THE "AMPARO" SUIT:

JUDICIAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA

(A COMPARATIVE CONSTITUTIONAL LAW STUDY OF THE SUIT FOR "AMPARO")

VOLUME I

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CONTENT

INTRODUCTION

CHAPTER I

THE CONSTITUTIONAL DECLARATIONS OF HUMAN RIGHTS IN LATIN AMERICA

I. RIGHTS: CONSTITUTIONAL RIGHTS, HUMAN RIGHTS, CIVIL RIGHTS, FUNDAMENTAL RIGHTS 11

II. THE CONSTITUTIONAL DECLARATIONS OF HUMAN RIGHTS 13

1. The North American and French Declarations 13

2. The influence in Latin America 16

3. The situation in France 18

III. THE EXPANSION OF THE CONSTITUTIONAL DECLARATIONS OF RIGHTS 21

1. The individual and Civil Rights 21

2. The social, Economic and Cultural Rights 24

3. The collective Rights 27

4. The problem of the relation between rights and obligation in the Constitutional Declarations 27

IV. CHANGES IN THE OBLIGED PARTY REGARDING CONSTITUTIONAL RIGHTS AND FREEDOMS 32

V. THE DECLARATIVE NATURE OF THE CONSTITUTIONAL DECLARATIONS OF RIGHTS AND THE OPEN CONSTITUTIONAL CLAUSES 33

VI. ABSOLUTE OR LIMITATIVE CHARACTER OF THE DECLARATIONS 38

CHAPTER II

THE CONSTITUTIONALIZATION OF THE INTERNATIONALIZATION OF HUMAN RIGHTS

I. THE CONSTITUTIONAL AND INTERNATIONAL REGULATIONS **41**

II. THE AMERICAN INTERNATIONALIZATION OF HUMAN RIGHTS **43**

III. THE CONSTITUTIONALIZATION OF THE INTERNATIONALIZATION OF HUMAN RIGHTS 51

1. The supra constitutional rank of international instruments of Human Rights 51

2. The constitutional rank of international instruments of Human Rights 60

3. The supra statutory rank of international treaties on Human Rights 62

4. The statutory rank of international treaties on Human Rights 65

IV. THE INTERPRETATIVE CONSTITUTIONAL RULES REGARDING THE INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS 68

1. The constitutional general references to the Universal Declarations on Human Rights 70

2. The enforcement of rights regardless of their Statutory Regulation 72

3. The principle of progressive interpretation of constitutional rights 73

CHAPTER III

THE JUDICIAL MEANS FOR THE PROTECTION OF HUMAN RIGHTS

I. THE CONSTITUTIONAL GUARANTEES TO THE DECLARATIONS OF RIGHTS 77

II. THE JUDICIAL GUARANTEE OF CONSTITUTIONAL RIGHTS 80

1. The right to have acces to justice and the protection of rights 80

2. Judicial means for the oprotection of constitutional rights 85

3. The United States judicial means for the protection of rights (including constitutional rights) 85

4. The protection of Human Rights in France and Italy through the general judicial means 89

III. THE SPECIFIC JUDICIAL MEANS FOR THE PROTECTION OF HUMAN RIGHTS 92

1. Origins of the Latin American "amparo" suit 92

2. The judicial review methods as means for the protection of Human Rights 96

3. The european "amparo" actions 98

CHAPTER IV

THE LATIN AMERICAN "AMPARO" ACTION OR RECOURSE AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

I. THE "AMPARO" ACTION, RECOURSE OR SUIT: A LATIN AMERICAN CONSTITUTIONAL INSTITUTION 101

1. **"Amparo", Habeas Corpus and Habeas Data in Argentina** 102

2. "Amparo" and Habeas Corpus in Bolivia 103

3. **"Mandado de Segurança", "Mandado de Injunção", Habeas Corpus and Habeas Data in Brazil** 104
4. **Recourse for "tutela" and Habeas Corpus in Colombia** 105
5. **"Amparo" and Habeas Corpus in Costa Rica** 107
6. **Recourses for protection and of Habeas Corpus in Chile** 107
7. **"Amparo", Habeas Corpus and Habeas Data in Ecuador** 109
8. **"Amparo" and Habeas Corpus in El Salvador** 111
9. **"Amparo" in Guatemala** 111
10. **"Amparo" and Habeas Corpus in Honduras** 112
11. **Suit for "amparo" in México** 113
12. **"Amparo" and Habeas Corpus in Nicaragua** 115
13. **"Amparo" and Habeas Corpus in Panama** 115
14. **"Amparo", Habeas Corpus and Habeas Data in Paraguay** 116
15. **"Amparo", Habeas Corpus and Habeas Data in Perú** 118
16. **Habeas Corpus in Dominican Republic** 119
17. **Habeas Corpus in Uruguay** 120
18. **"Amparo" in Venezuela** 121

II. **THE INTERNATIONALIZATION OF THE "AMPARO" IN THE LATIN AMERICA** ... 123

1. **The "amparo" in the American Convention on Human Rights** 125
2. **The meaning of the regulation of the "amparo" in the American Convention** 127
3. **The "amparo" as a Human Right** 127
4. **The "amparo" as a judicial guarantee.** 128
5. **The "amparo" as a simple, prompt and effective judicial guarantee.** 129
6. **The "amparo" as a judicial guarantee for the protection of everyone's rights and guarantees** 130
7. **The "amparo" as a judicial guarantee for the protection of all Constitutional Rights and guarantees** 131
8. **The "amparo" as a judicial guarantee for the protection of all constitutional rights and guarantees, against any violation or harm from the state or individuals** 133
9. **The "amparo" as a judicial guarantee that can be filed at any time, including in situations of emergency** 135

CHAPTER V

THE AMPARO AS A CONSTITUTIONAL RIGHT AND AS A CONSTITUTIONAL REMEDY (ACTION FOR "AMPARO")

I. THE CITIZENS RIGHT TO THE SUPREMACY OF THE CONSTITUTION AND THE CONSTITUTIONAL RIGHT TO ITS PROTECTION 137

II. THE NATURE OF THE "AMPARO" AS A CONSTITUTIONAL RIGHT 138

III. THE MEXICAN SUIT OF "AMPARO" 138

IV. THE RIGHT TO "AMPARO" IN VENEZUELA 144

CHAPTER VI

THE AMPARO AND HABEAS CORPUS AS CONSTITUTIONAL REMEDIES WITHIN THE LATIN AMERICAN DIFUSSE AND CONCENTRATED SYSTEMS OF JUDICIAL REVIEW OF LEGISLATION

I. THE AMPARO AS A SPECIFIC JUDICIAL GUARANTEE FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS AND THE SYSTEMS OF JUDICIAL REVIEW OF LEGISLATION 165

II. THE AMPARO ACTION IN COUNTRIES WITH ONLY A DIFFUSE SYSTEM OF JUDICIAL REVIEW: THE CASE OF ARGENTINA 169

III. THE AMPARO ACTION IN COUNTRIES WITH ONLY A CONCENTRATED SYSTEM OF JUDICIAL REVIEW 179

1. The amparo action or recourse in concentrated systems of judicial review exercised before one single tribunal: the constitutional chamber of the Supreme Court in Costa Rica and El Salvador 180

A. The recourse of amparo in Costa Rica 180

B. The recourse of amparo in El Salvador 182

2. The amparo action or recourse in Concentrated Systems of Judicial Review exercised before a universality of Courts: The case of Bolivia, Chile, Honduras, Panama, Paraguay and Uruguay 183

A. The recourse of amparo in Bolivia 183

B. The "recourse of protection" in Chile 185

C. The action of amparo in Honduras 187

D. The action of amparo in Panamá 189

E. The petition for amparo in Paraguay 191

F. The action of amparo in Uruguay 192

SELECTED BIBLIOGRAPHY 195

INTRODUCTION

Latin American countries have a longstanding tradition on extensive constitutional declarations of human rights. Since the beginning of republican constitutionalism in 1811, Latin American constitutions have enshrined a Bill of Rights and the authority of courts to adjudicate on constitutional violation.

Particularly during the second half of the XX Century, these declarations have been progressively enlarged, adding economic, social, cultural, environmental and indigenous rights to the traditional list of civil rights and political liberties; and have entrenched, in many cases, not only such rights and liberties, but also principles relating to the social goals of the State and of the political system.

However, Latin American Countries have also had a long history of human rights violations and misknowledge. That is why, in an effort to ensure for its effective guaranty and enforcement, another main trend in Latin America has been to formally insert all human rights, *expressis verbis,* in the texts of the Constitutions.

Additionally to the enlargement of the constitutional declarations, a new tendency among these countries has been to constitutionalize the rights enumerated in the dully ratified international treaties and conventions on human rights, therefore expanding the constitutional declarations and provisions with the ratification of such international instruments.

Moreover, regarding statutes, other Constitutions have granted pre-emptive status to duly ratified international treaties or conventions on human rights, whenever the treaty provides for more favourable provisions in the exercise of a human right. Some Constitutions even go as far as granting this pre-emption with respect to other constitutional provisions.

Together with this expansive and protective process of human rights declarations, Latin American constitutions have incorporated into their constitutional text, specific judicial remedies for the protection of constitutional rights; which in some constitutions, has been incorporated itself as a civil right, and not merely as a procedural or adjective device to guarantee human rights.

Accordingly, and in addition to the writ of *habeas corpus*, and *habeas data*, the individual's constitutional right to be protected on their fundamental rights has prompted the development of a peculiar Latin American institution known as: suit, judgment or writ of "amparo". The "amparo" was initially established in Mexico in 1857 where it was developed as the "amparo suit" or judgment (*juicio de amparo*). Particularly during the last century (XX Century), the "amparo" spread all over Latin America but took a different shape to the Mexican "amparo".

The Mexican suit of "amparo" is a very complex institution -found exclusively in Mexico- developed with the purpose of both protecting human rights and as a mean for judicial review of the constitutionality and legality of statutes, administrative actions, judicial decisions, as well as peasant's rights protection. On the contrary, in the rest of the Latin American countries, the "amparo" action or recourse was established as a specific judicial remedy with the exclusive purpose of protecting human rights and freedoms, so that it can be said that many of the "amparo" actions or recourses in these

later countries became more effective as a means of protection of human rights than the original Mexican institution[1].

This course is intended to examine the most recent trends in the constitutional and legal regulations in all Latin American countries regarding the "amparo" suit, action or recourse- including the old *habeas corpus* writ and the new *habeas data* actions or recourses. By means of a comparative constitutional law approach, the course will analyze this Latin American institution departing from the regulation of the "amparo" guarantee established in Article 25 of the 1969 American Convention of Human Rights which entered into force in 1978 after being ratified by all Latin American States.

The main purpose of this course is to study the character of this judicial remedy both from the perspective of the constitutional right and the action or procedural recourse for protection; to identify the courts with jurisdiction to grant the protection; to examine the general procedural rules to bring an "amparo"; to determine the kind of constitutional rights worthy of protection by means of an "amparo" (whether all constitutional rights or only some of them, namely "fundamental rights", should be covered); to analyze the individuals or legal entities that may be entitled to the protection of an "amparo", that is, the aggrieved, affected or injured party (the plaintiff); to study the standing requirements to file the action; to analyze the potential proper defendants in the judicial process, namely, the party perpetrator of the nuisance, whether a State body, a public officer, individuals or private entities; to analyze the particular types of public or private actions or omissions that can cause the violation of constitutional rights, with particular reference to the various State acts which can be the object of the "amparo" action or recourse: statutes, administrative acts or judicial decisions, as well as State bodies' omissions; and finally, to study the purpose of the protection that may be awarded and the available remedies for the re-establishment of the individual or collective rights infringed, as well as the means for the enforcement of the judicial adjudication[2].

One of the main aspects to be analyzed regarding the "amparo" suit in Latin America is the one referred to the special character of this judicial mean. This particularity comes from the fact that the "amparo" is not incorporated in the general judicial procedures law regulations, but specifically regulated in the Constitution, as a separate and specific mean for the protection of human rights. In this respect, it is also relevant to our analysis, the justification for such treatment, particularly when compared with other legal systems that also effectively protect human rights, but by means of the normal or common judicial actions, recourses or writs.

In other words, we will examine why Latin American countries have established a special judicial mean for human rights protection; considering that, in general terms, the most important duty of all the Judiciary as the Judicial Branch of Government, in any country, is to decide and resolve in specific cases, questions or controversies regarding individual rights and interests. That is, the reasons why the common and general judicial means established in the Civil Codes and Civil procedures Codes of Latin America are not the only devoted to guaranteeing the effective protection of human rights.

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1 See Joaquín Brague Camazano, *La Jurisdicción constitucional de la libertad. Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*, Editorial Porrúa, México 2005, p. 156.

2 See in general Allar R. Brewer-Carías, *El amparo a los derechos y libertades constitucionales. Una aproximación comparativa*, Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Público, N° 1, Universidad Católica del Táchira, San Cristóbal 1993, 138 pp; also published by the Inter Americanl Institute on Human Rights, (Interdisciplinary Course), San José, Costa Rica, 1993, (mimeo), 120 pp.,and in *La protección jurídica del ciudadano. Estudios en Homenaje al Profesor Jesús González Pérez*, Tomo 3, Editorial Civitas, Madrid 1993, pp. 2.695-2.74; and Allan R. Brewer-Carías, *Mecanismos nacionales de protección de los derechos humanosd (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano),* Instituto Interamericano de Derechos Humanos, San José 2005.

CHAPTER I

THE CONSTITUTIONAL DECLARATIONS OF HUMAN RIGHTS IN LATIN AMERICA

I. RIGHTS: CONSTITUTIONAL RIGHTS, HUMAN RIGHTS, CIVIL RIGHTS, FUNDAMENTAL RIGHTS

In general terms, the Judiciary is established in any country in order to decide cases and to make binding judgments which affect personal and proprietary rights. In this regard, the expression "rights" is used to describe that which is legally guaranteed and due to a person; or the power, privilege or immunity secured to a person by law. That is to say, rights are legal or constitutional situations that empower a person to act (freedom of expression) or not to act (conscience objection), usually being personal freedoms or liberties what oblige the State and other individuals not to interfere with or obstruct the exercise of rights of others.

But rights can also be considered as legal situations that entitle a person to request something or to receive goods or services form a public entity (right to health protection or right to education) in which case the State is obliged to furnish services or to accomplish certain activities. In both cases, the rights are recognized and protected, the violation of which is a wrong.

It can be said that in any society, from a legal point of view, all persons are in one way or another in one of two situations: either they are in a legal situation or condition of having power to do something or request something, or in a legal situation of having some duties or obligations to accomplish. In some cases, a person may have the right to act or not to act, or to make, to enjoy or to take advantage of something, or to dispose of determined possessions. In all these legal interpersonal relations, they are in a status or position of being empowered.

But in other cases, the same person can be in the legal situation of having a duty to accomplish; that is, they can be in a position of being obliged to respect, to refrain from, to abstain from or to render or give certain services or goods to others.

What is certain is that it is inconceivable that a society could exist without such personal interrelations of powers and duties. If one person for instance, has freedom of religion or speech as a constitutional right, that situation always implies that the State, the public officials and every other individual have the duty to respect, to abstain from embarrassing or to impede the freedom of others. In this case, the situation of the obliged person is a status of having the duty to abstain from interfering with the freedom of others.

In other cases, if the constitutional right is not conceived as a right to act or not to act, that is, as a freedom, but instead is conceived as a right to receive certain services or goods, for instance health care, education or cultural services, that situation implies that the State has the duty to render those services in the form of public utilities. In this situation, the status of the obliged person is to act or to provide something to others.

So rights are always attributed to persons, whether as freedoms to act or as rights to receive something; and in both situations, "persons" are not only human beings but also entities or corporations recognized by law as having rights and duties.

Now, among the "rights" attributed to a person, it is possible to distinguish those which are declared or recognized in the Constitution, that is to say, "constitutional rights". Those rights can not only be attributed to natural persons or human beings, but also to artificial persons like entities or corporations. This is the case, for instance, of property rights or the right to due process of law.

Other rights, conversely, such as the right to life or in general, the rights known as freedoms, like freedom of association, freedom of expression or freedom of speech are only attributed to human beings. Thus, the expression "human rights", in a strict sense, is referred to those attributed to human beings. Among these it is also possible to distinguish those called in North American law as "civil rights", or civil liberties, that is, the individual rights of personal liberty or freedom guaranteed in the Constitution, such as freedom of speech, press, assembly, or religion guaranteed by the First Amendment of the U.S. Constitution.

However, "civil rights" do not exhaust the list of constitutional rights, which nowadays also comprises social, economic, cultural and environmental rights. It may be true that civil rights were those first declared in the Constitutions, but at present time they are accompanied by a long list of other rights belonging to what has been called other "generations" of rights.

In other countries, mainly in Europe, as evidenced in the cases of Germany and Spain, the expression "fundamental rights" is also used in the Constitutions, in order to identify certain constitutional rights that can be protected by a special judicial mean of protection or "amparo", which in general terms are equivalent to the individual or civil rights. This expression of "fundamental rights" is also used in the Colombian Constitution, to identify a category of constitutional rights, mainly the individual rights, which are of immediate application and can be protected by the "acción de tutela".

These regulations, in particular, tend to distinguish among the constitutional rights, those that can be considered as "justiciable rights" particularly by means of the specific judicial action or recourse of "amparo", and constitutional rights not considered "fundamental rights". The latter group is left to be protected by means of the general or common judicial means. Constitutional rights can always be considered essentially justiciables, but their "justiciability" -as the quality or state of being appropriate or suitable for reviewing by a court-, will vary depending on the judicial means available in the legal system for such purpose. In some countries, all constitutional rights are justiciables by means of the general judicial means of protection, such as in the United States; in other countries all constitutional rights are justiciables by means of a specific judicial mean of protection like the *habeas corpus* or "amparo" action or recourse, such as in the case of Venezuela; and in other countries, the constitutional rights are protected by a special mean of protection if they are "fundamental rights", being the other constitutional rights justiciables through the common judicial means.

In the United States, regarding rights, the word "fundamental" is used when referring to civil rights that are protected in the Constitution, as "fundamental civil rights". As has been ruled by the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649; 18 S. Ct. 456; 42 L. Ed. 890; (1898) on March 28, 1898, referring to "**fundamental civil rights** for the security of which organized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution…"

Thus, this expression "fundamental rights" is commonly used with various meanings: form a formal point of view, they can be considered as the rights embodied in the Constitution; from a substantive point of view, fundamental rights can also be considered as are the most important rights that

according to their own principles and value are recognized in a society[3]; and from a judicial point of view, they are such when they can be judicially protected by special means as the "amparo".

Our intention is to analyze the process of constitutionalization of rights in modern constitutionalism, and for this purpose it is possible to consider all "constitutional rights" as "human rights", in spite of the fact that some of them are also attributed to artificial persons. This is why, for the purpose of this Course, the expressions "constitutional rights" and "human rights" are used in an equivalent sense.

II. THE CONSTITUTIONAL DECLARATIONS OF HUMAN RIGHTS

1. The North American and French Declarations

The declaration of rights in the text of the Constitutions began with constitutionalism itself, and with the very notion of Constitution as a superior llaw[4].

This happened with at the Convention of Virginia in 1776, at the beginning of the Independence process of the American Colonies, when the first Declaration of Rights in constitutional history was approved. Practice followed subsequently by the other Colonies.

This practice differed from the English precedents, mainly because in establishing entrenched rights, they did not refer to rights based on the common law and tradition, but rather to the rights derived from human nature and reason. Thus the rights declared in the Bill of Rights of those colonies were those natural rights which "do pertain to ... [the people] and their posterity, as the basis and foundation of government" as the Virginia Declaration of Rights stated.

In the brief preamble to that Declaration (which precedes the text of the Constitution or Form of Government of Virginia of June 29, 1776), the relation between natural rights and government was clearly established. Also evident is the direct influence of Locke's theories in the sense that political society forms itself upon those rights as the basis and foundation of government. That is why the Declaration was based on the fact of the existence of "inherent rights" to all men, which by nature were declared "equally free and independent" (I); enumerating as individual rights the following: the "enjoyment of life and liberty"; the right to "acquiring and possessing property" (I) so that no property could be taken from any person for public usage without his consent (VI); "the freedom of the press" (XII); and the freedom of religion "according to the dictates of conscience" (XVI).

The due process of law rights were also declared, by stating the right of all men in criminal prosecutions "to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself"; and also "that no man be deprived of his liberty except by the law of the land or the judgment of his peers" (VIII); "that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted" (IX); and that no "general warrants… may be

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3 See Alfonso Gairaud Brenes, "Los Mecanismos de interpretación de los derechos humanos: especial referencia a la jurisprudencia peruana" in José F. Palomino Manchego, *El derecho procesal constitucional peruano. Estudios en Homenaje a Domingo García Belaunde*, Editorial Jurídica Grijley, Lima, 2005, Tomo I, p.124.

4 See in general Allan R. Brewer-Carías, *Reflexiones sobre la Rrevolución Americana (1776) y la Revolución Francesa (1789) y sus aportes al constitucionalismo moderno,* Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Administrativo, Universidad Católica Andrés Bello, N° 1, Editorial Jurídica Venezolana, Caracas 1992.

commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence" (X).

The Virginia Declaration also guaranteed, as a political right, the right of suffrage and to have free elections of representatives (VI).

Finally, a collective right was also declared, a right appertaining to "a majority of the community" and considered as "an indubitable, unalienable, and indefeasible right" to "reform, alter or abolish" any government founded "inadequate or contrary" to the purposes set forth in the Declaration (III).

The same fundamental liberal principles of the Virginia Declaration can also be found in the Declaration of Independence of the United States of America, approved less than one month later (July 4, 1776), holding as a self evident truths "That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness"; and that, "to secure these rights, government is instituted among men, deriving their just powers from the consent of the governed"; "that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness".

These declarations, undoubtedly, marked the beginning of the democratic and liberal era of the modern rule of law constitutionalism.

Although the 1787 Constitution of the United States did not contain a declaration of fundamental rights, such Declarations nevertheless constituted one of the main characteristics of American constitutionalism, influencing modern constitutional law.

The 1787 Constitution was criticized for the fact that it did not include a Bill of Rights, but this deficiency was solved two years later when ten first Amendments to the Constitution were drafted by the first Congress and approved on September 29, 1789 just one month after the approval on August 26, 1789 of the French Declaration of the Rights of Man and of the Citizen.

The Bill of Rights entered in force in 1791 after the last ratifications were approved by Vermont and Virginia, where "certain rights" were enumerated, but with the express statement that said enumeration, "shall not be construed to deny or disparage other [rights] retained by the people" (IX), thus, reinforcing the "declarative" character of the constitutional declaration of rights.

The following "certain rights" were the ones declared: the freedom of religion and of the exercise of cult; freedom of speech, or of the press; the right to peaceably assemble, the right to petition the Government (I); the right to keep and bear arms (II); the right to not accept quarters of soldiers in any house in time of peace, without the consent of the owner (III); and the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures (IV).

The due process of law rights were also declared as follows: only to be condemned by the Judiciary; not to be subject twice to prosecution for the same offence; not to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation (V). In criminal prosecutions, the right of the accused to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and the rights to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence (VI). Additionally, in suits at common law, the right of trial by jury; and the right not to have re-examined the fact tried by a jury except according to the rules of the common law (VII). Fi-

nally, the right people have not to be asked for excessive bail, nor to be imposed of excessive fines, nor to be subjected to cruel and unusual punishments (VIII).

The Bill of Rights contained in the first Ten Amendments was complemented with the declaration of other rights in subsequent Amendments. In 1865, the prohibition of slavery and involuntary servitude (XIII); in 1868, 1970 and 1920, the right to elect representatives, to vote and to be elected, as political rights (XIV,2,3; XV; XIX); and in 1868, the right to citizenship; the right of persons not to be deprived of life, liberty, or property by any State, without due process of law; and the right to have equal protection of laws (XIV,1).

The general trend to declare human rights in the Constitutions, as superior laws, seeking their entrenchment, was immediately followed by the French Revolution, first adopting the Declaration of the Rights of Man and of the Citizen by the National Assembly on August 26, 1789 and second by embodying it at the beginning of the 1791 First French Constitution[5].

In the drafting of the seventeen articles of the Declaration recognizing and proclaiming all the fundamental rights of man, the influence of the American Declarations was decisive, particularly in the principle itself of the need of a formal declaration of rights, and in its contents. The mutual influence that the continents had on each other at the time are well known: the French philosophers, including Montesquieu and Rousseau were studied in North America; French participation in the War of Independence was important; Lafayette was a member of the drafting committee of the Constituent Assembly which produced the French Declaration and submitted his own draft based on the Declaration of Independence and the Virginia Bill of Rights; the *repporteur* of the Constitutional Commission proposed "transplanting to France the noble idea conceived in North America"; and Jefferson himself was present in Paris in 1789, having succeeded Benjamin Franklin as American Minister to France[6].

The main objectives in both declarations were the same: to protect the citizen against arbitrary power and to establish the rule of law.

However, it is certain that the French Declaration was, of course, more directly influenced by the thoughts of Rousseau and Montesquieu. The drafters of the Declaration took from Rousseau the principles of considering the role of society as being related to the natural liberty of man, and the idea that the law, as the expression of the general will passed by the representatives of the nation, cannot be an instrument for oppression. They also took from Montesquieu his fundamental distrust of power, and therefore, the principle of separation of powers also embodied in the Virginia Declaration[7].

Of course, the rights proclaimed in the French Declaration were also natural rights of man, thus inalienable and universal; rights that were not granted by political society, but rights inherent to the nature of human beings.

This conception is clear in the justifying text of the Declaration issued "considering that the ignorance, forgetfulness or contempt of the rights of man are the sole causes of public misfortunes and of the corruption of government"; originating a perpetual reminder of the "natural inalienable and sacred rights of man."

The rights and freedoms were recognized and proclaimed forwarded by these declaration of principles: that "men are born and remain free and equal in rights" (1); that "liberty, property, security,

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5 See in general Allan R. Brewer-Carías, *Reflexiones sobre la Rrevolución Americana (1776) y la Revolución Francesa (1789) y sus aportes al constitucionalismo moderno,* Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Administrativo, Universidad Católica Andrés Bello, N° 1, Editorial Jurídica Venezolana, Caracas 1992.

6 J. Rivero, *Les libertés publiques*, Dalloz, Paris, 1973, Vol. I, p. 45.

7 J. Rivero, *op. cit*, p. 41-42.

and resistance to oppression" are "natural and inalienable rights of man" (2); that "liberty consists of the power to do whatever is not injurious to others; hence the enjoyment of the natural rights of every man has as its limits only those that assure to other members of society the enjoyment of those same rights; limits that can only be determined by law (4); that "nothing may be prevented which is not forbidden by law", and that "no one may be constrained to do what it is not provided for by law (5); that "all citizens have the right to concur personally, or through their representatives" in the formation of the law, as the "expression of the general will"; and that the law "must be the same for all, whether it protects or punishes" (6). There is express reference to the following civil rights: rights to free expression and to free communication of ideas and opinions, considered in the Declaration as "one of the most precious of the rights of man"; the right of every citizen to "speak, write, and print with freedom" (11); the right not to "be disquieted on account of his opinions, including his religious views" (10); and the right to property considered "sacred and inviolable", and the right to be "equitably indemnified" when someone is deprive of his property because of a legally determined public necessity, (17).

The rest of the Declaration refers to the due process of law rights: the right of all persons not to "be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law" (7); the right to be punished "only as are strictly and obviously necessary" and only when the punishment is "legally inflicted in virtue of a law passed and promulgated before the commission of the offence" (8); and the right of all persons to be "held innocent until they shall have been declared guilty" (9).

As for political rights, the Declarations recognized the right of all citizens to be "equally eligible to all dignities and to all public positions and occupations" (6); and the right to "require of every public agent an account of his administration" (15)

The whole process of the development of modern constitutionalism based on the rule of law or the *État de droit*, began with the products of the American and French revolutions and with the general principles they motivated: the idea of Constitution as a superior and fundamental law adopted by the people as sovereign; the democratic and republican principles, based on popular representation, the separation of powers, in the horizontal and the vertical systems; the role of the Judicial Branch, and the formal Declarations of Rights; -principles that were subsequently incorporated into all written constitutions of the modern world.

2. The Influence in Latin America

These principles first had an immediate impact in Latin American constitutionalism, long before than in other European countries[8].

We must bear in mind that the process of independence of the Spanish Colonies in Latin America started in 1810, only twenty three years after the sanctioning of the American Constitution, and seven years after the Marbury v. Madison landmark judicial review case. This happens in a moment in which Spain was occupied by French troops after Napoleon had imposed to the invaded realm the Bayonne Constitution of 1808. Spain was fighting for independence from France, and the American Colonies, repudiating the French invasion, began to seek independence from Spain.

So the principles of modern constitutionalism were first adopted in Latin America, from 1811 on, before than in Spain. In Spain these principles were embodied with a monarchical framework a few

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8 See in general Allan R. Brewer-Carías, *Los derechos humanos en Venezuela: casi 200 años de historia*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Serie Estudios, N° 38, Caracas 1990.

months after -in the Cadiz 1812 Constitution- which remained in force only for two years, until the Monarchy was restored in 1814. The important aspect to be stressed out is that no Spanish constitutional influence can be found in the beginning of Latin American modern constitutionalism, which basically followed the North American trend.

It can be said that, in general, the American -North American and Latin-American- constitutional revolution process and its declarations of rights were very different to the French and even the Spanish ones.

In the French Revolution and Declaration, it was not a case of establishing a new state but of the continuation of a national state already in existence, within the monarchical principle. The same occurred in Spain. On the contrary, in the American Revolution and Declarations, new states were being built upon a new basis.

The purpose of the French Declaration, as stated in its introduction, was to solemnly remind all members of the community of their natural rights and duties. Hence the new principle of individual liberty appeared only as an important modification within the context of a political unity already in existence.

On the other hand, in the North American and Latin-American declarations, the enforcement of rights was an important factor in the independence process, and thus, in the building of the new states upon a new basis. Particularly relevant was the principle of the sovereignty of people with all its democratic content. Therefore, on the American Continent, the solemn Declaration of Fundamental Rights meant the establishment of principles on which the political unity of the nations was based, and the validity of which was recognized as the most important assumption in the emergence and formation of that unity.

Putting aside the Haiti Constitution of 1805, it can be said that the third formal declaration of rights by an independent state in constitutional history was the "Declaration of Rights of the People" adopted by the Supreme Congress of Venezuela in 1811 four days before the formal Venezuelan Independence Act of July 5th, 1811, was approved.

The content of that Declaration followed both the French and the American Declarations, but was much more detailed in the enumeration of rights, including new ones such as the right to industrial and commercial freedom and the freedom to work (20); and the right to consider peoples' home as an inviolable asylum (22). In the declaration of the rights of people, there is also a reference to a social right when it states that "instruction is necessary for all. The society must favor with all its power the progress of public reason to put instruction at the reach of all" (Ch. 4, 4).

The Declaration was also incorporated as a final Chapter of the first of all Latin-American constitutions, the Venezuelan Constitution of December 21, 1811[9], in 59 extensive articles, among which, as an example, articles 151 ff. can be pointed out. This set of articles follow what was established in the French and American declarations, stating that governments are established in order to guarantee the exercise of rights of man, namely "liberty, equality, property and security", defining such rights as follows:

153. Liberty (freedom) is the power to do whatever is not injurious to others or to society, which limits can only be establish by law.

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9 See in general Allan R. Brewer-Carías, *Las Constituciones de Venezuela,* Universidad Católica del Táchira (Venezuela), Instituto de Estudios de Administración Local y del Centro de Estudios Constitucionales (España), Madrid l985, l.086 pp. A second edition was published by Academia de Ciencias Políticas y Sociales, Caracas, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 1997.

154. Equality consists in that the law must be the same for all citizens, whether it punishes or protects.

155. Property is the right of everybody to enjoy and dispose goods acquired with its work and industry.

156. Security exists within the guaranty and protection that the society gives to each of its members regarding the preservation of their person, their rights and properties.

These two Venezuelan Declarations of Rights of 1811 mark the beginning of a very long tradition of almost 200 hundred years of continuous, extensive and always enlarging Latin American Declarations of Rights; a tradition very different from the European one.

3. The Situation in France

For instance, we must remember that in France, after the Declaration of 1789, no other Declaration of Rights was adopted. After the 1875 Constitutional Laws[10] even its contents were excluded from the text of the Constitution, considering that their provisions were not directly applicable to individuals. That is why the 1958 French Constitution only refers to human rights in an indirect way when it states in its Preamble that "The French people, solemnly proclaim their subjection to the rights of Man and to the national sovereignty principles as have been defined by the Declaration of 1789, confirmed and completed by the Preamble to the constitution of 1946".

Moreover, this Preamble to the Constitution was initially considered by the Constitutional Council itself, only as a principle for the orientation of constitutional interpretation[11]; criteria that began to change after the Constitutional Council decision of July, 16, 1971 regarding the freedom of association, when it was decided that a proposed law establishing a particular judicial controls in order for an association acquiring legal capacity, was against the Constitution. The proposed statute was an amendment bill to a 1901 statute relating to non-profit associations, which the Council considered unconstitutional[12], using the following argument:

The 1958 Constitution through the Preamble to the 1946 Constitution referred to the "fundamental principles recognized by the laws of the Republic" among which the freedom of association must be listed.

In conformity with this principle, associations were to be constituted freely and could publicly develop their activities. The only condition to this association was making a previous declaration, the validity of which was not to be submitted to a previous intervention by either administrative or judicial authorities.

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10 J. Rivero, *Les libertés publiques*, Vol. 1, Paris, 1973, p. 70.

11 L. Hamon, "Contrôle de Constitutionalité et protection des droits individuels. A propos de trois décisions récents du Conseil Constitutionnel", *Recueil Dalloz Sirey 1974*, Chronique XVI, p. 85.

12 See the Constitutional Council decision in L. Favoreu, y J. Philip, *Les grandes décisions du Conseil Constitutionnel*, Paris 1984., p. 222. See the comments of the 16 July, 1971 decisions in J. Rivero, "Note", *L'Actualité Juridique. Droit Administratif*, 1971, p. 537; J. Rivero, "Principes fondamentaux reconnus par les lois de la Republique; une nouvelle categorie constitutionnelle?", *Dalloz 1974*, Chroniques, p. 265; and J.E. Bradsley, "The Constitutional Council and Constitutional Liberties in France", *The American Journal of Comparative Law*, 20, (3), 1972, p. 43; B. Nicholas, "Fundamental Rights and Judicial Review in France", *Public Law*, 1978, p. 83.

Thus, the Constitutional Council determined that the limits imposed on associations by the proposed bill establishing a prior judicial control of said declaration, were unconstitutional. This decision allowed Professor Jean Rivero to say,

> "The liberty of association, which is not expressly established either in the Declaration or by the particularly needed principles of our times, but which is only recognized by a Statute of July 1st., 1901, has been recognized by the Constitutional Council decision, as having a constitutional character, not only as a principle, but in relation to the modalities of its exercise"[13].

This decision of 1971 is an example of the creative tendency regarding fundamental rights of the Constitutional Council, even though for that purpose its decision was based on the Preamble to the Constitution, and through it, in what the Preamble to the 1946 Constitution considered the "fundamental principles recognized by the laws of the Republic." In general, therefore, to establish a fundamental right or liberty as a "fundamental principle", the Constitutional Council based itself on a particular existing statute, as happened with the liberty of association which was recognized by the Statute of July 1st, 1901.

But in other cases[14], as has happened with the right to self defence, the Constitutional Council has not based itself in a particular Statute for deducing a right based on "the fundamental principles recognized by the laws of the Republic." In that decision dated January 19th-20th 1981[15], the Constitutional Council radically changed the previous approach regarding the right to one's own defence, which was considered by the *Conseil d'État* simply as a general principle of law[16]. Conversely, after the 1981 decision, the Constitutional Council recognized it as part of the "principles and rules of constitutional value", an expression used by the Constitutional Council to describe in a generic manner all the norms that, without being contained in the text of the constitution itself, have Constitutional status[17].

Therefore, in France, "conformity with the constitution" as a consequence of the principle of constitutionality, is not understood today strictly as conformity with an express disposition of the Constitution. Since the 1970's, the notion of constitutional norms that could serve as reference norms to control the constitutionality of legislation has been progressively understood in a wider sense, comprising dispositions or principles outside the constitutional text, and in particular, the Declaration of 1789, the Preambles to the 1946 and 1958 Constitutions, the fundamental principles recognized by the laws of the Republic, and the general principles of constitutional value[18]. All these sources of the principle of constitutionality enjoy the same authority as the written articles of the Constitution.

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13 J. Rivero, "Les garanties constitutionnelles des droits de l'homme en droit français", *IX Journees Juridiques Franco-Latino Americaines*, Bayonne 21-23 mai 1976, (mimeo), p. 11.

