

Iberian (South American) Model of Judicial Review: toward Conceptual Framework

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ABSTRACT

The paper explores Latin American countries legislation with the view to identify specific features of South American model of judicial review. The research methodology rests on comparative approach to analyzing national constitutions provisions and experts' interpretations thereof. The constitutional provisions of Brazil, Peru, Mexico, Ecuador are taken as core examples to compare the relevant procedure with Anglo-Saxon and European models of judicial review. The paper underlines that within the traditional separation of powers (i.e. legislative, executive and judicial), each of the respective branches conducts supervision and review functions to a particular extent. The text covers some examples regarding the head of the state, the supreme legislative body activities in this respect and goes further to explore the nature of the phenomenon under study, taking into account that majority of Latin American countries supported the organizational structure of judiciary operating in line with the separation of powers and also grant their courts of general jurisdiction the right of review for constitutionality and legality. The comparative analysis of national constitutions provisions and scholars' interpretations has led to a number of conclusive statements regarding distinctive features of constitutional supervision and judicial review procedure in the South American legal tradition.

KEYWORDS

Constitutional supervision, judicial review, South American model of judicial supervision, constitutional justice

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Introduction

There are several predominant conceptual approaches to describing the status of judicial and quasi-judicial institutions that exercise relevant powers in the relatively rare academic, educational, and reference literature that focuses in one or another way on organizing the core systems and the most known types of specialized review and constitutional justice that have emerged within the

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decentralized – ‘American’ (North-American) – and centralized – ‘European’ – models of constitutional justice.

A number of scholars believe that this type of public activities predetermines the institutional distinctions and peculiarities of the legal status of those public institutions that implement them in practice. Review functions exercised by relevant authorities on behalf of the government are, on one hand, differentiated from other types of review activities, and, on the other hand, are different from departmental (intra-departmental) and other special, functions. Review powers are vested in some form in many governmental authorities.

It should be noted that the ‘European’ model differs in many fundamental respects from the ‘American’ system of judicial review, which for quite objective reasons lacks a number of procedural advantages that are inherent to specialized constitutional justice. We can point out many of them, but still the key advantage of specialized constitutional review is that it streamlines the procedure for examining the facts and making the decision: the constitutional court or a quasijudicial authority (unlike courts of ordinary jurisdiction) only examine matters relevant to constitutional law.

Eventually, this spares them the need to address at a time specific issues inherent to public relations governed by criminal, civil, labor and administrative law. The constitutional justice authority focuses exclusively on the constitutional law component of collisions in question. Moreover, it is not reduced to the need to handle only those matters that arise in the context of specific cases examined within ordinary legal proceedings that initially had no constitutional law context.

It has access to various procedures of specialized constitutional judicial proceedings. Thus, if the constitutional justice body is to make a judgment on constitutionality of a law that arises when addressing a specific collision within regular legal proceedings, it may handle this matter by way of abstract review. Thus, it can make a generally binding interpretation of the Constitution much faster, unlike a judicial authority that has to apply the case-law procedure in handling such issues and to recur to interpretation of the Constitution only in the context of a case subject to regular legal proceedings that has given rise to such matter.

The paper’s goal is to compare and identify features of constitutional review models regarding European and South American legislation and practices with a view to specify major distinctive features regarding the judicial review in Latin American countries.

Materials and Methods

Traditionally, with the ‘classic’ separation of powers scheme as the basis, in parallel (often simultaneously) with their ‘traditional’ – legislative, executive and judicial – functions, each of the above branches will exercise supervision and review functions to some extent. The head of the state acts as the guarantor of the Constitution with all particularities inherent to the political and legal status ensuing from this. The supreme legislative body reviews the government that supervises the activities of the government administration and ministers.

Hierarchically, supreme courts that act as courts of appeal or cassation review decisions of district and other courts of ordinary jurisdiction. In this regard, V.Ye. Chirkin (2001) notes that “[t]here can be many other examples,

but it is evident that in any area of public administration a superior government authority will always exercise some form of review with respect to inferior elements. Besides, there are departmental... and intra-departmental review bodies that have administrative powers... Most often similar activities are of, though important, but still 'auxiliary', non-essential nature..." (Chirkin, 2001).

