely, without fearing the existence of any other higher governmental office above them.[366]

This constitutional organism was furnished with an easier procedure for receiving and resolving denounces; with a more accurate and congruent set of functions; with a more precise competence; and with a new system of appeals.[367] Through this appeal system, the Federal Commission may review the proceedings and resolutions issued by the state commissions as well as the unfulfilled recommendations issued by the local commissions against the authorities.[368]

There are two kinds of complaints that can be brought before the National Commission of Human Rights: the *queja* (complaint) and the *impugnación* (impugnment).[369] The complaint proceeds when the inactivity or omission of the state commissions affects the human rights of the interested. The impugnment is used against definitive resolutions of state commissions; and against definitive information of local authorities concerning the fulfillment of the state commission's recommendations.[370]

It is relevant to mention why aspects related to elections, labor, and jurisdiction were excluded from the competence of the organism. First, matters related to elections are regarded as heavily influenced by political debate, which could damage the impartial character that the National Commission of Human Rights should have. Second, the Commission does not accept complaints regarding labor problems because they mainly

---

[365] López-Chavarría, *supra* note 352, at 1068.
[366] Id.
[367] Id.
[368] Id.
[369] Id. at 1069

concern disputes between particulars. Third, the Commission is incompetent to review aspects of jurisdiction because it must respect the independence of the Federal Judicial Power to act.[371]

Finally, the National Commission of Human Rights is an organism meant to offer an alternative solution of administrative controversies regarding human rights violations through a non-jurisdictional system. Therefore, it is interesting to ponder that its recommendations are not binding in a country where even binding decisions of the courts are some times disregarded.

C. Existing Mechanisms Protecting Constitutional Rights in the German Legal System

When enacted in 1949, the Basic Law was structured in such a way as to ensure effective protection against dictatorship and neglect of human rights.[372] As stated in section C of the second chapter of this work, the Parliamentary Council, while working out the Basic Law, needed to consider that Nazis had gained power and had ignored constitutional provisions precisely because of the weakness of the Weimar Constitution of 1919.[373]

In addition to the concerns of the Parliamentary Council, the presence of the military governors made it clear to the Germans that judicial review was implied in their

---

[370] Id.
[371] Hernández-Martínez, *supra* note 354, at 106.
[372] Dieter Grimm, *Human Rights and Judicial Review in Germany, in* HUMAN RIGHTS AND JUDICIAL REVIEW, A COMPARATIVE PERSPECTIVE 267, 270 (David M. Beatty Ed., 1994)
[373] See *supra* p. 23- and note 104.

concept of an independent judiciary.[374] Both the German desire to achieve a truly lawful society and the Allied Powers' desire to ensure a democratic government for West Germany gave birth to a special institution designed to enforce the constitution against any other government authority.[375]

This institution, which was established by the Parliamentary Council, is the Federal Constitutional Court or Bundesverfassungsgericht founded with extensive powers, among them judicial review.[376] This constitutional jurisdiction with the power to review laws made it possible for the Basic Rights to be some thing more than "a mere appendage of the Basic Law.[377]

The Federal Constitutional Court has two main competencies with regard to human rights:

---

[374] KOMMERS, *supra* note 115, at 70. (Indicating that in a an aide-memoire sent to the framers of the Basic Law, the military governors of west Germany noted: "The constitution should provide for an independent judiciary to review federal legislation, to review the exercise of federal executive power, and to adjudicate conflicts between federal and land authorities as well as between land authorities, and to protect the civil rights and freedom of the individual").

[375] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, 7 (Duke University Press Durham and London 2nd ed. 1997). *See also* Grimm, *supra* note 372, at 271. *See also* KOMMERS, *supra note* 115, at 70 (Commenting that it would be a mistake to presume that the military governors imposed judicial review on a reluctant nation: "In the first place, the aide-memoire was not released until after the parliamentary council had done most of its work. In the second place, German-Allied correspondence during the time of the parliamentary council shows no disagreement on judicial review.")

[376] Grimm, *supra* note 372, at 271. *See also* KOMMERS, *supra* note 375, at 7. *See also* KOMMERS, *supra* note 115, at 71-72.

[377] Starck, *supra* note 88, at 22.

1. Abstract and Concrete Judicial Review.

Under Article 93(1) 2[378] of the Basic Law, the federal Constitutional Court can review any law as to its conformity with the human rights contained in the Basic Law on the basis of abstract judicial review.[379] The Constitutional Court is entitled to do so on petition of the federal government, of the government of a land, or of one third of the members of the parliament. In exceptional cases, the Constitutional Court can also review a law on a petition of a person whose basic rights are directly affected by that statute and not merely by its application.[380] When deciding cases on abstract judicial review, the Bundesverfassungsgericht is meant to devote itself to the "objective" judgment of the validity or invalidity of a legal norm or statute.[381]

Under Article 100[382] of the Basic law, the Constitutional Court can review the conformity of any law with the human rights included in the Basic Law on petition of any ordinary court which has to employ a law whose constitutionality is doubtful.[383] The Bundesverfassungsgerich executes this review of laws on the basis of Concrete Judicial

---

[378] F.R.G. CONST. art. 93(1)2 "The Federal Constitutional Court decides: . . .2. in cases of differences of opinion or doubts on the formal and material compatibility of Federal law or Land law with this Basic Law, or on the compatibility of Land law with other Federal law, at the request of the Federal government, of a Land government or of one-third of the Bundestag members; . . ."

[379] Grimm, *supra* note 372, at 271. *See also supra* note 314 and accompanying text. *See also* KOMMERS, *supra* note 115, at 106 (Stating that Abstract Judicial Review is not "an adversary proceeding in strict legal sense. But neither are the decisions of the Court in such cases merely advisory opinions; for the question of a law's validity is squarely before the Court, and a decision against it validity renders it null and void.")

[380] Grimm, *supra* note 372, at 271. *See also* F.R.G. CONST. art. 93(1)2, 4a

[381] KOMMERS, *supra* note 375, at 1. (Explaining that the proceeding is described as objective because "it is intended to vindicate neither an individual's subjective right nor the claim of the official entity petitioning for review; its sole purpose is to declare what the Constitution means.")

[382] F.R.G. CONST. art. 100(1) "Where a court considers a law unconstitutional, the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Land court competent for constitutional disputes if the matter concerns the violation of the constitution of a Land, or from the Federal Constitutional Court if the matter concerns the violation of the Basic Law. . ."

[383] Grimm, *supra* note 372, at 271

Review.[384] The ordinary court's petition must be signed by those judges who have a voice in support of referral and accompanied by a pronouncement of the legal provision at issue, the provision of the Basic Law supposedly violated, and the magnitude to which a constitutional ruling is essential to resolve the controversy.[385]

As it is not the duty of the Federal Constitutional Court to engage in judicial review every time it is suggested by ordinary courts, the Bundesverfassungsgerich is extremely stern in examining the conditions of reference when a court conveys a statute before it on the grounds of unconstitutionality.[386] The Federal Constitutional Court is obliged to enforce the constitution only in the cases pre-established in Article 100(1) of the Basic Law.[387]

Concrete Judicial Review is a greatly significant form of procedure in the judicial practice of Germany. Statistically, it is second in the ranking list behind the procedure for individual constitutional complaints. Nonetheless, its importance does not lie in their number of cases because most of the cases submitted to the Constitutional Court are not successful but in the fact that consequences that may arise from a particular statute are realized only in the day-to-day practice of law.[388]

The outcome of both Abstract and Concrete Judicial Review has been a high standard of exacting compliance of the Basic Law and its rights. The complaint of

---

[384] Id.

[385] KOMMERS, *supra* note 375, at 13. (Adding that the Federal Constitutional Court will discard the case "if the judges below it manifest less than a genuine conviction that a law or provision of law is unconstitutional or if the case can be decided without settling the constitutional question.") *See also* KOMMERS, *supra* note 115, at 105-106.

[386] Jörn Ipsen, *Constitutional Review of Laws in,* 23 MAIN PRINCIPLES OF THE GERMAN BASIC LAW, *supra* note 113, at 107, 114-115.

[387] Ipsen, *supra* note 386, at 115.