14 Decisions of 8 Nov. 1976; 2 Dec. 1976; 20 July 77, 19 January 1981; 20 January 1981, *Cf.* the quotations in F. Luchaire, "Procedures et techniques de protection des droits fondamentaux. Conseil Constitutionnel français", in L Favoreu (ed.), *Cours constitutionnelles européennes et droit fondamentaux,* Aix-en-Provence 1982, pp. 69, 70, 83.

15 L Favoreu and L. Philip, *Les grandes décisions..., cit*., pp. 490, 517.

16 *Cf.* D.G. Lavroff, "El Consejo Constitucional francés y la garantía de las libertades públicas", *Revista española de derecho constitucional*, 1 (3), 1981, pp. 54-55; L. Favores and L. Philip, *Les grandes décisions..., cit*., p. 213.

17 L. Favoreu, "Les décisions du Conseil Constitutionnel dans l'affaire des nationalisations", *Revue du droit public et de la science politique en France et à l'étranger*, T. XCVIII, nº 2, Paris, 1982, p. 401.

18 L. Favoreu, "L'application directe et l'effect indirect des normes constitutionnelles", *French Report to the XI International Congres of Comparative Law*, Caracas, 1982, (mineo), p. 4

This process of adaptation of the Constitution by the constitutional judge was also confirmed in France in the decision of the Constitutional Council in the *Nationalizations* case of 1982. In this case, the Council applied the article concerning property rights of the 1789 Declaration, thus declaring such right as having constitutional status. In the decision dated January 16 1982[19], the Council considered that even though the relevant article of the 1789 Declaration was obsolete, and that it ought to be interpreted in a completely different way from the sense it had in 1789[20], it:

> Considering that, after 1789 and up to date, the purposes and conditions of the exercise of property rights have evolved because of the expansion of its range of application regarding new individual domains and because of the limitations imposed by the general interest, the principles contained in the Declarations of Man's Rights have full constitutional value, regarding both the fundamental character of the right to property, being its preservation one of the objectives of political society, located in the same level as liberty, security and resistance to oppression, as well as the guaranties given to the holders of such right and the public bodies prerogatives…"[21].

Consequently, the Constitutional Council in this case, not only "created" a fundamental constitutional right when giving constitutional rank and value to the 1789 Declaration, but "adapted" the former "sacred" and absolute property right set forth 200 hundred years ago creating the limited and limitable right of our times. Its preservation led the Council to declare some articles of the Nationalization Law as unconstitutional.

Since these decisions of the Constitutional Council adopted in the seventies, the *block of constitutionality*[22] was enlarged precisely to include the Declaration of Rights of Man and Citizens of 1789 and the Preamble of the 1946 Constitution, by means of interpretation of the 1958 Constitution Preambles, and of the fundamental principles recognized by the laws of the Republic[23]. This also led Professor Rivero to assert, with respect to the activism of the Constitutional Council, that with those decisions -based on "the constitution and particularly on its Preamble"-, a revolution has taken place, stating that "In a single blow, the 1789 Declaration, the 1946 Preamble, the fundamental principles recognized by the laws of the Republic, have been integrated into the French Constitution, even if the Constituent did not want to do it. The French Constitution has doubled its volume through the single will of the Constitutional Council"[24]. The author concludes by saying that "Through the single will of the Constitutional Council the French Constitution has doubled its volume"[25].

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19 See L. Favoreu y L. Philip, *Les grandes décisions..., cit.,* pp. 525-562

20 L. Favoreu, *Le contrôle juridictionnel des lois et sa légitimité. Développements récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala 1984, (mineo), p. 32; also published in L. FAVOREU and J.A. JOLOWICZ, *Le contrôle juridictionnel des lois. Légitimité, effectivité et developments récents*, Paris 1986, pp. 17-68.

21 L. Favoreu y L. Philip, *Les grandes décisions..., cit.,* p. 526. *Cfr.* L. Favoreu, "Les décisions du Conseil Constitutionnel dans l'affaire des nationalisations", *Revue du droit public et de la science politique en France et à l'étranger*, T. XCVIII, nº 2, Paris 1982, p. 406.

22 L. Favoreu, "Le principe de constitutionalité. Essai de définition d'après la jurisprudence du Conseil constitutionnel", in *Recueil d'études en 1'honneur de Charles Eisenmann*, Paris, 1977, p. 33.

23 L. favoreu, *Le contrôle juridictionnel des lois et sa légitimité. Développements récents en Europe Occidentale*, Association Internationale des Sciences Juridiques, Colloque d'Uppsala, 1984, (mineo), p. 8 ; also published in L. Favoreu and J.A. Jolowicz, *op. cit.*, pp. 17-68.

24 J. Rivero, "Rapport de Synthèse" in L. Favoreu, (ed.), *Cours constitutionnelles europeenes et droit fondamentar,* Aix-en-Provence, 1982, p. 520.

25 *Idem*, p. 520.

This process of expansion of constitutional declarations of rights can be considered as one of the main characteristics of the recent evolution of modern constitutionalism, in which various "generations" of rights can be distinguished.

III. THE EXPANSION OF THE CONSTITUTIONAL DECLARATIONS OF RIGHTS BEGINNING WITH THE INDIVIDUAL AND CIVIL RIGHTS

1. The Individual and Civil Rights

In effect, the initial human rights set forth in the Constitutions, as was the case of the North American Bill of Rights or the French Declaration of Citizens and Man's Rights, or of the XIX Century Latin American constitutional declarations of human rights, have been considered the "First declaration" of human rights, containing those rights essential to human nature, or essential to the quality of the human being, and which are common to all human persons. These rights were precisely those referred to in the French declaration, when stating that "The aim of all political association is the preservation of the natural and imprescriptibly rights of man". At the end of the XVIII Century those rights were reduced to freedom, equality before the law, personal safety and safety of property. To these original human rights, the American Bill of Rights added the freedom of religion and cult, freedom of speech and of the press, the right to peaceably assemble, the right to petition, the due process of law guaranties, the right to move and the right to vote. During the XX Century the list of political rights was also enlarged, adding to the right to vote the right to public demonstration, the right to participate in political parties, the right to seek for asylum and in general terms, the right to participate in political life.

All those rights have configured what has been called the "First generation" of human rights[26], as civil or individual rights essential to all human beings, which were regulated in all of the XIX and XX Centuries' constitutions. This First generation of rights is still important, particularly regarding the justiciability of human rights. For instance, in the Spanish Constitution, they are equivalent to "fundamental rights" in order to be protected by means of the "amparo" recourse that can be brought before the Constitutional Tribunal.

In effect, Article 53,2 of the Spanish Constitution empowered any citizen to ask for the protection ("tutela") of the liberties and rights recognized in Article 14 and in the first Section of the Second Chapter of the Constitution. This protection is sought before the regular courts through a process based on the principles of preference and speed, and when appropriate, through the recourse of "amparo" before the Constitutional Court. This last recourse shall be applicable to objections of conscience recognized in Article 30. Accordingly, as mentioned before, the recourse of "amparo" is only reserved to protect certain constitutional rights equivalent in general contemporary terms to the First generation of Rights, called "fundamental rights", which are the following: The right to equality before the law, without any discrimination (Article 14); the right to life and to physical and moral integrity and not to be subjected to torture or inhuman or degrading punishment or treatment, and the right to the abolishment of death penalty (Article 15); the freedom of ideology, religion, and cult (Article 16); the right to personal liberty and security, particularly regarding detentions (Article 17); the right to honour, to personal and family privacy and to identity; the right to the inviolability of home; and the right to secrecy of communications (postal, telegraphic, and telephone communication) (Article 18); free-

26 The classification of human rights in "generations", only serves to more or less appreciate the chronological trends of the evolution process of their constitutionalization. See Antonio A. Cançado Trindade, "Derechos de solidaridad", in *Estudios Básicos de Derechos Humanos*, Vol. I, Instituto Interamericano de Derechos Humanos, San José, 1994, pp. 64 ff.

dom to move (Article 19); the rights to freely express and disseminate thoughts, ideas and opinions through words, writing, or any other means of reproduction and the right to freely communicate or receive truthful information without any kind of censorship (Article 20); the right to peaceful and unarmed assembly and the right to demonstrate (Article 21); the right to association (article 22); the right to participate in public affairs, directly or through representatives freely elected in periodic elections and the right to accede, under conditions of equality, to public functions and positions (Article 23); the right to be effectively protected by judges and courts in the exercise of their rights; the right to self defence and the due process of law rights (no self-incrimination, the presumption of innocence) (Article 24); the *Nulla Poena Sine Lege* rights (Article 25); the right to personal and collective petition (Article 29); and the right oppose conscientious objection for exemption from compulsory military service (Article 30).

All these rights are the civil or political rights that for example, have also been declared in the United Nations International Covenant on Civil and Political Rights of 1966.

One recently enacted Constitution in which all these individual or civil rights are regulated in an extensive way is the 1999 Venezuelan Constitution. This example I want to highlight, not only because it is an illustration of contemporary tendency to constitutionalize human rights by means of very rich and progressive declarations, but also because it is an example that even with such impressive declarations, there is still an absence of an effective independent and autonomous Judiciary, that renders very difficult the justiciability of such rights.

In the Venezuelan Constitution above all one can find a group of very important regulations related to the constitutional guarantees of human rights, that is to say, to the instruments that allow the exercise of such rights.

In this regard, the following guarantees are largely regulated: general freedom in the sense of the right of every one to develop its own personality with only the limits connected to the other individuals rights and to the social and public interest (Article 20); the general principle of the non-retroactive effects of statutes (Article 24); the principle of the nullity of any State act that violates constitutional rights and the principle that all public officials that produced or executed them, are liable (Article 25); and the general principle of equality before the law forbidding any kind of discrimination (Article 21). The Constitution also regulates, following the Spanish Constitution provision, the right of any person to have access to the courts in order to demand enforcement of his rights and interests, including the collective or diffuse rights; the right to obtain effective protection of his rights and to obtain a promptly corresponding decision (Article 26).

The Constitution also regulates the persons' right to have the immediate guarantee or protection of his constitutional rights by means of effective actions or recourse such as the action of "amparo"; the action of protection of personal freedom or *habeas corpus*; and the action of *habeas data* devoted to protect personal data from public or private data bank institutions (Article 27).

On the other hand, the rights to due process of law are also expressly regulated, as well as the right to access to justice, which impose the duty to the Judiciary to only decide cases in accordance with the standards established in the Constitution and the law. The rights to the due process had been established in detail in Article 49, which requires that "due process be applied to all judicial and administrative actions", specifically regulating the following guarantees: the right to self defence; the presumption of innocence; the right to be heard; the right to be judged by the competent and preexisting judge, that must be independent and impartial; the guarantees against self indictment; the principle of *nullum crimen nulla poena sine lege*; the principle of *non bis in idem* and the guarantee of the State's liability for errors or judicial delays.

Nevertheless, of all the constitutional guarantees of human rights, there can be no doubt that the most important is the guarantee of legality in the sense that only by means of statutes constitutional rights can be limited and restricted. Hence the reference in all constitutional articles on constitutional rights to the "law", is made to law in the sense of statutes (formal law), as acts emanating from the National Assembly acting as a legislative body (Article 202). Additionally, these are the only acts that can restrict or limit constitutional guarantees, as provided in Article 30 of the American Convention on Human Rights, pursuant to the interpretation of the Inter American Court for Human Rights (Advisory Opinion Nº 6).

One aspect that we must mention is that even with these kind of constitutional guarantees, the same Constitution provides a formula for its bypassing and potential violation, when regulating the possibility for the Assembly to "delegate legislative powers" in the President of the Republic, by means of so-called "enabling laws" (Article 203), whereby he can dictate executive acts with the rank and value of statutes on any subject (Article 206, Ordinal 8). This provision contrasts with the previous 1961 Constitution which used to set forth that the President could only regulate, by means of enabling laws, matters related to the economy and finance (Article 190, Ordinal 8)[27].

The 1999 Constitution provision, instead, has unfortunately opened up a constitutional loophole that allows the National Assembly and the President, even with the impressive range of rights and guarantees embodied in the Constitution, to violate the guarantee of legality which, as stated above, is the most important guarantee for the effective enforcement and execution of human rights.

When referring to constitutional guarantees, it should finally be mentioned that under Article 29 of the Venezuelan Constitution, the State is expressly compelled to investigate and legally sanction any human rights violations committed by its authorities, and Article 30 establishes the State's obligation to wholly indemnify victims of human rights abuse attributable to the State, including the payment of damages. The State shall also protect victims of ordinary offences and endeavour to have the guilty parties repair the damage caused.

Title III, Chapter III of the Venezuelan Constitution is devoted to regulate civil or individual rights, beginning with the right to life, as inviolable thus banning the death penalty (Article 43). This right has also been reinforced by obliging the State to protect "the life of people when deprived of their freedom, rendering military or civil service, or in any other way are submitted to its authority".

The Constitution also expressly regulates the peoples right to a name (identification right) (Article 56); the right to the inviolability of personal freedom (Article. 44), establishing guarantees against arrest and detention, and the prohibition to be held incommunicado (Article 44), the prohibition of slavery or servitude (Article 54) and prohibition of forced disappearance of people.

It is also regulated in detail the right to personal safety (Article 46), with the following rights: the right to not be subjected to torture or degrading punishment; the right of those arrested to be treated with respect on their human dignity; the right to consent upon experiments or treatments; and the liability of public officials for infringements of such rights.

The text of the Constitution, in accordance with the tradition of previous texts, additionally enshrines the inviolability of the home (Article 47); the inviolability of private communications (Article 48); free passage or right to move (Article 50); the right to petition and to a timely response (Article 51); and the right of association (Article 52). This last right, however, has certain constitutional limitations first with respect to judges, who may not associate (Article 256); and second a very inconvenient

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27 See Pedro Nikken, "Constitución Venezolana de 1999: La habilitación para dictar decretos ejecutivos con fuerza de ley restrictivos de los derechos humanos y su contradicción con el derecho internacional", in *Revista de Derecho Público*, nº 83, Editorial Jurídica Vvenezolana, Caracas, 2000, p. 5 ff..

one, referred to the intervention of the State in the internal elections of labor unions and professional associations, which must be organized by the National Electoral Council, as one of the five branches of government (Electoral Power) (Article 293, 6).

In relation to individual rights, the Constitution also guarantees the right to public or private unarmed assemble, without requiring any previous permits from authorities (Article 53); the right to the free expression of thought, ideas and opinion, by any means and without censorship (Article 57); and the right to "opportune, true and unbiased" information, as well as the right to response and correction when directly affected by incorrect or offensive information (Article 58). Express regulation also exists regarding the right to religious freedom and cult (Article 59); the right to protection of honour, privacy, self image, confidentiality and reputation (Article 60); the right to freedom of conscience (Article 61); and the right to be protected by the State (Article 55).

All these civil rights can be protected by means of the amparo and habeas corpus actions set fourth in article 27 of the Constitution.

3. The social, economic and cultural rights

But regarding the already mentioned "fundamental rights" listed in the Spanish Constitution in order to guaranty their protection by means of the "amparo" recourse -mainly referred to civil rights, it must be indicated that additionally to those civil and political rights, the Spanish Constitution has listed within the "fundamental rights", two social rights: the right to education, including the freedom to teach and to create educational institutions (Article 27); and the workers right to found unions and to strike in defense of their interest (Article 28). These rights are thus also protected by means of the recourse of "amparo".

These social rights can be considered as part of the so called Second Generation of human rights referred to the social, economic and cultural rights, which began to be incorporated in the constitutional declarations of Rights with the Mexican Constitution of 1917 and with the Weimar Constitution of Germany of 1919. All those rights were also the object of the United Nations International Covenant on Social, Economic and Cultural Rights of 1966.

But in fact, well before the adoption of the UN Covenant, after World War II, and due to the Welfare State model that spread all over the Occidental world, almost all Latin American Constitutions started to incorporate in their Declarations of rights, additionally to the civil and political rights, the social, economic, and cultural rights. In this sense, the right to education and the right to health care were constitutionalized, as well as the labor rights: the right to work, the right to membership of labor unions, the right to strike, the right to social security; and additionally, the right to equal treatment at work and the right to a salary. The rights to social benefits and to have stability at work and the right to bargain collectively for labor benefits.

Other rights that were progressively constitutionalized, were the right to have proper housing and the right to cultural heritage; as well as all the right to social protection or welfare, such as the right to have family, children protection, maternity and disabled persons protections.

Many of these social rights were incorporated in the Constitutions in order to set forth a constitutional duty or obligation for the State to provide social protection to the people or to render certain public services, as public utilities.

On the other hand, also as Second generation of rights, additionally to the property rights, the economic rights were also constitutionalized, particularly the economic freedom which implies the freedom of industry and trade and the freedom to work.

The 1999 Venezuelan Constitution can be mentioned not only regarding the regulation of these social, economic and cultural rights, but also as an example of extensive and complex policy declarations, regarding which is difficult to find the necessary relation between right and obligation[28]. On the other hand, the Constitution, in a highly paternalistic and State oriented trend, attributes innumerable social obligations to the State bodies, and in the compliance of which society's participation is expressly excluded. Thus, in the 1999 Constitution, the State is responsible for almost all social goals and welfare, a task impossible to be accomplished, even with the rich oil producing State that Venezuela is, where in the first six years of the enforcement of the Constitution (1999-2005), because the rising oil prices, State revenues rose to a level never dreamed before. The tragic result has been that in the same period of time, in parallel to the State populist distribution of money policy, poverty has risen.

Anyway, regarding constitutional regulations, the Constitution starts by regulating a group of social rights, referring to families (Article 75); maternity and paternity (Article 76); marriage "between a man and a woman" (Article 77); children and teenagers (Article 78); young people (Article 79); the elderly (Article 80); and to disabled (Article 81); with express regulation of the obligation of televised media to include subtitles and translation into sign language for people with hearing problems (Article 101).

The Constitution also expressly regulated, as a declaration, the people's right to a dwelling place, that must be "adequate, sure, comfortable, hygienic with the essential utilities, including an habitat that humanizes family, neighbourhood and communal relations" (Article 82); and the right to health care (Article 83), imposing on the State the obligation to create, oversee and administer a "national public health system", that must be inter-sectorial, decentralized and participative, integrated with the social security system, governed by the principles of freeness, universality, integrity, fairness, social integration and solidarity (Article 84).

Hence, the health service is constitutionally conceived as being integrated with the social security system (as a sub-system), and also conceived as being free and universal, which bears no relationship whatsoever with the social security system established for the affiliates or the insured. It is also set forth with constitutional rank, that public health goods and services are considered as State ownership and shall not be privatized. Finally, it is set forth that the organized community shall have the right and duty to participate in decisions regarding the planning, execution and control of specific policies at the public health institutions (Article 84).

Article 85 of the Constitution establishes that the State shall be obliged to finance the public health system by means of tax income, the obligatory contributions to social security and any other source of financing determined by law. The State shall also guarantee a health budget that covers the objectives of the health policy. Finally, the above-mentioned Article 85 indicates that the State "shall regulate public and private health institutions"; this being the only ruling that names private health institutions, but merely as subjects to regulation.

In regard to the right to social security, Article 86 of the Constitution regulates it "as a non-lucrative public service that guarantees the health and assures protection in contingencies concerning maternity, paternity, sickness, invalidity, catastrophic illnesses, disability, special needs, labor risks, loss of employment, old-age, widowhood and widowerhood, orphanage, housing, costs derived from family life and any other circumstance of social welfare".

In the same Chapter relative to social and family rights, the 1999 Constitution, in a way similar to the 1961 Constitution, incorporated the group of labor rights into the text of the Constitution, but this

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28 See in general Allan R. Brewer-Carías, *Derecho Constitucional Venezolano. La Constitución de 1999*, Editorial jurídica Venezolana, Caracas 2004, 2 vols..

time it broadened them and reinforced them even more, raising many rights to a constitutional rank. Thus, the right and duty to work was expressly regulated (Article 87); as well as the right to equality at work (Article 88); the State protection of work (Article 89); the workday and right to rest (Article 90); the right to a salary (Article 91); the right to social benefits (Article 92); the right to work stability (Article 93); responsibilities at the workplace (Article 94); the right to join a labor union (Article 95); the right to collective bargain (96); and the right to strike (Article 97).

In regard to the right to join labor unions, the very inconvenient State's influence over the unions' functions should be emphasized, by reason of Article 293.6 of the Constitution, which states that the National Electoral Council shall be the organ competent to "organize the elections of labor unions and professional associations". In Venezuela, therefore, the unions are not free to organize their own elections of their authorities and representatives, since such elections organization shall be carried out by the State.

On the other hand, Title III, Chapter VI of the Constitution enshrines a series of rights regarding culture, such as cultural freedom and creation, and intellectual property (Article 98); cultural values and the protection of cultural heritage (Article 99); the protection of popular culture (Article 100) and cultural information (Article 101), establishing that the State shall guarantee the broadcasting, reception and circulation of cultural information. To this end, the media is duty-bound to assist in the broadcasting of the values of popular tradition and the work of artists, composers, filmmakers, scientists and other such creators of culture.

With regards to education, Article 102 of the Constitution begins by establishing, in general terms, that "education is a human right and an essential social duty, democratic, free and obligatory". The consequence of this is the provision under Article 102 that imposes on the State the obligation to assume education as an "indeclinable function" and one of maximum interest at all its levels and types, and as an instrument of scientific, humanistic and technological knowledge at the service of society. Hence, constitutionally speaking, education is declared a public utility or service, emphasizing however that: "the State shall encourage and protect any private education that is rendered according to the principles provided in the Constitution and the Law".

The right to an integral education, the free nature of public education and the obligatory character of all levels of education from pre-school to diversified secondary level, are also regulated. Insofar as State school education is concerned, this shall be free up to pre-university level (Article 103). The teachers´ regime is also established (Article 104); as are the right to educate (Article 106), and the obligatory teaching of environmental and civic education; as well as the history and geography of Venezuela (Article 107). Article 108 also emphasizes that social communication media, both public and private, shall contribute to the citizens' education. Additionally, the 1999 Constitution formalizes the principle of the universities' autonomy (Article 109); regulates the regime of the liberal professions (Article 105); the regime of science and technology (Article 110); and the right to sporting activities (Article 111).

All these social rights imply State obligations and can also be enforced by means of the "amparo" action or recourse, as has been used mainly regarding social protection rights, like maternity rights, and right to education and health care.

The 1999 Constitution also incorporates in Chapter VII, with detail, the economic rights of people, as follows: on the one hand economic freedom (Article 112); and on the other the right to property and right to only be expropriated by means of due process and just compensation (Article 115). This form of regulation follows the orientation of Venezuelan constitutionalism, although certain variations with regard to its equivalent in the previous 1961 Constitution (Article 99), should be emphasized: *firstly*, it is not mentioned that private property shall perform a social function, as indicated in the 1961 Constitution; *secondly,* in the 1999 Constitution the attributes of the ownership of property (use, possession

and disposal) are detailed, where such provision were previously a legal matter (dealt with under Article 545 of the Civil Code); and *thirdly*, in regard to expropriation, the new constitutional text provides that the payment of fair compensation be "timely". Thus the regulation guarantees more strongly the right to ownership of property. But in contrast to these guarantees, it can be said that never before the State has occupied more land without proper compensation as has occurred since the enactment of the Constitution in 2000, particularly in the country side.

The Constitution also forbids any kind of confiscation of goods, except in the cases allowed by the Constitution itself, by way of exception and due process, to the goods and property of national or foreign individuals or companies guilty of corruption crimes committed against public property, or those who have illicitly enriched themselves acting as public officials, or in cases of enrichment arising from commercial, financial or other activities associated with the illicit traffic of drugs and narcotics (Articles 116 and 271).

Additionally, Title VI of the 1999 Constitution is dedicated to the regulation of the socio-economic system. Amongst its regulations, Article 307 should be mentioned, since it declares the regime of large rural estates (*latifundio*) as being contrary to social interest, and encouraging the legislator to tax idle land and to establish the measures necessary to transform such land into productive economic units, also rescuing land being eminently agricultural land.

This same regulation establishes the right of peasants and other countryman to own land, pursuant to the methods and cases specified by the respective law. This implies the establishment of constitutional State obligations to protect and encourage associative and individual ownership mechanisms in order to guaranty farm production, and to control the sustainable organization of farm land in order to ensure food and agricultural potential.

The same article exceptionally provides that the legislator create taxlike contributions to facilitate the funding for the financing, research, technical assistance, technology transfer and other activities promoting productivity and competition in the agricultural sector.

4. The collective rights

More recently, in the past decades, a Third generation of rights has developed, related to collective rights, considered as human kind rights or solidarity rights, like the right to have a healthy environment; the right to development; the right to free competition; the consumer's rights to have products and services of quality; the right to have a certain standard of living; the right to human kind heritage, the rights of the indigenous communities and even the right to peace, as is set forth in the Colombian Constitution of 1991 (Article 22).

Many recent constitutions have incorporated such rights in their texts, as has happened with the right to have a healthy environment, to which Constitutions devote extensive articles. This is the case of the 1994 Argentinean Constitution, whose article 41 states that:

(1) All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.

(2) The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education.

(3) The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions.

(4) The entry into the national territory of present or potential dangerous wastes, and of radioactive ones, is forbidden.

Before the Argentinean Constitution, the 1988 Constitution of Brazil initiated the constitutionalization process of the rights to healthy environment, with its article 255, in which it is also regulated the general policy of the State regarding environment, as follows:

"All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations.

(1) In order to ensure the effectiveness of this right, it is incumbent upon the Government to:

I. preserve and restore essential ecological processes and provide ecological handling of the species and ecosystems;

II. preserve the variety and integrity of Brazil's genetic wealth and supervise entities engaged in research and handling of genetic material;

III. determine, in all units of the Federation, territorial spaces and components which are to receive special protection, any alteration and suppression only being allowed by means of a law, and any use which adversely affects the integrity of the attributes which justify their protection being forbidden;

IV. demand, according to the law, for the installation of works or activities which may cause significant degradation of the environment, a prior environment impact study, which shall be made public;

V. control the production, marketing, and use of techniques, methods, and substances which represent a risk to life, to the quality of life, and to the environment;

VI. promote environmental education at all school levels and public awareness of the need to preserve the environment;

VII. protect the fauna and the flora, all practices which jeopardize their ecological function, cause the extinction of species or subject animals to cruelty being forbidden according to the law.

(2) Those who explore mineral resources shall be required to restore the degraded environment according to the technical solution required by the proper government agency, according to the law.

(3) Conduct and activities considered harmful to the environment shall subject the individual or corporate wrongdoers to penal and administrative sanctions, in addition to the obligation to repair the damages caused.

(4) The Brazilian Amazon Forest, the Atlantic Woodlands, the "Serra do Mar", the "Pantanal Mato Grossense" and the Coastline are part of the national wealth, and they shall be used, according to the law, under conditions which ensure preservation of the environment, including the use of natural resources.

(5) Vacant governmental lands or lands seized by the States through discriminatory actions, which are necessary to protect natural ecosystems, are inalienable.

(6) Power plants operated by nuclear reactor shall have their location defined in a federal law and may otherwise not be installed.

Following this general pattern, the right to the environment is also regulated in the Constitutions of Colombia (Article 79), Cuba (Article 27), Chile (Article 8), Ecuador (Articles 86-91); Guatemala (Articles 97-98), Mexico (Article 4), Panamá (Article 114), Paraguay (article 7), Perú (Article 22) and Venezuela (Articles 127-129).

In the 1999 Venezuelan Constitution, which we have been commenting as a Latin American example of contemporary constitutional declarations of rights, and as an innovation is the regulation of rights relative to the environment -establishing standards for the right and duty to enjoy and maintain a healthy environment (Article 127); the territorial land planning policy (Article 128); environmental impact studies and the toxic substances régime; and the obligatory inclusion of environmental clauses in public contracts (Article 129).

Another constitutional innovation regarding economic matters, but as collective rights, is regulated by Article 117, referred to the right of everybody to possess quality goods and services, as well as adequate and non-deceptive information of the products and services they consume; to freedom of choice; and to a fair and dignified treatment. In this case, in fact, the Constitution has established a collective right of the Third generation, as well as in Article 113 referred to the prohibition of monopoly and to the abuse of dominion position in trade competitions relations.

Also regarding collective rights, the rights of the indigenous peoples have been regulated in a very extensive way in many recent Constitutions of Latin America, as has happened in the Constitutions of Colombia (Articles 171, 246, 329, 330), Ecuador (Articles 83-85), Mexico (Article 2), Paraguay (Articles 62-67) and Venezuela (Articles 119-126).

In the latter, Chapter VIII contains a group of regulations of the rights of the indigenous people, in contrast with the previous Constitution of 1961 (Article 77) which contained only a brief protection regulation. In this regard, the 1999 Constitution recognizes "the existence of indigenous peoples and communities, their social, political and economic organization; their cultures, usages and customs, languages and religions; and their habitat and their original rights over their ancestral and traditional lands, necessary for developing and guaranteeing their life-styles" (Article 119). The Constitution sought to neutralize the danger that might arise from this regulation in regard to the national territory integrity, by stating that "since they represent cultures with ancestral roots, the indigenous people are part of the Nation, the State and the sole, sovereign and indivisible Venezuelan people", where the term "people" should not be interpreted in the sense provided under international law (Article 126).

Apart from this, the Constitution provided a set of regulations relative to the development of natural resources to be found in indigenous habitats (Article 120); to the indigenous cultural values (Article 121); to the right of the indigenous people to integral health care (Article 122); and to indigenous people's rights to the collective intellectual property of their knowledge, technologies and innovations (Article 124). Finally, Article 125 of the Constitution enshrines the indigenous people's right to political participation, with Article 126 of the Constitution guaranteeing "indigenous representation in the National Assembly and the consultant bodies of the federal and local entities that have indigenous populations, pursuant to the law."

In all these cases, the Constitutions regulates these rights not as individual rights, but as collective rights, which are also different to the individual rights that can be collectively claimed, like the labor rights.

Some of these rights have been the object of international regulations, as is the case of the right to development incorporated in article 1 of the United Nations Declarations on the Right of Development (1986), as follows:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Finally, it must be mentioned that beside these collective rights, in the contemporary world, a Fourth generation of human rights is beginning to appear, yet in the process to be constructed, such as the human right to the protection of the human genome and the genetic identity and also the rights to the informatics technology progress.

4. The problem of the relation between rights and obligation in the constitutional declarations

As mentioned before, when analyzing the subject of rights and freedoms, as constitutional rights, they essentially are legal situations of power that individuals hold within a society, by which they have the right to do or not to do, to make, to act or to be protected. Being situations of power, they must always have a direct relationship with other legal situations of duty that are held by the State or by other individuals in the same society, in the sense that if somebody has the power to act, some other person has the duty to refrain from or to impede that action; or if somebody has the right to be protected for instance on his health, the State is obliged to developed institutions in order to care for the health of individuals.

Hence a society cannot be conceived without these direct relations among the subjects that act therein, between those situations of power that are correlative to situations of duty. That is to say, a society cannot be imagined without this interrelation between subjects that, on the one hand, hold the legal power to do, enjoy, use or have, and other subjects that, on the other hand, are in a legal situation of duty, respect, abstention, rendering or giving. In other words, there is always a relationship between a right and an obligation or, in general, between a power and a duty.

From a legal viewpoint, human rights are legal situations of power that are consubstantial with human nature or with the quality of being human, in fact, with the quality of man, and which all men have in equal measure, but in whose regime and declaration, of course, the principle of relation or correlatively with duties has to be always present. Thus, if there is an active subject that has a right, there always has to be someone with an obligation (a passive subject) towards that right, that is, someone who is obliged to abstain from or to perform certain activities to satisfy the enjoyment of those determined rights; therefore there can be no right without a correlative obligation.

In this sense, for instance, there cannot be a human right "to not to get ill." This is a wish, a political declaration, a general purpose of society, but not a right, because correlatively to that dream there is no a particular subject with the duty of ensuring that peoples will not get ill.

In the case of the Venezuelan Constitution, for example, one of the problems that arises when facing the most ample and excellent listing of human rights contained in it, is the confusion that can be found in the constitutional text between good intentions, declarations of public policy and constitutional rights. In some cases, illusion or frustration can derive from the impossibility of satisfying certain aims that have been formulated as social rights, that, because of conceptual impossibility, cannot originate obligations or obligated parties.

This happens with several social rights and guarantees established in the Constitution that are simply impossible to satisfy literally. They are excellent declarations of principle and intent of an unquestionably teleological nature, but it is difficult to conceive them as "rights", since there cannot exist a subject with the obligation to satisfy them.

Such is the case, for example, of the "right to health", enshrined as an "essential social right and obligation of the State, that it shall guarantee as part of the right to life" (Article 83). The fact is that it is impossible for anybody to guarantee somebody else's health, and therefore that constitutionally the "right to health" be established. This would be like, as mentioned before, establishing in the Constitution the right to not become ill, which is impossible since nobody can guarantee to another person that they are not going to become ill.

Constitutional formulas in these matters, however, are quite similar over Latin America. In some cases health is declared public property, as provided in the Constitution of El Salvador: "... the health of the inhabitants of the Republic is considered public property" (Article 65). The Constitution of Guatemala (Article 95) regulates health in a similar sense, and for this reason, both Constitutions establish that the State and the people are under the obligation to ensure its conservation and reestablishment. In this sense it can be said that the right to health is more conceived as a collective right, rather than an individual right.

Yet apart from these general declarations of a constitutional nature, in the majority of the Constitutions of Latin America, the "right to health" is expressly established within the fundamental or constitutional rights of the people (Bolivia, Article 7.a; Brasil, Articles 6 and 196; Ecuador, Article 42; Nicaragua, Article 59; Venezuela, Article 84). This fundamental right corresponds "equally" to all people, as declared in the Constitution of Nicaragua (Article 59); and the Constitution of Guatemala reaffirms this, providing that "the enjoyment of good health is a fundamental right of every human person, and there shall be no discrimination whatsoever in this regard" (Article 93).

Therefore, this constitutional formula of the "right to health", as mentioned above, in fact constitutes a declaration of principles relative to the State's commitment and that of society as a whole to the human person, which would be very difficult to identify "literally" as a real "constitutional right", except from the collective point of view, since such description or declaration lacks the principle of reciprocity.

Nevertheless, it can be said that what the Constitutions seeks to establish with this formula, from the individual rights point of view, is in fact the right of all people to have their health protected by the State, whose corresponding obligation is to ensure the care and recuperation of the health of the people.

For this reason, other Latin American Constitutions declare, more exactly, as an individual right, "the right to the protection of health" (Honduras, Article 145); or they refer more precisely to the right of all people to the protection of their health" (Chile, Article 19,9; Mexico, Article 4; Peru, Article 7); or that "their health be cared for and protected" (Cuba, Article 50); or that "all people be guaranteed access to the promotion, protection and recuperation of health" (Colombia, Article 49). In Panama, Article 105 of the Constitution even provides that:

> "The individual, as part of society, is entitled to the promotion, protection, conservation, restitution and rehabilitation of his or her health and the obligation to maintain such health, this being understood to be complete physical, mental and social well-being".

In certain cases, as occurs in the above-mentioned Constitution of Venezuela, it could be said that both formulas are mixed together, when, for example, Article 83 provides that "health is an essential social right", moreover adding that "all people shall have the right to the protection of their health." A

similar situation occurs in Article 68 of the Constitution of Paraguay, where, under the heading "right to health", it establishes that "the State shall protect and promote health as being a fundamental right of the individual and in the interest of society."

Another case that can be highlighted as an example of this relationship between constitutional declarations and the relation of rights with duties, is the right that the Venezuelan Constitution enshrines in favour of "all people to an adequate, safe, comfortable and healthy dwelling, with all the basic essential utilities and a habitat that humanizes family, neighbourhood and community relationships" (Article 82). This "right", as written, is impossible to satisfy, and not even a rich State can be obliged to satisfy it. It is, rather, a declaration of principles or intent, beautifully structured, that cannot however lead to identifying a party that is obligated to satisfy it, and much less to the State. Here, good intentions and social declarations were confused with constitutional rights and obligations, which cause a different type of legal relationship that are even justifiable or entitled to constitutional protection. What in fact can and must be constructed from such "right to dwelling", in the obligation of the State to provide everyone with the means and conditions to have such a home.

IV. CHANGES IN THE OBLIGED PARTY REGARDING CONSTITUTIONAL RIGHTS AND FREEDOMS

In any case, according to the initial concept behind the formulation of the declaration of civil rights, the responsible party in the relation right/duty was the State. This means that the rights were originally formulated before the State, in order to be protected from State actions or intrusions, so the active subject was always man, a citizen, and the passive subject - the obligated party - was the State.

This initial concept of the formulation of constitutional rights, particularly regarding civil or individual rights, even led to their justiciability by means of the "amparo" action or recourse always conceived as a protection mechanisms against the State. So in its origin, the "amparo" action was not conceived to protect individuals from other individuals' offences.

This of course changed later on with the alteration of the way of conceiving the relationship between rights and duties (in the sense that the passive subject in the constitutional rights is not only the State). The latter continues to be so, but not exclusively, since the field of the passive subject has been progressively universalized, to the point where there now exist obligations -that is, situations of duty in the field of rights- that correspond, naturally, to individuals, to groups, to communities, and even to the international community. This is the case of the Third generation of rights like the right to development, a right which, moreover, is not only held by man as an individual but by peoples and communities and also the international community.