One of the most concise and correct definitions of judicial review, which contains the quintessence of a generalized understanding of this multifaceted concept, has been offered by Prof. Steinberger, who believes that constitutional justice "means a statutorily institutionalized framework for making generally binding decisions on constitutional law matters" (Steinberger, 1994).

In the context of the above, it is hard to dispute that, however diverse were systems existing in individual countries, we can highlight only two principal (in terms of their propagation) models of constitutional review and constitutional justice. Under the first – 'American' – model, constitutional law cases lie within the competence of the supreme judicial body within the review (oversight) or appellate authority, which crowns the hierarchical judicial system of the state, and, accordingly, simultaneously acts as the supreme authority for courts of ordinary jurisdiction in what is known as ordinary cases (Zhidkov, 1985). Thus, constitutional review 'is entrusted to the agency that exercises the powers of ordinary judicature' or, in other words, 'to the entity that is known in the U. S. as "courts of ordinary jurisdiction".' The most known examples include the U. S. Supreme Court and the Federal Supreme Court of Switzerland (Steinberger, 1994).

The particularity (indeed a distinctive feature in some countries) of the second – 'European' – model is that it provides for courts or quasi-judicial authorities of specialized constitutional review, which are actually designed "only to address matters of constitutional law" (Steinberger, 1994).

The research stood on the comparative approach to exploring the issues under study. The research materials included the national constitutions of European and Latin American countries with regard to review procedure.

It goes without saying that prominent scholars' studies in the above field were also taken into account and explored to compare possible approaches to core concepts and relevant steps though the procedure under study. A particular focus was laid on the institutional variations of the constitutional review model that emerged during the contemporary world history.

Results and Discussion

Regarding developed democratic countries of Latin America it has been found that the function of constitutional review (oversight) is vested in courts of general jurisdiction with a Supreme Court at their head. This might reflect direct or indirect influence on the process of constitution of a public administration branch exerted by the USA.

Most Latin American countries followed what might be called the 'path of least resistance' not only by copying the organizational structure of judiciary operating in line with the separation of powers theory and the system of 'checks and balances' in their 'North American' version, but also by granting their courts of general jurisdiction the right of review for constitutionality and legality (Mirow, 2004).

Moreover, the emergence of judicial constitutional review was materially affected by the institute of caudillism that had long restrained the dynamics of political and legal development, and endless military coups that resulted in personal or collective dictatorships (Orlov, 2001).

The analysis of a limited number of the region's countries leads to the conclusion that they have adopted the 'European' model of specialized constitutional review in one or another institutional variation of the constitutional review model that had emerged in Austria in the first third of the twentieth century" (Steinberger, 1994).

There are some cases, however, where we can see a certain unjustified substitution of concepts. Specifically, the structure of judicial constitutional review that emerged in Peru in the late 20th century is viewed as a certain modification of the 'European' system of constitutional justice.

The Constitution adopted in Peru on 31 October 1993 has established the Tribunal of Constitutional Guarantees to act in parallel with the Supreme Court, which, like all other judicial authorities (*juzgados* and *tribunales*), has no prerogative of constitutional review. The Tribunal of Constitutional Guarantees is an independent specialized judicial authority comprised of seven members elected for a five-year term by two thirds of votes of the Congress members and whose functions include constitutional review (Law systems of world countries, 2000).

In general, the legal system of Peru is related to the Romano-Germanic legal family. The jurisprudential culture of the former metropole (Spain) initially served as the basis for the Peruvian legal system. At the same time, its constitutional law follows in many respects the model of the United States of America. Although the current Supreme Law has established a more authoritative system of public administration, we cannot but point out that many of its provisions (particularly those relating to its economic structure foundations) are of very liberal nature. Following modern constitutionalism trends, the Constitution of 1993 has introduced a number of new public administration institutions designed to enhance independence and professionalism of judicial authority, including the Tribunal of Constitutional Guarantees.

The Tribunal of Constitutional Guarantees has the following powers: the exclusive right to interpret the Constitution; determine the constitutionality of laws, international treaties and other regulatory legal acts (at the same time it has the right to exercise both preliminary and follow-up review); as the supreme court, examine cases under the *habeas corpus*, *habeas data* and *juicio de amparo* procedures; and settle competence-related disputes (Law systems of world countries, 2000). Decisions on constitutionality of certain acts adopted by the Tribunal of Constitutional Guarantees have no retroactive effect.