[388] Id.

unconstitutionality is strongly popular as a source of potential relief, although in most cases it does not prosper in the Constitutional Court, either for lack of substance or lack of importance to the evolution of Constitutional law.[389] However, lower courts are ready to find constitutional aspects in their docket and to present such issues. "So far these structures have strengthened most constitutional rights to the extent that it seems, as if the constitution and the courts and not the people themselves, are the best guardians of human rights."[390]

In addition, it is under Article 100 of the Basic Law that the Bundesverfassungsgerich, in exceptional circumstances, can also review a law on a petition of a person whose basic rights are directly affected by the law and not just by its application.[391]

2. Individual Complaints

Under Article 93(1)4a[392] of the Basic Law, and upon individual complaint, the Constitutional Court can review any act of a public authority to verify its conformity with human rights.[393] Before submitting a complaint to the Constitutional Court, the

---

[389] Goerlich, *supra* note 122, at 51
[390] Id.
[391] Grimm, *supra* note 372, at 271
[392] F.R.G. CONST. art. 93(1)4a "The Federal Constitutional Court decides:. . .4a. on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been violated by public authority;. . ."
[393] Grimm, *supra* note 372, at 271. *See also* Ipsen, *supra* note 386, at 125. *See also* KOMMERS, *supra* note 375, at 14.

individual must first exhaust all possible means of relief in ordinary courts.[394] However, the Bundesverfassungsgerich will except a constitutional complaint from exhausting all legal remedies if this complaint involves an issue of "general importance" or if the complainant will suffer a serious harm by exhausting all his/her remedies.[395]

This kind of complaint must be used within a certain period of time, specify the incompatible action or omission and the agency responsible of that, and particularize the constitutional right that has been transgressed.[396] In conformity with Article 93(1) 4a of the Basic Law, any individual, who can be a natural or a legal person possessing rights under the Basic Law, may initiate a complaint of unconstitutionality if one of his or her rights has been violated by public authority.[397]

Constitutional complaints may also be settled against any governmental action, including judicial decision, administrative decrees, and legislative acts in accordance to the public authority clause of Article 93(1) 4a.[398] With regard to judicial decisions, the complainant must file his complaint within a month after the decision has been handed down. With regard to a statute not the subject of a judicial proceeding, and concerning which no other legal redress is possible, a constitutional complaint can be brought against it within a year after its enactment.[399]

However, jurisdiction over individual complaints is not a universal legal remedy that individuals may employ at any time. To submit a complaint to the federal

---

[394] Grimm, *supra* note 372, at 271. *See also* KOMMERS, *supra* note 375, at 14.
[395] KOMMERS, *supra* note 115, at 107
[396] KOMMERS, *supra* note 375, at 14. *See also* KOMMERS, *supra* note 115, at 107 (Adding that the complainant must submit any accompanying document relevant to the case.).
[397] KOMMERS, *supra* note 375, at 14. *See also supra* note 328 and accompanying text.
[398] KOMMERS, *supra* note 375, at 15. *See also* KOMMERS, *supra* note 115, at 107. *See also* Ipsen, *supra* note 386, at 125.

Constitutional Court, a complainant must have his or her rights affected by an act of the state.[400] This is a consequence of the principal purpose of individual complaints: Jurisdiction over individual complaints is not meant as a general protection of the constitution but rather as a means to defend the individual citizen against encroachments of his or her fundamental rights under the constitution.[401]

In addition, the injury suffered by the complainant must be a present and direct consequence of the encroachment on his or her rights by the governmental act. Indeed, the motive for the "present" consequence requirement is to keep out acts that have been disposed of, or future acts; the second requirement is used as an obstacle to *in rem* proceedings intended against statutes by individuals not adversely affected by a statute.[402]

3. Some Effects of the Application of these Methods to the Protection of Human Rights

Indeed, the first effect that must be mentioned is that these methods have broadened the scope of human rights protection.[403] As already mentioned in the first chapter, section C of this work, the Basic Law starts by setting up the protection and inviolability of human dignity, whose protection is the duty of all state.[404] This guiding

---

[399] KOMMERS, *supra* note 115, at 107
[400] Ipsen, *supra* note 386, at 125.
[401] Id.
[402] Id. (Adding that commonly acts are not self-executing. "Their practical embodiment usually requires a large number of supplementary actions, such as administrative measures or judicial decisions before a law is finally applied to a particular case. A fiscal law itself, for example, does not affect the individual taxpayer because the individual's liability to pay taxes has to be put into concrete form by administrative practice, that is to say it needs a special executive act (tax assessment) to bring it into effect. If a statute requires such a special executive act to impose direct injury to the individual and if this act has not yet been carried out, the Bundesverfassungsgerich must reject the complaint as inadmissible.")
[403] Grimm, *supra* note 372, at 274.
[404] *See supra* p. 25 and note 114.

principle, which rules all the constitution and commands the state to respect and protect human dignity, is followed by an entire catalogue of human rights.[405] Such catalogue contains a wide range of social relations, individual occupations, and various institutions which have a tendency to be menaced by governments regarding historical incidence.[406]

The Bundesverfassungsgerich's application of the articles concerning human rights in the Basic Law has enhanced their relevance. For instance, by the content of Article 2, the Constitutional Court established an entire system of judicial review and human rights protection, which guards human activity not even considered by an article in the Basic Law.[407] Accordingly, any time the government interferes with a human activity of conduct not mentioned in some constitutional guarantee, the Bundesverfassungsgerich can review it under Article 2(1).[408]

Another important asset introduced by the Constitutional Court to protect human right is the principle of proportionality, which derives from Article 1 and sets human rights as superior to the law.[409] In this context, the Bundesverfassungsgerich decided that laws could restrict human rights, but only in order to make conflicting rights compatible, to protect the rights of other people or to guard important community interest. The Constitutional Court followed to say that any restraint of fundamental rights not only

---

[405] *See supra* pp. 25-30

[406] Grimm, *supra* note 372, at 275. *See supra* pp. 23-25.

[407] Grimm, *supra* note 372, at 275

[408] Id. (Citing the case BVerfGE 6, 32 (36 f.) *Elfes*; 80, 137 (152 f.) Riding in the wood; and dissenting opinion, p. 164 ff.). *See also* Ipsen, *supra* note 386, at 127.

[409] Id. *See also* KOMMERS, *supra* note 375, at 46. (Explaining that in general terms, the principle of proportionality is employed by the Constitutional Court to determinate whether legislation and other governmental acts conform to the values and principles of the Basic Law.)

requires a constitutionally valid objective but also needs to be proportional to the rank and importance of the right at stake.[410]

To make certain that legislation and other governmental acts are in conformity with the values and principles of the Basic Law, the Bundesverfassungsgerich applies a three-step test. First, any time parliament passes a law infringing on a fundamental right, the instrumentality used must be appropriate to the achievement of a lawful end. Second, the question is whether it is indispensable to achieve this goal. Third, the question is whether an appropriate relationship exists between the human right limited by law and the purpose of the restriction. The burden on the right must not be extreme relative to the benefits secured by the state's objective.[411]

Another main feature of the Constitutional Court defense of human rights is its interpretation of these rights not only as subjective ones but also as objective principles.[412] On one hand, while interpreted as subjective rights, human rights oblige the state to restraint from taking particular actions. On the other hand, as objectives ones, human rights oblige the state to perform specific actions either to protect them or to give true effect to these rights.[413]

---

[410] Grimm, *supra* note 372, at 275. (Citing the case BVerfGE 19, 342 (348 ff.) 30, 292 (315*) Mineral Oil Stock Pile*; 61, 126 (134))

[411] Id. at 276. *See also* KOMMERS, *supra* note 375, at 46.

[412] Grimm, *supra* note 372, at 276. (Citing the *Lüth* case as a leading decision, BVerfGE 7, 198 (204ff.) *See also* Starck, *supra* note 88, at 33. (Commenting that by the end of the nineteenth century, the legal character of fundamental rights was recognized as objective law issued by the state against its authorities. By 1914, scholars started to look at fundamental rights as genuine subjective rights. During the Weimar Reich, the character of human rights became more and more recognized as subjective without ever becoming applicable, due to the lack of a constitutional control over the legislature, through which the citizen could have exercised his or her rights.) *See also* KOMMERS, *supra* note 375, at 48.

[413] Grimm, *supra* note 372, at 276. *See also* Starck, *supra* note 88, at 33.