On the other hand, referring to the necessary relationship between situations of power and situations of duty, it can be found that the situations of duty, -those corresponding to the passive subject, are not always of the same nature.

Often the situations of duty are configured as situations of being obliged to provide or to give or render something, accomplishing a positive obligation, that is to say, as obligations to render, give or make. This is the common situation regarding social rights, such as the right to education or right to health care, in relation to which the State is obliged to carry out a positive activity, or to render a public service or utility, that the citizens have the right to received or enjoy, as the active subjects in the legal relation.

In other fields, constitutional rights instead of being rights to receive something as a service, are rather "freedoms", because the situation of the passive subject, for example of the State itself, does not correspond to any obligation to do or to give. In these cases, the obligation is basically an obligation to abstain from acting, to not disturb, to not harm, to not stop, to not deprive. Therefore, from the strictly

legal viewpoint, these are more freedoms rather than rights. For example, the freedom of moving implies more a correlative situation of duty consisting in the obligation to restrict the free circulation of people; the freedom or the right to free expression of thoughts, to free speech or to free press implies the State's duty not to bother, not to censor, not to prevent or impede the exercise of such rights.

This relation between the various situations of power and duty leads to a clear distinction between freedoms and rights, when the situation of the obligated subject is not, in the case of freedoms, an obligation to give or to do, but rather not to do, to abstain. In contrast, in the rights as such, there is an obligation to render, as occurs, for example, in general, in public services and, particularly, in those of a social nature (health, education).

From this point of view, regarding the rights in strict sense, it can be said that in general, the obliged party is the State, that is the party with the duty to provide health care or education to the people; instead, regarding freedoms, not only the State is obliged not to restrict, or not to impede its exercise, but also other individuals have the duty to abstain or to refrain. That is why, in contemporary constitutional law, the action of "amparo" in many countries can also be exercised against individuals and not only against the State, as was the initial constitutional trend.

V. THE DECLARATIVE NATURE OF THE CONSTITUTIONAL DECLARATIONS OF RIGHTS AND THE OPEN CONSTITUTIONAL CLAUSES

From a legal point of view, and regarding all the "generations" of rights, it is important to note how the declarations are not "constitutive" of such rights, in the sense that they do not create such rights, but rather, as their name itself implies, are of a declaratory nature, that is, they only recognize the existence of rights. Therefore neither the Constitutions nor the International Conventions create or establish them, but rather admit them as being inherent to the human person, as natural rights.

From this angle, the most important aspect of the expansion process of the constitutional declarations of human rights in Latin America, has been the progressive and continuous incorporation in the Constitutions of the "open clauses" of a person's rights, which has also arisen through the influence of the United States IX (1791) in which it is stated that "the enumeration in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people".

The express enshrining of clauses of such sort in the Constitutions confirms that the list of constitutional rights does not end with those that are expressly listed in the constitutional declaration, but that all others rights which are inherent to the human person or those declared in international instruments are also considered as human rights.

In this respect it can even be said that all Latin American Constitutions, with only very few exceptions (Cuba, Chile, Mexico and Panamá), contain open clauses of the rights, according to which it is expressly indicated that the declaration and enunciation of the rights that is made in the Constitution shall not be understood to be a denial of others not listed therein, that are inherent to the human person or to human dignity. Clauses of this type are to be found, for example, in the Constitutions of Argentina (Article 33), Bolivia (Article 33), Colombia (Article 94), Costa Rica (Article 74), Ecuador (Article 19), Guatemala (Article 44), Honduras (Article 63), Nicaragua (Article 46), Paraguay (Article 45), Peru (Article 3), Uruguay (Article 72) and Venezuela (Article 22).

In the Dominican Republic, the Constitution is less expressive, only indicating that the constitutional list (Articles 8 and 9) "is not limitative, and therefore does not exclude other rights and duties of a similar nature" (Article 10).

Regarding the rights inherent to human persons referred to in many of the open clauses, the former Supreme Court of Justice of Venezuela in a decision of January 31, 1991 (Case: *Anselmo Natale*), stated:

> "The inherent rights of a human person are natural, universal rights which find their origin and are direct consequence of the relationships of solidarity among men, of the need for the individual development of mankind and for the protection of the environment."

Therefore the same Court concluded by stating that

> "...such rights are commonly enshrined in Universal declarations and in national and supranational texts, and their nature and content as human rights shall leave no room for doubt, since they are the very essence of a human person and shall therefore be necessarily respected and protected" [29].

Accordingly, Article 22 of the Constitution of Venezuela, following the tradition of previous Constitutions, expressly establishes that "the enunciation of the rights and guarantees contained in this Constitution and in the international instruments on human rights shall not be understood to be a denial of others that being inherent to the human person, are not expressly set forth in those texts"; adding that "the absence of the regulating statute of such rights do not impede its exercise" (Article 22).

This article, like Article 94 of the 1991 Colombian Constitution and Article 44 of the Guatemalan Constitution, refers to the "inherent rights of a human person", thus incorporating notions of a natural right, in the sense that human rights precede the State and the Constitutions themselves. The Constitution of Paraguay, in the same sense, refers to "rights inherent to human personality" (Article 45).

But in the case of Colombia and Venezuela, the open clause allows for the identification of rights inherent to human persons, not only regarding those listed in the Constitution, but also in international human rights instruments, thus considerably broadening their scope. On the other hand the clause has allowed national Courts to identify human rights inherent to human beings not expressly regulated in the Constitutions, but set forth in international instruments. It was the case during the nineties of the former Supreme Court of Justice of Venezuela, which annulled statutes basing its rulings in the violation of rights set forth in the American Convention which were considered as rights inherent to human beings according to open clause incorporated in article 50 of the 1961 Constitution.

In effect, in 1996, the Supreme Court of Justice, when deciding a judicial review action brought before the Court against the State of *Amazonas* legislation setting its territorial division, ruled that being the State mainly populated by indigenous people, the sanctioning of the statute without hearing the opinion of the indigenous communities, violated the constitutional right to political participation. Such right was not expressly regulated in the 1961 Constitution, so the Court founded its ruling in the open clause enshrined in Article 50 of the Constitution (equivalent to Article 22 of the 1999 Constitution), considering the right to political participation as inherent to human being, in particular, as a "general principle of constitutional rank in a democratic society", adding, regarding the case, that "because of being a minorities rights (indigenous peoples in the case), it must be judicially protected, ac-

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29 See the reference in Carlos Ayala Corao, "La jerarquía de los instrumentos internacionales sobre derechos humanos", en *El nuevo derecho constitucional latinoamericano*, IV Congreso venezolano de Derecho constitucional, Vol. II, Caracas, 1996, and in *La jerarquía constitucional de los tratados sobre derechos humanos y sus consecuencias*, México, 2003.

cording to Article 50 of the Constitution, to the great international treaties and conventions on human rights, and to the national and states legislation". In the December 5, 1996 ruling it was provided:

> In the case, there was no evidence of the accomplishment of the previsions regarding citizens participation, lacking the statute of its original legitimacy derived from the popular hearing. The defendants argued that the advice of public bodies such as the Ministry of the Environment and the Environment Autonomous Services of the Amazon States where asked, as well as the advice of some indigenous organization. The Court deems that such procedure does only constitute a timid and insignificant expression of the constitutional right to political participation in the process of elaborating statutes, which must be guarantied before and pending the legislative activity and not only when the legislation is promulgated… Regarding a statute referred to the political-territorial division of a State like the Amazonas State (mainly populated by indigenous communities), it is a statute that changes and modifies the economic and social conditions of the region, the vital environment of individuals, the municipal boundaries, the land ownership regime and the daily life of indigenous peoples. Thus their participation must be considered with special attention, due to the fact that indigenous peoples are one of the most exposed groups to human rights violations, due to their socio-economic and cultural conditions, in which habitat intervenes various interest some times contrary to the legitimate rights of autochthonous populations… It is in this context that the rights of indigenous peoples acquire more force, as it is expressly recognized by this Court[30].

According to the aforementioned, the Court's decision referred to the violation of constitutional rights of minorities set forth in the Constitution and in the international treaties and conventions on human rights, particularly the right to citizenship participation in the statute elaborating process, particularly because no public consultation was made in the case to the minority indigenous communities, as a consequence of which, the Court decided to annul the challenged statute.

The following year, in 1997, another important decision was issued by the former Supreme Court of Justice of Venezuela, this time annulling a national (federal) statute referred to wicked and crooked persons (Ley de vagos y maleantes) which was considered unconstitutional, based on the "constitutionalization of human rights process according to Article 50 of the Constitution", because such statute "violated *ipso jure* the international conventions and treaties on human rights which had acquired constitutional rank". In its November 6, 1997 ruling, the Supreme Court considered the challenged statute which allowed executive detentions without due process to persons considered wicked or crooks, as infamous, supporting its decision on Article 5 of the Universal Declaration on Human Rights, and in the American Convention on Human Rights "which has been incorporated on internal law as self applicable regulation reinforced by courts decisions that has given the Convention constitutional force, which implies the incorporation to our internal legal order of the regime set forth in the international conventions". The Court considered that the challenged statute was unconstitutional because it omitted the guaranties for a fair trail set forth in Articles 7 and 8 of the American Convention and Articles 9 and 14 of the International Covenant on Human Rights, and because it was discriminatory violating Article 24 of the same American Convention, transcribing in the ruling text the entire text of those articles. The Court also referred in its annulling ruling, to the existence of "reports of human rights organization which openly condemn the Venezuelan legislation on wicked and crook persons, particularly on the grounds of promoting the sanction of a statute on citizen's security protection"[31].

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30 Caso: *Antonio Guzmán, Lucas Omashi y otros,* in *Revista de Derecho Público*, nº 67-68, Editorial Jurídica Venezolana, Caracas, 1996, pp. 176 ff.

31 See in *Revista de Derecho Público* nº 71-72, Editorial Jurídica Venezolana, Caracas, 1997, pp. 177 ff.

More recently, and regarding the challenging of the proposed call for a consultative referendum for the convening of a National Constituent Assembly by the elected President of the Republic in December 1998, which was not regulated in the 1961 Constitution as a mean for constitutional review or reform, the Supreme Court in January 1999, issued two rulings deciding interpretative recourses, allowing the convening of such Constituent Assembly by means of a referendum based on the peoples right to political participation also founded in the open clause on human rights set forth in Article 50 of the Constitution, considering it as an implicit, constitutionally unenumerated right inherent in the human person.

Considering the referendum as a right inherent to the human person, the Court specifically indicated that:

> This is applicable, not only from a methodological point of view, but ontologically as well, since if the right to a constitutional referendum were considered to depend on a reform of the current Constitution, it would be subordinate to the will of the constituted power, which in turn would be placed above the sovereign power. The absence of such a right in the Fundamental Charter must be interpreted as a gap in the Constitution, since it could not be sustained that the sovereign power had renounced, ab inicio, the exercise of a power that is the work of its own political decision.[32]

The conclusion of the Court's decision was that it was not necessary to previously reform the Constitution in order to recognize the referendum or popular consultation on whether to convene a Constituent Assembly as being a constitutional right[33].

Open clauses of human rights, of the same nature, which have served in Latin American countries to resolve important constitutional issues, are found in almost all their Constitutions, even with different contents. The Constitution of Ecuador, for instance, indicates that "the rights and guarantees provided in this Constitution and in international instruments do not exclude others derived from the nature of the human person and are necessary for his or her full moral and material development (Article 19). This provision is complemented by Article 18 in which it is stated that the rights and guaranties enshrined in the Constitution and in the international instruments, are directly and immediately applicable by and before any court or authority; and that the absence of regulatory statutes can not be alleged in order to justify the violation or the ignorance of the rights set forth in the Constitution, or to reject the action for its protection, or to deny the recognizance of such rights.

In Nicaragua, the Constitution is more detailed regarding the listing of international instruments and, as such, more limitative, when its Article 46 provides as follows:

> Article 46.- Every person in the land shall enjoy State protection and the recognition of the rights inherent to the human person, of the unrestricted respect, promotion and protection of human rights, and of the full enforcement of the rights consigned in the Universal Declaration of Human Rights; in the American Declaration of the Rights and Duties of Man; in the International Covenant on Economic, Social and Cultural Rights; in the United Nations' International Covenant on Civil and Political Rights; and in the American Convention on Human Rights of the Organization of American States.

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32 See in *Revista de Derecho Público,* nº 77-80, Editorial Jurídica Venezolana, Caracas, 1999, p. 67

33 See the comments in Allan R. Brewer-Carias, "La configuración judicial del proceso constituyente o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción", in *Revista de Derecho Público,* nº 77-80, Editorial Jurídica Venezolana, Caracas, 1999, pp. 453 ff.

In other cases, such as the Constitution of Brazil, the open clause, without referring to the inherent rights of human persons, indicates that the listing in the Constitution of right and guaranties, does not exclude others "derived form the regime and principles adopted by the Constitution or by international treaties to which the Federative Republic of Brazil is a party" (Article 5.2). However, pursuant to the majority of international instruments, the rights listed therein are considered human attributes, and therefore the effect when applying this enunciative clause is the same.

Other Latin American Constitutions also contain these open clauses allowing for the extension of the human rights listed in the text of the Constitution, even though perhaps with some lesser scope regarding the previous examples.

It is the case of the Constitution of Costa Rica when indicating that the enunciation of rights and benefits it contained does not exclude others "which derive from the Christian principle of social justice" (Article 74), expression that nonetheless must be interpreted in the sense of occidental notion of human dignity and social justice.

In other Constitutions, the open clauses on human rights refer to the sovereignty of the people and the republican form of government and therefore more emphasis is made on regarding political rights, than on the inherent rights of human persons, as occurs in Argentina, where Article 33 of the Constitution states that:

> "The declarations, rights and guaranties enumerated in the Constitution, can not be understood as to deny others rights and guaranties not enumerated, but that rose from the principle of the people's sovereignty and from the republican form of government".

An almost exact regulation is contained in article 35 of the Constitution of Bolivia. Also in similar way, other Constitutions make reference to the rights derived both from the republican form of government and from the representative nature of the government as well as from the dignity of man. This is the case of Uruguay where Article 72 of the Constitution states that "the enunciation of rights, duties and guaranties made by the Constitution does not exclude the others that are inherent to human personality or derive from the republican form of government". Also in Peru Article 3 of the Constitution refers to "others guaranteed by the Constitution, nor others of an analogous nature or that are based on the dignity of man, or on the sovereignty of the people, of the democratic rule of law and of the republican form of government".

Also in Honduras, Article 63 states that

> "The declarations, rights and guaranties enumerated in this Constitution, must not be understood as a denial of other unspecified declarations, rights and guarantees, rising from sovereignty, the republican, democratic and representative form of Government and from the dignity of man".

Naturally, in all these cases, the incorporation of open clauses in the Constitution regarding human rights, as mentioned before regarding the Venezuelan constitutional provision, implies that the absence of statutory regulation of such rights cannot be invoked to deny or undermine the exercise of these rights by the people, as is expressed in many Constitutions (Argentina, Bolivia, Paraguay, Venezuela, and Ecuador). This, of course responds to the principle of the direct applicability of the Constitution in human rights matters, which excludes the traditional concept of the so-called "programmatic clauses" which was constructed under the constitutionalism of some decades ago, particularly in the question of social rights, which impeded their being exercised until legally regulated, and also impeded their justiciability.

In this regard, as mentioned, the Constitution of Ecuador is careful to point out the following:

> **Article 18.** The rights and guarantees determined in this Constitution and in the international instruments in force, shall be directly and immediately enforceable by and before any judge, court or authority...
>
> …The lack of statutes shall not be alleged in order to justify the violation or ignorance of the rights established in this Constitution; to dismiss actions by reason of these facts; or to deny the recognition of such rights.

VI. ABSOLUTE OR LIMITATIVE CHARACTER OF THE DECLARATIONS

It must also be noted, on the other hand, that the constitutional enunciation of rights, notwithstanding the increase of scope we have mentioned, and even including the enunciative character of their constitutional declarations, has been laid down in parallel with the establishment of a specific scope for the limitations to such rights.

It is true that there are absolute rights, as are all the rights considered and declared as inviolable and not limitable, such as the right to life, the right to not be tortured, and the right to not receive shameful sentences or the right self defence.

But beyond these, there exists the principle of the limitability of rights and freedoms, whose borderline is always marked by both the rights of others persons and public and social order, because, unquestionably, rights are exercised in society and they have many titleholders. This requires, therefore, the need to conciliate the exercising of rights by everyone, in order that it not bring about, in particular, the violation of other people's rights and, in general, of public and social general order.

Of course, this principle can lead to extreme dangerous situations such as the one which unfortunately still remains in the Constitutions of Cuba, which leaves open an "unlimited" possibility of limitations to human rights, founded on the conservation of principles that can only be determined by the established Power, thus rendering the rights futile. In this regard, Article 62 of the Cuban Constitution provides that: "None of the citizens' recognized freedoms may be exercised against the provisions of the Constitution and the laws, or against the existence and purposes of the socialist State, or against the Cuban people's decision to construct socialism and communism. Offences against such principle are punishable."

Generally speaking however, and leaving aside this fortunately isolated case, the limitation to rights allowed by the Constitutions are only linked to the demands for public and social general order and to the exercise of the same rights by others.

Legally speaking, this all leads to important matters that concern the exercise of rights. Firstly, that any limitation confronts a fundamental guarantee in the sense that is constitutionally required that they be imposed only by means of statutory regulations or by a formal law sanctioned by the elected legislative body.

In this regard and as we have mentioned before, in spite of the advances contained for instance in the 1999 Constitution, with its exhaustive list of rights and the constitutionalization of international treaties concerning human rights, a specific negative aspect of its regulations which signifies a serious and potential harm to the guarantee of the principle of legality, is the establishment of the broad legislative delegation in the President of the Republic (Article 302), that can lead to executive limitations of constitutional rights.

On the other hand, mention must be made of the progressive search for the balance that must exist between the different rights, which must be done in such a way that the exercise of one right does

not imply the infringement of another. That is the reason for the principles of indivisibility and interdependence in the enjoyment and exercise of rights; a matter that cannot be completely resolved through the sole provision of the Constitution. It only can be achieved through the progressive application of such texts by an effective and efficient Judiciary, which is the only branch of government that can clarify when the exercise of one right shall outweigh that of another.

There have been many legal cases, for example in relation to freedom of speech, that have determined how far freedom of speech can signify, for instance, the infringement of a child's rights, or to what extent freedom of speech can affect the right to privacy. In these cases the judge is the one who has to decide which right shall prevail in a specific moment, or under what circumstances precedence shall be given to the rights of a child, for example, as has happened in court cases in Venezuela, in regard to the right to free expression of thought[34].

In this task of interpretation, the principles of progressiveness, interdependence, reasonableness, *favor libertatis* and the concept of the essential nucleus of rights, among others, are essential for guaranteeing for they exercise and enforceability.

34 See for example, Allan R. Brewer-Carías *et al*: *La libertad de expresión amenazada (Freedom of speech under attack)*, Instituto Interamericano de Derechos Humanos, Editorial Jurídica Venezolana, Caracas, 2001.

CHAPTER II

THE CONSTITUTIONALIZATION OF THE INTERNATIONALIZATION OF HUMAN RIGHTS

I. THE CONSTITUTIONAL AND INTERNATIONAL REGULATIONS

Human rights today are not solely a matter concerning constitutional law and constitutional regulations. Progressively, and particularly after the Second World War, they have been also a main and essential matter of international law. During the past decades both branches of law have mutually feedback one to the other in setting forth declarations and regulations regarding human rights.

Initially, and particularly until the Second World War, the human rights regulations were the process of a constitutionalization process, by mean of the expansion of the declarations of rights, freedoms and guarantees enshrined in the Constitutions. This was the case of the initial declarations of civil rights in the XVIII Century American and French Constitutions, and of the extensive subsequent chapter devoted to enumerate constitutional rights in all the Latin American Constitutions.

The first stage of the protection of human rights process was, then, a process of constitutionalization of the declarations of human rights.

That first stage was then followed by a second one, that of the internationalization of the constitutionalization of human rights, particularly after the Second World War, characterized not only by the general approval in the United States and in the Organization of American States in 1948 of general declarations on human rights, but also by the approval of multilateral treaties on the matter. It was, undoubtedly, the evil and most aberrant violations of human rights uncovered after the end of the War that provoked such international reaction seeking for the protection of human right as a matter of international and supranational law, not being considered enough for the effective protection and enforcement of rights, their sole national constitutional provisions.

For this purpose, a re-arrangement of the concept of sovereignty was needed, in order for the States to accept the imposition of international law over national regulations. International law began to play an important role in the establishing of limits to constitutional law itself, as a result of the new international principles and commitments that came about after the War to guarantee peace.

Therefore it is not surprising that precisely following the end of the War began the process of internationalization of human rights, with the adoption in 1948 of both the American Declaration of the Rights and Duties of Man by the Organization of American States, and the Universal Declaration of Human Rights by the United Nations Organization. Those declarations were followed only two years latter by the first multilateral treaty on the matter, the 1950 European Convention on Human Rights, which entered into force in 1953.

Regarding the American Declaration adopted in 1948, its contents referred basically to civil, social and political rights, as follows: right to life, liberty and personal security (I); right to equality before the law (II); right to religious freedom and cult (III); right to freely search information, to opinion, and

expression (IV); right to protection of honour, personal reputation and privacy (V); right to family and to its protection (VI); rights to maternity and children protections (VII); right to residence and move (VIII); right to the inviolability of the home (IX); right to the inviolability and transmission of correspondence (X); right to the preservation of health (XI); right to education (XII); right to culture (XIII); right to work and to fair remuneration (XIV); right to leisure time (XV); right to social security (XVI); right to the recognition of personality (XVII); right to fair trial (due process) (XVIII); right to nationality (XIX); right to vote and to political participation (XX); right to assembly (XXI); right to association (XXII); right to property (XXIII); right to petition (XXIV); right to personal liberty and to protection from arbitrary arrests (XXV); and right to presumption of innocence, to impartial hearing (XXVI), to seek for asylum (XXVII).

The process of internationalization of human rights was consolidated in 1966, with the adoption of the United Nations International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both in effect since 1976; and, in 1969, with the adoption of the American Convention on Human Rights, which also entered into force in 1976.

The International Covenant on Civil and Political Rights declared the following rights: the right to life and restrictions on death penalty (6); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and without his free consent to medical or scientific experimentation (7); the prohibition of slavery, servitude and compulsory labor (8); the right to liberty, to personal security, not to be subjected to arbitrary arrest or detention, and only to be deprived of his liberty by means of due process of law (9); the right of detainees to be treated with humanity and with respect for the inherent dignity of the human person (10); the right not to be imprisoned due to contractual obligations (11); the right to liberty of movement and freedom to choose residence (12); the right of aliens to be expelled only by means of due process (13); the rights and guaranties of due process of law, among them: to be equal before the courts; to have a fair and public hearing by a competent, independent and impartial tribunal established by law; to be presumed innocent; to be informed and to self defense; to not to be compelled to testify against himself or to confess guilt; to the reviewing of the convicting judicial decision; and the *non bis in idem* right (14); the *nulla pena sine lege* right (15); the right to be recognized as a person (16); the right to privacy, honor and reputation (17); the right to freedom of thought, conscience and religion (18); the right to hold opinions and to express them and the freedom to seek, receive and impart information and ideas (19), except in cases of propaganda for war and incitement to discrimination, hostility or violence (20); the right of peaceful assembly (21); right to freedom of association, including the right to form and join trade unions (22); the rights to protections of family, the right of men and women to marry and to found a family (23); the right of children to be protected, to have a name and a nationality (24); the citizens rights to take part in the conduct of public affairs, to vote and to be elected, and have access to public service (25); the right to be equal before the law and to the equal protection of the law 26); and the minority groups rights to enjoy their own culture, to profess and practice their own religion, or to use their own language (27).

Article 2 of the International Covenant expressly provides for the obligation of each State Party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Additionally, the State Parties are obliged to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

In particular, regarding the judicial guarantee for the protection of the rights declared in the Covenant, article 2,3 oblige each State Party:

"(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that when granted, the competent authorities shall enforce such remedies".

Accordingly, the Covenant also establishes a general right of any person not only to have access to justice for the protections of their rights but to have at their disposition an effective remedy to seek protection to their rights not only against public official actions but also against individual actions.

Regarding the International Covenant on Economic, Social and Cultural Rights, it declares the following rights: the right to work (6); the right to the enjoyment of just and favorable conditions of work, in particular, remuneration with fair wages providing decent living; safe and healthy working conditions; equal opportunity, and rest, leisure and reasonable limitation of working hours (7); the right of everyone to form and join trade unions and the right of trade unions to function freely; and the right to strike (8); the right of everyone to social security, including social insurance (9); the right to family, marriage, maternity and children's protection (10); right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (11); the fundamental right of everyone to be free from hunger (12); the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and to health care (13); the right of everyone to education, the liberty of parents to choose for their children schools, other than those established by the public authorities, and the liberty of individuals and bodies to establish and direct educational institutions (13) and the right of everyone to culture and to enjoy the benefits of scientific progress (14).

Article 2,2 of the Covenant obligated the States Parties to guarantee that the rights enunciated in it will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; and Article 3 obligated them to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. In Article 4 of the Covenant, the guarantee of legality concerning the social, economic and cultural rights was set forth by stating that the States Parties "recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

Nevertheless, in contrast with what was established in the International Covenant on Civil and Political Rights, in the International Covenant on Economic, Social and Cultural Rights, no justifiability rights for their enforcement were set forth.

II. THE AMERICAN INTERNATIONALIZATION OF HUMAN RIGHTS

The American Convention on Human Rights, as mentioned, was approved in the Organization of American States General Assembly in Costa Rica in 1969, and entered into force in 1979. It has been ratified by all Latin American Countries, all of which have recognized the jurisdiction of the Inter American Court on Human Rights. It must be noted that the only American country that has not signed the Convention is Canada, and the United States of America, even though has signed the Convention on June 1st, 1977 at the OAS General Secretariat, has not yet ratified it.

The American Convention has extreme importance in Latin America, being its content mainly referred to civil and political rights. Regarding economic and social rights, the Convention just limits its scope to declare that "the States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States".

Now, regarding civil and political rights, the American Convention declares the following rights:

Article 3. Right to Juridical Personality:

Every person has the right to recognition as a person before the law.

Article 4. Right to Life:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 6. Freedom from Slavery

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.
3. For the purposes of this article, the following do not constitute forced or compulsory labor:
    a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;
    b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;
    c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or
    d. work or service that forms part of normal civic obligations.

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for no fulfillment of duties of support.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
    a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
    b. prior notification in detail to the accused of the charges against him;
    c. adequate time and means for the preparation of his defense;
    d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
    e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
    f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
    g. the right not to be compelled to be a witness against himself or to plead guilty; and
    h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit there from.

Article 10. Right to Compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to Privacy

1. Everyone has the right to have his honour respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
   a. respect for the rights or reputations of others; or
   b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 14. Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and Television Company, shall have a person responsible who is not protected by immunities or special privileges.

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 18. Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Article 20. Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 22. Freedom of Movement and Residence

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right lo leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
9. The collective expulsion of aliens is prohibited.

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:
   a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
   b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
   c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

But additionally to all the previous rights, in these American Convention, and in a different way to what was established in the International Covenant on Civil and Political Rights, it was expressly set forth as the right of everyone to judicial protection of human rights, by means of the "amparo" action, recourse or suit, as follows:

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection ("que la ampare") against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

Finally, in order to ensure fulfillment of the commitments made by the States Parties to the Convention, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights were created (33). For that purpose the Convention recognized the right of any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, to lodge petitions with the Commission containing denunciations or complaints of violation of the Convention by a State Party (44), as well as the power of the State Parties to allege before the Commission that another State Party has committed a violation of a human right set forth in the Convention (45). Following a very extensive regulated procedure, the Commission can bring before the Inter American Court on Human Rights cases of violation of the State Parties obligations and if the Court, following the procedure set forth in the Convention, finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated, and if appropriate, can also rule that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party (63).

The general rule of admissibility of the petition is that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law"(Article 46,1,a); rule that has the following exceptions: when in the internal law of the State the due process for the protection for the violated rights is non existent; when the affected party has been impeded in his rights to access to the internal jurisdictional recourses, or when he has been impeded of exhausting them; or when a unjustified delay has occurred regarding such recourses (Article 77,2 of the Internal regulation of the Commission).

Even though the petition before the Inter-American Commission has been qualified as an "international amparo"[35], not being the Commission a jurisdictional body, the initial petition can not qualify as a judicial mean. Eventually, the Commission is the only body that can bring before the Inter American Court a request for protection on behalf individuals. On the contrary, in the European system, individuals can bring direct petitions against Member States before the European Tribunal on Human Rights regarding the protection of human rights.

Nevertheless, it must be mentioned that in some Latin American Constitutions, as is the case of the 1999 Venezuelan Constitution, the right to petition for the protection of human rights before international organizations has been regulated as an individual constitutional right. In this regard, Article 31 sets forth:

> **Article 31.** According to what is set forth in the treaties, covenants and conventions on human rights ratified by the Republic, everybody has the right to file petitions or complaints before the international organizations created for such purposes, in order to seek for the protection (amparo) of his human rights.

The Constitution also imposes the State the obligation, according to the procedures provided in the Constitution and the statutes, to adopt the necessary measures in order to comply with the decisions of the abovementioned international organizations.

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35 See Carlos Ayala Corao, "Del amparo constitucional al amparo interamericano como institutos para la protección de los derechos humanos" in *Memoria del VI Congreso Iberoamericano de derecho constitucional*, Tomo I, Bogotá, 1998.

Anyway, since the beginning of its activities in 1979, the Commission and the Court have been very active in the exercise of its functions, having decided in numerous cases against State parties for violations of human rights. The Courts consultative opinions and rulings now constitute the basic doctrine on human rights in Latin America.

Finally, regarding international treaties, mention must also be made to the African Charter of Human Rights, adopted in 1981. The fact, in any case, is that since the establishment of the United Nations, many other declarations and treaties referring to human rights –more than 70- have been adopted, creating various international organizations on human rights, including two International Courts –the European and the Inter American Courts-as international judicial organs with the purpose of assuring the accomplishment of State obligations regarding human rights and to protect them.

From all these international regulations on human rights, it can be clearly appreciated that following the initial process of constitutionalization of human rights by means of the progressively enlarged national constitutional declarations, which took place up to the Second World War, a second stage was developed, marked by the internationalization of such constitutionalization process, by means of the international declarations of rights.

III. THE CONSTITUTIONALIZATION OF THE INTERNATIONALIZATION OF HUMAN RIGHTS

But in recent times, we have witnessed a third stage on the process of protecting human rights, which can be characterized as a process now again of constitutionalization but of the internationalization of human rights, that has developed precisely, by the incorporation in the constitutional internal regulations, of the international systems of protection.

This process can be characterized, first of all by the process of giving internal constitutional or statutory rank to the international instruments on human rights, that is to say, by setting forth expressly in the Constitutions, the value to be given to both the international declarations and treaties on human rights regarding the internal constitutional norms and statutes concerning human rights, even determining which shall prevail in the event of there being a conflict among them.

This is a matter that of course must be regulated in the Constitutions themselves, whether by mean of enshrining the regulatory rank of international treaties in the constitutional texts, or by means of setting forth in the Constitutions for the rules for constitutional interpretation of human rights and of the international instruments referring to them.

1. The supra constitutional rank of international instruments of human rights

In many Latin American Constitutions the question of the internal normative value and rank of the international human rights instruments has been expressly resolved in four different ways: by granting the international instruments supra-constitutional rank, constitutional rank, supra-legal rank or statutory rank[36].

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36 For a general comment regarding this classification, see Rodolfo E. Piza R., *Derecho internacional de los derechos humanos: La Convención Americana*, San José, 1989; Carlos Ayala Corao, "La jerarquía de los instrumentos internacionales sobre derechos humanos", in *El nuevo derecho constitucional latinoamericano*, IV Congreso venezolano *de Derecho constitucional*, Vol. II, Caracas, 1996 and *La jerarquía constitucional de los tratados sobre derechos humanos y sus consecuencias*, México, 2003; and Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio pro homine", en *Revista IIDH*, Instituto Interamericano de Derechos Humanos, nº 39, San José, 2004, pp. 71 y ss. See also, Allan R. Brewer-

Firstly, certain Constitutions have expressly set forth the supra-constitutional rank of human rights declared in international instruments. This has implied giving the international regulation a superior rank regarding the Constitution itself, therefore prevailing over their provisions.

Such is the case, for example, of the Constitution of Guatemala, whose Article 46 sets forth the general principle of pre-eminence of International law, by stating that in declaring that "in human rights matters, the treaties and conventions accepted and ratified by Guatemala shall have pre-eminence over internal law", in which it must be included other that the statutes, the Constitution itself. Based on this prevalence of international treaties, the Constitutional Court has decided cases applying the American Convention, as was the case of the decision issued on May 27, 1997 regarding freedom of expression and the rectification rights. In the case, by means of an "amparo" action, a person asks the constitutional protection of the Court regarding the news published in two news papers referring to his as forming part of a band of criminals, and asking before the Court to be respected in his right to seek for the rectification of the news by the news papers. Even tough the constitutional right to seek for rectification in cases of news published affecting the honour, reputation and privacy of any body is not expressly set forth in the Constitution, the Constitutional Court applied Articles 11, 13 and 14 of the American Convention which guarantee the right of any affected party by news papers information to "rectification and response that must be published in the same news paper", considering such provisions as forming part of the constitutional order of Guatemala[37].

Also in Honduras, Article 16 of the Constitution sets forth that the all treaties subscribed with other States (not only related to human rights), are part of internal law; and Article 18 establishes the pre-eminence of treaties over statutes in case of conflict between them. In addition, the Honduran Constitution admits the possibility of ratification of treaties contrary to what is set forth in the Constitution, in which case they must be approved according to the procedure set forth for constitutional revision (Article 17). A similar regulation is established in Article 53 of the Peruvian Constitution.

In Colombia, the Constitution has also established a similar provision, with Article 93 providing that: "international treaties and conventions ratified by Congress, which recognize human rights and forbid their limitation in states of emergency, shall prevail over internal law". In this case, also, internal law must be understood to comprise not only statutes but the Constitution itself.

The Constitutional Court of Colombia in a decision nº T-447/95 of October 23, 1995, recognized the right of everybody to have an identity as a right inherent to human being, basing its ruling in what is set forth in the international treaties and covenants, for which it was recognized supra constitutional and supra legal rank. The Court began by referring to previous ruling of the former Supreme Court of Justice which had determined their supra-legal value, by arguing:

> Since 1928 the Supreme Court of Justice has given prevalent value to international treaties regarding legislative internal order; due to the fact that such international norms, by will of the Colombian state, enter to form part of the legal order with supra legal rank, setting forth the coactive force of provisions the signing State has the obligation to enforce. The supra legal value has been expressly established in article 93 of the Constitution of Colombia, as has been recognized by the Supreme Court of Justice, arguing that it must be added that such superiority has been sustained as an invariable doctrine that "is a public law principle, that the Constitution and the international

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Carías, *Mecanismos nacionales de protección de los derechos humanos*, Instituto Internacional de Derechos Humanos, San José, 2004, pp.62 y ss.

37 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997, pp. 45 ff.

treaties are the superior law of the land and their dispositions prevail over the legal norms contrary to their provisions even if they are posterior laws" [38].

In the same decision, the Constitutional Court referred to the "supra constitutional" rank of international treaties, which implies the State's obligation to guarantee the effective enforcement of human rights, basing the constitutional provision on Article 2,2 of the International Covenant on Human Rights and in Article 2 of the American Convention on Human Rights. The Court stated:

> The American Convention and the United Nations International Covenants set forth that the obligation of the States is not only to respect civil and political rights but also to guarantee, without discrimination, its free and complete enjoyment by any person subjected to its jurisdiction (Article 1, American Convention; Article 2,1 International Covenant on civil and political rights). For that purpose, these covenants that have been ratified by Colombia, and consequently prevail in the internal order (Article 93 Constitution), set forth that the Member States have the obligation according to the constitutional proceedings, to adopt "the legislative or other character measures in order to make human rights effective" (Article. 2, American Convention; Article 2,2, International Covenant on Civil and Political Rights) . According to this authorized doctrine, the Constitutional Court considers that the judicial decisions and particularly this Court's rulings must be among the "other character" measures abovementioned, due to the fact that the Judiciary is one of the Branches of the Colombian State, which has the duty to adopt the necessary measures in order to make effective the persons' rights"…Consequently it is legitimate for the judges and particular for the Constitutional Court, when deciding cases, to consider within the legal order the rights recognized in the Constitution and in the Covenants"[39].