Apparently, this is not a type of 'European' (continental) model, but a system of specialized justice that could be considered as 'Iberian' (South American) model of constitutional justice. That is, a model integrating – after a certain update – the most important elements of judicial review of the Anglo-Saxon, continental and own national legal defense traditions. Moreover, it also incorporates the practice of protecting individual and collective rights that went down into the history of international state and law theory as the *amparo*

procedure or amparo trial that has its roots in the colonial period (Constitución Española, 1978).

Finally, some researchers not only recognize the existence of a mixed (or hybrid) system of judicial constitutional review. They also conclude that there is an ever-strengthening trend under which the traditions of Latin American constitutionalism of the mid-19th century – first half of the 20th century are being gradually abandoned.

For example, A.G. Orlov (2001) specifies that “Latin American countries have adopted both the centralized (European) model of constitutional review with a special body or only the Supreme Court and the decentralized (American) model, and also mixed systems of constitutional review”.

The Federative Republic of Brazil can undoubtedly serve as a vivid example of the significant socio-political changes in the last third of the 20th century in a number of Latin American countries. The transformation that took place affected, inter alia, the constitutional review system that should be viewed as ‘mixed’ (or hybrid) based on the analysis of Chapter III of the 1988 Constitution. With this regard it is important to point out that the current Supreme Law does not establish any special constitutional review body whose exclusive jurisdiction would cover specialized justice powers. In this connection, we need to reiterate that the constitutional law of Brazil (as in many other Latin American countries) and the framework of its authorities were subject to immense impact by the USA law enforcement practices.

On the other hand, we agree with A.R. Avtonomov (2001), who believes that “the legal system of Brazil in general is closer to the continental (Romano-Germanic) than to the Anglo-Saxon legal framework as the Brazilian legal system has its roots in the Portuguese legal system, which obviously stems from the continental system”.

We believe that in many respects this was the reason – resulting from the convergence of elements of decentralized justice inherent to the ‘American’ system of constitutional justice, and centralized justice inherent to judicial constitutional review exercised under the ‘European’ model – why Brazil has today a system for enforcing the primacy of the Constitution that is generally viewed as ‘mixed’ (or hybrid). Under Article 92 of the Constitution (*La Constitución de la República Federativa del Brasil*, 1988), authorities that have judicial powers include: 1) the Supreme Federal Court; 2) the Supreme Court; 3) regional federal courts and federal judges; 4) labor courts and judges; 5) electoral courts and judges; 6) military tribunals and judges; 7) courts and judges of states, the Federal District and territories.

The jurisdiction of the Supreme Federal Court mainly includes the powers to safeguard the Constitution.

Specifically, the Court may:

First, handle through legal proceedings and deliver rulings acting as a court of first instance on:

a) matters directly related to non-constitutionality of a law or a regulation adopted on the federal or state level and matters related to the declaration of constitutionality of a federal law or regulation;



b) ordinary criminal offences committed by the country's President, Vice President, members of the national Congress, members of the Supreme Federal Court and the Prosecutor General;

c) ordinary criminal offences and crimes related to the exercise of powers committed by government ministers, except for cases provided for in paragraph I, Article 52, members of supreme federal courts, the Federal Court of Accounts and heads of permanent diplomatic representations;

d) matters related to the granting of *habeas corpus* if the interested party includes the country's President, a Vice President, a member of the National Congress, a member of the Supreme Federal Court, the Prosecutor General, a government minister, members of supreme federal courts or the Federal Court of Accounts, or heads of diplomatic representations; matters related to the delivery of a judicial security order and *habeas data* against actions of the federal President, the office of the Chamber of Deputies or the Federal Senate, Federal Court of Accounts, Prosecutor General and the actual Supreme Federal Court;

e) disputes between a foreign country and an international organization and the Federation, a state, the Federal District or a territory;

f) cases and conflicts involving the Federation and states, the Federation and the Federal District or federal constituent entities, including relevant indirect administration authorities;

g) matters related to recognition of awards delivered by foreign courts; matters related to the granting of *exequatur* to foreign judicial orders (which can fall within the competence of the Chairman of the Supreme Federal Court under internal rules);

h) matters related to the granting of *habeas corpus* (including if the enforcing or interested party is a court, a government agency or an official whose actions directly fall under the jurisdiction of the Supreme Federal Court, or if the matter is related to an act within the competence of the Supreme Federal Court acting as the court of the first and only instance);