The subjectivity of these rights comes from their very nature. As long as human rights are clearly rights of the subject, they are subjective rights.[414] If for any reason, a fundamental right lacks subjective character, this character must be particularly established. In the case that fundamental rights embody objective guarantees, this kind of guarantees cannot supersede the subjective basis of the fundamental rights.[415]

The Constitutional Court has made several departures from the premise that human rights are also objective principles.[416] The principle of objectivity regarding human rights has had a special impact in the area of private law, which is no longer out of the influence of human rights protection.[417] In the *Lüth* case, the Bundesverfassungsgerich stressed that the objective system of values of the Basic Law "expresses and reinforces the validity of the enumerated basic rights."[418] The Constitutional Court went on to state that according to the relevance of this system of values, these objective values "must apply as a constitutional axiom throughout the whole legal system," affecting private as well as public law.[419] Under this new doctrine, all decisions of the ordinary courts are subjected to constitutional review, supposing that the law they interpret and apply affects a human right.[420]

The objective system of values has given birth to a collateral search for a congruent theory of basic right, which faces an interpretative difficulty when it is confronted with open-ended words such as "democracy," "constitutional order," and "free

---

[414] Starck, *supra* note 88, at 33.
[415] Id. at 34.
[416] Grimm, *supra* note 372, at 277.
[417] Id.
[418] KOMMERS, *supra* note 375, at 48.
[419] Id. at 48-49.
[420] Grimm, *supra* note 372, at 277

democratic basic order."[421] To this extent, German constitutional theorists have advanced five normative theories of fundamental rights: liberal, institutional, value/oriented, democratic, and social:

> *Liberal theory, based on postulates of economic liberty and enlightened self-determination, emphasizes the negative rights of the individual against the state. Institutional theory focuses on guaranteed rights associated with organizations or communities such as religious groups, the media, universities (research and teaching), and marriage and the family. Value oriented theory places its emphasis on human dignity as it relates to rights flowing from the nature of the human personality. Democratic theory is concerned with certain political functions incident to the rights of speech and association and the role of elections and political parties. Social theory, finally, highlights the importance of social justice, cultural rights, and economic security.*[422]

All these normative theories find support in either the literature of constitutional theory or decisions of the Bundesverfassungsgerich, which appears to be happy to decide human rights question on a case-by-case basis, using what it considers as the most persuasive theory appropriate in a given circumstance.[423]

Another inference that the Constitutional Court has gained from the concept that human rights are also objective principles is that governments may be compelled to furnish an individual or a group of individuals with the instrumentality necessary to make use of a right. This new concept introduced a shift from a purely formal tenet of freedom to a substantial notion of constitutionally protected freedom.[424]

This substantial notion of constitutionally protected freedom consists of the use of freedom by the individual to obtain from government the necessary assistance to make

---

[421] KOMMERS, *supra* note 375, at 49.
[422] Id.
[423] Id.
[424] Grimm, *supra* note 372, at 278.

human rights valuable. This notion depends upon the condition that, without government help, a fundamental right would be totally worthless for a person. It is also true when government constraints the use of a right to conditions which could not ordinarily be met without public furtherance.[425]

The first step towards this new concept was taken by the Constitutional Court in the *Numerus Clausus* case, which involved the medical schools of the universities of Hamburg and Munich.[426] This case emerged out of limiting admission policies which students, rejected because of these restraints but otherwise seemingly qualified for admission, sued against the regulations before the administrative courts in their corresponding states.[427] Questioning the harmony of these admission policies with the right of all Germans to freely select a trade or an occupation under Article 12,[428] the two courts submitted the question to the Bundesverfassungsgerich.[429]

The Constitutional Court stated that education is the first step in pursuing a profession; "both are integral parts of a coordinated life process."[430] Furthermore, in the field of education, the Court said, the constitutional guardianship of basic rights is not restricted to the function of defense against state intervention conventionally attributed to the fundamental liberty rights. According to the Bundesverfassungsgerich, basic rights in their capacity as objective norms also set up a value order that stands for a fundamental

---

[425] Id.
[426] Id. (Citing the BVerGE 33, 303 (330 ff.) *Numerus Clausus* case.) *See also* KOMMERS, *supra* note 375, at 282.
[427] KOMMERS, *supra* note 375, at 282.
[428] *See supra* pp. 28-29 and note 139.
[429] KOMMERS, *supra* note 375, at 282
[430] Id. at 283.

constitutional decision in all areas of law.[431] The Constitutional Court finally declared that "any absolute numerical limit on admission into a course of study is unconstitutional unless the institution applying it can demonstrate that all available space is completely filled."[432]

A characteristic regarding the decision of this case was that the Bundesverfassungsgerich refrained from obliging the government to expend a huge amount of money to fulfill its duty, and instead, it ruled that in the long run the government should take steps to ameliorate the situation.[433]

A third principle the Constitutional Court has developed from the objective character of human rights is a duty of the legislatures to protect human rights against threats from private individuals or groups.[434] This principle arose from the First Abortion case, which involved an act of the legislature making abortions unpunishable if performed within the first three moths of pregnancy.[435] The Bundesverfassungsgerich decided that the right to life in Article 2(2)[436] of the Basic Law not only prohibits the government from annihilating life itself but, in addition, requires the state to defend human life against transgressions by others.[437]

---

[431] Id. at 284.
[432] Id. at 288.
[433] Grimm, *supra* note 372, at 279.
[434] Id.
[435] Id. (Citing BVerGE 39, 1(42). *See also* Stern, *supra* note 88, at 51. (Pointing out that the Constitutional Court concluded, "on the basis of legislative history that referenced the particular high value placed on human life in reaction to the Nazi experience, that everyone included every life-possessing human individual and not merely every finished person.") *See also* KOMMERS, *supra* note 375, at 53-54. (Discussing the form and effect of the Court's decisions, the author comments that while invalidating the abortion statute, the Constitutional Court practically rewrote the law, which Parliament afterward felt obligated to pass.)
[436] *See supra* p. 25 and note 119.
[437] Grimm, *supra* note 372, at 279

Despite the abortion case which gave birth to this new approach, the typical case for the use of the protection of fundamental rights against threats stemming from third parties is a case involving new technical, economic, or social developments endangering basic rights.[438] According to the Bundesverfassungsgerich, if a human right is seriously disturbed by developments such atomic energy, automatic data processing, genetic engineering, etc., the legislature is constitutionally obliged to take measures securing the right threatened.[439]

Contractual relations also involve the protection of human rights against threats from private individuals. If the distribution of balance within the contract conveys heavy disadvantages of one party's basic rights, the legislature is bound to take protective measures. However, in the absence of such protective measures on the part of the legislature, the ordinary courts are required to ponder human rights as much as possible within the setting of statutory interpretation when they construe and enforce contacts.[440]

The last conclusion of the Constitutional Court regarding the objective dimension of human rights may be described as the protection of human rights by procedure and organization. A case in this context may arise when a fundamental right can be exercised only if an appropriate procedure is implemented, and it is the duty of the legislature to provide for such a law.[441]

---

[438] Id. at 280.
[439] Id. at 281
[440] Id.
[441] Id. (Explaining that it occurs when a legal position derived from a human right such as the asylum right can be exercised only if a suitable procedure is provided.)

Chapter III

A. Establishing a Point of Comparison between United States and German Law regarding Human Rights Protection.

As seen in preceding chapters, the United States and Germany have a strong commitment to the protection of human rights within their legal systems.[442] This commitment is rooted in different backgrounds that will not be discussed in this section; however, the means by which this commitment is fulfilled deserves a close view.

On the one hand, in the North-American legal system, the Substantive Due Process of Law of the Fourteenth Amendment has played an important role in securing the protection of other civil liberties against actions of the states which violate fundamental rights.[443] The Supreme Court has utilized the Due Process Clause to expand the scope of the Bill of Rights and to standardize its application nationwide. This work of the Court has been known as the "incorporation process" of the Bill of Rights into the Fourteenth Amendment.[444]

On the other hand, the German legal system possesses a human-rights-distinctive feature, which has also played a mayor role in the protection of the fundamental rights

---

[442] *See supra* pp. 31-45 & 57-70.

[443] WITT, *supra* note 157, at 378. *See also* STONE, *supra* note 2 at 804

[444] STONE, *supra* note 2 at 804. *See also* PRITCHETT, *supra* note 1, at 247. *See also* William J. Brennan, Jr.; *The Bill of Rights and the States in,* THE EVOLVING CONSTITUTION, ESSAYS ON THE BILL OF RIGHTS AND THE U.S. SUPREME COURT 254, 256-257 (Norman Dorsen Ed., 1989). *See also* Antonin Scalia,

included in Basic Law. In the context of Article 1(1) of the Basic Law, human dignity is the immovable base of the constitutional order, which the state is obliged not only to respect but also to protect.[445] In addition to this important precept, Article 1(3) settles the character of directly valid law that human rights enjoy; and second, the binding effect of these rights over the legislature, executive, and judiciary.[446]

In addition to these principles, which indeed bear an important impact regarding human rights protection, the Courts responsible for the enforcement of such rights have played a key role throughout recent history. The U.S. Supreme Court and the federal Constitutional Court of Germany have been the institutions that have shaped the constitutional protection of human rights in the national level.[447] These courts have the authority to determine the proper application of the rights bestowed in the constitutions of their countries.[448] In both cases, this authority emanates from the institution of Judicial Review, which is perhaps the finest contribution made by the United States to political theory and civil liberty.[449]

Federal Constitutional Guarantees of Individual Rights in the United States of America in, HUMAN RIGHTS AND JUDICIAL REVIEW, *supra* note 281, at 57, 66-67. *See supra* pp. 33-44.

[445] Grimm, *supra* note 372, at 270.

[446] Id. Dürig, *supra* note 88, at 13. *See also* Ress, *supra* note 88, at 117.

[447] Grimm, *supra* note 372, at 65, 271.