Based in the abovementioned, and considering that Article 29,C of the American Convention forbids the interpretation of its provisions that preclude other rights or guarantees that are inherent in the human personality and that give a very wide sense to the interpretation of such rights, the Court concluded that being "the right to have an identity implicitly set forth in all the international covenants and conventions, and thus, legally protected" it is possible to affirm such right "as being inherent to human person fully guaranteed due to the obligatory force of the international covenant" which also set forth the right to dignity and to the free development of own personality"[40].

To a certain point, the case of the 1999 Constitution of Venezuela could also be placed under this first system of supra-constitutional hierarchy of human rights contained in treaties, with its Article 23, which provides that:

> "Treaties, covenants and conventions referring to human rights, signed and ratified by Venezuela, shall have constitutional hierarchy and will prevail over internal legal order, when they contain regulations regarding their enjoyment and exercise, more favorable than those established in this Constitution and the statutes of the Republic. Those treaties and conventions shall be immediately and directly applicable by the courts and all other official authorities.

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38 See the text in *Derechos Fundamentales e interpretación Constitucional*, *(Ensayos-Jurisprudencia)*, Comisión Andina de Juristas, Lima, 1997; and in Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional", *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 y ss.

39 *Idem*.

40 *Idem*.

By declaring that human rights enshrined in international instruments shall prevail over internal legal order, when containing more favorable conditions of enjoyment and exercise such rights, it is referring not only to what is declared on statutes, but also in the Constitution. This undoubtedly grants supra-constitutional rank to such rights.

This article of the 1999 Constitution, without doubt, is one of the most important ones in matters of human rights[41], not only because it sets forth the supra-constitutional rank of human rights treaties, but because it prescribes the direct and immediate applicability of such treaties by all courts and authorities of the country. Its inclusion in the new Constitution was a significant advancement in the completion of the protection framework of human rights.

But unfortunately, this very clear constitutional provision has been interpreted by the Constitutional Chamber of the Supreme Court in a way openly contrary to what it states, and to what was the intention of the proponents and of the Constituent. In effect, in a decision n°1942 of July 7th, 2003 when resolving a judicial review action on the constitutionality of some Penal Code articles regarding the freedom of expression that where challenged because they were contrary to international treaties, the Constitutional Chamber ruled as follows:

First, the Chamber stated that Article 23 of the Constitution, contained two key elements: "1) It refers to human rights applicable to human beings; 2) It refers to norms setting forth rights and not to decisions or opinions of institutions, resolutions of bodies, etc, established in the treaties; thus it only refers to norms that created human rights".

The Constitutional Chamber was repetitive by stating that: "It is a matter of prevalence of norms which conform treaties, covenants or Agreements (synonym expressions) referred to human rights, but not to reports or opinions of international bodies which pretend to interpret the scope of international instruments". The Chamber concluded that it is clear that according to Article 23, "the constitutional hierarchy of treaties, covenants or conventions refers to its norms which once integrated into the Constitution, the only institution capable of interpreting them vis-à-vis Venezuelan law, is the constitutional judge according to Article 335 of the Constitution, only the Constitutional Chamber"; insisting in the same proposition by stating that:

> "Once the human rights substantive norms contained in Conventions, covenants and treaties have been incorporated to the constitutional hierarchy, the maximum and last interpreter of them, vis-à-vis internal law, is the Constitutional Chamber, which determines the content and scope of the constitutional norms and principles (Article 335), among them are the treaties, covenants and conventions on human rights, duly subscribed and ratified by Venezuela"

From this proposition, the Constitutional Chamber concluded that "is the Constitutional Chamber the only one that determines which norms on human rights contained in treaties, covenants and conventions, prevail in the internal legal order; as well as which human rights not incorporated in such international instruments have effects in Venezuela"; concluding that:

> "This power of the Constitutional Chamber on the matter, derived from the Constitution, cannot be diminished by adjective norms contained in the treaties or in other international texts on human rights subscribed by the country, allowing the States parties to ask international institutions for the interpretation of rights referred to in the Convention or covenant, as established in Article

41 See the author's proposal of the draft of this article to the National Constituent Assembly, in Allan R. Brewer-Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*, Fundación de Derecho Público, Caracas, 1999, pp. 88 y ss y 111 y ss.

64 of the Approbatory statute of the American Convention of Human Rights, San José Covenant, because otherwise, the situation would be of a constitutional amendment, without following the constitutional procedures, diminishing the powers of the Constitutional Chamber, transferring it to international or transnational bodies, with the power to dictate obligatory interpretations" [42].

The Constitutional Chamber based its decision on sovereignty principles, arguing that decisions adopted by international courts cannot be enforced in Venezuela, but only when they are in accordance with the Constitution. Thus, the surpa constitutional rank of treaties when establishing more favorable regulations regarding human rights was suddenly eliminated by the Constitutional Chamber, assuming an absolute monopoly of Constitution interpretation, which, according to the constitution, the Chamber does not have.

The main problem regarding this restrictive criterion on the interpretation of international instruments is that unfortunately the ruling was set forth as an obligatory interpretation of the Constitution limiting the general powers of any court to resolve by means of judicial review on the matter, directly applying and giving prevalence to the American Convention regarding constitutional provisions.

This restrictive interpretation was really issued in a ruling devoted to deny any constitutional value and rank to the recommendations of the Inter-American Commission on Human Rights, thus refusing to consider unconstitutional some articles of the Penal Code regarding restrictions to the freedom of expression when referring to public officials that were contrary to the recommendations of the Commission which was argued were obligatory for the country.

The Constitutional Chamber argued that according to the American Convention, the Commission may formulate "recommendations" to the governments in order for them to adopt progressive measures in favor of human rights within their internal laws and constitutional prescriptions, as well as provisions to promote the respect of such rights (Article 41.b), adding:

If what is recommended by the Commission must be adapted to the Constitution and statutes of the States it means they do not have obligatory force, because the internal laws or the Constitution could be contrary to the recommendations. Thus, the articles of the Convention do not refer to the obligatory character of the recommendations, in contrast, they refer to the powers assigned to the other organ: the Court, which according to Article 62 of the Convention, can give obligatory interpretations of the Convention when requested by the States, which means that they accept the opinion,

If the Court has such power, and the Commission does not, it is compulsory to conclude that the recommendations of the latter do not have the character of the opinions of the former, and consequently, the Chamber declares that the recommendations of the Inter American Commission of Human Rights are non obligatory regarding internal law,.

The Chamber considers that the recommendations must be weigh up by the Member States. They must adapt their legislation to the recommendations if they do not collide with the constitutional provisions, but for such adaptation there is no timing set, and until it is done, the statutes in effect which do not collide with the Constitution, or according to the Venezuelan courts with the human rights enshrined in the international conventions, will remain in force until declared unconstitutional of repealed by other states"[43].

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42 See the text in in *Revista de Derecho Público,* nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 136 ff.

43 See the text in in *Revista de Derecho Público,* nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 136 ff.

Eventually, the Chamber concluded stating that the recommendations of the Commission regarding what has been called the "*leyes de desacato*" (statute protecting public officials from public criticism), are only the Commission's point of view without any imperative effect, and an alert directed to the States in order for them, in the future, to repeal or to reform them adapting them to international laws. Unfortunately, the Constitutional Chamber forgot that what the States are obliged to do regarding the recommendations, is to adopt the necessary measures in order to adapt their internal law to the Convention, measures that do not exhaust themselves with only repealing or reforming statutes, being one of such measures, precisely, the judicial interpretation which could be adopted by the constitutional judge in accordance with the Commission's recommendations. Contrary to what was resolved by the Venezuelan Tribunal, in Argentina, once the Inter American Commission determined that the amnesty statutes (*Punto Final* and *Obediencia Debida*) and the pardon measures adopted regarding the crimes committed by the military dictatorship were contrary to the American Convention, some courts began to consider such statutes as unconstitutional because they were in violation of international law[44].

The Venezuelan Constitutional Chamber, in any case, concluded its restrictive interpretation by stating: that: "A different interpretation means giving the Commission a supranational character which weakened the Member State's sovereignty, something that is prohibited by the Constitution"[45]. Anyway, after the Constitutional Chamber's ruling, the Penal Code was reformed but not in the relevant parts regarding the crimes referred to as "*leyes de desacato*". This decision was contrary to what was decided in 1995 by the Argentinean Congress regarding the same matters, by repealing the articles related to the same crimes in compliance with the Inter American Commission recommendation on the matter[46]

The restrictive approach of the Venezuelan Constitutional Chamber regarding the importance on internal law of the Inter American Commission on Human Rights recommendations was previously stated in a decision dated May 5th, 2000. In this decision the Constitutional Chamber objected the quasi-jurisdictional powers of the Inter American Commission on Human Rights. The case was as follows: after a magazine (*Revista Exceso*) filed an "amparo" action before the national jurisdictions seeking constitutional protection of its right to free expression and information, the plaintiff went before the Inter American Commission on Human Rights denouncing the mal functioning of internal jurisdiction regarding the amparo action filed, and seeking international protection against the Venezuelan State for violation of its rights to freedom of expression and due process and against judicial harassment practices against one of its journalist and the director of the magazine. In the case, the Inter American Commission issued provisional protective measures.

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44 Decision de 4-03-2001, Juzgado Federal nº 4, caso: *Pobrete Hlaczik. Cit.*, por Kathryn Sikkink, "The transnacional dimension of judicialization of politics in latin America", in Rachel Sieder et al (ed), *The Judicalization of Politics In Latin America,* Palgrave Macmillan, New York, 2005, pp. 274, 290.

45 Decision nº 1942 of July, 15, 2003, in *Revista de Derecho Público,* nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 136 ff. i.

46 Case: *Verbistky, Report of the Comisión* nº 22/94 of September 20, 1994, case: *11.012* (Argentina). See the comments by Antonio Cançado Trindade, "Libertad de expresión y derecho a la información en los planos internacional y nacional", in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997, pp.194-195. See the "Informe sobre la compatibilidad entre las leyes de desacato y la Convención Americana sobre Derechos Humanos de 17 de febrero de 1995", in *Estudios Básicos de derechos Humanos*, Vol. X, Instituto Interamericano de Derechos Humanos., San José, 2000.

When the time arrived to decide the "amparo" action, the Constitutional Chamber considered that in the case, the plaintiff's due process rights had been effectively violated (independently of its right to freedom of expression), but regarding the provisional measures adopted by the Inter American Commission, qualifying it as "unacceptable", the Chamber stated that:

> [The Constitutional Chamber] also considers unacceptable the instance of the Inter American Commission on Human Rights of the Organization of American States in the sense that asking for the adoption of measures that imply a gross intrusion in the country's judicial organs, like the suspension of the judicial proceeding against the plaintiff, are measures that can only be adopted by the judges exercising their judicial attributions and independence, according to what is stated in the Constitution and the statutes of the Republic. Additionally, article 46,b of the American Convention on Human Rights set forth that the petition on denunciations or complaint for the violations of the Convention by a State, requires the presentation and exhaustion of the internal jurisdiction remedies according to the generally accepted principles of international law, which was allowed in this case, due to the fact that the judicial delay was not attributable to the Chamber" [47].

This unfortunate ruling can also be considered contrary to Article 31 of the Venezuelan Constitution which sets forth the individual rights of anybody to bring before the international organizations on human rights, as it is the Inter American Commission on Human Rights, petitions or complaints to seek protection (amparo) of their violated rights. How can this right be enforced if it is the same Constitutional Chamber the one that refuses to accept the jurisdiction of the Commission?

In contrast to this reaction of the Venezuelan Constitutional Chamber, the situation is different in other countries, as is the case of Costa Rica, in which the Constitutional Chamber of the Supreme Court, in its decision nº 2313-95, based the annulment of Article 22 of the Journalist College Organic Statute (imposing the obligatory membership of the Journalist College in order to exercise the profession), on what the Inter American Court decided in its Advisory Opinion nºOC-5 of 1985[48], stating that "if the Inter American Court on Human Rights is the natural organ for the interpretation of the American Convention on Human Rights, the force of its decision when interpreting the Convention and judging on the national statutes according to the Convention, have the value of an interpreted norm"[49]. Consequently, the Chamber concluded the case by arguing that because Costa Rica was the Member State which requested from the Inter American Court its Advisory Opinion:

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47 Case: *Faitha M.Nahmens L. y Ben Ami Fihman Z.* (*Revista Exceso*), Exp. nº 00-0216, decisión nº 386 de 17-5-2000. See in *cit.*, en Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" en *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 y ss.

48 Opinión Consultiva OC-5/85 de 13 de noviembre de 1985. *La colegiación obligatoria de periodistas (arts. 13 y 29 Convención Americana sobre Derechos Humanos). In such Opinion the Inter American Court considered that "the compulsory affiliation of journalists is incompatible with article 13 of the American Convention, because it impedes any other person to the full use of the Medias as a mean to express or transmit his information*"; and also "that the Costa Rican Organic Statute on Journalists (Ley n° 4420 of September 22, 1969), which is the subject of this Opinion, because it impedes certain persons to be affiliated to the Journalists Collage, and consequently, it is incompatible because it impedes the full use of the Media as a vehicle to express and transmit information".

49 Decision nº 2312-05 of May, 9, 1995, in Rodolfo Piza Escalante, *La justicia constitucional en Costa Rica,* San José, 1995; and en Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" en *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 y ss.

When the Inter American Court on Human Rights, in its OC-O5-85 unanimously decided that the obligatory affiliation of journalists set forth in Statute nº 4420 is incompatible with article 13 of the American Convention on Human Rights because it impedes persons the access to the Media, [such Opinion] cannot but oblige the country that started the complex and costly procedure of the Inter American system of protection of human rights"

On the other hand, and according to the case law decisions of the Constitutional Chamber of Costa Rica, the constitutional system of this country can also be classified within the category of those that give supra constitutional rank to the international treaties on human rights when they contain more favorable provisions on the matter. Accordingly, in the abovementioned decision 2313-95, the Constitutional Chamber considered that:

Being international instruments in force in the country, Article 7 of the Constitution does not apply, due to the fact that Article 48 of the same Constitution contains a special provision regarding treaties on human rights, giving them a normative force of constitutional level. To the point, as has been recognized by this Chamber's jurisprudence, the international instruments on human rights in force in Costa Rica, have not only a similar value to the Political Constitution, but they prevail over the Constitution when giving to persons more rights or guaranties (vid. decisions N° 3435-92 and N° 5759-93)[50].

Consequently, in the same 2313-95 decision, the Constitutional Chamber when considering its own powers of judicial review of constitutionality stated that:

The Constitutional Chamber not only declares violations of constitutional rights, but of all the universe of fundamental rights set forth in the international instruments on human rights in force in the country. From this point of view, the Constitutional Chamber's recognition of the normative contents of the American Convention on Human Rights, as was interpreted by the Inter American Court on Human Rights in its Consultative Opinion OC-05-85, is natural and absolutely according with its wide powers. So, without needing to duplicate rulings, based on the same arguments of that Opinion, the Chamber considers that it is clear for Costa Rica that the norms of Statute nº40… are illegitimate and contrary to the right to information in the wide sense which is developed in Article 13 of the San José of Costa Rica Covenant, as well in Articles 28 and 29 of the Political Constitution.

Now, back to the Venezuelan situation, mention must be made to the fact that before the abovementioned restrictive interpretation was issued, many Venezuelan courts, when dealing with other matters, did apply the American Convention on Human Rights, thus declaring its prevalence vis-à-vis the Constitution and statutory provisions.

This is the case of the constitutional right to appeal judicial decisions before a superior court. According to the 1976 general statute regulating the special jurisdiction for judicial review of administrative acts (*jurisdicción contencioso-administrativa*)[51], some administrative acts, such as those of independent Administrations, were to be challenged before the First Court on judicial review of administrative

50 See also the text of the decisión in Alfonso Gairaud Brenes, "Los Mecanismos de interpretación de los derechos humanos: especial referencia a la jurisprudencia peruana" en José F. Palomino Manchego, *El derecho procesal constitucional peruano. Estudios en Homenaje a Domingo García Belaunde*, Editorial Jurídica Grijley, Lima, 2005, Tomo I, p. 133, note 21.

51 See the comments in Allan R. Brewer-Carías y Josefina Calcaño de Temeltas, *Ley Orgánica de la Corte Suprema de Justicia,* Editorial Jurídica Venezolana, Caracas, 1978.

action, in a proceeding that had to be decided in a sole instance, without any appeal before the corresponding Chamber of the Supreme Court of Justice. The 1999 Constitution only set forth the right to appeal regarding criminal cases in which a person would be declared guilty (Article 49,1); thus, in other cases, like judicial review of administrative acts, no constitutional norm guarantees the right to appeal. In particular cases, the appeal was brought before the Administrative Review Chamber of the Supreme Court alleging the unconstitutionality of the statutorily limits to appeal, and a few judicial decisions were taken by means of judicial review (diffuse method), admitting the appeal, based on "the right to appeal the judgment to a higher court", that is set forth in Article 8,2,h of the American Convention on Human Rights, which was considered as forming part of internal constitutional law of the country.

The matter eventually also reached the Constitutional Chamber of the Supreme Tribunal of Justice, which in a decision nº87 of March 13, 2000 stated:

> If this provision (Article 8,2,h of the American Convention) is compared to Article 49,1 of the Constitution in which the right to appeal only corresponds to those who have been declared guilty in criminal cases, including an authorization to set forth statutory exceptions, it must be interpreted that the norm of the Convention is more favorable to the exercise of such right, due to the fact that it guarantees the right of everybody to be heard not only regarding to criminal procedures, but also regarding rights and obligations in civil, labor, taxation or any other procedure, in which the right to appeal without any exception is established; assigning such right to the category of minimal guarantee of anybody, independently of its condition in the proceeding, and governed by the principle of equality".
>
> If this international provision of the American Convention is compared with the first paragraph of Article 185 of the Organic statute on the Supreme Court of Justice, it must be interpreted that the latter is incompatible with the former, because it denies in absolute terms, the right that the Convention guarantees" [52].

Based on the aforementioned, the Constitutional Chamber concluded its ruling by stating that it:

> "recognized and declared, based on what is set forth in Article 23 of the Constitution, that Article 8,1 and 2,h of the American Convention on Human Rights, is part of the Venezuelan constitutional order; that its dispositions regarding the right to appeal are more favorable regarding the exercise of such right in relation to what is set forth in Article 49,1 of the Constitution; and that such provisions are of direct and immediate application by courts and authorities"[53].

The Constitutional Chamber even resolved in its obligatory interpretation, to re-write the statute, stating:

> Consequently, and taking into account that last first paragraph of Article 185 of the Organic Statute of the Supreme Court of Justice sets forth that: "Against the First Court decisions in the matter listed in numbers 1 to 4 of such provision, no recourse or appeal will be heard"; that such provision is incompatible with the one set forth in Article 8,1 and 2,h of the American Convention of Human Rights which have constitutional hierarchy and are of prevalent application; that Article

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52 Case: *C.A. Electricidad del Centro (Elecentro) y otra vs. Superintendencia para la Promoción y Protección de la Libre Competencia. (Procompetencia)* en *Revista de Derecho Público*, nº 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 157 y ss

53 *Idem*.

334 of the Constitution sets forth that "In case of incompatibility between this Constitution and a statute or other legal norm, the constitutional provisions will apply, being attributed such power to decide to all courts in any case, even in an ex officio manner"; this (Constitutional) Chamber leaves without application the aforementioned disposition contained in the first paragraph of Article 185 of the Organic Statute, applying instead, in the case (File 99-22167), the provision of second paragraph of the same Article 185 of the Statute, which states: "Against definitive decisions of the same (First) Court…an appeal can be brought before the Supreme Court of Justice (rectius: Supreme Tribunal of Justcie)". So is decided"[54].

2. The constitutional rank of international instruments of human rights

Secondly, other Constitutions also attributed in an express way the constitutional rank to international treaties on human rights, thus acquiring the same normative hierarchy as those set forth in the Constitution.

Two types of constitutional regimes can be distinguished in this group: Constitutions that confer constitutional rank on all international instruments of human rights, and Constitutions that only grant such rank to a group of instruments that are expressly listed in the Constitution.

In the *first group*, for example, is to be found Peru's 1979 Constitution, repealed in 1994, which in its Article 105 established that "the precepts contained in treaties on human rights, shall have constitutional hierarchy..." and therefore "...cannot be modified except by the procedure in force for reforming the Constitution."

Among the *second type* is to be found the 1994 Constitution of Argentina which grants to a group of treaties and declarations in force at the time, specifically listed in Article 75.22 of the Constitution, a hierarchy superior to the laws, that is, constitutional rank, listing only the following: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights and its Facultative Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child .

These instruments as set forth in the Constitution, "pursuant to the conditions determining their validity, shall have constitutional hierarchy, shall not abrogate any article of the first part of this Constitution, and shall be understood to be complementary to the rights and guarantees recognized by such Constitution." Apart from this, "they may only be denounced, if such were the case, by the Executive, with prior approval of two thirds of the total members of each Chamber."

In regard to other human rights treaties different to those listed in Article 75,22, the Constitution established that they could enjoy such constitutional hierarchy, provided that they were approved by a qualified majority of 2/3 of the total members of the Senate and the Chamber of Deputies.

According with these constitutional provisions, the Supreme Court of the Nation of Argentina, has applied the American Convention on Human Rights, giving prevalence to its provisions regarding internal statutes, as has happened regarding the Criminal Procedural Code. In contrast to what is set forth in the American Convention, the Criminal Procedural Code excluded from the right to appeal, some judicial decisions according to the amount of the punishment. The Supreme Court of the Nation

54 *Idem*.

declared the invalidity on the grounds of its unconstitutionality of such limits, applying the American Convention which in Article 8, 1,h guarantees "the right to appeal the judgment to a higher court"[55].

Additionally, in Argentina, the courts have also considered the decisions of the Inter American Commission and of the Inter American Court as obligatory, even before the international treaties on human rights were constitutionalized. In a decision dated July 7, 1992 the Supreme Court applied the Inter American Court Advisory Opinion OC-7/86[56], stating that "the interpretation of the Covenant, additionally, must be oriented by the decisions of the Inter American Court on Human Rights, one of its purposes being the interpretation of the San José Covenant"[57].

In 1995, the same Supreme Court considered that due to the recognition by the Argentinean State of the Inter American Court jurisdiction to resolve on cases referred to the interpretation and application of the American Convention, its decisions "must serve as a guide for the interpretation of constitutional provisions"[58]. In other decisions the Supreme Court has repealed lower court decisions when considering that their interpretation was made in an incompatible way regarding the decision's doctrine of the Inter American Commission on Human Rights[59]

Reference should also be made to the case of Panama, where even though the Constitution has no express provision regarding the normative rank of treaties, from the jurisprudence of the Supreme Court such rank can be deducted, when considering that any violation of an international treaty is considered as a violation of Article 4 of the Constitution.

In effect, Article 4 of the Panamanian Constitution only sets forth that "The Republic of Panama respects the norms of international law". Thus, such norm has allowed the Supreme Court of Justice to consider as a constitutional violation any violation to norms of international treaties. In a decision of March 12, 1990, the Supreme Court declared the unconstitutionality of an Executive Decree which established general arbitrary conditions for the exercise of the rights to free expression and press, and stated that:

> Such act violates article 4 of the Constitution that oblige the national authorities to respect the international law norms. In the case under examination, as stated by the plaintiff, it is a matter of

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55 Decision of April, 4, 1995, Giroldi, H.D. an others. See the references in Aida Kemelmajer de Carlucci and María Gabriela Abalos de Mosso, "Grandes líneas directrices de la jurisprudencia argentina sobre material constitucional durante el año 1995", in *Anuario de Derecho Constitucional latinoamericano 1996*, Fundación Konrad Adenauer, Bogotá, 1996, pp. 517 ff.; and in Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" in *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 ff.

56 Advisory Opinion OC-7/86 August 29, 1986. *Exigibilidad del derecho de rectificación o respuesta (arts. 14.1, 1.1 y 2 de la Convención Americana sobre Derechos Humanos).*

57 Case Miguel A. Ekmkdjiam, Gerardo Sofivic and others, in Ariel E. Dulitzky, "La aplicación de los Tratados sobre Derechos Humanos por los tribunales locales: un estudio comparado" in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales*, Centro de Estudios Legales y Sociales, Buenos Aires, 1997. See Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" en *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 ff.

58 Case H Giroldi/Cassation Recourse, April 7, 1995 in *Jurisprudencia Argentina*, Vol. 1995-III, p. 571. See Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" in *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 ff.

59 Case: *Bramajo,* September 12, 1996, in *Jurisprudencia Argentina*, Nov. 20, 1996. See Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" en *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 y ss.

violation of the International Covenant on Human Rights and of the American Convention on Human Rights approved through statutes 14-1976 and 15-1977, which rejects any prior censorship regarding the exercise of the freedoms of expression and press, as fundamental human rights"60.

3. The supra statutory rank of international treaties on human rights

Thirdly, other Latin American Constitutions have expressly established the supra-legal rank of international treaties and conventions in general, including those relative to human rights. In these systems, the treaties are subject to the Constitution, but prevail over the statutes.

This was the solution followed in the Constitutions of Germany (Article 25), Italy (Article 10) and France (Article 55), and in Latin America is the solution followed in the Constitution of Costa Rica, which provides that: "Public treaties, international agreements and covenants duly approved by the Legislative Assembly shall, as of their enactment or the day they themselves set forth, have superior authority to that of the laws" (Article 7). Nevertheless, as mentioned above, the jurisprudence of the Constitutional Chamber has given constitutional rank to international treaties on human rights, and even supra constitutional rank in cases in which they contain more favorable provisions regarding the exercise of such rights.

In this respect, the Constitutional Chamber has for instance, directly applied the American Convention on Human Rights, as prevailing regarding statutes, arguing that the legal "norms which contradict [a treaty] must be considered simply as repealed, by virtue precisely of the superior rank of the treaty (decision 282-90, case of violation of Article 8.2 of the American Convention on Human Rights by the repealed Article 472 of the Criminal Procedures Code). Thus, when considering that Article 8.2 of the American Convention "recognizes as a fundamental right of everybody who has been criminally indicted, to appeal the judicial decision"; the Chamber considered that Article 472 of the Criminal Procedure Code which limits the exercise of the cassation recourse, had to be considered as "not set forth" and understand "that the cassation recourse is a mean legally given to any condemned person regarding whatever sanction imposed in a criminal procedure". The Constitutional Chamber in a subsequent decision nº 719-90 accepted a judicial review action declaring the unconstitutionality of said Article 474 of the Criminal procedure Code, deciding its annulment and considering that the limits set forth in such article to the right to appeal in cassation in favor of any criminally condemned person, as "not being set forth".

It must be noted, that in another Constitutional Chamber decision (nº 1054-94), the challenging of Article 426 of the Criminal Procedures Code which denies appeal regarding decisions on other non criminal contraventions, was rejected according to the jurisprudence set by the Chamber, based on the fact that what the Chamber has clearly decided is that "what is established in the said American Convention is the fundamental right to appeal given to anybody condemned in a criminal procedures, and not indistinctively in other matters".

Now, regarding the supra legal rank of treaties and their prevalence over internal statutes in case of conflict, in a similar sense, Article 144 of the Constitution of El Salvador provides the legal status of treaties and their prevalence with respect to the statutes in the event of conflict, when stating that: "International treaties executed by El Salvador with other States or with international organisms, shall constitute laws of the Republic upon entering into force, pursuant to the provisions of the treaty itself and of this Constitution," adding the regulation that: "The statute shall not modify or abrogate that

60 *Véase* en *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997 pp. 80-82

which is agreed upon in the treaty for El Salvador" and that: "In the event of conflicts between the treaty and the statute, the treaty shall prevail".

In accordance with these provisions, the Constitutional Chamber of the Supreme Court of Justice of El Salvador has also applied International treaties on human rights, on deciding cases on which the international regulations are considered to prevail. It was the case of a November 17, 1994 decision issued regarding a provisional detention of a former commander of the irregular armed forces, ordered in a defamatory criminal trial brought against him. The Chamber stated that "For the adequate comprehension of the provisional detention institution in our system, we must additionally bear in mind -according to Article 144 of the Constitution, what is set forth in the international treaties ratified by El Salvador"[61]. So the Court analyzed Articles 11,1 of the Universal Declaration on Human Rights, and Article 9,3 of the International Covenant on Civil and Political Rights, which refers to the presumption of innocence and to the exceptional character of the preventive detention, which must not be considered as a general rule. The Court also analyzed Article XXVI of the American Declarations of Human Rights, referred as well to the presumption of innocence; and Articles 7,2 and 8,2 of the American Convention on Human Rights, which refer to the rights of persons regarding detentions, particularly the principle *nulla pena sine lege*. From the aforementioned the Court concluded by stating that "It is within this –constitutional and international- context where the analysis of the provisional detention must be framed, because such provisions, due to their superior place in the normative hierarchy, are obligatory"[62].

Consequently and based on the international regulations, regarding the preventive detention the Chamber concluded that "It must never be considered as a general rule in criminal proceedings –as expressly forbidden in Article 9,3 of the International Covenant on Civil and Political Rights-, so that it cannot be automatically decided", because it cannot be understood as an anticipated sanction. On the contrary, in order to be decided, it needs in each case the judge's evaluation of the circumstances regarding its need and convenience for the protection of fundamental public interest.

Based in the aforementioned, the Chamber concluded regarding the case, that "when the provisional detention was decided, the judge did not base its decision in any justification at all, thus being unconstitutional"[63].

In another decision of the Constitutional Chamber of the Supreme Court of El Salvador issued on June 13, 1995, the Chamber declared the unconstitutionality of a local government regulation (*Ordenanza municipal*) setting forth restrictions to the exercise of the political rights to meeting and demonstration, basing its decision in Article 15 of the American Convention on Human Rights and in Article 21 of the International Covenant on Civil and Political Rights, according to which limitations to such rights can only be regulated by means of statutes. The Chamber argued as follows: "The international treaties in force in our country, having supremacy regarding secondary regulations, and among them, the Municipal Code, recognized the freedom of meeting and public demonstration and established that such rights can only be subjected to limitations or restrictions as are necessary in a democratic society and are provided in statutes", which "must be sanctions by the Legislative Assembly following the formalities set forth in the Constitution". The Chamber also ruled that such statute, according to Article XXVIII of the American Declaration on Human Rights, can only set forth limitations subjected to the "principle of reasonability", which means that they must be "intrinsically just, that is to say, that they must be in accordance to certain rules of enough value in order to give the sense to the

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61 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997, p. 157

62 *Idem*, p. 157.

63 *Idem*, p. 158.

substantive notion of justice enshrined in the Constitution". In this regard, the Chamber concluded its decision regarding the case, declaring the unconstitutionality of the challenged municipal regulation, stating:

> Non of these elements are found in the challenged instrument on grounds of unconstitutionality, that is to say, it is a typical case of authority abuse, not only because without any authorization it regulated a constitutional right, but because it usurped a function reserved to the Legislative body

The Constitution of Mexico, when referring to international treaties is the one among the Latin American countries which more closely resembles the North American constitutional provision, stating:

> **Article 133.** This Constitution, the laws (statutes) of Congress of the Union and all the treaties that have been made and shall be made in accordance therewith by the President with the approval of the Senate according to the Constitution, shall be the supreme law of the Union. The judges of each state shall conform to the Constitution, laws and treaties, in spite of any disposition in contrary to them that could be contained in the Constitutions and statutes of the States.

According to this traditional supremacy clause, treaties were also traditionally considered as having the same rank as statutes. This was decided by the Supreme Court of the Nation by the ruling C/92, June 30, 1992, in which it stated that because the statutes have the same rank that treaties have, "immediately below the Constitution in the hierarchy of norms of the Mexican legal order", and:

> "international treaties cannot be the criteria in order to determine the unconstitutionality of a statute, nor vice versa. Thus, the Commerce and Industrial Associations Statute cannot be considered unconstitutional because it is contrary to what is regulated in an international treaty"[64]

But this criteria has been abandoned by the same Supreme Court in a ruling of revision of an amparo decision nº 1475/98, in which the Court, interpreting Article 133 of the Constitution according to the 1969 Vienna Convention on Treaties determined that because "the international compromises are assumed by the Mexican State as a whole and obliged all its authorities regarding international community", the international treaties are located in a second level immediately under the Constitution and above the federal and local statutes[65].

Among this group of countries that gives international treaties on human rights a superior rank regarding statutes, it can also be mentioned the case of Paraguay. The Constitution has a supremacy clause similar to the North American and Mexican one, with the following text:

> **Article 137.** On the supremacy of the Constitution. The supreme law of the Republic is the Constitution. The latter, the international treaties, covenants and agreements approved and ratified, the statutes sanctioned by Congress and the other legal hierarchical inferior regulations accordingly issued, integrate the positive national law in the enunciated preference order.

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64 Tesis P. C/92, in *Gaceta del Semanario Judicial de la Federación*, nº 60, diciembre de 1992, p. 27.

65 *Véase* Guadalupe Barrena y Carlos Montemayor "Incorporación del derecho internacional en la Constitución mexicana", *Derechos Humanos. Memoria del IV Congreso Nacional de Derecho Constitucional*, Vol. III, Instituto de Investigaciones Jurídicas, UNAM, México, 2001, *cit*., por Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", en *Revista IIDH*, Instituto Interamericano de Derechos Humanos, nº 39, San José, 2004, p. 82, nota 15.

Nonetheless, this constitutional clause has a peculiarity regarding other similar clause, since it enunciates the order of preference given to the legal regulations; thus, the treaties being located under the Constitution but above the statutes. Additionally, the Article is complemented by Article 141 of the same Constitution which provides that "international treatises approved by the National Congress and which are duly ratified, are part of the internal legal order with the hierarchy established in Article 137"

According to these provisions, the Court of Appeal in criminal cases, First Chamber, in a decision dated June 10, 1996, revoked a judicial decision of an inferior court which had sentenced a person for a defamation offence regarding a public politician person. The argument of the Court was that in a "democratic society, the politicians are exposed to citizens criticism" and that in "no way individual interest can prevail over public interest", invoking for the revocation not only constitutional articles, but also Article 13 of the American Convention on Human Rights[66]

4. The statutory rank of international treaties on human rights

In *fourth* place, regarding the legal hierarchy of international instruments of human rights, it can be said that in general, constitutional systems have attributes to international treaties the same hierarchy as of statutes. It can be considered as the most widespread system in contemporary constitutional law, following the orientation begun by the Constitution of the United States of America, in which Article VI. 2, states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In such systems, therefore, "international law is part of the law of the land", the treaties having the same legal rank as the statutes. They are subject to the Constitution, and in their application regarding statutes, they are governed by the principles of subsequent law and special law in regard to the derogatory effects they may have.

Is the case of Uruguay, Article 6 of the Constitution only provides that in all treaties a clause must be incorporated regulating that "the differences between the parties must be decided by mean of arbitration or other peaceful means". In the article, no reference is made regarding the hierarchy of treaties in the legal order or human rights.

Nonetheless, for instance, the Supreme Court of Justice on a decision of October 23, 1996, directly applied international treaties in order to reject the question of unconstitutionality raised in the case by the Public Prosecutor regarding the Press Statute, whose regulations guarantied the right of the plaintiff to the be prosecuted while in freedom. The case referred to a press offence trial for critics to the President of Paraguay, in which the plaintiff was the Paraguayan Ambassador to Uruguay. In the case, the Public Prosecutor raised the question of unconstitutionality arguing that the Press Statute, when allowing only to certain persons to be tried while in freedom, violates the equality principle set forth in Article 7 of the American Declaration of Human Rights, and Article 24 of the American Convention on Human Rights. In order to decide the question, rejecting the Public prosecutor's argument, the Supreme Court carefully analyzed the human right of free expression, making reference to Article 19 of the International Covenant of Civil and Political Rights; to Article 13.1 of the American Conven-

66 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997 pp. 82-86.

tion on Human Rights; to the Consultative Opinion OC-O5 of the Inter American Court on Human Rights referred to the incompatibility of the freedom of expression with the obligatory affiliation of journalists to the Journalist's College in Costa Rica; and to the presumption of innocence right "expressly set forth in the international Declarations and Conventions to which the country has adhered or that in one way or another oblige it (Universal Declaration on Man's Rights, art. 11; International Covenant on Human Rights, art 14.4; and Inter American Convention on Human Rights, art. 8.2)", all allowing the defendant to be trial in freedom[67].

The Dominican Republic constitutional system can also be classified in this group of countries in which their Constitutions give treaties the same legal rank as statutes. Precisely due to that fact, being the Dominican Republic one of the very few Latin American Countries that do not have in its Constitution expressly regulated the "amparo" action or recourse as a special judicial mean for the protection of human rights; the Supreme Court did apply the American Convention of Human Rights in order to admit the "amparo" recourse.