i) matters related to a supervisory review sought by a convicted person; and reversal of decisions with respect to persons within the jurisdiction of the Court;

j) execution of awards on cases within its competence as a court of first instance (while retaining the right of delegating its powers to execute legal proceedings);

k) matters related to collisions of jurisdiction between the Supreme Court and some other courts, between supreme courts or between the above judicial authorities and any other court;

l) matters related to preventive measures to be taken if direct non-constitutionality proceedings are initiated;

m) a binding judicial order to be delivered (including if the issuance of a regulation falls within the competence of the head of state, the supreme federal legislative authority, any chambers of the national Congress, their offices, the Federal Court of Accounts, or one of the supreme courts or the Supreme Federal Court).

Second, make *ordinary revision* decisions on:

a) matters related to *habeas corpus*, a judicial security order, *habeas data* or a binding judicial order (if the relevant decision is taken by supreme federal courts acting as the only instance and they have refused to issue such orders);

b) political crimes.

Third, examine and deliver awards by way of *extraordinary revision* of cases for which awards have been delivered by the only or last instance, provided that the award:

a) contains contradictions against the provisions of the federal Supreme Law;

b) declares a treaty or a federal legislative act incompliant with the provisions of the Constitution; or

c) recognizes the authority of a law or an act of a local government whose constitutionality is disputed.

It should be underlined that making charges of failure to comply with key prescriptions ensuing from the provisions of the Constitution of Brazil of 1988 currently in effect falls within the exclusive competence of the Supreme Federal Court. Final decisions on the merits made by the Supreme Federal Court on matters related to constitutionality of the federal law or another regulatory legal act are applicable to all parties to the relevant legal relations and are binding on all other judicial and executive authorities.

The research has revealed that regarding the analysis of key types of judicial review that are represented in the existing constitutional justice models of Latin America countries (La Constitución Política de los Estados Unidos Mexicanos, 2016), only some authors (Yeremyan, 1998) have paid attention to such institution of constitutional justice, unique in its nature, as the *amparo* procedure that has been known in the practice of political and legal evolution of these countries since the colonial period and the first decades of independent development. Moreover, there have been attempts to show what can be called 'peripheral' and secondary (or auxiliary) nature of *juicio de amparo* with respect to *habeas corpus* of the Anglo-Saxon legal tradition and the practice of its enforcement by courts of ordinary jurisdiction (Perez Tremps, 2004).

These matters are reflected and evaluated from legal standpoint in Russian studies on constitutional and procedural law. At the same time, we should, however, recognize that the few existing works on the organization and operation of constitutional justice most often consider judicial review only in the context of individual types of specialized justice.

E. g. in evaluating how collisions related to law enforcement practices and activities of executive authorities are handled, A.B. Zelentsov (1997, 2001) finds in one of his studies that a specific type of legal proceedings – the *amparo* process or 'proceedings to protect rights' (*juicio de amparo*) – existing in a number of Latin American countries has quite original distinctive features. According to this comparativist, *amparo* is a public law institution, which is similar to *habeas corpus* of the Anglo-Saxon legal tradition in the most general terms. At the same time, we must recognize that it is not reduced only to the protection of physical freedom as under *habeas corpus*, but covers all constitutional civil rights and freedoms.

A somewhat simplified approach to such a form of constitutional review as the *amparo* procedure can be found in those studies that view them exclusively

in the context of safeguards for organization and operation of the judiciary. Thus, A.G. Orlov (2001) notes that among such guarantees, there is a special institution: the *amparo* process similar to the English *habeas corpus* procedure adopted in many European countries and representing a legal guarantee against unjustified detention of a person.

As to the above abstract, we would remind the following. Legislators in a number of countries have interpreted the above in an absolutely different way, without limiting themselves to the traditional (in the context of practical implementation of the *Habeas Corpus Amendment Act* of 1679 and *The Bill of Rights* of 1689) framework of *habeas corpus* and *habeas data* in their 'Anglo-American' version as institutions protecting the rights of the detained, arrested and accused. Along with the above institutions, Article 200 of the Peruvian Constitution of 1993, mentioned above, sets forth as a major constitutional guarantee such form of judicial review as the *amparo* procedure (process).