[448] Id. *See also* Danielle E. Finck, *Judicial Review: The United States Supreme Court Versus the German Constitutional Court,* 20 B.C. Int'l & Comp. L. Rev. 123, 125-126. (1997). *See also* William Safran, *The Influence of American Constitutionalism in Postwar Europe: The Bonn Republic Basic Law and the Constitution of the French Republic in,* AMERICAN CONSTITUTIONALISM ABROAD, SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY 91, 103 (George Athan Billias Ed., 1990). *See also* Norman Dorsen, *How American Judges Interpret the Bill of Rights,* 11 Const. Comment. 379, 379 (1994). *See also* David L. Faigman, *Reconciling Individual Rights and Government Interests Madisonian Principles versus Supreme Court Practice,* 78 Va. L. Rev. 1521, 1522 (1992).

[449] Grimm, *supra* note 372, at 59, 271. *See also* Dorsen, *supra* note 448, at 379. *See also* BREWER-CARIAS, *supra* note 228, at 138. *See also* Finck, *supra* note 448, at 124-125. *See also* Helmut Steinberger, *American Constitutionalism and German Constitutional Development in,* CONSTITUTIONALISM AND RIGHTS, 199, 214 (Luis Henkin and Albert J. Rosental Ed., 1990)

In general terms, judicial review is the power of the courts to decide upon the constitutionality of legislative and executive acts.[450] A comparative brief analysis of this institution in Germany and the United States demonstrates that judicial review can be implemented in more than one way. Consequently, the ability of each of these countries to interpret and advance their respective constitutions, and thus to apply judicial review, relies on particular conditions.[451]

One of this conditions is whether judicial review is applied within the boundaries of a decentralized or centralized system.[452] The United States has a decentralized system of judicial review, which gives all the organs within it the power to decide the constitutionality of state acts.[453] In this context, it is the duty of the entire judiciary to disregard any norm that conflicts with the wording of the Constitution, and to apply the latter in the given case.[454] All conflicts, whatever their nature, are decided by the same courts, by the same procedures, in essentially similar circumstances. Constitutional concerns may be found in any case and do not get special treatment.[455] The United States Supreme Court then enjoys original and appellate jurisdiction.[456]

---

[450] Finck, *supra* note 448, at 124. *See also* Dorsen, *supra* note 448, at 379

[451] Finck, *supra* note 448, at 124-125

[452] Id. at 125-126.

[453] Id. at 126. *See also* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, 46 (1971) (Mentioning that this system of judicial review is also known as the "American" system of control. This due to the fact that decentralized judicial review in one sense finds its beginning in the United States, "where judicial review remains the most characteristic and 'unique' institution.") *See also* BREWER-CARIAS, *supra note* 228, at 138.. (Concerning judicial review as a power of all courts, Brewer comments that in the United States there is no special judicial body empowered to decide upon the constitutionality of state acts. Thus, all courts have the power of judicial review of constitutionality, and none of them have their jurisdiction limited in any special way at all over the decisions of constitutional questions.)

[454] Finck, *supra* note 448, at 131-132. *See also* CAPPELLETTI, *supra* note 453, 52.

[455] Luis Favoreu, *Constitutional Review in Europe in,* CONSTITUTIONALISM AND RIGHTS, supra note 449, at 38, 41. *See also* BREWER-CARIAS *supra* note 228, at 137.

[456] BREWER-CARIAS *supra* note 228, at 144.

According to this doctrine, and as a result of the United States' federal system, three ramifications of judicial review can be established in this country: national judicial review, concerning the power of all courts to pass judgment upon the validity of acts of Congress under the United States Constitution; federal judicial review, pertaining to the power and duty of all courts to prefer the United States Constitution over all contradictory state constitutional provisions and statutes; and states' judicial review, regarding the power of state courts to pass verdict upon the validity of acts of the state legislatures under the particular state Constitutions.[457] Because of its importance for this work, the current comments are concerned only with the national judicial review.

In contrast to the system used in the United States, Germany exercises a centralized system of judicial review, which presupposes the existence of a court especially established to deal exclusively with constitutional issues.[458] This variant of judicial review organization is due to the fact that Germany, like many other European countries, differentiates among categories of litigation (administrative, civil, criminal, etc.) as well as the courts that decide cases in each category.[459] The centralized system of judicial review has been favored by European civil law countries which have more than one "higher" court.[460] This fact compels these countries to look for a specialized constitutional court, modestly staffed and limited in jurisdiction.[461]

---

[457] Id.

[458] Favoreu, *supra* note 455, at 41.

[459] Id.

[460] Finck, *supra* note 448, at 125. *See also* Donald P. Kommers, *German Constitutionalism: A Prolegomenon,* 40 Emory L.J. 837, 840. See also Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review,* 26 Law & Pol'y Int'l Bus. 1201, 1205. (Commenting that judicial review is structured differently in Europe than in the United States. "The most significant difference between review in the two regions is that the European model features a concentrated, or centralized, system of review. Under a system of concentrated judicial review,

Unlike the unitary U.S. system, which is supervised by the U.S. Supreme Court, the German judiciary has several higher courts, which are responsible for ordinary, civil, criminal, administrative, labor, tax, and social matters.[462] Thus, when an ordinary court finds that a statute involved in any civil, criminal, or administrative case is unconstitutional, it will refer the question to the Constitutional Court.[463] The Constitutional Court as the supreme protector of the Constitution has a monopoly on a wide range of jurisdictional powers ascribed to it in the Constitution.[464]

Then, although the concept of judicial review in Germany was strongly influenced by the North-American example, particularly so with respect to the protection of fundamental rights of individuals, it was to be undertaken by the Bundesverfassungsgericht as a court of specialized jurisdiction.[465] It is worth mention that besides its centralized character, the German Constitutional Court, is also separate from and independent of the regular judicial system, emphasizing its unique character as the protector of the Basic Law.[466]

---

constitutional review is exercised only by specialized courts that have been specially created to decide constitutional issues. . . . Constitutional Courts are created expressly by provisions in European constitutions, and they are independent of ordinary judicial structures.")

[461] Sheive, *supra* note 460, at 1202.

[462] Id. at 1204-1205.

[463] Finck, *supra* note 448, at 127.

[464] Id. *See also* BREWER-CARIAS, *supra* note 228, at 205..(Commenting that these powers may be classified in six groups of attributions through which the Bundesverfassungsgericht guarantees "the protection of the politico-constitutional order; the distribution of state powers; the electoral representative character of the political system; the protection of fundamental rights; the interpretation of the Constitution, and control of constitutionality of all normative acts. . . Specifically the Federal Constitution empowers the tribunal to decide 'on complaints of unconstitutionality' which may be entered by any person who claims that one of his basic constitutional rights has been violated by public authority. This power. . .has given rise to a very important recourse of protection of fundamental rights against public authorities.")

[465] Id. *See also* Kommers, *supra* note 460, at 840. *See also* Sheive, *supra* note 460, at 1202

[466] Kommers, *supra* note 460, at 840.

Another important consideration regarding judicial review is the extent to which this institution renders a state action unconstitutional.[467] Whether a judgment resulting from judicial review should affect only the parties to the case or whether it should affect all future litigants gives use to the question of "*inter partes*" and "*erga omnes*" effects. While both the centralized and decentralized systems of judicial review offer different answers to this question, practical considerations in each system have resulted in an impressive convergence between them.[468]

Generally, the United States Supreme Court's decisions concerning constitutional questions have relevance only for the parties to the case.[469] As a result, the decisions themselves have no general effect or *erga omnes* effect.[470] Any statute declared unconstitutional is neither annulled by the court nor repealed by it. Thus, the law declared null and void by a court remains on the books despite the adverse decision on its validity.[471]

However, this situation has been amply changed in the United States by the application of the principle of *stare decisis*.[472] Under this principle the Supreme Court usually follows the reasoning of its former opinions, so, the principle of constitutional interpretation that the Court applied in yesterday's lawsuit can be presumed to be the standard it will apply in tomorrow's lawsuit too.[473] As a consequence, it is the tendency

---

[467] CAPPELLETTI, *supra* note 453, at 85.
[468] Id.
[469] BREWER-CARIAS, *supra* note 228, at 149. *See also* CAPPELLETTI, *supra* note 453, at 86..
[470] BREWER-CARIAS, *supra* note 228, at 149.
[471] Id.
[472] CAPPELLETTI, *supra* note 453, at 86..
[473] Grimm, *supra* note 372, at 60. BREWER-CARIAS, *supra* note 228, at 149.

of civic responsibility and prudence for citizens and officials to standardize their actions to the most recently constitutional decisions of the Supreme Court.[474]

Hence, although the American system makes no explicit reference for decisions with *erga omnes* effect, the binding precedent of the Supreme Court's decisions over inferior courts carries effects not strictly limited to the parties to the case since they will bar contrary decisions in future cases.[475] "Thus the principle of *stare decisis* means that a judgement of unconstitutionality will become effective, practically speaking, *erga omnes*." In this context, the principle of *stare decisis* has contributed to the uniformity and certainty of the interpretation of the constitution in the United States as in other common law countries where the decentralized system of judicial review operates.[476]

On the other hand, *erga omnes* effect is an integral part of the German Constitutional Court's decisions, which are always obligatory for all constitutional organs of the federation and of the states, as well as the authorities, the courts, and, naturally, for the individuals.[477] For instance, any decision of the Bundesverfassungsgericht concerning the constitutionality of a statute "shall have the force of law" and, as law, shall be published in the Federal Gazette, along with other federal statutes. As a foreseen result, a decision of the Constitutional Court binds all of the entities and individuals mentioned above.[478]

---

[474] Grimm, *supra* note 372, at 60.
[475] CAPPELLETTI, *supra* note 453, at 56.
[476] Id. *See also* BREWER-CARIAS, *supra* note 228, at 150.
[477] BREWER-CARIAS, *supra* note 228, at 213-214. CAPPELLETTI, *supra* note 453, at 85-86. (Making reference to the Austrian Constitutional Court as the archetype of the centralized systems where a decision of unconstitutionality by a Constitutional Court give rise to an annulment with *erga omnes* effect. Comparing Austria, Italy, and Germany with the United States, the author refers to the *erga omnes* effect of judicial review in the European countries.)
[478] Kommers, *supra* note 460, at 840.