In effect, Article 3 of the Dominican Republic Constitutions states that "The Dominican Republic recognizes and applies international law regulations, general and American ones, when they have been approved by the State organs", and accordingly, in 1977 the Congress approved the American Convention on Human Rights, whose Article 8 and 25,1 as abovementioned, regulate the general due process of law rules and the "amparo" action or recourse for the judicial protections of human rights. Thus, according to these regulations, if it is true that the Constitution does not set forth the "amparo" action, it is regulated in the American Convention and then it can be exercised by anybody seeking protection of his human rights. But the problem was the absence of procedure rules, comprising the absence of formal attribution to specific courts of the power to decide upon "amparo" suits. That explains why actions or recourses of "amparo" were never brought before courts, until 1999, when a private company, the Avon enterprise, did so before the Supreme Court of Justice, against a judicial decision on labour matters, alleging violations of constitutional rights.

The Supreme Court, in a decision of February 24, 1999 admitted the "amparo" suit brought before the Court by *Productos Avon S.A.*, an enterprise, declared the "amparo" as a "public law institution" and prescribed in the decision the basic rules of procedure for such actions[68]. The case developed as follows:

1. The plaintiff company claimed that a judicial decision on labor matters, issued by a lower court, violated its rights to be judged by the competent court of justice, asking the Supreme Court: First: To declare in its ruling that the "amparo" recourse be considered as a Dominican is a public law institution; and second, that the Supreme Court, according to the provisions of the Organic Judicial statute which attributed to the Supreme Court the power to resolve on adjective matters when a specific procedure does not have a statutory regulation, to set forth the procedure to be followed regarding the "amparo" recourses. Additionally, the plaintiff asked the Court to issue a preliminary order suspending the effects of the challenged judicial labor decisions, pending the course of the trial.

2. The Supreme Court, in order to decide, fixed the criteria that the international treaties invoked by the plaintiff, particularly Articles 8 and 25,1 of the American Convention on Human Rights, as internal Dominican law, have the purpose to guarantee the judicial protection of fundamental rights

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67 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997 pp. 72-79.

68 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 7, Tomo I, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre, 2000 p. 329 ff.. See the comments regarding the decisión in Allan R. Brewer-Carías, "La admisión jurisprudencial de la acción de amparo en ausencia de regulación constitucional o legal en la República Dominicana", *Idem*, pp. 334 ff.

recognized in the Constitution, the law and the said Convention, against acts which violate such rights, committed by any person acting or not in their public functions thus also against individuals actions. In this regard, the Supreme Court decided that:

> "Contrary to what has been decided in the sense that the offending acts must be issued by judicial officials or persons acting in such functions, the "amparo" recourse, it is considered that as a protection mechanism of individual freedom in its various aspects, the "amparo" must not be excluded as a judicial remedy in order to resolve situations originated by persons accomplishing judicial functions. Article 25,1 of the Convention, provide that the "amparo" recourse is open in favour of anybody against acts which violate his fundamental rights "even when the violation is committed by individuals not acting exercise of public functions"; evidently including the judicial functions; … as well as against any action or omission from individuals or public administration officials, including omissions or non jurisdictional administrative acts from the courts, if they affect a constitutional protected right"[69].

In this regard, the Dominican Republic Supreme Court decision is considered a very important ruling, clearly stating that the "amparo" recourse can be filed against individuals, following the broad conception of the "amparo" action initiated in Argentina, and followed in Uruguay, Chile, Perú, Bolivia and Venezuela. The narrow conception excluding the "amparo" recourse against individuals is followed in Mexico, Brazil, Panama, El Salvador and Nicaragua. The Dominican Supreme Court also followed the broad conception of "amparo" admitting the action against judicial decisions, as it is accepted in the American Convention, contrary to the tendency observed in other Latin American countries that excluded judicial decisions from the "amparo" recourse, as is the case of Argentina, Uruguay, Costa Rica, Panama, El Salvador, Honduras and Nicaragua.

In Colombia, the 1991 statute regulating the action of "tutela" also admitted the amparo against judicial rulings, but the Constitutional Court annulled the corresponding article, considering that it violated the right to *res judicata* effects of definitive judicial decisions[70]. Nonetheless, the "tutela" against judicial decisions has indirectly been admitted when arbitrariness is alleged against judicial decisions[71]

3. Regarding the Dominican Republic Supreme Court decision, it additionally decided that even in the absence of procedural rules for the "amparo" recourse, contrary to what happens regarding habeas corpus recourses (where there is a statute establishing the competent court and the procedure); and because the amparo recourse is a simple, speedy and effective judicial mean for the protection of all constitutional rights other than those protected by means of habeas corpus, no judge can refuse to admit it adducing the absence of statutory regulation. For that purpose, the Supreme Court invoked its power according to Article 29,2 of the Judicial organization Statute, to establish the procedural rules in order to avoid the confusion that can cause the absence of such rules. Consequently, the Supreme Court decided "to declare that the recourse set forth in Article 25,1 of the November 22, 1969 San José, Costa Rica American Convention on Human Rights, is an institution of Dominican positive law, due to its approval by the National Congress through resolution n°739 of December 1977, according to Article 3 of the Constitution".

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69 *Idem*. p. 332.

70 Decision C.543 of September 24, 1992. See in Manuel José Cepeda Espinosa, *Derecho Constitucional Jurisprudencia*, Legis, Bogotá, 2001, p. 1009 ff.

71 Decision T-213 of May 13, 1994. See inManuel José Cepeda Espinosa, *Derecho Constitucional Jurisprudencia, Legis*, Bogotá, 2001, p. 1022 ff..

On the other hand, the Supreme Court resolved the practical problems derived from the acceptance of the "amparo" suit, by setting forth the procedural rules, as follows: First, by determining that the competent courts to decide on the matter are the courts of first instance in the place in which the challenged act or omission has been produced; and second, by stating adjective rules of procedure, similar to those established in Articles 101 and following of the Statute nº 834 of 1978, adding references to the delay to bring the action before the court, to the hearing that has to take place, the delay for the decision and the delay for the appeal. The Supreme Court finally remembered, in order to avoid abuses in the use of the action, that the "amparo" recourse must not be understood as the introduction of a third instance in the judicial process[72].

This Dominican Republic Supreme Court 1999 decision, taken in absence of constitutional and statutory regulations regarding the "amparo" action, admitting this judicial means for protection of all human rights according to what is set forth in the American Convention on Human Rights, is without doubt a very important one, not only regarding the "amparo" recourse or action as a specific judicial means for human rights protection, but also regarding the enforcement within internal law of the American Convention on Human Rights.

IV. THE INTERPRETATIVE CONSTITUTIONAL RULES REGARDING THE INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS

Now, in absence of express constitutional regulations regarding the hierarchy of international treaties on human rights in the internal legal system, -whether constitutional, supra statutory or statutory rank-, such instruments can also acquire constitutional value and rank by means of different constitutional interpretation rules. In other words, the rights declared in international treaties can also be considered as constitutional rights, by means of other constitutional regulations or techniques: first, by referring the interpretation of constitutional rights to what is set forth in the international treaties; second, by enshrining in the Preambles or general declarations of the Constitutions references to the universal declarations on human rights.

In the first place, some Constitutions expressly set forth a guiding rule for interpreting human rights declared in their text, requiring that such interpretation must be made in accordance to what is set forth in the international treaties on human rights. This is the technique found in the Spanish Constitution, where article 10,2, states:

> The norms concerning fundamental rights or freedom recognized in the Constitution, must be interpreted in accordance to the Universal Declaration of Human Rights and the international treaties and conventions referred to the same matter ratified by Spain.

In similar way, the Portuguese Constitution also sets forth, that:

> **Article 16,2.** The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights.

These two constitutional provisions, without doubt, influenced the drafting of the 1991 Colombian Constitution, where Article 93 establishes:

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72 See the text *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 7, Tomo I, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 2000 p. 329 y ss. See the comments in Allan R. Brewer-Carías, "La admisión jurisprudencial de la acción de amparo en ausencia de regulación constitucional o legal en la República Dominicana", *Idem*, pp. 334 ff.

Article 93. The rights and duties enshrined in this Charter shall be interpreted pursuant to the international treaties on human rights ratified by Colombia.

Following this constitutional provision, all State bodies, not just the courts, have to interpret the constitutional regulations regarding human rights pursuant to the provisions of the international treaties on the matter. The result of this constitutional principle of interpretation is the recognition of an equal rank and constitutional value for those constitutional rights declared in international treaties, which are the ones that will guide the interpretation of the rights enshrined in the Constitution.

This interpretative technique has been frequently used by the Constitutional Court in Colombia when interpreting the extent of constitutional rights, as was the case in a decision of February 22, 1996 issued when deciding a judicial review action filed on the grounds of unconstitutionality against the statute which regulates Television networks, considered by the plaintiff as being contrary to the constitutional right to inform.

The Constitutional Court began its decision by arguing that:

> "the internal validity of a statute is not only subjected to the conformity of its regulations to what is set forth in the Constitution, but also to what is prescribed in the international treaties approved by Congress and ratified by the President of the Republic".
>
> As clearly set forth in Article 93 of the Constitution, the conformity of the internal legislation to international treaties and obligations of the Colombian State regarding other States and supranational entities, is imposed more severely by the Constitution when the matter relates to the application and exercise of fundamental rights. According to such article of the Constitution, the international treaties and covenants approved by Congress and ratified by the Executive in which human rights are recognized and its limitations are prohibited in states of exception, prevail regarding the internal legal order.
>
> The constitutional article declares in a straightforward manner that the rights and duties enshrined in the Constitution must be interpreted in accordance to the international treaties on human rights ratified by Colombia"[73].

Based on the abovementioned, the Constitutional Chamber then referred in its decision to the constitutional right to freedom of expression of thoughts and of information, following what is set forth in Article 19,3 of the International Covenant on Human Rights and in Article 13,2 of the American Convention on Human Rights, particularly regarding the universality of the exercise of such rights "without any considerations of frontiers"; concluding by ruling that:

> To forbid in the national territory the installation or functioning of land stations devoted to receive and later to diffuse, transmit or distribute television signals coming from satellites, whether national or international, is a flagrant violation of the right to be informed which everybody has pursuant to Article 20 of the Constitution[74].

The interpretative technique of human rights according to what is established in international instruments on the matter has also been established, for instance, in the Peruvian Constitutional Procedure Code, by article V that sets forth:

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73 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997 pp. 34-35.

74 *Idem*, p. 37.

Article V. *Interpretation of constitutional rights*. The content and the scope of constitutional rights protected by means of the constitutional process established in this Code (including habeas corpus and amparo) must be interpreted according to the Universal Declaration on Human Rights, the treaties on human rights, as well as to the decisions issued by the international courts on human rights established according to treaties in which Peru is a Party".

1. The constitutional general references to the universal declarations on human rights

The second interpretative technique through which international declarations on human rights acquired constitutional rank and value, results from the general declarations enshrined in the Preambles or the constitutional text precisely referring to those international declarations on human rights.

Regarding the Preambles of the Constitution, many of the Post War Constitutions contain general declarations regarding human rights, with particular reference to universal declarations. The classic example is the 1958 French Constitution in which, without containing in its text a Bill of Rights, the following general declaration is contained in its Preamble:

> The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution.

By means of this general declaration the Constitutional Council has enlarged the constitutionality block, attributing constitutional value and rank to all the fundamental rights contained in the 1789 Declaration of Rights of Citizens and Man[75].

In other Constitutions, the Preambles contain general declarations in order to define a general purpose of the Constitution and to give a general orientation to State and society actions seeking the respect and full enforcement of human rights. For instance, the Preamble of the 1999 Venezuelan Constitution declares that the Constitution itself was sanctioned in order to "assure the rights to life, to work, to cultural heritage, to education, to social justice and to equality without any kind of discrimination", promoting "the universal and indivisible guarantee of human rights".

The Constitution of Guatemala also expressly declares in its Preamble that its text shall "encourage full enforcement of human rights within a stable, permanent and popular institutional order, where governed and governors shall proceed in strict observance of the law".

Being in those cases the general purpose of the countries' Constitution to guarantee, promote and encourage the full enjoyment and enforcement of human rights referred to their universal context, the rights enshrined in the international declarations and treaties can be considered or interpreted as having the same value and rank to those expressly declared in the Constitution's texts themselves.

Other Constitutions contain similar general declarations, not in their Preambles, but within their texts, when regulating specific aspects of the State bodies functioning and setting forth, for instance, the need for the effective guaranty that must be given to anybody to enjoy and exercise constitutional rights. In these cases, upon constituting as a State obligation the respect of human rights or to assure that they are properly enforced, it has been interpreted that such rights generally acquire constitutional rank and value even if not expressly listed in the constitutional declarations.

Such is the case of the Constitution of Chile, whose 1989 reform included a declaration pursuant to which it was expressly recognized that the exercise of sovereignty is limited by "respect for the es-

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75 See the references in Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge, 1989.

sential rights to be found in human nature", also prescribing as a "duty of State bodies to respect and promote such rights guaranteed by this Constitution, as well as by international treaties ratified by Chile and currently in force" (Art. 5,II). Hence, if it is the State's duty to respect and promote human rights that are guaranteed by international treaties, such rights acquire the same rank and value as the constitutional rights expressly listed in the constitutional text itself. Moreover, the reference to "essential rights to be found in human nature" permits and requires that not only those expressly listed in the Constitution be identified as such, but also those established in international treaties and, what is more, those not expressly declared but that are part of human nature itself.

The Constitution of Ecuador also prescribes the State's obligation "... to respect and have respected the human rights guaranteed by this Constitution" (Article 16); assuring to "all its citizens, with no discrimination whatsoever, the free and effective exercise and enjoyment of the human rights established in this Constitution and in the declarations, covenants, agreements and other current international instruments in force."

Therefore, in these cases, the State's obligation refers not only to its guaranteeing the exercise and enjoyment of the rights listed in the Constitution, but all those named in international instruments too, which therefore can be considered as acquiring the same rank and value of constitutional rights.

In this regard, special reference should be made to the Constitution of Nicaragua which establishes the general declaration that all people shall not only "enjoy State protection and the recognition of rights inherent to the human person and the unrestricted respect, promotion and protection of their human rights", but also the protection of the State for the "full enforcement of the rights enshrined in the Universal Declaration of Human Rights; in the American Declaration of the Rights and Duties of Man; in the United Nations' International Covenant on Civil and Political Rights; and in the American Convention on Human Rights of the Organization of American States."

In this case, the Constitution's reference to certain international instruments, due to the international dynamic on these matters, can only be interpreted as a non-exhaustive statement, given the preceding declarations referred in general to human rights and to those inherent to the human person.

Based on Article 46 of the Nicaraguan Constitution, statutes have been challenged on the grounds of unconstitutionally because they violate rights declared in international treaties. It was the case of the judicial review process of the 1989 General statute on Medias (*Ley General sobre los medios de la Comunicación Social (Ley nº 57*), in which the Supreme Court, in its decision of August 22, 1989, even if it rejected the "amparo of unconstitutionality" recourse filed against the statute, in order to decide, the Court extensively considered the denounced violations not only regarding Article 46 of the Constitution but, through it, also considered articles of the Human Rights Declaration, the International Covenant on Civil and Political Rights and the American Convention on Human Rights[76].

Finally, the Constitution of Brazil proclaims that the State in its international relations, is ruled by the principle of the prevalence of human rights (Article 4,III); and that being constituted as a democratic rule of law State, it has as one of its foundations the dignity of human person (Article I, III). Regarding in particular human rights, Article 5,2 of the Constitutions declares, that:

> The rights and guarantees set forth in the Constitution do not exclude others which can result from the regime and principles therein set forth or from the international treaties on which the Federative Republic of Brazil may be part.

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76 See the text in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997, pp. 128-140. See the comments of Antonio Cançado Trindade, "Libertad de expresión y derecho a la información en los planos internacional y nacional", *Idem*, p. 194.

This article has been interpreted as a mean for inserting the Constitution in the general trend of Latin American constitutionalism that gives a special treatment in internal law to the rights and guarantees internationally guarantied.

2. The enforcement of rights regardless of their statutory regulation

In addition to the abovementioned, regarding the process of constitutionalization of the internationalization of human rights, special reference must be made to constitutional clauses which prescribe the right to the enforcement of constitutional rights regardless of the existence or not of statutory regulations.

In these sense, for instance, the Venezuela Constitution since 1961 established that "The lack of statutory regulations of rights (inherent to human beings) does not impede their exercise" (Article 50), in the sense that there is no need for a statute to be enacted in order for the exercise of the constitutional rights. This is the same regulation that can be found for instance in the Ecuadorian Constitution in which Article 18 states: "The absence of statute cannot be alleged in order to justify or ignore rights set forth in this Constitution, or to not admit actions for their protections, or to deny the acknowledgment of such rights".

Regarding the Venezuelan regulation, now enshrined in Article 22 of the Constitution, it must be indicated that it has serve for the acknowledgment and enforcement of very important constitutional rights, like precisely, the enforcement of the right to "amparo".

In effect, the right to "amparo" was originally set forth in the 1961 Constitution, as follows:

> **Article 49**. The courts shall protect ("ampararán") all inhabitants of the Republic in the exercise of their rights and guarantees set forth in the Constitution, according to the law (statute). The procedure shall be brief and speedy and the competent judge will have the power to immediately restore the infringed legal situation.

The wording of this article was interpreted by the courts in the sense that the acceptability of the amparo suit was conditioned to the previous enactment of the statute regulations on the matter, particularly because the same Constitution expressly regulated in a transitory way the procedure for the habeas corpus action, pending the sanctioning of such statute, "in order to not leave (its applicability) suspended". From this regulation the courts then understood that the intention of Article 49 was to condition the admissibility of the amparo action to the previous sanctioning of the statute on the matter, providing only in an exceptional way for the immediate acceptability of the habeas corpus action[77].

In this sense, the Supreme Court of Justice in 1970 regarding the amparo suit, considered Article 49 to be a "programmatic" one, thus not directly applicable, being necessary the previous enactment of the statute on the matter, in order to bring before a court an action of amparo. The Court said:

> The article is not a direct and immediately applicable stipulation by the courts, but only a programmatic one directed to Congress that is the competent body to regulate for constitutional

77 See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Tomo V, *Derecho y Acción de Amparo*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas, 1998, pp. 111 ff.

guarantees; interpretation reinforced by the transitive constitutional regulation on habeas corpus[78].

This constitutional judicial approach regarding the acceptability of the amparo action began to change after the approval by Congress in 1977, of the 1969 American Convention on Human Rights and in 1978, of the International Covenant on Civil and Political Rights; treaties that regulated the specific need for a simple and speedy judicial mean for the protection of human rights. Consequently, contrary to the Supreme Court initial interpretation –which at the time had no *stare decisis* effects- the lower courts began in 1982 to accept amparo suits, funding directly their rulings in the American Convention[79]; situation that finally lead the Supreme Court to change its criteria by applying the open clause on human rights inherent to persons, and particularly the provision that states that the absence of a regulatory statute regarding human rights cannot affect the exercise of the rights declared in the Constitution. In a decision of October 20, 1983 the Supreme Court thus admitted the possibility of the filling of the constitutional protective amparo action regarding any constitutional right. Notwithstanding the Court said in its ruling that:

> "By admitting the possibility of the exercise of the amparo recourse, the Court must draw the attention of the lower courts, to be prudent and rational when using the powers granted in the Constitution (for the immediate constitutional protection of human rights), in order to fill the gap produced by the absence of the regulatory statute"[80].

The Organic Amparo statute for the protection of constitutional rights and guarantees was finally sanctioned in 1988[81], giving way to the massive use of this judicial mean for protection of human rights, particularly because of the unsuitability of the common judicial mean for that purpose. Nonetheless, it was by mean of the application of the open clause regarding human rights that the amparo suit was previously accepted.

3. The principle of progressive interpretation of constitutional rights

Finally, mention must be made to the principle of progressive interpretation of human rights, which implies that as a matter of principle, no interpretation of statutes related to human rights can be admitted if the result is the diminishing of the effective enjoyment, exercise or guarantee of constitutional rights; and also that in case involving various provisions, the one that should prevail is the one that contains the more favorable regulation[82]. As stated by the former Supreme Court of Justice of Venezuela, the principle of progressiveness in human rights implies the need to preferably apply the most favorable provision to human rights, whether of constitutional law, international law or ordinary

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78 See in *Gaceta Forense*, nº 70, Caracas, 1970, pp. 179 y ss; and in Allan R. Brewer-Carías, "La reciente evolución jurisprudencial en relación a la admisibilidad del recurso de amparo", in *Revista de Derecho Público,* nº 19, Editorial Jurídica Venezolana, Caracas, 1984, pp. 207 ff.

79 See the references in A. R. Brewer-Carías, "La reciente evolución jurisprudencial en relación con la admisibilidad del recurso de amparo", *Revista de Derecho Público*, nº 19, Editorial Jurídica Venezolana, Caracas, 1984, pp. 211 ff.

80 See in *Revista de Derecho Público*, nº 11, Editorial Jurídica Venezolana, Caracas, 1983, pp. 167-170.

81 *Gaceta Oficial* nº 33.891 de 22-01-1988. See Allan R. Brewer-Carías y Carlos Ayala Corao, *Ley Orgánica de Amparo sobre derechos y garantías constitucionales*, Caracas, 1988.

82 See in general, Pedro Nikken, *La protección internacional de los derechos humanos. Su desarrollo progresivo*, Instituto Interamericano de Derechos Humanos, Ed. Civitas, Madrid, 1987.

law"[83]. Consequently, the interpretation of statutes must always be guided by the principle of progressiveness, in the sense that it must always result in more protection regarding rights.

The principle of progressiveness is expressly regulated, for example, in the 1999 Constitution of Venezuela, where Article 19 provides that the enjoyment and exercise of human rights shall be guaranteed to everybody by the State, "... pursuant to the principle of progressiveness and without any discrimination."

Other Constitutions also expressly establish it as a principle of interpretation, as may be seen in Article 18 of the Ecuadorian Constitution which provides that "... in matters of constitutional rights and guarantees, the interpretation that most favors its effective enforcement shall be the one upheld."

This principle of the progressive interpretation of human rights regulations is equivalent to the *pro homines* principle of interpretation, which has been defined as "the hermeneutical criteria that conditions all the human rights law, according to which the widest and most protective provision must be applied in the sense that one must always prefer the provision that is in favor of man (*pro homine*)"[84]. The principle has been incorporated in the Ecuadorian Constitution when specifying the method of interpretation that must be applied in matters of rights and guaranties established in the Constitution, in the sense that the interpretation must be done in the way "that most favors its effective enforcement" (article 18)[85]. It also has been deducted as incorporated in other Constitutions, as is the case of Chile and Peru, when they provide as one of the essential purposes of the State the protection of human rights. It was the case of the 1993 Peruvian Constitution which stated that "the defense of human beings and the respect of their dignity are society and State goal" (Article 1); and is the case of the Chilean Constitution when it provides that it is "the duty of the State to respect and promote human rights guaranteed in the Constitution, as well as in the international treaties in force ratified by Chile" (art. 5)[86]. In Peru, the Constitutional Tribunal, when choosing the most favorable interpretation for the protection of human rights, has defined "the *pro homine* principle as the one according to which a rule referred to human rights must be interpreted 'in the most favorable way for the person, that is, for the beneficiary of the interpretation' "[87]

As it has been indicated by Henderson, the *pro homine* principle has various application forms: first, when various provisions on human rights can be applied in the case, the one to be chosen is the

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83 Decision of July, 30, 1996, in *Revista de Derecho Público*, nº 67-68, Editorial Jurídica Venezolana, Caracas, 1996, p. 170.

84 See Mónica Pinto, "El principio *pro homine*. Criterio hermenéutico y pautas para la regulación de los derechos humanos", in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales*, Centro de Estudios Legales y Sociales, Buenos Aires, 1997, p. 163. Also see, Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", in *Revista IIDH, Instituto Interamericano de Derechos Humanos*, no. 39, San José, 2004, p. 92.

85 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, 2004, p. 92.

86 See Iván Bazán Chacón, "Aplicación del derecho internacional en la judicialización de violaciones de derechos humanos" in *Para hacer justicia. Reflexiones en torno a la judicialización de casos de violaciones de derechos humanos*, Coordinadora Nacional de Derechos Humanos, Lima, 2004, p.27; Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", en *Revista IIDH, Instituto Interamericano de Derechos Humanos*, no. 39, San José, 2004, p.89, nota 27.

87 See decisión 1049-2003-AA/TC of January 30, 2004 in Alfonso Gairaud Brenes, "Los Mecanismos de interpretación de los derechos humanos: especial referencia a la jurisprudencia peruana" en José F. Palomino Manchego, *El derecho procesal constitucional peruano. Estudios en Homenaje a Domingo García Belaunde*, Editorial Jurídica Grijley, Lima, 2005, Tomo I, p.138.

one with the best and must favorable provisions regarding the individual; second, in cases rulings succession, it must be understood that the last provision does not repeal the previous one if this has better and more favorable provisions which must be preserved; and third, when it is a matter of application of just one legal provision on human rights, the same must be interpreted in the way resulting more favorable to the protection of the person[88].

In a certain way this *pro homine* interpretation was the one that guided *Chief Justice Warren* of the United States Supreme Court in its 1954 opinion in *Brown vs Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). in which, when referring to the XIV Amendment, he said that:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Fersugon* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

From this, he concluded saying:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment".

This principle of progressivism, regarding the interpretation of constitutional rights, has also been incorporated in the American Convention on Human Rights in which Article 29 provides the following rules regarding "restrictions regarding interpretation", in the sense that "no provision of this Convention shall be interpreted as":

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Regarding the specific principle of progressiveness set forth in the Venezuelan Constitution, it also has implied that if a constitutional right is regulated with different contexts in the Constitution and in international treaties, then the most favorable provision must prevail and be applicable to the interested party.

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88 See Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", in *Revista IIDH, Instituto Interamericano de Derechos Humanos*, no. 39, San José, 2004, pp. 92-96.

In an "amparo" decision issued by the former Supreme Court of Justice on December 3, 1990, the Court applied the principle regarding the rights of a pregnant public official not to be unjustifiably dismissed of her job during pregnancy. At that time, the Organic Statute on Labor did not regulate such right, and it was only set forth in the Covenant nº103 of the Labor International Organization and in the Convention eliminating all forms of discrimination against women. Regarding the constitutional provisions, Article 74 only provided for the general right to maternity protection. Notwithstanding the Supreme Court in the concrete case, after analyzing the protection asked by the employee whose dismissal impede her to enjoy the pre and post natal rest, admitted the "amparo" and declared the requested protection. In its decision, the Supreme Court ruled as followed:

> "The right not to be dismissed when pregnancy and the right to enjoy a pre and post natal rest are rights inherent to human beings that are constitutionalized due to Article 50 of the Constitution which stated that "the enunciation of rights and guarantees contained in the Constitution must not be understood to deny others not expressly within regulated. The lack of regulatory statute regarding such rights does not impede its exercise…".
>
> Consequently, from all these supranational regulations and particularly due to the protection set forth in article 74 of the Constitution, which guaranties the protection of maternity and of the pregnant women, such protection being materialized through the right of the pregnant working women not to be dismissed and the right to enjoy the pre and post natal rest…
>
> Based in such clear and conclusive dispositions, this Court considers that any attempt from the employer to diminish the right of the pregnant women not to be dismissed without justification or disciplinary reasons, and the consequent effect of denying the right to pre and post natal rest, constitute an evident and flagrant violation of the constitutional principle set forth in Articles 74 and 93 of the Constitution…"[89]

89 See in *Revista de Derecho Público*, nº 45, Editorial Jurídica Venezolana, Caracas, 1991, pp. 84-85. See the references in decisión sentenciaos July 30, 1996 in *Revista de Derecho Público,* nº 97-98, Editorial Jurídica Venezolana, Caracas, 1996, p. 170.

CHAPTER III

THE JUDICIAL MEANS FOR THE PROTECTION OF HUMAN RIGHTS

I. THE CONSTITUTIONAL GUARANTEES TO THE DECLARATIONS OF RIGHTS

Constitutional declarations of rights, in the Constitutions or in international treaties and covenants, would be of no use at all, unless supported by a set of constitutional guarantees of the exercise of such rights.

The first of all constitutional guaranties is the guaranty of the supremacy of the Constitution and of entrenched declarations of human rights therein contained; the second is the judicial guaranty, that is to say, the set of judicial means established in benefit of persons in order to assure the effective exercise of such rights, and the effective protection of them.

In other words, the insertion of Declarations of rights in the Constitutions would be of no use to the citizen unless there is a fundamental right that establishes their supremacy, which can be enforced in court.

In fact, the idea of Rule of Law is indissolubly bound to the idea of the Constitution as an essential and supreme rule, which shall prevail over any state rule or action. This was the great and principal contribution of the American Revolution to modern constitutionalism, and its progressive development has provided the basis for the constitutional systems of justice in the modern world, particularly those aimed at protecting and defending the rights and freedoms enshrined in the Constitutions.

It can be said that this idea of constitutional supremacy, that is, of the Constitution as a fundamental and supreme law, was first developed in America in 1788 by Alexander Hamilton in *The Federalist*[90] when referring to the role of judges as interpreters of the law, stating:

> "A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents".

He added in response to the assertion that "the rights of the courts to pronounce legislative acts void, because contrary to the constitution" would "imply a superiority of the judiciary to the legislative powers", the following:

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90 *The Federalist* (edited by B.F. Wright), Cambridge, Mass. 1961, pp. 491-493.

"Nor does this conclusion -that the Courts must prefer the constitution over statutes- by any means supposes a superiority of the judicial to the legislative body. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its Statutes stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental".

Thus, his conclusive assertion that:

"No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representative of the people are superior to the peoples themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid'.

Thus, in *The Federalist*, Hamilton not only developed the doctrine of the supremacy of the constitution, but most importantly the doctrine of "the judges as guardians of the constitution", as the title of letter nº 78 reads, where Hamilton said, considering the constitution as a limit to state powers and particularly to the Legislative authority, that,

"Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be, to declare all acts contrary to the manifest tenor of the constitution, void. Without this, all the reservations of particular rights or privileges would amount to nothing".[91]

But among Hamilton's proposals, I would like to place more emphasis on *the idea itself that since the Constitution is the expression of the will of the people, the principal constitutional right the people can have, is the right to that supremacy, that is to say, the right to the respect for and preservation of their own will as expressed in the Constitution*. The consequence of this principle is the other derived and fundamental principle, that the Judiciary shall have the power to declare null and void any state or federal law that is contrary to the Constitution[92]. It is clear, that nothing would be gained by stating that the Constitution, being the expression of the will of the people, shall prevail over that of the State entities and over individual actions, if the people do not have the right to demand the respect of the Constitution.

For this precise reason, one of the most recent Latin American Constitutions, that of Colombia (1991), expressly enshrines the principle of constitutional supremacy as follows:

"**Article 4**. The Constitution is the rule of rules. Whenever a case of incompatibility between the Constitution and a statute or another legal norms, arises the constitutional provisions shall be applied ..."

The 1999 Constitution of Venezuela similarly establishes that: "... the Constitution is the supreme rule and basis of the legal system" (Article 7) and that "in case of incompatibility between this constitution and a statute or other legal norm, the constitutional provisions shall be applied, being the courts empowered to decide, even ex officio" (Article 334).

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91 *The Federalist* (ed. by B.F. Wright), Cambridge, Mass 1961, p. 491 -493.

92 See referentes to the cases *Vanhorne's Lessee v. Dorrance, 1776* and *Masbury v. Madison,* 1803 in Allan R. Brewer-Carías in *Judicial Review in Comparative Law,* Cambridge University Press, Cambridge, 1989.

In both countries this implies that the custody of the basic constitutional right of the citizen to the protection of such supremacy, is assured by means of: first, the judicial review powers regarding statutes attributed to all court and judges (Article 4, Colombia; Article 334, Venezuela); second, the popular action that can be brought before the Constitutional Court (Colombia, Article 214) or Constitutional Chamber of the Supreme Tribunal (Venezuela, Article 336) in order to seek the concentrated judicial review of constitutionality of statutes; third, by means of the exercise of specific actions for protection of constitutional rights, as is the case of the actions of *habeas corpus*, of "amparo" or of habeas data (Articles 30 and 86, Colombia; Article 27, Venezuela).

Therefore, modern constitutionalism is founded not only on the principle of constitutional supremacy, but also on the principle that the *citizens have a constitutional right to such supremacy*, that in fact, pursuant to the principle of separation of powers, becomes *a fundamental right to the judicial protection of such constitutional supremacy*, both regarding the organic part of the Constitution (separation of powers, territorial distribution of powers), as well as regarding the dogmatic part of the Constitution (human rights), for the preservation of which a set of guarantees are established.

Among these guarantees it can be mentioned, the "objective guarantee" which declares that any acts contrary to the Constitution shall be considered null and void. The principle, explained in the twenties by Hans Kelsen[93], has been incorporated in the Latin American Constitutions since the beginning of the XIX Century, as occurred with the Venezuelan Constitution of 1811.

This principle implies that any State body decision that is contrary to the fundamental rights established in the Constitution is null and void, as has been set fourth in the 1999 Venezuelan Constitution:

> "**Article 25**: Any State authority act that violates or lessens the rights guaranteed in this Constitution and the law, is null; and the public officials which orders or execute them shall be criminally, civil and administratively liable, without any possible excuses based on superior orders".

In the particular case of Peru, Article 31 lists the right of citizens to participate in public affairs through: a referendum; legislative initiative; removal or revocation of authorities and the demand for accounting; the right to be elected and freely choose their representatives; the right of the local population to participate in the municipal government of its jurisdiction; and the right to vote; adding that "any act that forbids or limits the citizen's exercise of his or her rights is null and punishable."

Other constitutional guaranty of the declarations of human rights, perhaps the most important, is the legislative privilege to set fourth restrictions or limitations to constitutional rights, which can only by established by statutes, that is to say, by the laws passed by the legislative body and not by executive regulations.

There is also, of course, the guarantee of liability, or the guarantee that the public officials or individuals responsible for the injury or nuisance are legally obligated or accountable under civil, criminal and administrative law.

Apart from all the above-mentioned guarantees, the other basic guarantee of constitutional rights is of course, precisely, the possibility of bringing claims before the courts in order to assure that such rights are protected, preventing its violation or restoring the aggrieved party in its exercise. Hence, the fundamental guarantee of constitutional rights is definitely the judicial guarantee.

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93 See Hans Kelsen: «La garantie jurisdictionnelle de la Constitution (La justice constitutionnelle)», *Revue du droit public et de la science politique en France et à l'étranger,* Paris, 1928, p. 250.

II. THE JUDICIAL GUARANTEE OF CONSTITUTIONAL RIGHTS

1. The right to have acces to justice and the protection of rights

In any country subjected to the rule of law, the judicial branch of government is established not only to guarantee the enforcement of the law, but in particular, to hear and decide cases or questions of rights affecting personal and proprietary interests, making the necessary binding judgments on them. Of course, among those rights to be protected and enforced by the Judiciary, are the constitutional rights.

In effect, in all constitutional judicial systems, the most classical of citizens' rights is to have access to justice. This is the right to obtain judicial protection and enforcement of one's rights and interests. This is the essential reason for the organization of the Judiciary, to assure the judicial guarantee of personal and proprietary rights.

However, the Judiciary not always accomplishes its fundamental duty, as has occurred in Latin America, where in spite of the constitutional declarations, many countries still are facing a rather dismal situation regarding the effectiveness of the Judiciary as a whole, as an efficient and just protector of fundamental rights.

In Venezuela, for example, the 1999 Constitution declares that the State is a "... democratic and social State of law *and justice*," emphasizing justice as being among the uppermost values of the legal system and of the State's actions (Article 2). To this end, it is expressly stated that "... the State shall guarantee free, accessible, impartial, ideal, transparent, autonomous, independent, liable, fair and timely justice, without undue delay, and without senseless formalities or reversals" (Article 26).

It is really very difficult to find in any Constitutions in the contemporary world, similar sort of magnificent declarations about justice and the Judiciary, to which, the Supreme Tribunal of Venezuela, has referred to very eloquently, by stating:

> Consequently, when the Constitution qualified the State as a State of law and justice and set fourth Justice and preeminence of fundamental rights as a superior value of the legal order, it is only stressing that all public entities –and specially the Judiciary- must inexorably privilege a notion of justice above formalities and technicalities that belongs to a formal legality which certainly has give way to a new State conception. And this notion of Justice has a special meaning in the fertile field of the judicial proceeding in which the right to self defense and the due process of law rights (article 49), the search for the truth as an consubstantial element of justice, in which the former must not be scarified due to the omission of non essential formalities (article 257); bearing in mind that access to justice is set forth in order to allow citizens to ask for the enforcement of their rights and could obtain their effective and expedite judicial protection, without undue delays and without useless formalities and procedural reviews (article 26); all of which conform a Cosmo vision of a Lawful State, of the parties as element of democracy, and of the inescapable duty of the Judiciary and judges to maintain processes and judgments within the constitutional values and principles[94].

But in spite of these marvellous declarations, in order to achieve these aims of the State of Justice, the most elemental institutional condition needed, in any Country, is the existence of really autono-

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94 See decision nº 949 Politico Administrative Chamber of the Suporeme Court of Justice (SPA-CSJ) of April 26, 2000, in *Revista de Derecho Público*, nº 82, (abril-junio), Editorial Jurídica Venezolana, Caracas, 2000, pp. 163 ff.

mous and independent judges, empowered to interpret and apply the law, achieving justice in an impartial way; and that can effectively protect citizens, particularly when referring to the enforcement of rights against State actions.