If there is no in-principle difference between *habeas corpus* of the Anglo-Saxon legal tradition and the *amparo procedure* of the Hispano-Iberian legal tradition from the institutional and law enforcement perspectives, the logic of modern Peruvian, Mexican and Spanish legislators seems to be rather unclear. But the *juicio de amparo* can be perceived in an absolutely different way if we admit that its scope goes beyond the narrow boundaries of a process to protect civil rights of the detained, arrested and accused to include civil, administrative, labor, family, land and other relations into the jurisdiction of constitutional law.

From the formal legal standpoint, judicial review exercised through the *amparo procedure* cannot be associated with either the 'American' (North American), or the European' model of constitutional justice. Despite the fact that, on the one hand, individual or collective rights violated by the relevant regulatory act or action (inaction) by an official are protected via a system of ordinary courts, they are also protected, on the other hand, via independent (separate, among other things, from civil and criminal) proceedings (Pastor Prieto, 2003; Rodriguez-Patron, 2003).

It would be even less appropriate from the academic and practical points of view to consider *juicio de amparo* outside the context of specialized review activities (as a special – 'review' – branch of public authority) carried out to safeguard constitutionality in general and legality in particular. There is no doubt that a superficial, formal analysis would leave an impression that the *amparo procedure* (primarily in the narrow, organizational sense of the word) cannot be institutionally interpreted as a standalone and independent 'branch of review authority'. Moreover, such generalizations, in our view, would only be further aggravated for a quite justified reason that the functions of constitutional review are oftentimes not held by a public administration entity specifically created for these purposes (a constitutional court, or a constitutional or government board) that is not part of a 'classic' framework of government authorities, but are concentrated within the special jurisdiction of judiciary institutions.

Many centuries of the political and legal evolution in Latin American countries have produced a robust framework of political and legal safeguards for the constitutional civil rights and liberties. There are several of such safeguards, but the *amparo procedure* or *amparo trial* is the most widespread, proven and

often applied facility (apart from standard and specialized means of legal protection, such as, among other things, *habeas corpus* and *habeas data*).

Before examining specific distinctive features of *juicio de amparo* as a form of constitutional justice in Mexico, we believe it necessary to make some preliminary remarks on the legal safeguards of compliance with the provisions of the Political Constitution of 1917 that have historically developed and have been set out in legislation currently in effect in the country. These safeguards mostly focus on four processes (Yeremyan, 1998).

The first is known as a kind of *political tribunal* that establishes the official or political liability of top public officials irrespective of their subsequent administrative, financial, or criminal liabilities. In general terms, this process is similar to the *impeachment* procedure of the Anglo-Saxon (Anglo-American) legal tradition and is governed by Article 111 of the Constitution (*La Constitución Política de los Estados Unidos Mexicanos*). Its implementation falls within the competence of the Chamber of Deputies and the Senate of the Republic, which as quasi-investigation and quasi-judicial authorities bring the charges and rule on the merits of the case. Just like in the practice of the U.S. Congress, arbitrators involved in this process are not professional judges, but deputies elected by the country's nationals. The process aims to sanction for infringements on the provisions of the Constitution committed by top officials rather than to redress the rights violated by them or through their actions.

What is known as the *constitutional dispute* (or 'competence conflict' as put by some authors) set out in Article 105 of the Supreme Law can be seen as the next similar process (Rabasa & Caballero, 1982). It is a political and legal tool that is resorted to in case of: 1) contradictions between two or more states; 2) contradictions between government authorities of a constituent entity of the federation as to constitutionality of their acts; and 3) collisions between the federation and a state, and disputes involving the federation as a party to the conflict. The Plenary Session of the country's Supreme Court is responsible for resolving these contradictions in practice.

The *rights protection (amparo)* process is set forth in Articles 103 and 107 of the Constitution. The jurisdiction of federal judicial institutions exercising constitutional review via *juicio de amparo* primarily covers matters related to: a) laws and other acts of government and local self-government authorities that infringe on personal rights and freedoms of their nationals (individuals); b) laws and regulations of federal authorities that infringe on state sovereignty; c) laws and legal regulatory acts of government authorities of constituent entities of the federation that relate to the jurisdiction of nationwide authorities (Ley de Amparo, 1988).