The decisions of the Bundesverfassungsgericht have *erga omnes* effect principally in cases of abstract or concrete control of norms,[479] and the decisions have the same force as a statute in the sense that its *erga omnes* character includes the Constitutional Court itself.[480]

As already discussed in the former chapter, the German Constitutional Court practices abstract and concrete judicial review.[481] In contrast to the Bundesverfassungsgericht's practice of abstract judicial review, the United States Supreme Court review only constitutional issues in the context of ripe adversarial lawsuits where parties have standing to bring a case.[482]

In short, judicial review in the United States is incidental to ordinary litigation, which has been the principal tendency in the American system.[483] This incidental character of judicial review, essential to the diffuse system, has been advanced by the Supreme Court by interpreting the term "case and controversy"[484] included in Article 3, Section 2 of the Constitution.[485] In addition, the Supreme Court will not decide a

---

[479] *See supra* pp. 59, 60, & 61.

[480] BREWER-CARIAS, *supra* note 228, at 214. (Once accepting jurisdiction over a petition, a constitutional complaint or a court referral, the Bundesverfassungsgericht is not bound by the content of the complaint. The Constitutional Court has *ex officio* powers to raise another constitutional question and to decide *ultra petita*. This means that if other disposition of the same statute is incompatible with the constitution, or another norm of federal law, the Constitutional Court can declare it null at the same time.)

[481] *See supra* pp. 59, 60, & 61.

[482] Sheive, *supra* note 460, at 1203. *See also* Favoreu, *supra* note 455, at 41.
See also BREWER-CARIAS, *supra* note 228, at 144.

[483] Sheive, *supra* note 460, at 1203. *See also* BREWER-CARIAS, *supra* note 228, at 144.

[484] U.S. CONST. Art. 3, Sec 2. "The judicial Power shall extend to all Cases, in Law and Equity, . . .to Controversies to which the United States shall be a party; . . ."

[485] Sheive, *supra* note 460, at 1203. *See also* BREWER-CARIAS, *supra* note 228, at 144.

constitutional issue unless individual litigants have the necessary standing by alleging a personal stake in the outcome of the controversy.[486]

It has been a brief comparison concerning the form in which judicial review is applied in the United States and Germany. The purpose of this comparison is to give some basic elements for the understanding of an institution that has been of special importance in the protection of human rights. After all, the second, and perhaps the most frequently cited, justification for constitutional review in Europe is its protection of fundamental rights.[487]

Despite the differences in the concepts of judicial review in the United States and Germany, and Europe in general, these models are two means to the same end, and both fulfill the same tasks.[488] Above all, these systems of judicial review defend human rights against violation of the individuals's rights by governmental authority, particularly the legislature.[489]

B. Proposing the Creation of a National Court of Human Rights in Mexico

The widespread violation of human rights in Mexico has put the country at the center of international attention.[490] Behind the headlines from Mexico lies a deep and

---

[486] Sheive, *supra* note 460, at 1203. *See also* BREWER-CARIAS, *supra* note 228, at 146. *See also* Favoreu, *supra* note 455, at 41

[487] Sheive, *supra* note 460, at 1221.

[488] Favoreu, *supra* note 455, at 41.

[489] Id.

[490] Paige Bierma, *Mexico Rights Study Cites Torture, Corruption*, THE SAN DIEGO UNION-TRIBUNE, July 25, 1996, at A16. *See also* Michael C. Taylor, *Why do Rule of Law In* Mexico, 27 N.M. L. Rev. 141, 141. *See also* 1995 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP. *See also* 1996 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP. *See also* 1997 DEP'T ST. .MEXICO HUMAN RIGHTS

complex situation that affects the life of every person in this country.[491] Major human rights abuses include extrajudicial killings, torture, illegal arrests, and arbitrary arrests; arbitrary interference with privacy, family, and home; and denial of fair public trial.[492] Having in mind the exhaustive set of individual rights that the Mexican constitutions contains, the gross violations of fundamental rights in Mexico can be explained only as a failure of the existing institutions and instruments to protect these rights.

1. General Background of the Judiciary in Mexico

The Mexican constitution has been considered as the first constitution that emphasized economic and cultural rights as opposed to political and civil rights. Moreover, this constitution was regarded as a revolutionary document since, as a nationalistic constitution, it was designed to protect its citizens against foreign economic exploitation as well as political neocolonialism.[493]

The Mexican Constitution of 1917 is regarded as an original, unique document, which at the time of its promulgation was the longest constitution in the world. While

---

PRACTICES ANN. REP. *See also* Triunfo Elizalde, *Comenzará Amnistia Internatcional Campaña Mundial Sobre Violacion de Derechos Humanos en México.*, LA JORNADA, (Ciudad de México) Septiembre 25, 1997, at 1. *See also* Anne Marie Mergier, *Desde Europa, Fernando Mejia, de la FIDH: Hay una Verdadera Degradación de la Situación de los Derechos Humanos en México,* REVISTA PROCESO 1091, (Ciudad de México) Septiembre 28, 1997, at Reportajes No. 06 *See also* Bertha Fernandez, *Han Pedido Asilo a Canadá 1,189 Mexicanos*, EL UNIVERSAL, (Ciudad de México) Octubre 15, 1997, at 2 Nacional. Jose Carreco Figueras, *Preocupa en Estados Unidos la Violencia Contra Reporteros Mexicanos,* EL UNIVERSAL, (Ciudad de México) Septiembre 27, 1997, at 2 Nacional. *See also* Pascal Beltran del Rio, *Emite la CIDH Dos Recomendaciones Contra México y Prepara una Tercera por Vejaciones en Guerrero, Chiapas y Veracruz*, REVISTA PROCESO 1096, (Ciudad de México) Noviembre 2, 1997, at Reprtajes No. 12.

[491] Taylor, *supra* note 490, at 141.

[492] 1995 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP. *See also* 1996 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP. *See also* 1997 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP.

criticized for its length and prolixity, it represented an effort to resolve the nation's ills.[494] Maybe this is the reason why some Mexican constitutional scholars have characterized the constitution as a project to be accomplished, "a statement of revolutionary ideals that is nominal in that there is no intended immediate congruency between its stated aspirations and reality."[495]

The Mexican constitution currently in force recognizes the "division of powers" as the cornerstone of Mexico's political organization. In the present, it is commonly admitted that the necessary distribution of state duties among the several branches of government suggests a mutual control among branches: a system of checks and balances which in addition gives rise to a cooperation of the branches to act simultaneously and in collaboration. Consequently, there is no doubt that each of the traditional branches of government-legislative, executive, and judicial-must not be susceptible of any subordination or dependency with respect to other branches.[496]

In this context the federal judiciary should play an important role because it is the interpreter and the guardian of the whole legal order. Its mission as supreme interpreter of the Fundamental Law draws the conclusion that the judicial branch is the branch of government most commensurate to the observance and defense of basic human rights, as well as to the guardianship of the constitutional system.[497]

---

[493] CONSTITUTIONS THAT MADE HISTORY (Albert P. Blaustein et al eds., 1988)
[494] Id.
[495] James F. Smith, *Confronting Differences in the United States and the Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-Mex. L.J. 85, 94.
[496] Rafael Estrada-Samano, *Administration of Justice in Mexico: What does the Future Hold?*, 3 U.S.-Mex. L.J. 35, 39. *See also* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter One. art. 49.
[497] Estrada-Samano, *supra* note 496, at 39

Unfortunately, in Mexico this theory is no more than that, a theory. The lack of an authentic division of powers is deeply rooted in Mexican history as well as in the presidential system of government, topics to be discussed no further here.[498] However, these circumstances have not only affected the administration of justice in Mexico, but have also weakened the entire Mexican judiciary throughout its history.[499] Moreover, the trend of constitutional reforms concerning the Federal Judicial Branch has always tended to undermine the autonomy and public image of this power.[500]

2. An Overview of the 1994 Reforms to the Mexican Judicial Branch

The undermining effect to the authority of the Federal Judiciary was not absent in the latest 1994 constitutional reforms relating to the judicial branch in Mexico. Congruent to the historical example of some of his predecessors, President Ernesto Zedillo initiated the reform by dissolving the existing Supreme Court.[501] Some of the

---

[498] Id. (Commenting how the presidential system has further degenerated into a "presidentialist" one, in which the chief executive acts outside of constitutional bounds in the exercise of certain powers supposedly having been conferred upon him by the political system itself, rather than by the Constitution.)