For that purpose, an effective Judiciary has to be built upon the principle of separation of powers. On the contrary, if the Government controls the courts and judges, no effective guarantee exists regarding constitutional rights, particularly when the offender party is a governmental agency. In this case, and in spite of all constitutional declarations, it is impossible to speak of rule of law.

The braking news in the December 28, 2005 edition of *The New York Times* (front page left), was the title: "When Chinese Sue the State, cases are Often Smothered"; referring to the fact that if it is true that "the number of people wanting to sue the government is large and growing", the truth is that " the number of people who succeed in filing cases against the government is minuscule", concluding by stating that: "So you could say there is a gap between theory and practice". The article referred to the impossibility for peasants to even file complaints seeking compensation for the take over of farmed land converted for the construction of roads and commercial, noting that "the case would not even be registered and there would be no rejection notice, either", and adding: "They met Kafkaesque obstacles at every turn. The only party that used the courts successfully was the state-linked construction company. It won an injunction in March declaring peasants' protest illegal"; judicial decision that -in this case-, was massively published in the village and even "the party boss read the text of the decision over the village's loudspeakers". The "villagers said -points out the article- that they were outraged that the court acted so quickly after suppressing their own suit" adding that they "discovered that the law is what they say", "What they practice is power"[95]

This reportage sounds familiar when authoritarian governments take control of States, as has so frequently happened in Latin American history, and for instance, as it has been occurring since 1999 in Venezuela. There, the "gap between theory and practice" is abysmal; the "State of Justice" being in the hands of a government controlled Judiciary. Just one example can enlighten the situation:

Since 1976, and for 25 years, Special Courts for judicial review of administrative action, acting within a democratic regime, developed a very important jurisdiction in order to control the legality of Public Administration activities.

In July 17, the Venezuelan Federation of Doctors or Physicians, brought before the Judicial Review of Administrative Actions First Court in Caracas, a nullity claim against the Mayor of Caracas and the Ministry of Health act taken in conjunction with the Caracas metropolitan College of Doctors, by which these bodies, regulated the hiring of Cuban doctors for a health program called "*Barrio Adentro*" (Inside the Slums); which the Federation of doctors considered discriminatory against the rights of Venezuelan doctors to exercise medicine, allowing foreign doctors to exercise the profession without complying with the Medicine Profession Statute regulations for the exercise of such profession. So the Federation also filed an "amparo" action seeking the collective protection of the Venezuelan doctor's constitutional rights"[96].

In August 21, 2003, the Court issued a preliminary injunction considering that there were sufficient elements to consider the equality before the law right violated. The Court ordered the suspension of the Cuban doctor's hiring and ordered the Collage of Doctors to substitute the Cuban doctors

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95 Article by Joseph Kahn, *The New York Times*, December 28, 2005, pp. A1 and A10.

96 See Claudia Nikken, "El caso "Barrio Adentro": La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos" in *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 5 y ss.

already hired by Venezuelan or foreign doctors who had fulfilled the Statute regulations in order to exercise the medical profession.

The preliminary injunction could not be executed; was rejected and ignored by the Ministry of Health and by the Mayor, and even the President of the Republic in his weekly TV program said that the judicial decision would not be executed[97]. In the mean time, the offender parties, on September 5th, 2003 also brought an "amparo" action before the Constitutional Chamber of the Supreme Tribunal, demanding the Supreme Court to take over the case; which decided on September 25, 2003, based on jurisdictional arguments. The result was the Supreme Tribunal, assuming the case, annulling the lower Court decision and intervening its attributions to ensure the non execution of the preliminary injunctions initially issued. Three years latter, no other decision was taken on the case.

But in the meantime, other governmental decisions were taken: days after the Supreme Tribunal's decision, in September 2005, Secret Service officials seized the lower Court, after detaining a clerk on futile motives; the President of the Republic publicly called the President of the lower Court a bandit[98]"; and a few weeks later, the Special Commission of intervention of the Judiciary, dismissed all the five judges of the Lower Fist Court, basing its decision in a supposedly "inexcusable error" they had incurred in when deciding a case in 2002[99]. The decision was protected by the Bar Associations of all States[100] and also by the International Jurist Commission[101]; but in fact the lower First Court remained suspended and closed[102] for more than ten months[103], during which no judicial review of administrative action could be sought. This was the governmental response to a judicial decision which affected a very sensitive governmental populist program; response which was expressed trough the government controlled Judiciary administration[104]. It must be borne in mind that the same Commission for the intervention of the Judiciary, has dismissed without due process almost all judges. As a result of these massive dismissals the Judiciary ended up being composed by the end of 2005 by more that 90% of provisionally appointed judges, thus dependent of the ruling power[105].

One of the main political critics to the party-democratic system that functioned in Venezuela from 1961 up to 1998, was the exclusively political appointment process of the Supreme Court Justices by the National Congress. That is why in the 1999 Constitution a parliamentary proceeding was set forth, in order to limit the discretionary power of the National Assembly, assigning to a Proposing Commit-

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97 "*Váyanse con su decisión no sé para donde, la cumplirán ustedes en su casa si quieren…*" (You can go with your decision, I don't know where; you Hill enforced in your house, if you want…) Talk in the TV programme *Aló Presidente*, nº 161, August 24, 2004

98 Public declaration, September 20, 2004.

99 See the information in *El Nacional*, Caracas, November 5, 2004, p. A2. In the same page, the dismissed President of the First Court said: "La justicia venezolana vive un momento tenebroso, pues el tribunal que constituye un último resquicio de esperanza ha sido clausurado" (Venezuenal Judiciary lives a tenebrous moment, due to the Fac. that the last resort of espoir Court has been shout down")..

100 See the Communiqué of the Asociación Venezolana de Derecho Administrativo, in *El Nacional*, Caracas, October 12, 2003, A-5.

101 See in *El Nacional,* Caracas, November 18,-2004, p. A-6.

102 See in *El Nacional*, Caracas, October 24, 2003, p. A-2.

103 See in en *El Nacional*, Caracas, July 16,2004, p. A-6.

104 See Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004", in *XXX Jornadas J.M Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp.33-174.

105 *Idem.*

tee integrated exclusively by representatives of civic society, the task to choose and postulate before the Assembly the candidates to be appointed Justices. Unfortunately, the Statute sanctioned for that purpose turned the independent Committee into traditional parliamentary commission, politically controlled, which was challenged by the Peoples Defender before the Constitutional Chamber on grounds of unconstitutionality, but the suit was never decided. Additionally, in the case, the Constitutional Chamber resolved that the Constitution did not apply for the appointment of the same Justices by ratification.

Thus, since 2000, the result has been a more partisan governmental controlled Supreme Tribunal, with the aggravating circumstance of the power the Constitution vested in the National Assembly to dismiss the Supreme Tribunal Justices by vote of two thirds of its members, which the Statute concerning the Tribunal has unconstitutionally modified, adding a procedure for "the annulment of the appointment act" just by the absolute majority voting, which was used in 2004[106].

Thus, with Justices of the Supreme Tribunal politically appointed and politically dismissible, the independence and autonomy of the Judiciary in Venezuela is simply an illusion; and without such independence and autonomy, it is difficult to think on effective guarantees of constitutional rights.

Unfortunately, after more than 40 years of democratic ruling the time has come for Venezuela to have an authoritarian regime, showing that the historical pendulum movement between democracy and authoritarian regimes continues to be a general pattern in Latin America constitutional history, as has occurred in other countries and in other times.

Anyway, the lesson to be learned is that judicial guarantee of constitutional rights requires an independent and autonomous Judiciary, conducted out of reach of the government.

Other question is that even in democratic regimes; some times the Judiciary appears to be incapable of guaranteeing the effective resolution of disputes, thus respecting individual rights and protecting constitutional rights. Justice has not always been swift and efficient; on the contrary, it has proved to be slow; and slowness in judicial matters leads to the opposite, that is, injustice.

Thus the first and main problem of the Rule of Law in Latin America, even in democratic regimes, is the functioning of the judicial systems; which has provoked that almost all Latin American countries have taken on the challenge of restructuring the Judiciary, seeking to make it truly independent and giving truth to the provision of all the Constitutions. This is the cornerstone of the Rule of Law, in the sense that judges shall act only pursuant to the law, without being influenced by outside the law factors, whether they are exercised by other public bodies or by political pressures.

But beyond their substantive independence, Judge must also be personally independent to act, which has to do with their appointment stability. In this regard, again, for example, the Venezuelan 1999 Constitution has established, in general terms, the regime for entering the judicial career and promotion only "through public competition that assures suitability and excellence," guaranteeing "citizen's participation in the procedure of selection and appointment of the judges." The consequence is that they may not be removed or suspended from their positions except through a legal proceeding before a disciplinary jurisdiction (Article 255). This, again, unfortunately is just a theoretical aim, because all contests for judge's appointment have been suspended since 2002. Almost all judges are being provisionally appointed without citizen participation, and there is no disciplinary jurisdiction for their dismissal. Furthermore, the suspension and dismissal of all judges corresponds to a Commission for the intervention of the Judiciary that is not regulated in the Constitution[107]

106 *Idem.*

107 *Idem.*

On the other hand, and beyond achieving independence, the other challenge in all our countries, is to assure the effective administration of justice, that is to say, that the judicial cases be decided surpassing the trend of slow and unjust administration of justice. This is why reforms such as the ones being carried out in many countries on matters of procedure are so essential, since many of the procedures were conceived in other times and now only serve to delay, obstruct, slow down and, finally, not resolve cases.

These reforms had even led many countries to seek other mechanisms for solving disputes and conflicts, like conciliation and arbitration systems. The "privatization of justice" –as it has been called- has been developed in order to guarantee the individual's right to recur to means of arbitration or conciliation without having to resort to the ordinary courts of justice. This approach is not new at all: in the 1824 Stature of the Regime of Administration of Justice of the Republic of Colombia (Colombia, Venezuela and Ecuador) it was stated that all citizens had the constitutional and fundamental right to be able to resolve their conflicts by means of arbitration, and even established the obligation to attempt to resolve disputes through arbitration or conciliation, before resorting to an ordinary legal procedure. In this regard, the 1999 Constitution of Venezuela also states that the law "... shall promote arbitration, conciliation, mediation and any other alternative means to resolve dispute" (Article 258).

Finally, regarding the administration of justice, another aspect that has to be mentioned is the matter of access to justice, which is another of the major problems surrounding the constitutional protection of constitutional rights in Latin America. The access to justice and the right to have effective judicial protection are enshrined in the Constitutions, as can be found in the 1999 Constitution of Venezuela in which it is expressly provided that "Everybody shall have the right of access to the institutions of administration of justice to assert their rights and interests, including collective and diffuse rights and interests; the right to the effective protection of such rights, and the right to obtain a prompt corresponding decision" (Article 26). For that purpose, adds the Constitution, that "the procedure is a fundamental instrument in achieving justice", and therefore "procedural laws shall establish the simplification, uniformity and effectiveness of the proceedings and shall adopt a brief, oral and public procedure" in order to ensure that "justice not be sacrificed because of the omission of non essential formalities" (Article 257).

The formula provided in Spain's 1978 Constitution is far more precise:

> **Article 24.1**. All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.

However, even when not expressly enshrined in the constitutional texts, this right to have access to justice for the protection of people's rights and interests - including the constitutional rights - is an essential element of all contemporary constitutional systems, and in many cases it is what guarantees the right to protection ("amparo") of constitutional rights and freedoms even when the legal system has not established specific procedural means or special courts that are designed to guarantee such protection.

Nonetheless, in practice, access to justice has not always been guaranteed to everybody, and huge portions of the population simply know nothing about judicial protection mechanisms, since they have no possibility of accessing to justice to resolve disputes because of the costs and complications involved. Moreover, the Latin American State has not been able to establish the appropriate legal assistance mechanisms that for decades have been recognized and have been developed in European countries, as judicial assistance, but which we have been unable to be established in our countries to offer everyone the possibility of access to the judicial institutions.

In any case, the deterioration of the Judiciary in our countries is not a recent event, it has been occurring over several decades, with many generations involved. That is why the Judiciary reform program, while being one of the most important elements in achieving effective internal protection of constitutional rights, is something that has to be carried out over a lengthy period. The systematic change of the Judiciary and of the way justice is administered is not even a task of one generation, but rather of several generations, provided there is a consciousness of the need to establish such mechanisms and to initiate reform.

Any way, as I have noted, the Judiciary and the judicial system is established in any country in order to protect peoples rights, and to resolve controversies between parties.

2. Judicial means for the protection of constitutional rights

Legal or constitutional rights are both to be protected and enforced by the courts by means of the judicial proceedings set forth for that purpose in procedural law, without being necessary or indispensable the establishment of specific judicial means only devoted to assure that protection. But of course, this is not excluded, and its existence depends on how the Judiciary accomplished its protective role regarding human rights.

That is why, in contemporary world, especially regarding constitutional rights and freedoms (those embodied in the constitutional Declarations of Rights), their judicial protection and guarantee can be achieved in two ways: first, by means of the general established (ordinary or extraordinary) suits, actions, recourses or writs set fourth in procedural law in order to have a right or duty judicially enforced; or second, in addition to the general means, by means of specific judicial suits, actions or recourses seeking remedies particularly established in order to protect and enforce constitutional rights and freedoms and to prevent and redress wrongs regarding those rights.

That is, the judicial guarantee of constitutional rights can be achieved through the general procedural regulations in order to enforce any kind of personal or proprietary rights and interest, as is the general trend in the United States and in Europe. It can also be achieved by means of specific judicial proceeding established only and particularly for the protection of the rights declared in the Constitution, being the latter the general trend in Latin America, mainly because the general judicial means have been insufficient for granting effective protection to the latter.

Our purpose in this Course of Lectures is to analyze this specific judicial means for protection of human rights in Latin America, generally called the "amparo" suit, action or recourse, but bearing in mind that such protection can also be achieved by the general judicial means, including the procedures set forth in case of urgency. This is the situation in Europe and in the United States, to which I want to refer first.

3. The United States judicial means for the protection of rights (including constitutional rights)

In the United States, following the British procedural law tradition, the protection of human rights, civil rights or constitutional rights (those embodied in the Bill of Eights), has always been achieved through the general ordinary or extraordinary judicial means, and particularly, be means of the remedies established in Law or in Equity.

This distinction between Law and Equity in order to construct two judicial system of courts, traditionally inherent to the anglo-american legal system, has also penetrated the civil law countries, where the judges can also decide cases based on "equidad", term also used in procedural law. For example, in the Venezuelan Civil Code, article 12 impose the judges the duty to decide cases in conformity with

the rules of law (normas de derecho), unless a statute authorize them to decide accordingly to "equidad"; and article 13 the indicates that the courts will decide the merits of the case based on to "equidad" only when asked to do so by the agreed consent of the parties and the rights involved in the controversy are rights that can be renounced or transfered, such as property rights. Only regarding arbitration the Code distinguishes between "law arbiters" (árbitros de derecho) and arbitrators. The former must always decide according to the legal procedure and to the law; the latter will proceed with complete liberty, according to their most convenient view in the parties' interest, particularly according to "equidad" (article 618).

The Venezuelan Constitution, when referring to the State as rule of law and Justice, also uses the expression "justicia equitativa" (equitable justice), which has lead the Supreme Court to consider the possibility of the existence of two sorts of jurisdictions: law and equity jurisdiction, identifying within the latter, the "peace judges" (*jueces de paz*), which in the local neighbourhoods must try to decide controversies by means of conciliation and when resulting impossible, according to equity except when a law solution is imposed by a statute (art. 3, Peace Justice Statute). Peace judges must also decide according to equity when expressly asked by the parties. Regarding this concept of "equidad", the Constitutional Chamber of the Supreme Court has indicated that the concept:

> Of difficult comprehension, refers to a value judgment, related to the idea of justice when applied to a concrete case, view that is not based on the law, but in the conscience, the moral, the natural reason and other values. Due to the personal and subjective character of these values, the treatment of decisions based upon them ought to be different to the decisions issued based on legal norms" [108].

But with exceptions (such as the "peace judges" jurisdictions), in general, it can be said that in civil law countries the law jurisdiction prevails, and no general distinction can be found between law and equity courts. In the United Stated, on the contrary, it is fundamental to distinguish between trial or causes at law and actions in equity; as well as legal remedies as opposed to equitable ones. The latter being the ones in which the judicial resolution "does not come from established principles but simply derives from common sense and socially acceptable notions of fair play"[109].

Both are used for the protection of rights, to the point that the most common definition of remedy is "the means by which rights are enforced or the violation of rights is prevented, redressed or compensated"[110]. Of course they are not judicial means only conceived for the protection of constitutional rights, because remedies can and are also commonly used for the protections of rights based upon statutes and also derived from common law.

The most important procedural rule regarding remedies is that equitable remedies are always subordinated to the legal ones, in the sense that they proceed when the remedy at law is inadequate; in other words, the legal remedies are preferred in any individual case if they are adequate. As it was stated in *In re Debs case*, 158 U.S. 564, 15 S.Ct 900, 39 L Ed. 1092 (1895): "As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary process of law, and the former are sufficient, the rule will not permit the use of the latter"[111]

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108 Decision nº 1139 of October, 10, 2000 (Amparo case: *Héctor L. Quiroga*), in *Revista de Derecho Público*, nº 84, Editorial Jurídica Venezolana, Caracas, 2000, p. 351.

109 See William Tabb and Elaine W. Shoben, *Remedie*s, Thomson West, 2005, p. 13.

110 See William Tabb and Elaine W. Shoben, *Remedie*s, Thomson West, 2005, p. 1.

111 See in Owen M. Fiss, *Injunctions,* The Foundation Press, 1984, p. 8.

The most common legal remedies are the damage remedies, the restitution remedies and the declaratory remedies.

The damage or compensatory remedies allow the injured party or the plaintiffs to seek compensation for losses sustained in violations of his rights. It is the main instrument to resolve disputes in contract law and regarding torts cases. These compensatory remedies find their equivalent in the actions for damages and prejudices in civil law countries.

On the other hand, restitution remedies are intended to restore property to its rightful owner or to obtain from the plaintiff any illegal profits or unjust enrichment he obtained as a consequence of the wrong made to the plaintiff property. The judicial ordinary writ or order commanding the offender party to do or to refrain from doing something that can be issued in these cases of restitution remedies, are the writ of detinue, issued to recover personal property; the writ of ejectment, for the recovery of land; the writ of entry, which allows a person wrongfully dispossessed of real property to enter and retake the property; and the writ of possession, issued to recover the possession of a land. In civil law countries, the equivalent remedies are the property restitution action ("*acción reivindicatoria*") or the action for enrichment without cause. It can also be identified as an equivalent the actions to restore possession of land or to prevent its invasions ("*interdictos*").

The declaratory remedies are intended to obtain from a court a declaration of the rights or legal relations between parties, being commonly used in cases or controversy, to determine the constitutionality of a statute. It is also used to construct a private instrument between parties so that the interested party may obtain a resolution of the dispute. The latter is equivalent to the declaratory actions on civil law countries, and the former, to the petition to declare in a case or controversy, the non applicability of a statute on the grounds of its unconstitutionality, requesting the prevalent application of the Constitution. .

The equitable remedies they are the coercive ones, particularly injunctions, by means of which a court of equity can decide that the plaintiff or aggrieved party is entitled to an extraordinary relief consisting of an order issued by a court commanding the defendant or the offender party to do something or not to do something, that is to say, to refrain from doing specific acts. They are called coercive remedies because they are backed by the contempt power, that is to say, the power of the court to directly sanction the disobedient defendant.

Particularly regarding the protection of civil or constitutional rights, in the United States the coercive remedies that has been used, as extraordinary ones, are the following: first, the writ of injunction, in its four types: preventive, structural, restorative and prophylactic; and second, the writ of habeas corpus.

In civil law countries, where "equitable" courts do not exist, the most common equivalent legal action to all these extraordinary coercive or equitable remedies or writs, are precisely the actions of "amparo" and of habeas corpus, for the protection of constitutional rights.

Regarding injunctions, and following what William M. Tabb and Elaine W. Shoben had explained[112], the four mentioned types of injunctions can be characterized as follows:

The preventive injunction, -preventive in the sense of avoiding harm- is a court order designed to avoid future harm to a party by prohibiting or mandating certain behaviour by another party. In other words, to prevent the defendant from inflicting future injury to the plaintiff. These preventive injunctions can be mandatory, prohibitory or quia-timed injunctions.

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112 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp.86 ff.

The mandatory injunction consists in orders issued to the defendant to do an affirmative act or to mandates a specific course of conduct. Regarding the violations of rights made by public authorities, within the mandatory injunction it must be mentioned the writ of mandamus, issued by a court to compel a government officer to perform certain duties or to execute actions which is obliged to do.

Regarding the prohibitory injunction, they are the ones issued in order to forbid or restrain an act. Among these prohibitory remedies it can be also mentioned the writ of prohibition, when used as an instrument to correct judicial actions by preventing lower judicial courts from acting in certain way.

It can also be distinguished the quia-timet injunction, consisting of an order granted to prevent an action that has been threatened but has not yet violated the plaintiff rights. All these injunctions can be permanent injunctions that affect the legal relationship of the parties until subsequently modified or dissolved

All the above mentioned preventive injunctions, are "preventive" in the sense that they tend to avoid harm, and therefore are not equivalent to the preliminary injunctions. This is important to be stressed in order to avoid wrongs, particularly when comparing with the civil law countries institutions. In Spanish language, the expression "preventive measures" is used to identify what would be "preliminary or interlocutory injunctions" and not preventive injunctions. Thus, regarding the interlocutory injunctions (preliminary injunctions and temporary restraining orders), the general equivalent procedural decision in the civil law counties would be what has been called the "unlisted preventive measures" ("*medidas cautelares innominadas*") that can be issued in order to preserve the status quo or to restore the factual situation during the specific trial development.

On the other hand, the structural injunction, were developed by the courts after the *Brown v. Board of Education* case (347 U.S. 483 (1954); 349 U.S. 294 (1955), in which the court declared the dual school system discriminatory, using injunction as an instrument of reform, by means of which the courts in certain cases, have undertaken the supervision over institutional State policies and practices where constitutional exists in those institutions. As described by Owen S. Fiss:

> "Brown gave the injunction a special prominence. School desegregation became one of prime litigative chores of courts in the period of 1954-1955, and in these cases the typical remedy was the injunction. School desegregation not only gave the injunction a greater currency, it also presented the injunction with new challenges, in terms of both the enormity and the kinds of tasks it was assigned. The injunction was to be used to restructure the educational systems throughout the nation.
>
> The impact of Brown on our remedial jurisprudence -giving primacy to the injunction- was not confined to schools desegregation. It also extended to civil rights cases in general, and beyond civil rights to litigation involving electoral reappointments, mental hospitals, prisons, trade practices, and the environment. Having desegregated the schools of Alabama, it was only natural to Judge Johnson to try to reform the mental hospitals and then the prisons of the state in name of human rights -the right to treatment or to be free from cruel and unusual punishment- and to attempt this Herculean feat through injunction. And he was not alone. The same logic was manifest in actions of other judges, North and South"[113].

Thus, structural injunctions can be considered a modern constitutional law instrument specifically developed for the protection of human rights, particularly in State institutions; instrument that has

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113 See Owen M. Fiss, *The Civil Rights Injunctions*, Indiana University Press, 1978 pp. 4-5; and in Owen M. Fiss and Doug Rendelman, *Injunctions*, The Foundation Press, 1984, pp. 33-34.

been considered to " become an implicit part of the Constitutional guarantee of protecting individual rights from inappropriate government action"[114].

In the third place, the restorative injunctions must be mentioned, also called reparative injunctions, devoted to correct a past wrong situation. In these cases, the court order is devoted to require the defendant to restore the plaintiff to the position it occupied before the defendant committed the wrong. In order to protect a constitutional right, as for instance the right to be elected, the court order can also consist in the repetition of the election process itself.

Among these restorative remedies, it can also be mentioned the writ of error, consisting in an order for the revision by reasons of unconstitutionality, of a judicial decision of a lower court.

Finally, there are also the so called prophylactic injunctions, issued also to safeguard the plaintiff's rights, preventing future harm, by ordering certain behaviours from the defendant, other than the direct prohibition of future actions. These prophylactic injunctions refer to behaviour indirectly related to the prohibited conduct, for instance devoted to ask the defendant to develop positive actions in order to minimise the risk of the repetition of the wrong in the future.

But other than by means of injunctions in order to protect freedom as a constitutional right particularly against government actions, the other extraordinary remedy in the United States -following the long British tradition-, is the writ of habeas corpus, the oldest judicial mean for the protections of life and personal integrity. It has also been employed to bring a person before a court in order to proof or certify that he is alive and in good health, or to determine that his imprisonment is not illegal. It has also been used to obtain review of the regularity of the extradition or the deportation process, of the right to bail or its amount.

In conclusion, as seen in the brief analysis of the remedies in United States law, the protection of constitutional rights is assured by these general (ordinary or extraordinary) judicial means known as remedies, particularly the injunctions and the writs, most of which can also be used to protect legal (non constitutional) rights. So the Constitution in the United States does not provide for a specific judicial means for the protection of human rights, contrary to what happens in Latin America.

4. The protection of human rights in France and Italy through the general judicial means

The situation in Europe, in general terms, with the exception of Germany and Spain -where the Constitutions provide an "amparo" recourse, is similar to the one of the United States: the protection of human rights is assured by general judicial means, and in particular by the extraordinary preliminary and urgent proceedings devoted to prevent an irreparable injury from occurring, issued before or during a trail and before the court has the chance to decide the case, but also with the particular procedural development that in many cases, they have become permanent orders.

This is the case in France with the institution known as the *référé,* the case or Italy with the extraordinary urgent measures and the case of Spain with the precautionary measures ("*medidas cautelares*").

In France, the Civil Procedural Code sets forth the distinction between proceedings regarding the decision of the substance and proceedings refers to decisions that must be taken before setting on legal grounds ("avant dire droit"); these are the writs of référé, which are judicial decisions issued in case of urgency, after a party request in order that the court adopt the necessary measures to immediately protect a right.

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114 See William M. Tabb and Eliane W. Shoben, *Remedies*, pp. 87-88.

There are to types of référés[115]: first, the provisional one consisting in orders issued to prevent imminent damages or to order the cessation of an evidently illicit action. They are devoted to protect rights in a preliminary and interlocutory way pending the trial, that is, pending the judicial decision of the merits. The référé can be issued (art. 809 CPC). This référés are equivalent to the preliminary injunctions in the North American system, both designated to preserve the status quo in order to prevent irreparable damages before the court decides the substantive merits of the dispute[116].

Second, the other référérs are the ones issues in cases of urgency, based in the existence of an evidently illicit conduct that affects an unquestionable right, for its protection. The defendant, of course, must furnish the appropriate proof of the existence of the rights and of the manifest illegality of the defendant actions. These référés can also consist in conservatory or restitution measures to prevent imminent damages or to stop illicit actions, and also, orders issued to the plaintiff to accomplish particular duties if the obligations is proved. In this case, the principal procedural element is the need for the court to summon the defendant in order to hear his argument in an oral hearing (art. 811 CPC). These référé are equivalent to the preventive or structural injunctions in the North American system, in the sense that they are not only devoted to protect constitutional or human rights but any legal right, and because their permanent injunctions. In France they are qualified as "provisional" judicial decisions but only in the sense that they do not produce substantive *res judicata* effects, that is, a definitive judicial decision regarding the merits which could prevent the principal lawsuit that can be brought before the courts. On the contrary, as it happened with the "amparo" decisions in almost all Latin American countries, the référé only produces formal *res judicata* effects in the sense that no other référé can be issued in the same matter, and between the same parties.

Thus, in the latter case, the référé is a judicial decision that is taken independently of the resolution of the controversy on the merits in the principal lawsuit that eventually can be brought before the courts. Consequently, the principal consequence of this "provisional" character of the decision is that if there is no principal lawsuit regarding the substantive merits of the case brought before the courts, the référé decisions becomes permanent.

As mentioned, and as it happened in the United States, the référés in France are a general procedural mean to seek judicial protection of any rights, and not only constitutional or human rights; but regarding the latter, they have been used successfully to protect them.

For instance, it has been used in controversies between individuals, for the protection of the constitutional right to privacy, and particularly to the individual right to each one's owns image. In 1980, the *Reader's Digest* magazine published in the front cover of one of its issues, the photo of a doctor showing him practicing medicine, in circumstance regarding which he did not give the magazine any consent for the publication. Consequently, he asked the Court of Great Instance of Paris the due protection, which on November 1980 decided on référé as follows: The Court took into account that in the cover of the issue nº405 of the magazine, Dr. Antoine Chapman's photography was published in support of an article referring to Hospital patients rights regarding the medical treatment they can receive; that the photography of Dr. Chapman that was published has no relation to his work and life as a physician; and that according to deontological rules of the medical profession, physicians can avoid any kind of advertisement. Then the Court concluded considering that Dr. Chapman has an individual right to his own image, before his own patients and his colleagues, and that consequently, that the publication of his photo, without his consent, in the cover of a non professional magazine of great diffusion, and in a moment in which he was exercising his medical profession produced an evidently

115 See R. Lindon, "Le juge des référés et la presse", *Dalloz 1985*, Chroniques, 61. See the comments by Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile, 1990, pp. 19-26.

116 See William M. Tabb and Eliane W. Shoben, *Remedies*, Thomson West, 2005, p. 4.

illicit overturn. The consequence was the judicial order directed to the magazine to publish in the following issue, a notice indicating that D. Chapman never gave his consent for the publication of his photograph in the previous issue[117].

In a similar case in 1981, a photo of a practicing lawyer was published in the weekly magazine *Le Nouvel Observateur*, showing her acting with her gown in courts; the photograph was published in order to support an article regarding the legal practice by women and also was published without her consent. In order to grant the référé protection, the same argument of absence of consent of the lawyer to publish her photo in a non professional magazine prevail, considering the courts also, in the case, that the deontological rules of the legal profession allow to avoid any kind of advertisement. The court also considerer the right of the lawyer to give of her self the image she wanted to her clients and colleagues. The publication of the photo was also considered an illicit overture of her rights that had to be stopped. Thus the judicial order directed to the weekly magazine to publish in the following issue, the notice that the defendant never gave authorization for the publication[118].

The référé protection to constitutional rights has also been used to protect rights against public official actions. For instance, regarding the constitutional right to free enterprise, a case was decided in 1983, as follows: In the town Saint Cry-sur-Mer, Mr. Decurgis was the owner of a bar located near a public square, having next to the bar, a stand in which he used to sell fruits and legumes to the passing people. The Mayor of the town ordered the closing of the square passage, impeding the customers to have access to Mr. Decurigs stand, who could then not sell his merchandise. He asked judicial protection via référé, not for his supposedly property rights which he did not have, but for his right to develop economic and commercial activities, which has not been forbidden by any formal administrative act. The Court considered the right to develop commercial and industrial activities, as a fundamental public freedom of persons which cannot be limited by the *de facto* activities (*voi de fait*), expressed without any previous formal administrative act issue as a consequence of an administrative procedure, which was non existent in the case. Consequently the référé decision ordered the mayor to restore the situation Mr. Decurigs had before the arbitrary municipal action was taken[119].

The référé has also been used in France for the protection of property rights, regarding industrial factories against illegal occupation of its premises by the workers. In such cases, the Courts, even though recognizing the workers constitutional right to strike, in protection of the property rights of the owners of the factory and their rights to have access to their property, considered illegal the *de facto* occupation of the premises by the workers (*voi de fait illegal*), contrary to the owners rights, that prevented the continuation of work and impede the free entrance to the buildings. The ruling was an order directed to the workers to leave the premises, and if the order was not to be voluntarily carried out then it authorized the use of the police to do so.

In similar situations, injunction has been issued in the United States, even brought before the courts by the Attorney General asking for the protection of property rights of the United States regarding mail, and the protection of freedom of interstate commerce and of transportation of the mail, against striking workers members of the American Railway Union who in 1894 had sit in the railroad premises paralyzing the traffic in Chicago. Without challenging the workers right to quit work and without interfering with the organization of labour, the court considered that the strike interfered with the operation of trains carrying mail and with interstate commerce, and ordered the end of the sit in. In the well known *In Re Debs* case 158 U.S. 564, 15 S.ct. 900,39 L. Ed. 1092 (1895), the Supreme Court

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117 See the references in Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile l990, pp. 22-23.

118 See in Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile l990, pp 23-24.

119 See in Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile l990, p. 26.

set forth the basic principles of injunctions, particularly regarding the power the courts have to punish the disobedience of its injunctive rulings by imposing fines and ordering imprisonment for contempt[120].

In Italy, the judicial mean equivalent to the French référé is the proceeding in case of urgency set forth in the Civil Procedural Code within the precautionary measures. According to article 700 of such Code those who have fundamental motives to fear that during the period in an ordinary process to enforce its rights, they can be threatened by an imminent and irreparable prejudice, may go before the court asking for the necessary urgent decisions that, according to the circumstances, could be suitable in order to provisionally assure the effects of the decision on the merits. Even though it is a precautionary power that can be used to protect any right, it has been used for the protection of constitutional rights such as the right to protection of health, environmental rights, rights to have a name and right to one owns' image[121]

Mention has also to be made to the same institution of the in nominate precautionary judicial power established in the Latin American Procedural Code, which have also been used for the protection of human rights when asked for in ordinary procedures. In this regard, for instance, the reform of the Civil Procedure Code sanctioned in the eighties set forth in Articles 585 and 588, that when there is an evident risk that the execution of the decision be illusory and provided there is accompanying evidence which constitutes a serious presumption of such circumstance and of the right claimed, the court may adopt the precautionary decisions it considers appropriate, when there exists a well-founded fear that one of the parties may cause to the rights of the other party serious or difficult to repair harms. In these cases, to avoid the damage, the court may authorize or prohibit the execution of determined acts, and adopt the decisions that are intended to stop the damage from continuing. With a provision of this nature, the ordinary judge has very broad powers when protecting constitutional rights.

But in fact, these in nominated precautionary judicial powers have only been set forth in recent times in the Latin American civil procedure codes. Thus, in absence of those emergency judicial powers, including the injunction powers attributed to ordinary judges, and because the inefficiency of the general available judicial means in order to obtain an effective and quick protection of constitutional rights, the general trend in almost all of Latin America since the XIX Century has been the progressive regulation of special judicial means exclusively set forth for the protection of constitutional rights, as is the institution named the suit, action or recourse of "amparo", protection or tutelage.

III. THE SPECIFIC JUDICIAL MEANS FOR THE PROTECTION OF HUMAN RIGHTS

1. Origins of the Latin American "amparo" suit

The origin of this specific Latin American judicial mean for the protection of constitutional rights and guaranties can be found in Mexico. In what was called the Constitutional "Reforms Act" of 1848, a special provision devoted to guarantee the fundamental rights declared in the Constitution, was incorporated (article 5), setting forth that in order to assure the human rights recognized in the Constitution, a statute had to regulate the guaranties of freedom, security, property and equality of all inhabitants of the Republic, and also had to establish the means for its enforcement. No statute was sanctioned but this disposition has always been considered as the remote antecedent of the "amparo" trial or law suit.

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120 See Owen M. Fiss and Doug Rendelman, *Injunctions,* The Foundation Press, Mineola New York 1984, p. 13.

121 See Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile, l990, p. 46.

The "Acta de Reformas" provision was followed by the so called "formula Otero", a draft proposal made by one of the members of the Constitutional Commission, embodied in Article 25 of the 1848 Constitution, with the following text:

> **Article 25**. The courts of the federation will protect (ampararán) any inhabitant of the Republic in the exercise and conservation of the rights granted to him in the constitution and the constitutional statutes, against any offensive action by the Legislative or Executive powers, whether of the Federation or of the states; the said courts being limited to give protection in the particular case to which the process refers, without making any general statement regarding the statute or the act provoking the decision.[122]

From this "formula" the main characteristics of the "amparo" suit have always been that it only precedes against public entities actions (Legislative or Executive) and that the judicial decision adopted cannot have general effects, but rather, only effects regarding the concrete controversy and the parties involved, following in the latter case, the general trends of the effects decision of judicial review ruling in the United States.

Based on this Article 25 of the Constitution and even without a regulatory statute, the first judicial judgment of amparo was issued on August 13, 1848, impeding the exile of a citizen without due process.

The 1857 Constitution developed further the amparo institution, setting forth that any controversy derived from a statute or any other authority act which violates the individual guaranties, or from statutes or acts of the Federation which violate or restrict the sovereignty of the States, will be resolved by the Federal courts as a result of the aggrieved party petition, by means of a judicial decision issued after following a formal proceeding; decision that cannot refer but only to the particular individuals, only in order to protect and "ampararlos" in the special case to which the process refers to, without making any general statement regarding the statute or the challenged act (arts. 101 and 102).