Even by simply listing matters that fall within the competence of federal courts exercising specialized constitutional review functions within the *amparo* procedure, we can see that this public law facility is the most efficient legal safeguard of the Political Constitution and is actually the only facility for review and interaction between the federation, states, municipalities and individuals that has been widely implemented in practice.

The process is set out in Part 3 of Article 97 of the Supreme Law (Rabasa, Caballero, 1982). It provides that the Supreme Court holds legal proceedings (without delivering its judgment) on matters related to: a) corruption and bribery by judges or members of federal courts; facts related to infringement on



rights and freedoms of individuals (that are not subject to the *amparo* procedure, although at times the investigation run by the Supreme Court serve as its necessary complement); and b) actual violation of an oath or any other offences prosecuted by the federal law.

The law determines the range of persons and public authorities entitled to cause an intervention by the Supreme Court of the country. They include nationwide executive authorities, any chamber of the General Congress and state governors. The Supreme Court must notify these authorities and officials of the outcome of its investigation so that any other federal court could deliver the final judgment.

The genesis of the Mexican national sovereignty includes two methods of organizing constitutional review and justice: 1) the system of review exercised by an administrative and political authority; and 2) a system of review exercised by judicial – both specialized and non-specialized – authorities. Moreover, the legal doctrine reflects a strong aversion towards the first system of organizing constitutional review, which is historically associated with the rule by the ‘constitutional dictator’ Santa Ana (Tena Ramirez, 1988; Hernandez, 1958).

The principal arguments *against* can be summarized as follows: first, a political agency being responsible for constitutional review is a fourth ‘review’ branch of power, which contradicts the classic principle of the separation of powers and the system of ‘checks and balances’; second, in such a framework, only a government agency (or a government official) can challenge constitutionality of a law or a regulatory act, but not a private person; and, third, such a review system would prompt multiple disputes and conflicts between various government authorities, which would result in something directly opposite to the core objectives of constitutional review, i. e. in legal destabilization and disruption of the existing political and legal balance of powers (Arellano, 1988).

Such a negative attitude towards the system of constitutional supervision exercised by a political authority led the Mexican legislators to adopt the second of the two options for organizing constitutional justice, i. e. review exercised exclusively by judicial authorities, in particular by district courts, collegiate circuit courts and the Supreme Court of the country. An inquiry into non-constitutionality of a regulatory act may be initiated before a relevant federal court by any individual (including disabled) or any legal entity (or a representative thereof) whose rights, freedoms or legal interests have been violated by such act (Carillo Flores, 1973; Burgoa, 1988; Borrell Navarro, 1988; Arellano, 1988).

Conclusion

The comparative analysis of national constitutions provisions and scholars’ interpretations has led to a number of conclusive statements regarding distinctive features of constitutional supervision and judicial review procedure in the South American legal tradition.

With a range of elements making close the *habeas corpus* of the Anglo-Saxon legal tradition and similar European or Latin American constructs, *juicio de amparo* (being one of the available and admissible means to redress violated rights) has the following distinctive features that set it apart from other constitutional supervision procedures applied by judicial authorities.

First, the request (*demanda de amparo*) to review constitutionality of a national or regional (state) parliament law or a regulatory legal act of any other government authority can be filed by any individual or legal entity whose constitutional rights, freedoms or legal interests have been violated.

Second, constitutionality (non-constitutionality) of the regulatory legal act so contested is reviewed through public legal proceedings involving the affected person (individual or legal entity) and the responsible government agency or official that has issued such regulatory act. The proceedings must also involve the Attorney General if the federation is directly involved in the case.

Third, decisions made by an authorized court on constitutionality of regulatory acts (actions) so contested are binding, but have legal implications only for the parties involved in the settlement of the conflict. We must point out that, once the case is examined on the merits under the *amparo* procedure, the contested regulatory act may be held non-constitutional only with respect to the plaintiff. Such decision will not result in revocation of the regulatory act that has eventually been declared non-constitutional, which in its turn does not prevent from filing a relevant request for appeal under the *amparo* procedure against the same regulatory act and on the same grounds, but by the other party to the proceedings.

Thus, the *amparo* procedure is a mechanism for federal judicial authorities to exercise efficient constitutional review that has distinctive features that set it apart from other institutions of specialized constitutional justice.

Disclosure statement

No potential conflict of interest was reported by the authors.

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