[499] Id. at 40. (Citing Carranca y Rivas, Professor Emeritus at the National Autonomous University of Mexico, who charges that Mexican presidencialism has impaired the independence of the judiciary.) *See also* Taylor, *supra* note 490, at 144-145.

[500] Taylor, *supra* note 490, at 144-145. (In 1928, President Plutarco Elias Calles weakened the judicial power by discharging all the Supreme Court ministers even though they had lifetime tenure. "Following his own precedent, President Calles instituted a series of reforms, which ignored the Constitution' s division of powers, but much of the original intent of the 1917 constitutionalists. . . Perhaps the only twentieth-century Mexican President who rivaled President Calles in sheer aggregated power was his successor, Lazaro Cardenas, who eliminated the constitutional provision of lifetime tenure for Supreme Court ministers, and replaced it with six-year terms, to run concurrent with the presidential term. . . Although the six year terms were later re-expanded to lifetime positions in 1944, the low opinion held for the Supreme Court, which the 1928 and 1934 reforms established, remains to this day. A position on the Supreme Court continues to lack the prestige, for example, of a good teaching position at a respected school in Mexico. . .")

[501] Id. at 149. *See also* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 Am. U.J. Int'l L. & Pol'y 295, 297.

main characteristics of these reforms, which affected twenty-seven constitutional articles, are the elimination of the "floating" ministers of the Supreme Court, and the reduction of the number of ministers from twenty-one to eleven.[502] The number of specialized *Salas* was also reduced from four to two, one for administrative and labor cases, the other for civil and penal cases.[503]

Furthermore, these reforms also affected the ministers' tenure of office by reducing it from a lifetime appointment to a fifteen-year term, without the possibility of reappointment.[504] The President still retains his power to propose to the Senate the ministers of the Supreme Court.[505] The difference now is that the President will submit to the Senate a list of three candidates to occupy a minister's seat.[506] The Senate then has to select one of the candidates by a super majority vote.[507] If the Senate discards all three nominees, the President must submit another list of three different candidates. If the Senate again rejects the list, the President at that point has the power to choose which candidate will occupy each open ministerial seat.[508]

In this set of reforms there are two that have specially captivated the public attention and were regarded as the most original reforms of 1994. One is the creation of

---

[502] Taylor, *supra* note 490, at 149. *See also* Vargas, *supra* note 501, at 302. *See also* IGNACIO BURGOA, DERECHO CONSTITUTCIONAL MEXICANO, 882 (1997). *See also Liberalismo Contra Democracia: Recent Judicial Reform in Mexico*, 108 Harv. L. Rev. 1919, 1929. [hereinafter *Liberalismo Contra Democracia*].

[503] Taylor, *supra* note 490, at 149. *See also* BURGOA, *supra* note 502, at 882. (Formerly there were four Salas, each for every area of specialisation: administrative, labor, civil, and penal cases. It is argued that the reduction of the number of Salas, and the inclusion of two areas of specialization in each one will worsen the administration of justice in Mexico because the minister of each *Sala* will have to decide on cases concerning totally different areas of specialization.)

[504] Taylor, *supra* note 490, at 149. *See also* BURGOA, *supra* note 502, at 886. (Stating that the new tenure term of ministers impairs the independence of the Supreme Court.)

[505] BURGOA, *supra* note 502, at 882-883.

[506] Id. *See also* Taylor, *supra* note 490, at 149.

[507] Taylor, *supra* note 490, at 149.

[508] Id.

the *Consejo de la Judicatura Federal* (Council of the Federal Judiciary), and the other is the introduction of the *Acciones de Inconstitucionalidad* (Unconstitutional Actions) Procedure.[509]

The *Consejo de la Judicatura Federal* is composed of seven members: One magistrate from the Collegiate Circuit Courts; one magistrate from the Unitary Circuit Courts; one District Court judge; three appointees, two selected by the Senate, and the other by the executive branch; and finally the President of the Supreme Court, who shall also presides over the Council.[510] In general terms, this *Consejo* was created to expand the administrative autonomy of the judicial branch and to free the Supreme Court from some of its administrative obligations.[511] Some of its main functions are the administration, vigilance, and discipline of the Federal Judicial Power, with the exception of the Supreme Court of Justice[512]

The *Acciones de Inconstitucionalidad* (Unconstitutional Actions) Procedure is the other significant innovation in the 1994 reforms to the Mexican judiciary.[513] This new and "original" procedure implanted in the Constitution is important for this work at least for two reasons. First, the introduction of these *Acciones* to the Constitution brought the *Erga Omnes* effect into the Mexican legal system for the first time. However, this great achievement has been greatly undermined and restricted to procedures of implementation

---

[509] Id. at 150

[510] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 100. *See also* BURGOA, *supra* note 502, at 885. *See also* Taylor, *supra* note 490, at 150. *See also* Vargas, *supra* note 501, at 324-325. *See also Liberalismo Contra Democracia*, *supra* note 502, at 1930.

[511] Taylor, *supra* note 490, at 150. *See also* Vargas, *supra* note 501, at 324. *See also Liberalismo Contra Democracia*, *supra* note 502, at 1930.

[512] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 100. *See also* Vargas, *supra* note 501, at 324. *See also* BURGOA, *supra* note 502, at 885. (Another important faculty of the *Consejo de la Judiciatura Federal*

that render it inapplicable.[514] Second, the *Amparo* trial, whose strict function is to protect individual guarantees, was not favored at all by the introduction of the Unconstitutional Actions Procedure, but condemned to exist under the *Mariano Otero* Formula.[515]

Before going into details with respect to the two reasons stated above, I will briefly describe the *Acciones de Inconstitucionalidad* procedure. The objective of this procedure is to establish a contradiction between the constitutional commands and the federal or state legislation.[516] This procedure allows the Supreme Court to strike down unconstitutional legislation by declaring it invalid. This represents an unprecedented event since the Supreme Court never before had been given this power.[517]

To observers of the development of the Mexican legal system, the Supreme Court's new power to make declarations with *erga omnes* effect certainly constitutes a most unparalleled evolution in Mexico's constitutional history.[518] However, the requirements for its use make the *Acciones de inconstitucionalidad* procedure impractical for two reasons. Firstly, in order to use the procedure, a constitutional challenge must be raised within thirty days of the law's publication.[519] This requirement has been regarded as illogical due to the fact that it may take months or even years before a statute's constitutional flaws become manifest.[520] Additionally, thirty days is such a short period

---

[513] Vargas, *supra* note 501, at 313. *See also* Taylor, *supra* note 490, at 150.
[514] BURGOA, *supra* note 502, at 888. *See also* Taylor, *supra* note 490, at 151.
[515] Vargas, *supra* note 501, at 314. *See also supra* p. 47 and note 252. (Concerning the effects of the Mariano Otero Formula on the Mexican legal system.)
[516] BURGOA, *supra* note 502, at 888.
[517] Taylor, *supra* note 490, at 151.
[518] Vargas, *supra* note 501, at 322.
[519] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 105, sec. II. *See also* Taylor, *supra* note 490, at 151 & 163.
[520] Taylor, *supra* note 490, at 151 & 163.

of time that it may make the Supreme Court unlikely to obtain enough evidence on the practical ramifications of the challenged legislation.[521]

Secondly, the challenge must be raised by either the Attorney General or by 33% of either house of Congress.[522] Since legislation is not approved without presidential support and the General Attorney is a presidential appointee who can be relieved of office by the president at will, it is unlikely that the General Attorney will ever raise a constitutional complaint against legislation.[523] Congress may be more likely to raise a constitutional challenge; however, the constitutionality of a statute should not depend upon the legislative support which a challenge generates.[524] In addition, obtaining a 33% vote in opposition to a majority-supported law is difficult in a scheme where the number of ruling-party Federal legislators is greater than the number of all other parties' legislators in Congress.[525]

The final consideration regarding the 1994 constitutional reforms is given to the "super qualified majority" requirement involving the Supreme Court decision in the *Acciones de Inconstitucionalidad* procedure.[526] According to this requirement the Supreme Court may declare a law unconstitutional only if a majority of eight ministers out of eleven decides to do so.[527] This means that in spite of the opinion of either the General Attorney or Congress who challenged the constitutionality of said law, and

---

[521] Id.
[522] Id. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 105, sec. II(c). *See also* BURGOA, *supra* note 502, at 888.
[523] BURGOA, *supra* note 502, at 888. *See also* Taylor, *supra* note 490, at 163.
[524] Taylor, supra note 490, at 163.
[525] Id. *See also* BURGOA, *supra* note 502, at 888.
[526] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 105, sec. II.

despite the Supreme Court's simple majority vote (six or seven votes out of eleven) against that law, it will remain effective and legally enforceable.[528]

This overview of the 1994 reforms to the Mexican constitution is by no means exhaustive. By having done this, I intend to clarify the view that the 1994 reforms are not a great leap forward in the autonomy and power of the Judiciary. Moreover, I consider it important to establish that the creation of new procedures under the current Mexican legal system is always accompanied by obstacles and tricks that render them unreachable. Weak procedures, such as the *Acciones de Inconstitucionalidad*, stress only the necessity for more deep thinking about new institutions and safeguards to truly protect human rights and the constitutional order in Mexico.