The unanimous opinion regarding the origin of the amparo suit in México in the XIX Century, before its subsequent development, coincides in affirming that its antecedents are to be found in the North American system of judicial review of the constitutionality of statutes, which was known in Mexico through the readings of the book by Alexis de Tocqueville, *Democracy in America* (1835), in which he refers to the role of the Judiciary on matters of judicial review once the *Marbury v. Madison* Supreme Court decision of 1803 was issued[123].

When Alexis De Tocqueville visited America almost two hundred years ago, and described the political system of the United States, he stressed, in particular, the way Americans had organized their judicial power, which he considered unique in the world.[124] His observations about the powers of the

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122 See the text in J. Carpizo, *La Constitución Mexicana de 1917*, México 1979, p. 271; Robert D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin, 1971, p. 23; and H. Fix-Zamudio, "Algunos aspectos comparativos del derecho de amparo en México y Venezuela", *Libro Homenaje a la Memoria de Lorenzo Herrera Mendoza*, Caracas, 1970, Vol. II, p. 336. See also H. Fix-Zamudio "A Brief Introduction to the Mexican Writ of Amparo", *California Western International Law Journal*, San Diego 1977, p. 313.

123 See Roberet D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University ofTexas Press, Austin1971, pp. 15, 33; Eduardo Ferrer Mac-Gregor, *La acción constitucional de* amparo *en México y España, Estudio de Derecho Comparado*, 2nd Edition, Edit. Porrúa, México D.F. 2000; Héctor Fix-Zamudio, *Ensayos sobre el derecho de amparo,* Universidad Nacional Autónoma de México, Editorial Porrúa, México 2003

124 Alexis De Tocqueville, *Democracy in America* (ed. by J.P. Mayer and M. Lerner), The Fontana Library, London, 1968, Vol. 1, p. 120.

courts, which he believed, "the most important power" of the country,[125] were directly referred to the powers for judicial review, whose basic trends can still be elaborated from them. He specifically pointed out that "that immense political power"[126] of the American courts, "lies in this one fact" -he said – "The Americans have given their judges the right to base their decisions on the constitution rather than on the laws. In other words, they allow them not to apply laws which they consider unconstitutional [127,] adding that "If anyone invokes in an American Court a statute which the judge considers contrary to the constitution, he can refuse to apply it.[128] This power of American judges, De Tocqueville stressed, was "the only power peculiar to an American judge"[129] , which at the time was correct. Today, it must be said, it is the power common to all judges in legal systems with a diffuse system of judicial review.

The influence of that American judicial review powers can be clearly appreciated regarding the original Mexican amparo regulation, particularly regarding the cases and controversy requirement, a basic element for judicial review and the amparo suit as well as the common exclusively the inter partes effects of the judicial decision.

But the original Mexican amparo institution devoted in the beginning to protect constitutional rights against authority acts, subsequently evolved into a unique and very complex judicial institution, that is not to be found in any other Latin American country, not only designed to guarantee judicial protection of constitutional rights against the State acts or actions, but as a multipurpose institution that additionally is used for the protection of personal freedom, equivalent to the habeas corpus writ (called "*amparo libertad*"); for judicial review of constitutionally of statutes (called "*amparo contra leyes*"), with trends similar to the North American diffuse system of judicial review; for judicial review of constitutionality and legality of judicial decisions (called "*amparo casación*") similar to the cassation recourse that existed in almost all civil law countries; for judicial review of administrative actions (called "*amparo administrativo*"), equivalent to the judicial review of administrative acts jurisdictions developed in almost all civil law countries, following the influence of the French contentieux- administrative jurisdiction; and for the protection of peasants rights derived from the agrarian reform process (called "*amparo agrario*") equivalent to the agrarian jurisdictions that can be found in almost all Latin American countries.

All those jurisdictions and judicial means in Mexico are all under the same "amparo" name and umbrella; which as mentioned, is a unique case in comparative law. No other country in the world follows the Mexican "amparo" omni comprehensive approach, by mean of which the original "amparo" judicial mean for the protection of constitutional rights was deformed in the sense that what in almost all civil law countries are separate actions, recourses or jurisdictions, with very different objectives, in Mexico all are called "amparo". On the other hand, this omni comprehensive trend of the Mexican amparo resulting form the effort to expand its protection, in the end paradoxically has provoke that the effective protection of constitutional rights in practice has been weakened[130]. Thus, it can be said that what really spread in almost all the other Lain American countries from the Mexican "amparo" institution, was only the name given to the special judicial means for the protection of con-

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125 *Idem*, p. 122.

126 *Ibid*, pp. 122, 124.

127 *Ibid*, p. 122.

128 *Ibid*, p. 124.

129 *Ibid*, p. 124.

130 See the coments in this regard in Joaquín Brage Camazano, *La Jurisdiccoión Constitucional de la Libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México, 2005, p. 156.

stitutional rights (amparo), but not at all of its complex content, as mentioned, unique to the Mexican system.

In other Latin American countries, also since the beginning of the XIX Century antecedents of the "amparo" can be found. In Venezuela, for instance, in the 1811 Declaration of Rights of the people, it was specifically provided the right to petition in order to protect such rights, as follows: "The citizens freedom of petition before public authorities in order to ask for the protection of his rights, in any way can be impeded or limited" (Article 22) . This declaration was followed by the 1830 Constitution declaration regarding the need to a special protective means of the constitutional rights, in which was stated that: "Every person must find a prompt and safe remedy according to the law, regarding the injuries and damages suffered in their persons, properties, honour and esteem" (Article 189).

And according to this constitutional provision, it was the Organic Statute on the Judiciary of 1950 that attributed to the Superior Courts powers: "To decide recourses of force, "amparo" and protection against written and oral orders or prescription, given by authorities of the Republic" (Article 9), using for the first time the word "amparo" to identify a judicial mean; as well as the person's right to ask for "amparo" to freedom rights (habeas corpus), as follows:

> 10. In case in which any public official were forming criminal cause against any person or had issued a detention order, the interested party or anybody acting in his name, can bring before the Superior Court by means of "amparo" or protection; and the latter, ordering the suspension of the procedure, will ask the files and the presence of the party (en vida), and if it finds the petition according to justice, will level the oppressive order".

Nevertheless, and inspite of these provisions, in Venezuela the "amparo" action was only developed after the enactment of the Constitution of 1961. Yet, in the XIX Century, in the Venezuelan 1897 Civil Procedure Code, judicial review as a power of all judges to consider null and void legal provisions contrary to the Constitution –in the North American legal tradition- was formally inserted in positive law, allowing judicial protection of constitutional rights. Article 20 of such Code provides: "When the law whose application is requested is contrary to any provision of the Constitution, the judges will give preference to the latter [131].

In other Latin American countries the amparo action or recourse as well as the habeas corpus recourse were introduced in positive law since the XIX century, as follows: regarding habeas corpus in Brasil (1830), El Salvador (1841), Argentina (1863) and Perú (1897), and regarding the amparo action or recourse in Guatemala (1879), El Salvador (1886), Honduras (1894), Nicaragua (1911), Brasil (manado de securanca 1934), Panama (1941), Costa Rica (1946), Venezuela (1961), Bolivia, Paraguay, Ecuador (1967), Panama (1972), Perú (1976), Chile (*recurso de protección* 1976) and Colombia (*acción de tutela* 1991). In Argentina, since 1957, the amparo action was admitted through court decisions and regulated in positive law in 1966; and in the Dominican Republic, since 2000 the Supreme Court has admitted the amparo action.

Currently (2006), in all Latin American countries, exception made of Cuba, the habeas corpus and amparo suits, actions or recourses ("*acción de protección*" in Chile and "*acción de tutela´* in Colombia) it

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131 The text of the norm in Spanish is as follows: "Cuando la ley vigente, cuya aplicación se pida, colidiere con alguna disposición constitucional, los jueces aplicarán ésta con preferencia." The text was originally adopted in the 1897 Code (Art. 10), followed by the 1904 Code (Art. 10) and the 1916 Code (Art. 7). In the 1985 Code the only change introduced in relation to the previous text, is the word "judges" which substituted the word "Tribunals." See the text of the 1897, 1904 and 1916 Codes in *Leyes y Decretos Reglamentarios de los Estados Unidos de Venezuela*, Caracas, 1943, Vol. V.

exists as a specific judicial means exclusively designed for the protection of constitutional rights; in all of them, exception made of the Dominican Republic, the provision for the action is embodied in the Constitutions and in all of them, exception made of Chile and Panamá, the actions of amparo have been expressly regulated in special statutes.

2. The judicial review methods as means for the protection of human rights

In the other hand, the regulation of the "amparo" actions in Latin America, must also be considered as a particular means for the protection of Constitution and of its supremacy regarding specifically the declarations of rights; a method of judicial review that complements the general systems of judicial review of the constitutionality of statutes developed in Latin America, also since the XIX century: the diffuse and the concentrated methods of judicial review.

According to the so called "American model", the diffuse method of judicial review empowers all the judges and courts of a given country to act as a constitutional judge, in the sense that when applying the law, they are allowed to judge its constitutionality and therefore, not to apply it in the concrete process when they consider it unconstitutional and void, giving priority to the Constitution[132]. This diffuse system of judicial review of constitutionality of legislation is not a system peculiar to the common law system of law and is perfectly compatible with the civil or Roman law tradition. It has existed since the XIX Century in most Latin American countries, as is the case of Dominican Republic (1844) [133], Mexico (1857), Colombia (1850), Argentina (1860), Brazil (1890) and Venezuela (1897). In Mexico, Argentina and Brazil, the method strictly follows the American model; and in Colombia, Venezuela and Perú, it exists in a mixed system with the concentrated method of judicial review. The diffuse method is also applied in some European countries with a civil law tradition, like Switzerland, Greece and Portugal.

The duty of the courts on the diffuse model of judicial review can only be accomplished *incidenter tantum*, through a particular process (cases and controversies) that have been brought before them, and where the unconstitutionality of a particular statute is neither "the issue" nor the principal issue in the process. Therefore, a process must be initiated before a court on any matter or subject whatsoever, the diffuse system of judicial review of constitutionality being, consequently, always an incidental system of review. In these cases, the decision adopted by the Supreme Court has *in casu et inter partes* effects, that is, effects related to the concrete case and exclusively to the parties who have participated in the process, and therefore, it cannot be applied to other individuals. The judicial decision has also declarative effect in the sense that it only declares the *ab initio* nullity of the challenged statute. Thus, when declaring the statute unconstitutional and inapplicable, in fact, the decision has *ex-tunc*, and *pro pretaerito* effects in the sense that they are retroactive to the moment of the enactment of the statute, considered as not having produced any effect regarding the concrete process and parties.

Finally, it must be said that in order to avoid the uncertainty of the legal order and contradictions due to the multiple decisions that can refers to constitutional issues, corrections have been made to

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132 See Allan R. Brewer Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

133 The 1844 constitution, as well as the 1966 constitution (Art. 46) established that 'are null and void all Laws, Decrees, Resolutions, Regulations or Acts contrary to the constitution'. Consequently all the Courts can declare an act unconstitutional and not applicable to the concrete case. C*f.* M Berges Chupani, "Report" in *Memoria de la Reunión de Cortes Superiores de Justicia de Ibero-América, El Caribe, España y Portugal*, Caracas, 1983, p. 380.

these *inter partes* effects through the *stare decisis* doctrine or through positive law, when the decision is adopted by the Supreme Court of a given country[134].

But Latin American countries have also followed the so called "Austrian" or European model of judicial review, established well before it was invented in Europe, as a concentrated method, by Hans Kelsen in 1920[135]. In Latin America, since the XIX century some countries have adopted it as the only method of judicial review and others, mixed with the diffuse method of judicial review.

The concentrated method of judicial review, contrary to the diffuse system, is basically characterised by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge, in the sense of being the only State organ called to decide upon constitutional matters regarding legislative acts and other State acts with similar rank or value, in a jurisdictional way.

This state body with the monopoly of acting as a constitutional judge can either be the Supreme Court of Justice of the country, in its character as the highest court in the judicial hierarchy or it can also be a special Constitutional Court, Council or Tribunal, specially created by the Constitution.

Therefore, the concentrated system of judicial review of the constitutionality of legislation, even though generally identified with the "European model" of special constitutional courts,[136] does not necessarily imply its existence. It only implies the assignment to a single state organ, which exercises jurisdictional activity, of the duty and power to act as a constitutional judge, with powers to declare the nullity of state acts, which has to be established and regulated expressly in the Constitution.

Contrary to the diffuse system of judicial review, which is always of an incidental character, the concentrated system of judicial review can have either a principal or incidental character, in the sense that constitutional questions regarding statutes may reach the supreme court or the constitutional court, by virtue of a direct action, some times a popular action, or request brought before the court or by reference of the question to the court, from a lower court, where the constitutional question has been raised in a concrete proceeding, either *ex-officio* or through the initiative of a party.

The decision adopted by the constitutional court or the supreme court acting as a constitutional judge in the concentrated method, has general effects, thus it applies *erga omnes*. Additionally the decision has a *constitutive* effect in the sense that: it declares the nullity of a statute which produces effects up to the moment in which its nullity is established. That is why it is said that the decision of the court, as it is a constitutive one, has *ex-nunc*, *pro futuro* or prospective effects, in the sense that, in principle, they do not go back to the moment of the enactment of the statute considered thereon unconstitutional, the effects produced by the annulled statute until that annulment are still considered valid.

In Latin America, since the middle of the XIX Century many countries have adopted a concentrated method of judicial review by assigning the supreme court of the country with the power to declare the nullity of legislation. This was the case in Colombia and Venezuela in which an authentic concentrated method of judicial review has existed since 1850 and in which the supreme courts have the monopoly of annulling statutes. It is also the case of Panamá, Uruguay and Paraguay.

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134 *Idem.*

135 See H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle), *Revue du droit public et de la science politique en France et à l'étranger*, Paris 1928, pp. 197-257 ; Allan R. Brewer Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

136 M. Cappelletti, *Judicial Review in the Contemporary World*, Indianapolis, 1971, pp. 50-53.

Subsequently, in many countries the system moved to a mixed one, in which the diffuse and the concentrated systems of judicial review coexist, as is the case of Brazil, Colombia, Peru, Venezuela, Peru and Guatemala.

Also, in Latin America, some countries have established Constitutional Courts or Tribunal in order to perform the concentrated method of judicial review, as is the case of Guatemala, Chile, Perú, Ecuador and Colombia.

Therefore, the judicial protection of constitutional rights in Latin America, additionally to the amparo actions or recourses, can be achieved by means of the diffuse and concentrated methods of judicial review.

3. The European "amparo" actions

Finally, we must mention that as a result of the regulation of the concentrated method of judicial review, in Austria, Germany and Spain, a specific judicial means for the protection of some constitutional rights was also established.

In effect, the "Austrian method" of judicial review was originated in Europe after the First World War under the influence of the ideas and direct work of Hans Kelsen, particularly regarding the concept of the supremacy of the constitution and the need for a jurisdictional guarantee of that supremacy;[137] but it was also a direct result of the absence of a diffuse system of judicial review of the constitutionality of legislation whose exclusion was expressly or indirectly established in the Constitution; and of the traditional European distrust regarding the judiciary to control the constitutionality or legislation. Thus, in order to accomplish such task it was necessary to establish an independent State body.

Accordingly, the first constitutional tribunals were established in Czechoslovakia and Austria, in their respective Constitutions of February 29 and October 1st 1920. Due to its permanence and its reestablishment in 1945, the Austrian Constitutional Tribunal, created in the 1920 Constitution, was to be the leading institution of the "European" concentrated system of judicial review. Hans Kelsen, a member himself of the Constitutional Tribunal until 1929, formulated the original general trends of the institution, very similar to the Czechoslovakian one, regulated in the 1945 Constitution[138] and in the Federal Law of the Constitutional Tribunal of 1953, modified on various occasions[139].

But in Austria, the Constitutional Tribunal not only has the power to act as a constitutional judge controlling the constitutionality of statutes, executive regulations and Treaties, but also to grant constitutional protection against the violation of fundamental rights. For this purpose, any individual has the right to bring before the Constitutional Tribunal, recourses or complaints against administrative acts when the claimant alleges that they infringe a right guaranteed in the constitution (art. 144).

This was the origin of the development of a special judicial means for the protection of fundamental rights in Europe, although in a concentrated way which establishes the difference with Latin American "amparo" recourses.

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137 H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle), *Revue du droit public et de la science politique en France et à l'étranger*, Paris, 1928, pp. 197-257.

138 Arts.137-148, Constitution of I May 1945. See a Spanish version of the Constitution in I. Méndez de Vigo, "El Verfassungsgerichthof (Tribunal Constitucional Austríaco)", *Boletín de Jurisprudencia Constitucional*, Cortes Generales, 7, Madrid, 1981, pp. 555-560.

139 Law nº 85, 1953. See in T. Ohlinger, *Legge sulla Corte Costituzionale Austriaca*, Firenze, 1982.

The Austrian model influenced the establishment of the a concentrated system of judicial review in the Second Spanish Republic, in accordance with the Constitution of December 9 1931, by which a Tribunal of Constitutional Guarantees was created[140]. The system was also conceived as a concentrated one, in which the Tribunal of Constitutional Guarantees had exclusive powers to judge upon the constitutionality of statutes, and additionally, the power to protect fundamental rights by means of a recourse of constitutional protection called "*recurso de amparo*", regarding which some authors have also found some influence of the Mexican "amparo"[141].

After the Second World War, also following the Austrian model, the 1949 Constitution of Germany created a Federal Constitutional Tribunal as the "supreme guardian of the Constitution"[142] having "the last word on the construction of the Federal Constitution."[143]. The Tribunal is empowered to decide in a concentrated way, upon petitions for the abstract control of norms and constitutional complaints against laws that can be brought before it in a direct way, or by the referrals made before it by any lower court to seek a concrete control of statutes. Additional to these means for judicial review, it was also established a constitutional complaint for the protection of a fundamental right that can be brought before the Federal Constitutional Tribunal against a judicial decision which is considered to have violated the rights and freedoms of a person because it applied a statute which is alleged to have been unconstitutional (Art. 93, 1, 4,a) FCT Law).

Finally, regarding an "amparo" action, we must mention the current Spanish regulations established in the 1978 Constitution with the creation of the Constitutional Tribunal, later regulated in the "Organic Law of the Constitutional Tribunal" of 3 October 1979[144], which had establish a concentrated method of judicial review, considered as an illustrative example of the concentrated European model[145]. In accordance with the Constitution, the Constitutional Tribunal is conceived as a constitutional organ, thus independent and separate from the Judicial Power, but with jurisdictional functions as the guarantor of the constitutionality of state action.[146]

Additionally to its functions to decide the "recourse of unconstitutionality against laws and normative acts with force of law" (ar. 161, 1,1 Constitution), through which "the Constitutional Tribunal guarantees the primacy of the Constitution and judges the conformity or inconformity" of the laws and normative acts with force of law with it (art. 27, 1, Organic Law 2/79), the Constitutional Tribunal is empowered to decide the *recursos de amparo* (recourse for constitutional protection), that can be directly brought by individuals before the Constitutional Tribunal, when they deem their constitutional

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140 J.L. Melián Gil, *El Tribunal de Garantías Constitucionales de la Segunda República Española*, Madrid, 1971, pp. 16-17, 53; P. Cruz Villalón, "Dos modos de regulación del control de constitucionalidad: Checoslovaquia (1920-1938) y España (1931-1936), *Revista española de derecho constitucional*, 5, 1982, p. 118.

141 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de* amparo *en México y España, Estudio de Derecho Comparado*, 2nd Edition, Edit. Porrúa, México D.F. 2000

142 See G. Müller, "E1 Tribunal Constitucional federal de la República Federal de Alemania", in *Revista de la Comisión Internacional de Juristas*, Vol VI, Ginebra 1965, p. 216; F. Sainz Moreno, "Tribunal Constitucional federal alemán", *Boletín de Jurisprudencia Constitucional*, Cortes Generales, 8, Madrid 1981, p. 606

143 See H. G. Rupp, "The Federal Constitutional Court and the Constitution of the Federal Republic of Germany", *Saint Louis University Law Journal*, Vol XVI, 1971-1972, p. 359.

144 Organic Law 2/1979. See the text in *Boletín Oficial del Estado*, nº 239, 5 October, 1979.

145 See P. Bon, F. Moderne and Y. Rodríguez, *La justice constitutionnelle en Espagne*, Paris 1982, p. 41.

146 M. García Pelayo, "E1 Status del Tribunal Constitucional", *Revista española de derecho constitucional*, 1, 1981, pp. 11-34; F. Rubio Llorente, "Sobre la relación entre Tribunal Constitucional y poder judicial en el ejercicio de la jurisdicción constitucional", *Revista española de derecho constitucional*, 4, 1982, pp. 35-67, As an independent organ it also has autoregulatory powers: Art. 2,2 Organic Law 2/1979.

rights and liberties violated by dispositions, juridical acts or simple factual actions of the public bodies, the Autonomous Communities and other public territorial entities or by their officials (Art. 161, 1, b) Constitution; Art. 41, 2 Organic Law 2/1979). This recourse for the protection of fundamental rights cannot be exercised directly against statutes, which violate fundamental rights in a direct way,[147] as in the West German system. Therefore, it can only be exercised against administrative or judicial acts and acts without force of law produced by the legislative authorities (Art. 42 Organic Law 2/1979), and only when the ordinary judicial means for the protection of fundamental rights have been exhausted (Art. 43, 1 Organic Law 2/1979.). Consequently, the recourse for *amparo* in general results in a direct action against judicial acts [148] and can only indirectly lead to judicial review of legislation when the particular state act challenged by it is based on a statute considered unconstitutional (Art. 55,2 Organic Law 2/1979).

The general trend of the European "amparo" recourse, in contrast to the Latin American institution, is that it is conceived as a concentrated judicial mean for the protection of fundamental rights against State actions, by assigning the power to decide them to a single Constitutional Tribunal; and only to protect certain constitutional rights listed in the Constitutions as "fundamental" rights, more or less equivalent to civil or individual rights. In contrast, in Latin American countries, the "amparo" action or recourse, exception made of Costa Rica and Panamá, can be exercised before all courts; exception made, at least formally, of Chile and Colombia, always for the protection of all constitutional rights, including social and economic ones; and in many countries can be exercised not only against State acts but also against individuals.

147 *Cf.* .Eduardo García de Enterría, *La Constitución como norma y el Tribunal Constitucional*, Madrid 1985, p. 151.

148 *Cf.* Favoreu, "Actualité et légitimité du Contrôle juridictionnel des lois en Europe occidentale." *Revue du droit public et de la science politique en France et à 1'étranger*, Paris 1984 (5), pp. 1155-1156.

CHAPTER IV

THE LATIN AMERICAN "AMPARO" ACTION OR RECOURSE AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

I. THE "AMPARO" ACTION, RECOURSE OR SUIT: A LATIN AMERICAN CONSTITUTIONAL INSTITUTION

Section 9, clause 2 of the Constitution of the United States regulates -although in an indirect way- the writ of habeas corpus, when it states that "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".

In contrast, as has been mentioned before, since the XIX Century, additionally to the common and general judicial guarantees of constitutional and other rights -and sometimes in parallel to the habeas corpus recourse-, a group of specific judicial remedies for the guarantee of constitutional rights has been developed in Latin America, expressly intended to protect those constitutional rights. Those are the action, recourse or suit of "amparo", also known as action of "tutela" (Colombia), recourse for "protección" (Chile), or in Brazil, the "*mandado de segurança*"[149].

In all of its versions, it is always a specific judicial guarantee set forth in order to protect constitutional rights, and is generally enshrined in the Constitutions, although it has also been developed without express constitutional or statutory provisions, as is case of the "amparo" recourse in the Dominican Republic.[150]

At present, the "amparo" action or recourse is expressly regulated in the Constitutions of Argentina, Bolivia, Brasil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, and Venezuela. Sometimes the provision also includes the protection of personal liberty, although most countries have set forth a different recourse of habeas corpus for the specific protection of personal freedom and integrity and even an habeas data recourse, of more recent creation, for the protection of personal data.

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149 See, in general, Allan R. Brewer-Carías, *El "amparo" a los derechos y garantías constitucionales (una aproximación comparativa),* Editorial Jurídica venezolana, Caracas, 1993.

150 As is the case of the Dominican Republic. See Juan De la Rosa, *El recurso de "amparo". Estudio Comparativo. Su aplicación en la República Dominicana*, Santo Domingo, 2001; Allan R. Brewer-Carías, "La admisión jurisprudencial de la acción de "amparo", en ausencia de regulación constitucional o legal en la República Dominicana» in *Revista IIDH*, Instituto Interamericano de Derechos Humanos, n° 29, San José, January-June 1999, pp. 95-102; and in *Iudicium et vita, Jurisprudencia en Derechos Humanos*, nº 7, Edición Especial, Tomo I, Instituto Interamericano de Derechos Humanos, San José, 2000, pp. 334-341.

1. "Amparo", habeas corpus and habeas data in Argentina

In effect, in Article 43 of the Constitution of Argentina, introduced in the reform of 1994, these three specific actions for human rights protection ("amparo", habeas data and habeas corpus actions), are expressly regulated. Regarding the "amparo" action, the Constitution provides[151]:

> **Artícle 43.-** Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.

Therefore, the "amparo" action can only be brought before a court if there is no other more suitable judicial mean. It proceeds not only against public official acts or omissions, but also against private individuals acts or omissions, for the protection of all constitutional rights and guaranties, not only the ones set forth in the Constitutions but also in international treaties and in statutes. Thus, the "amparo" action directly proceeds for the protections of all rights declared in international treaties ratified by Argentina.

The Constitution also provides a collective action of "amparo" that can be filed by the affected party, the people's defendant and Associations that seek general purposes, in order to protect collective rights. The rights protected are particularly the environment, free competition, user and consumer rights as well as rights of general collective incidence.

Additionally to the "amparo" action, the Argentinean Constitution also sets forth what in Latin America has been called the action of habeas data. This Constitution provides that any person can file a suit in order to acquire knowledge about data with reference to himself, contained in public or private registry or data banks set for preparing reports and about the purpose of this data. In case of falsity or discrimination, the plaintiff can also seek for its suppression, rectification, confidentiality and actualization. Nonetheless, the Constitution provides that the filing of this action must not affect the secrecy of journalistic information sources.

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151 **Article 43.** Toda persona puede interponer acción expedita y rápida de "amparo", siempre que no exista otro medio judicial mas idóneo, contra todo acto u omisión de autoridades publicas o de particulares, que en forma actual o inminente lesione, restrinja, altere o amenace, con arbitrariedad o ilegalidad manifiesta, derechos y garantías reconocidos por esta Constitución, un tratado o una ley. En el caso, el juez podrá declarar la inconstitucionalidad de la norma en que se funde el acto u omisión lesiva.

Podrán interponer esta acción contra cualquier forma de discriminación y en lo relativo a los derechos que protegen al ambiente, a la competencia, al usuario y al consumidor, así como a los derechos de incidencia colectiva en general, el afectado, el defensor del pueblo y las asociaciones que propendan a esos fines, registradas conforme a la ley, la que determinará los requisitos y formas de su organización.

Toda persona podrá interponer esta acción para tomar conocimiento de los datos a ella referidos y de su finalidad, que consten en registros o bancos de datos públicos, o privados destinados a proveer informes, y en caso de falsedad o discriminación, para exigir la supresión, rectificación, confidencialidad o actualización de aquellos. No podrá afectarse el secreto de las fuentes de información periodística.

Cuando el derecho lesionado, restringido, alterado o amenazado fuera la libertad física, o, en caso de agravamiento ilegitimo en la forma o condiciones de detención, o en el de desaparición forzada de personas, la acción de habeas corpus podrá ser interpuesta por el afectado o por cualquiera en su favor y el juez resolverá de inmediato, aun durante la vigencia del estado de sitio.

The Constitution also regulates the habeas corpus action, stating that:

> When the right affected, restrained, altered or threatened is that of physical freedom, or in case of an illegitimate worsening of procedure or conditions of detention, or in case of forced disappearance of persons, the action of habeas corpus can be filed by the affected party or by any other person on his behalf. In such cases, the judge will resolve immediately, even in state of siege

Therefore, in Argentina, by means of the three above mentioned specific remedies, any person can seek for the protection of all human rights declared in the Constitution, international treaties and statutes that could be violated by public officials and by individuals.

The three actions have been regulated in three separate statutes: the "amparo" Action Statute (*Ley de acción de "amparo", Ley 16986/ 1966*), the Habeas Corpus statute (*Ley 23098/1984*) and the Personal Data Protection Statute (*Ley 25366/2000*).

2. "Amparo" and habeas corpus in Bolivia

In Bolivia, the Constitution regulates both, the "amparo" and the habeas corpus recourses, as follows[152]:

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152 **Artículo 18.-** Toda persona que creyere estar indebida o ilegalmente perseguida, detenida, procesada o presa podrá ocurrir, por sí o por cualquiera a su nombre, con poder notariado o sin él, ante la Corte Superior del Distrito o ante cualquier Juez de Partido, a elección suya, en demanda de que se guarden las formalidades legales. En los lugares donde no hubiere Juez de Partido la demanda podrá interponerse ante un Juez Instructor.

La autoridad judicial señalará de inmediato día y hora de audiencia pública, disponiendo que el actor sea conducido a su presencia. Con dicha orden se practicará citación personal o por cédula en la oficina de la autoridad demandada, orden que será obedecida sin observación ni excusa, tanto por aquella cuanto por los encargados de las cárceles o lugares de detención sin que éstos, una vez citados, puedan desobedecer arguyendo orden superior.

En ninguna caso podrá suspenderse la audiencia. Instruida de los antecedentes, la autoridad judicial dictará sentencia en la misma audiencia ordenando la libertad, haciendo que se reparen los defectos legales o poniendo al demandante a disposición del juez competente. El fallo deberá ejecutarse en el acto. La decisión que se pronuncie se elevará en revisión, de oficio, ante el fallo.

Si el demandado después de asistir a la audiencia la abandona antes de escuchar la sentencia, ésta será notificada validamente en estrados. Si no concurriere, la audiencia se llevará a efecto en su rebeldía y oída la exposición del actor o su representante, se dictará sentencia.

Artículo 19.- Fuera del recurso de "habeas corpus" a que se refiere el artículo anterior, se establece el recurso de "amparo" contra los actos ilegales o las omisiones indebidas de los funcionarios o particulares que restrinjan, supriman o amenacen restringir o suprimir los derechos y garantías de la persona reconocidos por esta Constitución y las leyes.

El recurso de "amparo" se interpondrá por la persona que se creyere agraviada o por otra a su nombre con poder suficiente de esta Constitución, ante las Cortes Superiores en las capitales de Departamento y ante los Jueces de Partido en las provincias, tramitándose en forma sumarísima. El Ministerio Público podrá también interponer de oficio este recurso cuando no lo hubiere o no pudiere hacerlo la persona afectada.

La autoridad o la persona demandada será citada en la forma prevista por el artículo anterior a objeto de que preste información y presente, en su caso, los actuados concernientes al hecho denunciado, en el plazo máximo de cuarenta y ocho horas. La resolución final se pronunciará en audiencia pública inmediatamente de recibida la información del denunciado y, a falta de ella, lo hará sobre la base de la prueba que ofrezca el recurrente.

First, Article 18 refers to the habeas corpus recourse by stating that any person who thinks is being undue or illegally persecuted, detained, prosecuted or held, can, by himself or through any other person acting on his behalf, with or without power of attorney, file a suit before the District Superior Court or before any local judge, in order to ask for the respect of the legal formalities. In such cases, the judicial authority must immediately fix a day and hour for a public hearing ordering the appearance of the plaintiff before his presence; order which must be obeyed without excuse, not being a valid argument the obedience of superior orders. In no case the hearing can be suspended, and in it, once knowing about the antecedents, the judicial authority must decide ordering the freedom of the plaintiff, which must be sent before the competent judge, and must amend the legal wrongs.

Regarding the "amparo" recourse, Article 19 of the Constitution states as follows:

> **Article 19.-** Besides the recourse of habeas corpus, the recourse of "amparo" is set forth against the illegal acts or the undue omissions of public officials or of individuals, which restrict, suspend or threaten to restrict or to suspend the person's rights and guarantees recognized in the Constitution and in statutes.
>
> The recourse must be filed by the aggrieved person or by another on his behalf, before the Superior Courts of the Department's capitals or before the local judges of the provinces, and decided in a speedy procedure. The Public Prosecutor can also file the recourse on behalf of the affected person if he has not or could not file it.

Therefore, the "amparo" action is set forth for the protection of all constitutional rights declared in the Constitution and statutes. Additionally, about the Bolivian constitutional regulation, it must also be noted the possibility to file the "amparo" action against individuals, and not only against public officials; and the provision that the "amparo" judicial protection will only be issued "if there is no other mean or legal recourse for the immediate protection of the restricted, suspended or threatened rights or guarantees". Another important procedural regulation refers to the need to send *ex officio* the judicial decision to the Constitutional Tribunal for its revision before this court.

The "amparo" and the habeas corpus actions are regulated in the Constitutional Tribunal Statute (*Ley nº 1836 del Tribunal Constitucional*) enacted in 1998, even though the Constitutional Tribunal of Bolivia only has reviewing powers over judicial decisions on the matter.

3. "Mandado de segurança", "mandado de injunção", habeas corpus and habeas data in Brazil

In Brazil, Article 5 of the Constitution, after enumerating all the constitutional rights and guarantees, provides the actions for protection (the habeas corpus, the *mandado de segurança* the *mandado de injunção* and the habeas-data), as follows[153]:

> La autoridad judicial examinará la competencia del funcionario o los actos del particular y, encontrando cierta y efectiva la denuncia, concederá el "amparo" solicitado siempre que no hubiere otro medio o recurso legal para la protección inmediata de los derechos y garantías restringidos, suprimidos o amenazados, elevando de oficio su resolución ante el Tribunal Constitucional para su revisión, en el plazo de veinticuatro horas.
>
> Las determinaciones previas de la autoridad judicial y la decisión final que conceda el "amparo" serán ejecutadas inmediatamente y sin observación, aplicándose, en caso de resistencia, lo dispuesto en el artículo anterior.

153 **Article 5º**- Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e a propriedade, nos termos seguintes:

"The habeas corpus to anybody who suffers o there is a threaten to suffer violence or coactions on his moving freedom because of illegality or authority abuse;

The *mandado de segurança* in order to protect any true and enforceable right not protected by means of habeas-corpus or habeas-data, when a public authority or an agent of a legal person acting exercising public functions is responsible for the illegality or the abuse.

It must be noted that the *mandado de segurança* is excluded regarding individual's acts or omissions; and that the Constitution also provides a *mandado de segurança coletivo* that can be excersised by political parties with Congressional representation, labor unions, class entities or associations legally established and with one year of activities in defense of their members or associates.

Additionally, the Constitution sets forth the *mandado de injunção* in cases that due to the absence of regulatory statutes, the exercise of constitutional rights and freedoms and the prerogatives inherent to nationality, sovereignty and citizenship, would become unviable".

The Constitution also regulates:

The habeas data in order to ensure the knowledge of information referred to the plaintiff, contained in registries or databanks of governmental or public bodies; or to rectify the data when the petitioner decides not to do so through a confidential process, either administrative or judicial.

The procedural rules regarding the mandado de segurança are set forth in Lei nº 1.533, of December 31,1951.

4. Recourse for "tutela" and habeas corpus in Colombia

In Colombia, in addition to the habeas corpus recourse, the 1992 Constitution sets forth the "amparo" recourse but naming it "recurso de tutela", using a word that in Spanish has the same general meaning as "amparo" and as "protección".

- conceder-se-á habeas-corpus sempre que alguém sofrer ou se achar ameaçado de sofrer violência ou coação em sua liberdade de locomoção, por ilegalidade ou abuso de poder;

- conceder-se-á mandado de segurança para proteger direito líquido e certo, não amparado por habeas-corpus ou habeas-data, quando o responsável pela ilegalidade ou abuso de poder for autoridade pública ou agente de pessoa jurídica no exercício de atribuições do poder público;

- o mandado de segurança coletivo pode ser impetrado por:

partido político com representação no Congresso Nacional;

organização sindical, entidade de classe, ou associação legalmente constituída e em funcionamento há pelo menos um a no, em defesa dos interesses de seus membros ou associados;

- conceder-se-á mandado de injunção sempre que a falta de norma regulamentadora torne inviável o exercício dos direitos e liberdades constitucionais e das prerrogativas inerentes à nacionalidade, à soberania e à cidadania;

- conceder-se-á habeas-data:

para assegurar o conhecimento de informações relativas à pessoa do impetrante, constantes de registros ou bancos de dados de entidades governamentais ou de caráter público;

para a retificação de dados, quando não se prefira fazê-lo por processo sigiloso, judicial ou administrativo;

In this regard, referring to the habeas corpus, Article 30 of the Constitution states[154]:

Article 30.- Anyone who is deprived of his freedom, or who thinks has been illegally deprived of it, has the right to claim before any judicial authority for Habeas Corpus, personally of through any other person, which must be decided in 36 hours.