3. Acciones de Inconstitucionalidad, and the Amparo Trial

Some suggest that the implementation of the *Acciones de Inconstitucionalidad* procedure in Mexico is an influence from some European countries, Germany among them. [529] I think it is evident that the German concept of Abstract Judicial Review[530] strongly influenced the Mexican *Acciones de Inconstitutcionalidad* procedure. It is enough to compare Article 93(1)2of the German Basic Law with Article 105 sec. II of the Mexican Constitution to establish this influence.

---

[527] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 105, sec. II . *See also* Vargas, *supra* note 501, at 315.
[528] Vargas, *supra* note 501, at 315.
[529] Id. at 314.
[530] *See supra* p. 59 and note 315.

> *Article 93(1)2 of the Basic Law provides that "the Federal Constitutional Court decides: . . in cases of differences of opinion or doubts on the formal and material compatibility of Federal law or Land law with this Basic Law, or on the compatibility of Land law with other Federal law, at the request of the Federal government, of a Land government or of one-third of the Bundestag members. . ."*[531]
> *Article 105, sec. II (a)(b)(c) establishes that "the Supreme Court of Justice of the Nation shall know about. . .the Acciones de Inconstitucionalidad, (which) shall have as their objective to establish a contradiction between an ordinary law and this constitution. The Acciones de Inconstitucionalidad shall be excised by. . .the 33% of the house of representatives. . . the 33% of the Senate. . .the General Attorney. . ."*[532]

However, the *Acciones de Inconstitutcionalidad* procedure or, in other words, the new Mexican Abstract Judicial Review, does not seem to have brought about any real or tangible improvement to the undermined power of the Mexican Federal Judiciary.[533] It could be that by introducing the *Acciones de Inconstitutcionalidad* procedure, the end to be accomplished is merely to make apparent a new kind of federalism in Mexico.[534] But even to this end, the procedure is highly guarded against its use.[535] Even though some may argue that the *Acciones de Inconstitutcionalidad* procedure was set up to protect the Mexican constitutional order as a whole, including the individual's rights, the accessibility to this recourse and the existence of the *Amparo* trial oppose this assumption.

As already mentioned, the only ones entitled to bring an *accion de inconstitutionalidad* before the Supreme Court are either Congress or the General Attorney. In legal terms, congressmen represent the interests of the population within the

---

[531] F.R.G. CONST. art. 93(1)2
[532] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter Four. art. 105, sec. II(a)(b)(c).
[533] BURGOA, *supra* note 502, at 888.
[534] Vargas, *supra* note 501, at 318

government structure,[536] but practically speaking there, there is a huge gap between them and the population. Generally, Mexican congressmen hardly ever bring a public claim before Congress. Thus, it is unthinkable that congressmen will bring a single individual complaint concerning the unconstitutionality of a law violating human rights to discuss it in Congress.

In addition, the thirty-day period to install such procedure makes it even harder to think that the *Accionen de Inconstitutionalidad* procedure was designed to be used by individuals to protect their human rights. First, individuals need to become aware that a given law affects their rights in any way. Second, they will have to gather sufficient evidence in order to convince Congress that such law violates their rights. Third, Congress will need to consider first the individuals' claim and then discuss the incompatibility of this law with the Constitution. Are thirty days enough time to go through such a time-consuming process? Moreover, will Congress be enthusiastic about questioning the constitutionality of a law which it just approved some days ago?

The same happens with regard to the General Attorney's capacity to bring about the *Accion de Inconstitutionalidad* procedure against laws that violate constitutional human rights provisions. As a presidential appointee whose removal depends on the President's will, the General Attorney is totally unlikely to employ such procedure against a law that was approved with the presidential support. Furthermore, it is particularly surprising that now the General Attorney be embodied as the guardian of the

---

[535] *See supra* pp. 86-87.

[536] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Third Tittle, Chapter One. arts. 51, 52.

Constitution while this institution itself is frequently charged with a high standard of human rights violations.[537]

According to this, individuals in Mexico do not have any other legal resource to protect their human rights but the *Amparo* trial, whose characteristics have already been discussed in this work.[538] I will only make some further considerations with regard to this extensive institution, whose particular and general objectives are respectively to protect the individual guarantees, and to control the constitutionality of acts of the authority.[539]

The *Amparo* works mainly to protect individual guarantees and is considered the last bastion of the administration of justice in Mexico.[540] In addition, although the Mexican constitution was one of the first ones to recognize social rights, the Amparo does not protect them.[541] Moreover, the decisions resulting from *Amaparo* suits do not bear the *erga omnes* effect but rather are limited to ordering only that the law impugned

---

[537] Paige Bierma, *Mexico Rights Study Cites Torture, Corruption*, THE SAN DIEGO UNION-TRIBUNE, July 25, 1996. (After a ten day visit to Chiapas, Gerrero, Tijuana, and Mexico City, an Organisation of American States' human rights commission concluded that inefficiency, corruption, arbitrary arrests, and torture are among the worst human rights violations in Mexico.) *See also* Raúl Monge, *Ddesarticulada y Corrempida, la Procuraduría de Justicia es un mero Apéndice de Gobernación y el DDF: Romero Apis*, REVISTA PROCESO 1096, (Ciudad de México) Noviembre 02, 1997, at Reportajes No. 10. *See also* Triunfo Elizalde, *Comenzará Amnistia Internatcional Campaña Mundial Sobre Violacion de Derechos Humanos en México.*, LA JORNADA, (Ciudad de México) Septiembre 25, 1997, at 1. *See also* Miguel Cabildo, *Crisis de Derechos Humanos, Erosión Institutcional y Barbarie en México, Denuncias de Amnistia que Zedillo se Negó a Escuchar*,. REVISTA PROCESO 1091, (Ciudad de México) Septiembre 28, 1997, at Reportajes No. 04. *See also* 1995 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP. *See also* 1996 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP. *See also* 1997 DEP'T ST. .MEXICO HUMAN RIGHTS PRACTICES ANN. REP.

[538] *See supra* pp. 46-53

[539] Estrada-Samano, *supra* note 496, at 43.

[540] Camargo, *supra* note 312, at 414.

[541] Jesús Aranda, *Urge Amparo Social Contra Acaparadores y Monopolios, Dice el Ministro Castro*, PERIODICO LA JORNADA, (Ciudad de México) Noviembre 25, 1997, at 1.

not be applied against the claimant.[542] The law impugned will remain applicable since the Federal Judicial Branch does not have powers to abrogate or derogate a law.[543]

This fact carries a double effect: First, the *Amparo* does not nullify the law deemed contrary to the constitution; it merely nullifies the single act of the authority in the specific case brought before the Court, the law continues in force although it violates the human rights of other people. Second, although the *Amparo* does not fully protect human rights, it still goes further and limits the Supreme Court's scope of action. As a result of the limited legal effect of the A*mparo*, the Court finds itself bound by this instrument because the *Amparo* was designed precisely in the tradition of Roman Law, which restrains judges from declaring laws null.[544] This notion excludes the judiciary from nullifying legislative or executive acts in order to avoid any friction between any of these branches.[545]

In this regard, the Supreme Court cannot fully secure rights that the constitution grants to the people. The questions then become who will secure all the rights that the constitution gives to people in Mexico? and also who will have the power to nullify with *erga omnes* effect unconstitutional laws that violate human rights? In response to these questions, I propose the creation of a Court of Human Rights in Mexico. This specialized court would have the power of securing the basic rights of individuals, and, at the same time, it would have the power to invalidate legislative or executive acts on the grounds of unconstitutionality.

---

[542] Estrada-Samano, *supra* note 496, at 43. *See also* Camargo, *supra* note 312, at 417.
[543] Camargo, *supra* note 312, at 421.
[544] Taylor, *supra* note 490, at 153.
[545] EDUARDO PALLARES, DICCIONARIO TEORICO Y PRACTICO DEL JUICIO DE AMPARO, 16 (1967).

4. Why a National Court of Human Rights in Mexico?

The factual necessity of having in Mexico an organ capable to fully serving the individual guarantees that exist under the Mexican Constitution has already been settled. In addition to this important fact, there is another that especially calls my attention: the Mexican Federal Judicial Power faces probably its worst crisis since it was instituted as one of the three powers of the Union.

According to the United Nations Program for Development, the Judiciary enjoys credibility in only 22% of Mexican society.[546] This problem is greatly related to the dependent character of this branch in relation to the Executive Branch. The increasing percentage of human rights violations and the restricted capacity of the judiciary to protect those rights make the problem even more difficult to resolve.

Therefore, the creation of a National Court of Human Rights in Mexico is of contemporaneous importance mainly because of three reasons. First, the Mexican Judicial Power is incapable of successfully protecting individual guarantees under the current circumstances and with the existing legal instruments. Second, although there is a National Commission of Human Rights in Mexico, it is a mere governmental agency whose only reason for existence is to try to better the already undermined image of the federal government. In fact, this Commission does not deserve even to be considered as a remote source of human rights protection. Third, people view both the judiciary and the National Commission of Human Rights as incompetent and corrupt, and equate them

---

[546] David Ponte, *PNUD: la confianza en la justicia mexicana, de las mas bajas*, LA JORNADA, (Ciudad de México) Octubre, 9, 1997, at 1 (Showing that Mexican public's confidence in the Mexican judiciary is one of the lowest in the world.)

with the corrupt government and the ruling party. Therefore, if the task of constitutional protection of human rights is delegated to the current judiciary in the form of a specialized *Sala*, the public will question its legitimacy and capacity to protect such rights.

A new and specialized National Court of Human Rights could secure public reliance on the full interpretation and protection of individual's rights. This Court could be the final interpreter of the individual guarantees that the Mexican Constitution grants to the people. The Mexicans would finally have a specialized Court to secure their rights against the acts of any branch of the government, and even against acts of other individuals.

In addition, this Court would give people in Mexico the ability to control their elected officials, who sometimes have incentives to manipulate human rights to assure permanence in power. Mexico is a true example of this; the current ruling party, P.R.I., has held power for more than 75 years. This situation has generated an era of unprecedented human rights violations.

5. Characteristics of the Proposed National Court of Human Rights in Mexico (General Features)

The National Court of Human Rights could be a specialized court embodied with the power to invalidate legislative or executive acts on the grounds of incompatibility with constitutional human rights. This power of judicial review would be like the power

of judicial review that the American and German Courts enjoy,[547] that is, judicial review with general effect or *erga omnes*.

As a specialized Court, the National Court of Human Rights would be expressly created by a provision in the Mexican constitution, which would establish the independence of this Court from the ordinary judiciary. This provision could be inserted within Article 1 of the Mexican constitution, which dictates that any person in Mexico "shall enjoy the guarantees granted by the Constitution."[548] Including the creation of this Court in this Article would serve a double purpose: First, it would stress the character of the Court as guardian of those "guarantees granted by the constitution"; and second, it would clearly establish the independence of this Court from the ordinary judiciary.

Since the National Court of Human Rights would be a specialized court dealing with the protection of human rights, it would adopt the model of concentrated judicial review. It would have the exclusive power to decide whether a government act contravenes one of the individual guarantees in the constitution. Thus, ordinary courts would be required to refer to this Court any case in which a human right could be infringed, and subsequently they would be bound by the rulings of this court.

In deciding whether it is more convenient for Mexico to adopt decentralized or centralized judicial review, I would keep in mind that Mexico is a civil-law country and then follow the German example.[549] Mexico and Germany are both civil law countries. The European experience shows that the American system of diffuse judicial review does not fit in civil-law countries because unlike the unitary U.S. system, which is supervised

---

[547] CAPPELLETTI, *supra* note 453, at 56, 85-86. *See also* BREWER-CARIAS, *supra* note 228, at 213-214.
[548] CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, First Tittle, Chapter One. art. 1.

by the U.S. Supreme Court, European judicial systems commonly contain more than one higher court.[550]

The National Court of Human Rights would exercise both concrete and abstract judicial review. Abstract judicial review regarding the protection of human rights would exist under different conditions from those under which the current Mexican abstract judicial review was established. First, it could be requested by a person whose rights are directly affected by a law and not merely by its application. Particularities would be settled in the respective regulatory law. Second, keeping in mind that it can take "years or even decades"[551] before a law's violation of constitutional values become clear, the period to challenge a law would be open to a reasonable period of time.

This Court would also exercise concrete judicial review in the context of adversarial lawsuits in which parties would have standing to bring a complaint. That is, concrete judicial review would be incidental to ordinary litigation. Conditions in which parties to a case would be given standing should be established either by jurisprudence of the court or by a special regulatory law.

Review of a given case by this Court would not be subjected to judicial discretion such as *certiorary*. In contrast to the judicial discretion enjoyed by the United States Supreme Court to grant review only when there are special and important reasons, I would propose that the National Court of Human Rights had the obligation to review all human rights cases brought before it. In this way, Mexican people could have an homogeneous standard of protection of constitutional rights in which rely.

---

[549] *See supra* pp. 72-73
[550] Sheive, *supra* note 460, at 1204.

Yet the last consideration would be whether the National Court of Human Rights would exercise prior or posteriory abstract judicial review of laws violating human rights. In this regard I would suggest bestowing this Court with the power to review laws only after their promulgation.

[551] Taylor, *supra* note 490, at 163.

Conclusion

As seen in the first chapter of this work, the rights enumerated in the U.S. constitution, in the German Basic Law, and in the Mexican constitution are quite similar. By the time of their promulgation, these three constitutions included values and characteristics that made them prototypes for the constitutions of other countries.

There is no doubt that the founding fathers of each of these bodies of law were aware of the important role that these rights play in any society. Therefore, human rights are among those important values that characterized these three constitutions. However, the mere inclusion of human rights in any constitution does not guarantee the government commitment to protect them.

The protection of these rights evolved differently in the United States, Germany, and Mexico. As already mentioned, Germany and the United States faced gross violations of fundamental rights in their very own territory at some point in history. Since then, these nations have taken steps to successfully secure and protect individuals against human rights violations by government.

Mexico is presently going through such widespread transformations that securing individual rights must be one of the principal priorities. The Mexican constitution contains high standards of protection for human rights. However, violations of human rights in Mexico range from deficient administration of justice to forced disappearances

and summary executions. The current judiciary, the *Amaparo* suit, and the *Acciones de Inconstitucionalidad* have proven to lack sufficient power to stop this situation.

Reforms to the Mexican judiciary come and go without having a real impact with regard to the protection of human rights. The Mexican judiciary is a nullity in the federal schema. Dishonor, corruption, and executive presence inside its organs impair it from exercising the power it has never even tried to exercise. People do not and will not ever trust a judiciary which has refused to afford justice to nationals tragically victimized by government; a judiciary that following the instructions of the executive has remained silent and apart from affording a solution to the rampant human rights crisis.

Furthermore, although the *Amparo* is regarded as an evolving institution and the last bastion in the Mexican administration of justice, the truth is that its limited effect has been criticized by international and national legal scholars. The *Amparo* does not afford full protection of human rights because it lacks *erga omnes* effect, which has been regarded by many as an implicit weakness of this institution. In addition to its limited effect, its complex structure and requirements make this institution an impractical tool for people without legal knowledge and with scarce economic resources.

Unfortunately, the creation of the National Commission of Human Rights in Mexico did not bring a substantial change. Born under the auspices of the executive power, the Commission was stigmatized as another government attempt only to appear to protect of human rights. Again, reforms tried to better the character and credibility of this organ but its performance has always been viewed with skepticism.

Many constitutional reforms have affected the judiciary, and some of them have been concerned with the establishment of specialized *Salas* to deal with special fields of

law. However, none of these reforms has considered the creation of a specialized *Sala* to protect human rights. Unfortunately, under the current situation of the Mexican judiciary, the creation of such *Salas* will be meaningless.

Under these circumstances the arrival of a new National Court of Human Right will do more than just establish an institution to protect human rights. It could better the whole legal system because of its character as a guardian of constitutional fundamental rights. By having a parallel check, the federal judiciary will be forced to act according to the situation and to regain authority in the federal order. The current judiciary could not ignore any more the constitutional mandates, at least in the context of human rights, and it could then function as a real check upon other branches of government.

The creation of a National Court of Human Right in Mexico is a reachable objective whose consequences are by no means negative to the Mexican society. Throughout Mexican history, government has always talked about its sincere concern for protecting the human rights that the constitution grants. However, throughout history, reality has proven to be different.