Regarding the action of "tutela" or "amparo", Article 86 of the Constitution provides[155] as follows:

Article 86.- Everyone has the action of "tutela" in order to claim before the courts, by himself or by any other person acting on his behalf, at any moment and lieu, by means of a preferred and summary proceeding, the immediate protection of their constitutional fundamental rights, whenever they are violated of threatened by actions or omissions of any public authority.

The protection will consist in an order directed to who is sued in tutela, in order for him to act or to abstain from acting. The decision will be of immediate accomplishment, but it can be challenged before the competent judge, who in this case, must send the case to the Constitutional Court for its possible revision.

This action can only be filed when the aggrieved party has no other means for its judicial defense, unless it is used as a transitory mechanism to prevent an irremediable prejudice.

In no case more that 10 days can elapse from the request of tutela and its resolution.

The statute will provide the cases in which the tutela will proceed against individuals that are in charge of providing public services or those whose conduct may affect collective interests in a grave and direct manner, or those to whom the claimant is in a situation of subordination or is defenseless.

Thus, the "tutela" action was constitutionally regulated to protect only certain constitutional rights, those listed in the Constitution as "fundamental" or considered as such because their conexity with the latter, in general, against public official violations, but also against only certain individual damaging actions. It must be said that notwithstanding the limitations regarding the protected rights, by means of judicial interpretation, the list of protected rights through the "tutela" has been progressively enlarged.

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154 **Artículo 30.-** Quien estuviere privado de su libertad, y creyere estarlo ilegalmente, tiene derecho a invocar ante cualquier autoridad judicial, en todo tiempo, por sí o por interpuesta persona, el Habeas Corpus, el cual debe resolverse en el término de treinta y seis horas.

155 **Artículo 86.-** Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma o por quien actúe en su nombre, la protección inmediata de sus derechos constitucionales fundamentales, cuando quiera que éstos resultaren vulnerados o amenazados por la acción o la omisión de cualquier autoridad pública.

La protección consistirá en una orden para que aquel respecto de quien se solicita tutela, actúe o se abstenga de hacerlo. El fallo, que será de inmediato cumplimiento, podrá impugnarse ante el juez competente y, en todo caso, éste lo remitirá a la Corte Constitucional para su eventual revisión.

Esta acción sólo procederá cuando el afectado no disponga de otro medio de defensa judicial, salvo que aquella se utilice como mecanismo transitorio para evitar un perjuicio irremediable.

En ningún caso podrán transcurrir más de diez días entre la solicitud de tutela y su resolución.

La ley establecerá los casos en los que la acción de tutela procede contra particulares encargados de la prestación de un servicio público o cuya conducta afectare grave y directamente el interés colectivo, o respecto de quienes el solicitante se halle en estado de subordinación o indefensión.

In Colombia, the incorporation of the tutela action in the 1991 Constitution with the additional creation of the Constitutional Court, triggered a very important and drastic change regarding the effective judicial protection of constitutional rights, allowing the access to justice to peoples that where previously excluded.

The tutela action has been regulated in the statute-decree nº 2591 of November 19th, 1991 which has been developed by decree nº 306 of February 19th 1992 and decree nº 382 of July 12, 2000..

5. "Amparo" and habeas corpus in Costa Rica

The Constitution of Costa Rica has expressly regulated the right of persons to file recourses of habeas corpus and "amparo" in order to seek for the protection of constitutional rights.

In this regard, Article 48 of the Constitution states that "every person has the right to the habeas corpus recourse in order to guarantee his personal freedom and integrity, and to the "amparo" recourse in order to maintain and reestablish the enjoyment of the rights enshrined in this Constitution, as well as those fundamental rights set forth in international instruments on human rights applicable in the republic"; assigning to the Constitutional Chamber of the Supreme Court the legal authority to decide them[156].

Since the creation of the IV Chamber (Constitutional Chamber) of the Supreme Court, Costa Rica has also experienced a very important change regarding the access to justice and the effective protection of human rights.

Both the habeas corpus and the "amparo" recourses are regulated in the Constitutional Judicial Review statute (*Ley de la Jurisdicción Constitucional, Ley nº 7135*) of October 11th, 1989.

6. Recourses for protection and of habeas corpus in Chile

In Chile, Articles 20 and 21 of the Constitution regulate the recourse of protection (*recurso de protección*) but directing it only to a precise list of constitutional rights, and additionally, the habeas corpus recourse, as follows[157]:

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156 **Artículo 48.-** Toda persona tiene derecho al recurso de hábeas corpus para garantizar su libertad e integridad personales, y al recurso de "amparo" para mantener o restablecer el goce de los otros derechos consagrados en esta Constitución, así como de los de carácter fundamental establecidos en los instrumentos internacionales sobre derechos humanos, aplicables en la República. Ambos recursos serán de competencia de la Sala indicada en el artículo 10.

157 **Artículo 20.-** El que por causa de actos u omisiones arbitrarios o ilegales, sufra privación, perturbación o amenaza en el legítimo ejercicio de los derechos y garantías establecidos en el artículo 19, números 1., 2., 3. inciso cuarto, 4., 5., 6., 9. inciso final, 11., 12., 13., 15., 16. en lo relativo a la libertad de trabajo y al derecho a su libre elección y libre contratación, y a lo establecido en el inciso cuarto, 19., 21., 22., 23., 24. y 25. podrá ocurrir por sí o por cualquiera a su nombre, a la Corte de Apelaciones respectiva, la que adoptará de inmediato las providencias que juzgue necesarias para restablecer el imperio del derecho y asegurar la debida protección del afectado, sin perjuicio de los demás derechos que pueda hacer valer ante la autoridad o los tribunales correspondientes.

Procederá también, el recurso de protección en el caso del nº 8. del artículo 19, cuando el derecho a vivir en un medio ambiente libre de contaminación sea afectado por un acto arbitrario e ilegal imputable a una autoridad o persona determinada.

Artículo 21.- Todo individuo que se hallare arrestado, detenido o preso con infracción de lo dispuesto en la Constitución o en las leyes, podrá ocurrir por sí, o por cualquiera a su nombre, a la magistratura que señale

Article 20.- Anyone who, as a result of arbitrary or illegal acts or omissions suffers privation, perturbation or threat in the legitimate exercise of the rights and guaranties set forth in Article 19, numbers 1., 2., 3. clause fourth, 4., 5., 6., 9. final clause, 11., 12., 13., 15., 16. with respect to freedom to work and the right to freedom of contracting, and clause fourth, 19., 21., 22., 23., 24. and 25. by his own or anyone on his behalf, may file a complaint before the respective Appellate Courts, which shall immediately adopt the necessary measures in order to reestablish the rule of law and assure due protection to the affected party without prejudice to the other rights that it may allege before the respective authority or court.

The recourse of protection will also be admitted in case of number 8 of Article 19, when the right to live in a pollution-free environment would be affected by an arbitrary or illegal act attributed to a public official or to an individual

The Chilean regulation, as the Colombian one, is exceptional in Latin America, because it limits the protected rights only to a list expressly set forth in the Constitution, mainly referred to civil rights. The consequence is that all other constitutional rights not enumerated as protected by the recourse of protection, must be enforced by means of the ordinary judicial procedures. In this regard, the Chilean and Colombian Constitutions followed the pattern set by the German and Spanish constitutional regulations regarding the "amparo" recourse.

In Chile, the Constitution also provides for the habeas corpus recourse, as follows:

Article 21. Anybody being under arrest, detained or held-up in violation of what is set forth in the Constitution or in the statutes, can file before the court indicated by statute, by himself of by anyone on his behalf, a request for an order granting the protection of legal formalities, and the immediate adoption of the measures necessary in order to reestablish the rule of law and assure the due protection of the affected party.

The court can order the person be brought before his presence and his orders must be precisely accomplished by all those in charge of prisons or detentions sites. Once the history of antecedents is known, the court will order the immediate release of the plaintiff, that the legal defects be repaired or to send the plaintiff before the competent judge. The court must always act by means of a brief and summary proceeding, correcting ex officio such defects or informing to whom it might concern in order for its correction.

The same recourse can be filed in favor of any person that may illegally suffer any privation, perturbation or threatening of his personal freedom and individual safety. In such cases, the judge will order the measures previously indicated, in order to reestablish the rule of law and assure the due protection of the affected party.

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la ley, a fin de que ésta ordene se guarden las formalidades legales y adopte de inmediato las providencias que juzgue necesarias para restablecer el imperio del derecho y asegurar la debida protección del afectado.

Esa magistratura podrá ordenar que el individuo sea traído a su presencia y su decreto será precisamente obedecido por todos los encargados de las cárceles o lugares de detención. Instruida de los antecedentes, decretará su libertad inmediata o hará que se reparen los defectos legales o pondrá al individuo a disposición del juez competente, procediendo en todo breve y sumariamente, y corrigiendo por sí esos defectos o dando cuenta a quien corresponda para que los corrija.

El mismo recurso, y en igual forma, podrá ser deducido en favor de toda persona que ilegalmente sufra cualquiera otra privación, perturbación o amenaza en su derecho a la libertad personal y seguridad individual. La respectiva magistratura dictará en tal caso las medidas indicadas en los incisos anteriores que estime conducentes para restablecer el imperio del derecho y asegurar la debida protección del afectado.

The chilean "recurso de protección" has not yet been statutorily regulated, being only regulated in the constitution and by a supreme court regulation: *auto acordado de la corte suprema de justicia sobre tramitación del recurso de protección de garantías constitucionales, 1977.*

7. "Amparo", habeas corpus and habeas data in Ecuador

The Constitution of Ecuador also provides for the three fundamental means developed for the protection of human rights: the habeas corpus, habeas data and "amparo"; but not all as judicial remedies, contrary to the general trend of Latin America.

Article 95 of the Constitution[158] provides a detailed set of rules regarding the habeas corpus, as a right of "any person who thinks that he has been illegally deprived of his freedom"; but not as a right to a judicial remedy.

In the Constitution such right to habeas corpus is conceived as an a administrative request, in the sense that it must be filed not before a judge, but only before the corresponding local government authority or mayor (alcalde), being possible that the request be filed directly by the affected person or through another person, even without the need of a written power of attorney. Within 24 hours from the filing of the request, the local government authority must order that the aggrieved person be immediately brought before him, and that the order of detention be shown. The administrative order, according to the Constitution, "must be obeyed without any comment or excuse by the persons in charge of the center of detention".

It is also the "alcalde" who must issue the decision of the case in a 24 hour delay, deciding the immediate freedom of the claimant if the detainee were not brought before it, or the detention order were not shown, or such order does not fulfill the legal conditions, if the detention was irregular, or if the claim was justified.

The public official who disobeys the order will be immediately dismissed of his position by the mayor, without any other proceeding; decision that must be informed to the General Comptroller's Office and to the authority that must appoint his substitute.

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158 **Artículo 93.-** Toda persona que crea estar ilegalmente privada de su libertad, podrá acogerse al hábeas corpus. Ejercerá este derecho por sí o por interpuesta persona, sin necesidad de mandato escrito, ante el alcalde bajo cuya jurisdicción se encuentre, o ante quien haga sus veces. La autoridad municipal, en el plazo de veinticuatro horas contadas a partir de la recepción de la solicitud, ordenará que el recurrente sea conducido inmediatamente a su presencia, y se exhiba la orden de privación de libertad. Su mandato será obedecido sin observación ni excusa, por los encargados del centro de rehabilitación o del lugar de detención.

El alcalde dictará su resolución dentro de las veinticuatro horas siguientes. Dispondrá la inmediata libertad del reclamante si el detenido no fuere presentado, si no se exhibiere la orden, si ésta no cumpliere los requisitos legales, si se hubiere incurrido en vicios de procedimiento en la detención o, si se hubiere justificado el fundamento del recurso.

Si el alcalde no tramitare el recurso, será civil y penalmente responsable, de conformidad con la ley.

El funcionario o empleado que no acate la orden o la resolución será inmediatamente destituido de su cargo o empleo sin más trámite, por el alcalde, quien comunicará tal decisión a la Contraloría General del Estado y a la autoridad que deba nombrar su reemplazo.

El funcionario o empleado destituido, luego de haber puesto en libertad al detenido, podrá reclamar por su destitución ante los órganos competentes de la Función Judicial, dentro de los ocho días siguientes a aquel en que fue notificado.

Regarding the habeas data, Article 94 of the Constitution also conceives it as a right that all persons have, to access to the documents, data bank of reports referring to the person, or his properties, that are in public or private entities, as well as to know what is their use and purpose.

The person can request before the respective official for the data to be actualized or rectified, removed or annulled, when erroneous or when it illegitimately affects the claimant's rights.

In the Ecuadorian Constitution only the "amparo" action is directly conceived as a judicial remedy, for which, Article 95[159] sets forth extensive regulations:

> **Article 95**. Any person, by his own rights or as representative of a collectivity, can file an action of "amparo" before the judicial organ indicated by statute. By means of this action that must be carried out in a preferred and summary way, it will be necessary to adopt urgent measures in order to stop, prevent or immediately remedy the consequences of an illegitimate act or omission of a public authority, which violates or could violate any right enshrined in the Constitution or in an international treaty or convention in force, and that in an imminent way threatens to cause a grave harm. The "amparo" action can also be filed if the act or the omission is executed by persons rendering public services or that act by delegation or concession from a public authority.
>
> Judicial decisions issued in a procedure cannot be challenged by means of the "amparo" action.
>
> The "amparo" action can also be filed against individuals, when its conduct affects grave and directly a communitarian or collective interest or a diffuse right.
>
> In the "amparo" action there will be no inhibition from the judge that must decide it, and all days will be court day.

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159 **Artículo 95.-** Cualquier persona, por sus propios derechos o como representante legitimado de una colectividad, podrá proponer una acción de "amparo" ante el órgano de la Función Judicial designado por la ley. Mediante esta acción, que se tramitará en forma preferente y sumaria, se requerirá la adopción de medidas urgentes destinadas a cesar, evitar la comisión o remediar inmediatamente las consecuencias de un acto u omisión ilegítimos de una autoridad pública, que viole o pueda violar cualquier derecho consagrado en la Constitución o en un tratado o convenio internacional vigente, y que, de modo inminente, amenace con causar un daño grave. También podrá interponerse la acción si el acto o la omisión hubieren sido realizados por personas que presten servicios públicos o actúen por delegación o concesión de una autoridad pública.

No serán susceptibles de acción de "amparo" las decisiones judiciales adoptadas en un proceso.

También se podrá presentar acción de "amparo" contra los particulares, cuando su conducta afecte grave y directamente un interés comunitario, colectivo o un derecho difuso.

Para la acción de "amparo" no habrá inhibición del juez que deba conocerla y todos los días serán hábiles.

El juez convocará de inmediato a las partes, para oírlas en audiencia pública dentro de las veinticuatro horas subsiguientes y, en la misma providencia, de existir fundamento, ordenará la suspensión de cualquier acto que pueda traducirse en violación de un derecho.

Dentro de las cuarenta y ocho horas siguientes, el juez dictará la resolución, la cual se cumplirá de inmediato, sin perjuicio de que tal resolución pueda ser apelada para su confirmación o revocatoria, para ante el Tribunal Constitucional.

La ley determinará las sanciones aplicables a las autoridades o personas que incumplan las resoluciones dictadas por el juez; y a los jueces y magistrados que violen el procedimiento de "amparo", independientemente de las acciones legales a que hubiere lugar. Para asegurar el cumplimiento del "amparo", el juez podrá adoptar las medidas que considere pertinentes, e incluso acudir a la ayuda de la fuerza pública.

No serán aplicables las normas procesales que se opongan a la acción de "amparo", ni las disposiciones que tiendan a retardar su ágil despacho

The judge must immediately convene the parties, to hear them within the next 24 hours in a public hearing, and in the same decision, if reasons exists, will order the suspension of any act which could signified a violation to a right. .

Within the next 48 hours, the judge must issue a decision, which must be immediately executed, even though such decision can be appealed before the Constitutional Tribunal for its confirmation or repeal.

The statute must determine the sanctions applicable to the authorities or persons who disobey the judicial resolutions and the judges who violated the "amparo" procedures. In order to assure the accomplishment of the "amparo" decisions, the judges can adopt any pertinent measures; even ask the police for help.

All procedural norms contrary to the "amparo" action will not be applicable, nor the dispositions that could delay its quick application.

The habeas corpus, habeas data and the "amparo" -the last two ones as judicial remedies, are regulated in the Constitutional Judicial Review Statute (*Ley de Control Constitucional*, Ley nº 000. RO/99) of July 2nd, 1997.

8. "Amparo" and habeas corpus in El Salvador

In El Salvador, Article 247 of the Constitution also sets forth two different specific judicial means for the protection of all constitutional right: the "amparo" action and the habeas corpus action, the latter for the protection of personal freedom[160].

Regarding the violation of the rights granted in the Constitution, every person has the right to request "protection ("amparo") before the Constitutional Chamber of the Supreme Court of Justice.

Regarding the protection of personal freedom, the habeas corpus can be requested before the same Constitutional Chamber of the Supreme Court of Justice or before the Second Instance courts not located in the capital city. In the latter case, the decisions of such courts, when denying the freedom of the plaintiff, could be subjected to revision by the Constitutional Chamber of the Supreme Court of Justice., when requested by the interested party

The regulation of the "amparo" and habeas corpus action is set forth in the 1960 Statute on Constitutional proceedings (*Ley de Procedimienbtos Constitucionales*) of 1960, as amended in 1997.

9. "Amparo" in Guatemala

In the case of Guatemala, as is the case of México, the Constitution provides only one specific judicial mean for the protection of all constitutional rights, the "amparo" action, comprising the protection of personal freedom.

In this regard, Article 265 of the Constitution sets forth the "amparo"[161], with the purpose of protecting the people against the threats of violations to their rights to restore their effectiveness in case of

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160 **Art. 247**.- Toda persona puede pedir "amparo" ante la Sala de lo Constitucional de la Corte Suprema de Justicia por violación de los derechos que otorga la presente Constitución.

El habeas corpus puede pedirse ante la Sala de lo Constitucional de la Corte Suprema de Justicia o ante las Cámaras de Segunda Instancia que no residen en la capital. La resolución de la Cámara que denegare la libertad del favorecido podrá ser objeto de revisión, a solicitud del interesado por la Sala de lo Constitucional de la Corte Suprema de Justicia.

violations. The Constitution emphatically states that "There is no scope that is not susceptible of "amparo", and that ["amparo"] "will proceed whenever the authority acts, resolutions, dispositions or statutes imply a threat, restriction or violation of the rights guaranteed by the Constitution and the statutes".

The constitutional provision excludes the "amparo" against individual actions, and regarding public authorities, it is set forth for the protection of all rights declared in the Constitution and also in statutes.

The regulation of the action of "amparo" is set forth in the 1986 "Amparo", Personal Exhibition and Constitutionality Statute (*Ley de "amparo", exhibición personal y de constitucionalidad*).

10. "Amparo" and habeas corpus in Honduras

In the case of Honduras, the Constitution provides for two separate actions for the protection of human rights: "amparo" and habeas corpus[162].

Regarding habeas corpus, Article 182 of the Constitution states that

> "the State recognizes the guaranty of habeas corpus or personal exhibition"; thus, any aggrieved person or any other in his name has the right to file [the action], when illegally detained or in any way restrained in the enjoyment of his individual freedom; and when in his illegal detention or imprisonment; torments, tortures, abuses, illegal exaction and any repression, restriction or unnecessary annoyance regarding his individual safety or for the order of prison applied to the detainee".

The same article adds that the habeas corpus action may be filed without power of attorney or formality of any kind, orally or in writting, by means of any sort of communication, in any day and without costs. In no case shall the judges reject the action of habeas corpus, and they shall have the ineludible duty to immediately proceed in order to put an end to the violations to personal freedom or safety.

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161 **Artículo 265.-** Procedencia del "amparo". Se instituye el "amparo" con el fin de proteger a las personas contra las amenazas de violaciones a sus derechos o para restaurar el imperio de los mismos cuando la violación hubiere ocurrido. No hay ámbito que no sea susceptible de "amparo", y procederá siempre que los actos, resoluciones, disposiciones o leyes de autoridad lleven implícitos una amenaza, restricción o violación a los derechos que la Constitución y las leyes garantizan.

162 **Artículo 182.-** El Estado reconoce la garantía de habeas corpus o de exhibición personal. En consecuencia, toda persona agraviada o cualquiera otra en nombre de ésta tiene derecho a promoverla:

Cuando se encuentre ilegalmente presa, detenida o cohibida de cualquier modo en el goce de su libertad individual; y,

Cuando en su detención o prisión legal, se apliquen al detenido o preso, tormentos, torturas, vejámenes, exacción ilegal y toda coacción, restricción o molestia innecesaria para su seguridad individual o para el orden de la prisión.

La acción de habeas corpus se ejercerá sin necesidad de poder ni de formalidad alguna, verbalmente o por escrito, utilizando cualquier medio de comunicación, en horas o días hábiles o inhábiles y libres de costas.

Los jueces o magistrados no podrán desechar la acción de habeas corpus y tienen la obligación ineludible de proceder de inmediato para hacer cesar la violación a la libertad o a la seguridad personal.

Los tribunales que dejaren de admitir estas acciones incurrirán en responsabilidad penal y administrativa. Las autoridades que ordenaren y los agentes que ejecutaren el ocultamiento del detenido o que en cualquier forma quebranten esta garantía incurrirán en el delito de detención ilegal.

The courts that fail to admit these actions will become criminally and administratively liable. The authority that orders or the agent that executes the concealing or that in any way harm this guaranty, will incur in the illegal detention offence.

Regarding the recourse of "amparo", Article 183 of the Constitution also states that "the State recognizes the guaranty of '"amparo"'[163], thus any aggrieved person or any other on his behalf has the right to file the recourse, in order to be maintained or to be restored in the enjoyment of the rights and guaranties set forth in the Constitution; and in order to have a declaration made that a statute or an authority resolution, act or fact does not oblige the plaintiff and is not applicable because it contravened, diminished or distorted any of the rights recognized in this Constitution"

The Constitution adds that the "amparo" recourse must be filed according to the statute; which in the particular case, is the Constitutional Judicial Review statute (*Ley sobre la Justicia Constitucional*) of 2004.

According to these regulations, the "amparo" action can only be brought before the courts against authority actions or facts and is not admissible against individuals unless acting with authority delegated powers; the protected rights and guarantees being all those declared or recognized in the Constitution.

11. Suit for "amparo" in México

As was already mentioned, the specific judicial means for the protection of human rights, named "amparo" in Latin America, has its origin in Mexico, where it has been regulated in the Constitution since the XIX Century.

But from a remedy originally inspired in the North American injunctions, the Mexican institution of "amparo", was conceived as a suit, not only for the protection of constitutional rights and guaranties, but also to resolve what in other Countries is the object of different actions and procedures, in particular, judicial review of constitutionality of statutes, judicial review of administrative action and judicial review of judicial decisions (cassation).

But in particular, regarding the protection of constitutional rights and guaranties, in the Mexican Constitution the "amparo" is conceived as a general trail initiated be means of an action that can be brought before the courts for the protection of all individual guarantees declared in the Constitution, but only against actions of authorities such as statutes, judicial decisions or administrative acts, and not against private individual actions.

Article 107 of the Constitution regulates in a very extensive and detailed way the procedural rules for the exercise of the "amparo" action, as well as the competent courts. In its basic regulations[164], this

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163 **Artículo 183.-** El Estado reconoce la garantía de "amparo". En consecuencia toda persona agraviada o cualquiera otra en nombre de ésta, tiene derecho a interponer recurso de "amparo":

Para que se le mantenga o restituya en el goce o disfrute de los derechos o garantías que la Constitución establece; y,

Para que se declare en casos concretos que una ley, resolución, acto o hecho de autoridad, no obliga al recurrente ni es aplicable por contravenir, disminuir o tergiversar cualesquiera de los derechos reconocidos por esta Constitución. el recurso de "amparo" se interpondrá de conformidad con la ley

164 **Artículo 107**.- Todas las controversias de que habla el Artículo 103 se sujetaran a los procedimientos y formas del orden jurídico que determine la ley, de acuerdo a las bases siguientes:

I. El juicio de "amparo" se seguirá siempre a instancia de parte agraviada;

article provides that all controversies that could arise "out of statutes or acts of the authorities that violate individual guarantees" (art. 103,I), as set forth in Article 107, shall be subject to the legal forms and procedure prescribed by the statute, on the following bases:

I. The trial in "amparo" shall always be held at the instance of the injured party.
II. The judgment shall always be such that it affects only private individuals and it is limited to the preserving (ampararlos) and protecting them in the special case to which the complaint refers, without making any general declaration as to the statute or act on which the complaint is based.

In particular, in the case of "amparo" against judicial decisions on civil, criminal, or labor matters, the writ of "*amparo*" shall be granted only:

1. Against final judgments or awards against which no ordinary recourse is available by virtue of which these judgments can be modified or amended, whether the violation [of the individ-

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II. La sentencia será siempre tal, que solo se ocupe de individuos particulares, limitándose a ampararlos y protegerlos en el caso especial sobre el que verse la queja, sin hacer una declaración general respecto de la ley o acto que la motivare….

III. Cuando se reclamen actos de tribunales judiciales, administrativos o del trabajo, el "amparo" solo procederá en los casos siguientes:
   a) Contra sentencias definitivas o laudos y resoluciones que pongan fin al juicio, respecto de las cuales no proceda ningún recurso ordinario por el que puedan ser modificados o reformados, ya sea que la violación se cometa en ellos o que, cometida durante el procedimiento, afecte a las defensas del quejoso, trascendiendo al resultado del fallo; siempre que en materia civil haya sido impugnada la violación en el curso del procedimiento mediante el recurso ordinario establecido por la ley e invocada como agravio en la segunda instancia, si se cometió en la primera. Estos requisitos no serán exigibles en el "amparo" contra sentencias dictadas en controversias sobre acciones del estado civil o que afecten al orden y a la estabilidad de la familia.
   b) Contra actos en juicio cuya ejecución sea de imposible reparación, fuera del juicio o después de concluido, una vez agotados los recursos que en su caso procedan, y
   c) Contra actos que afecten a personas extrañas al juicio;

IV. En materia administrativa el "amparo" procede, además, contra resoluciones que causen agravio no reparable mediante algún recurso, juicio o medio de defensa legal. No será necesario agotar estos cuando la ley que los establezca exija, para otorgar la suspensión del acto reclamado, mayores requisitos que los que la ley reglamentaria del juicio de "amparo" requiera como condición para decretar esa suspensión; ….

VIII. Contra las sentencias que pronuncien en "amparo" los jueces de distrito o los tribunales unitarios de circuito procede revisión. de ella conocerá la Suprema Corte de Justicia:
   a) Cuando habiéndose impugnado en la demanda de "amparo", por estimarlos directamente violatorios de esta constitución, leyes federales o locales, tratados internacionales, reglamentos expedidos por el Presidente de la República de acuerdo con la Fracción I del Artículo 89 de esta constitución y reglamentos de leyes locales expedidos por los gobernadores de los estados o por el jefe del Distrito Federal, subsista en el recurso el problema de constitucionalidad;
   b) Cuando se trate de los casos comprendidos en las fracciones II y III del Artículo 103 de esta constitución. La Suprema Corte de Justicia, de oficio o a petición fundada del correspondiente tribunal colegiado de circuito, o del procurador general de la República, podrá conocer de los "amparos" en revisión, que por su interés y trascendencia así lo ameriten. En los casos no previstos en los párrafos anteriores, conocerán de la revisión los tribunales colegiados de circuito y sus sentencias no admitirán recurso alguno;

ual guarantees] is committed in the judgments or awards, or whether, if committed during the course of the trial, the violation prejudices the petitioner's defense by going beyond the outcome of the judgment; provided that in civil or criminal judicial matters timely objection and protest were made against it by means of the ordinary appeal, or if it occurred in the first instance, were raised in the second instance. None of these conditions are required in cases of "amparo" against judicial decisions referring to controversies related to personal statute and that affect the family stability and order.

2. Against acts at the trial, the execution of which would be irreparable out of court, or at the conclusion of the trial, once all available recourses have been exhausted.
3. Against acts that affect persons who are strangers to the trial.

In administrative matters, *"amparo"* may be filed against decisions which cause an injury that cannot be remedied through any legal recourse, trial, or defence. It shall not be necessary to exhaust these remedies when the statute that established them, in order to allow the suspension of the contested act, demands greater requirements than the regulatory statute for trials in *"amparo"* as a condition for ordering such suspension.

All the judgments in *"amparo"* rendered by district courts when a statute is impugned as unconstitutional or in cases of violation of individual guaranties, are subject to review by the Supreme Court of Justice (107, VIII). The Supreme Court, ex officio or when asked by the lower court or by the public prosecutor, may resolve the revision of "amparo" whose revision have been sought, if it considers it of interest or importance (art. 107, VIII).

The "amparo" suit has been regulated in the "amparo" statute developing Articles 103 and 107 of the Constitution (*Ley de "amparo" reglamentaria de los artículos 103 y 107 de la Constitución Política)* of 1935, which has been amended many times.

12. "Amparo" and habeas corpus in Nicaragua

Regarding the "amparo" action, in Nicaragua[165], the Constitution only provides that "the persons whose constitutional rights have been violated or are in peril of being violated, can file according to the case the recourse of personal exhibition or [the recourse] of "amparo", in accordance with the "amparo" statute". No constitutional precision exists regarding the origin of the violation, thus, the recourse can be brought not only against violations provoked by public officials but also by individuals.

Thus, in the Constitution, for the protection of all constitutional rights, two specific judicial actions are regulated: personal exhibition (habeas corpus) and "amparo"; both regulated in the "amparo" statute (*Ley de "amparo"*) of 1988.

13. "Amparo" and habeas corpus in Panama

Following the general trend of Latin American Constitution, the Constitution of Panama also distinguishes two specific judicial means for the protection of constitutional rights, habeas corpus and "amparo".

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165 **Artículo 45.-** Las personas cuyos derechos constitucionales hayan sido violados o estén en peligro de serlo, pueden interponer el recurso de exhibición personal o de "amparo", según el caso y de acuerdo con la Ley de "amparo".

Regarding habeas corpus, according to Article 23 of the Constitution[166], "any individual detained in cases not prescribed in or without fulfilling the formalities prescribed in the Constitution and statutes, by means of the habeas corpus recourse will be freed at his request or at the request of other person. The recourse can be filed immediately after the detention and without consideration regarding the applicable punishment".

The habeas corpus recourse must be treated with prevalence to other pending cases, by means of a very brief procedure, which cannot be suspended because of the hours or non working days.

The Constitution of Panama, in its Article 50[167], also regulates the recourse of "amparo", setting forth the right of any person to have revoked any order to do or not to do issued by any public servant which violates the rights and guaranties set forth in the Constitution. For that purpose, the recourse of "amparo" regarding constitutional guaranties can be filde before the competent court at his request of by any other person; being subject to a brief procedure.

Thus, the "amparo" is also conceived in Panamá for the protection of constitutional rights against authority actions, not being admitted against individual unconstitutional actions.

The statutory regulation regarding habeas corpus and "amparo" are set forth in the Judicial Code (*Código Judicial, Libro IV Insituciones de garantía*), Articles 2574-2614 (habeas corpus) and 2615-2632 (*"amparo" de garantía constoitucionales*).

14. "Amparo", habeas corpus and habeas data in Paraguay

Since the Constitution of Paraguay is a more recent one, not only has it regulated in a very extended way the "amparo" and habeas corpus recourses as constitutional guaranties regarding the rights declared in the Constitution (art. 131), but has also expressly regulated the habeas data recourse.

Regarding the habeas corpus, Article 133 of the Constitution[168] sets forth that this guaranty can be filed before any First Instance judge of the corresponding circuit, by he affected person or by someone

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166 **Artículo 23.-** todo individuo detenido fuera de los casos y a la forma que prescriben esta Constitución y la Ley, será puesto en libertad a petición suya o de otra persona, mediante el recurso de habeas corpus que podrá ser interpuesto inmediatamente después de la detención y sin consideración a la pena aplicable. El recurso se tramitará con prelación a otros casos pendientes mediante procedimiento sumarísimo, sin que el trámite pueda ser suspendido por razón de horas o días inhábiles.

167 **Artículo 50.**- Toda persona contra la cual se expida o se ejecute, por cualquier servidor público, una orden de hacer o no hacer, que viole los derechos y garantías que está constitución consagra, tendrá derecho a que la orden sea revocada a petición suya o de cualquiera persona.

El recurso de "amparo" de garantías constitucionales a que este artículo se refiere, se tramitará mediante procedimiento sumario y será de competencia de los tribunales judiciales.

168 **Artículo 133.- Del Habeas Corpus.** Esta garantía podrá ser interpuesto por el afectado, por sí o por interpósita persona, sin necesidad de poder por cualquier medio fehaciente, y ante cualquier Juez de Primera Instancia de la circunscripción judicial respectiva.

El Hábeas Corpus podrá ser:

Preventivo: en virtud del cual toda persona, en trance inminente de ser privada ilegalmente de su libertad física, podrá recabar el examen de la legitimidad de las circunstancias que, a criterio del afectado, amenacen su libertad, así como una orden de cesación de dichas restricciones.

Reparador: en virtud del cual toda persona que se hallase ilegalmente privada de su libertad puede recabar la rectificación de las circunstancias del caso. El magistrado ordenará la comparecencia del detenido, con un informe del agente público o privado que lo detuvo, dentro de las veinticuatro horas de radicada la peti-

on his behalf, without needing power of attorney, and distinguishes three types of habeas corpus: preventive, restorative and generic.

The preventive habeas corpus can be filed by any person in the situation of imminent deprivation of his physical freedom, in order to seek for the examination of the legitimacy of the circumstances that, according to the affected party, could threaten his freedom, as well as for an order to stop such restrictions.

The restorative habeas corpus can be filed by any person that is in the situation illegal deprivation of his freedom in order seek for the rectification of the circumstances of the case. In this case, the judge will order the appearance of the detainee within the following 24 hours, with a report from the public or private agent who detained him. When the summoned party doesn't accomplish the order, the judge must go to the site where the person is confined, and in such place make a judgment on the merits and arrange his immediate freedom, similarly as if the appearance of the detainee would have been accomplished, and the requested report filed. If there were no legal motives to authorize the deprivation of freedom, it will dispose the immediate release; and in case of existence of a written order from a judicial authority, will envoy the back grounds to whom ordered the detention.

Finally, the generic habeas corpus recourse is intended to seek rectification of circumstances that are not comprised in the two above mentioned cases, restrict freedom or threatened personal safety. Also, this guaranty could be filed in cases of physical, psychical or moral violence which aggravates the conditions of persons already legally deprived from freedom.

The Constitution refers to a statute for the regulation of the habeas corpus guaranty, by means of a procedure that must be brief, succinct and without cost; clarifying that it is admissible in states of emergency situations and that it can be initiated *ex officio*.

Regarding the "amparo" recourse, Article 134 of the Constitution[169] states that it can be filed before the competent judge by any person that considers himself gravely damaged in his rights of guar-

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ción. Si el requerido no lo hiciese así, el Juez se constituirá en el sitio en el que se halle recluida la persona, y en dicho lugar hará juicio de méritos y dispondrá su inmediata libertad, igual que si se hubiere cumplido con la presentación del detenido y se haya radicado el informe. Si no existiesen motivos legales que autoricen la privación de su libertad, la dispondrá de inmediato; si hubiese orden escrita de autoridad judicial, remitirá los antecedentes a quien dispuso la detención.

Genérico: en virtud del cual se podrán demandar rectificación de circunstancias que, no estando contempladas en los dos casos anteriores, restrinjan la libertad o amenacen la seguridad personal. Asimismo, esta garantía podrá interponerse en casos de violencia física, psíquica o moral que agraven las condiciones de personas legalmente privadas de su libertad.

La ley reglamentará las diversas modalidades del hábeas corpus, las cuales procederán incluso, durante el Estado de excepción. El procedimiento será breve, sumario y gratuito, pudiendo ser iniciado de oficio.

169 **Artículo 134.- Del "amparo".** Toda persona que por un acto u omisión, manifestamente ilegítimo, de una autoridad o de un particular, se considere lesionada gravemente, o en peligro inminente de serlo en derechos o garantías consagradas en esta Constitución o en la ley, y que debido a la urgencia del caso no pudiera remediarse por la vía ordinaria, puede promover "amparo" ante el magistrado competente. El procedimiento será breve, sumario, gratuito, y de acción popular para los casos previstos en la ley.

El magistrado tendrá facultad para salvaguardar el derecho o garantía, o para restablecer inmediatamente la situación jurídica infringida.

Si se tratara de una cuestión electoral, o relativa a organizaciones políticas, será competente la justicia electoral.

El "amparo" no podrá promoverse en la tramitación de causas judiciales, ni contra actos de órganos judiciales, ni en el proceso de formación, sanción y promulgación de las leyes.

La ley reglamentará el respectivo procedimiento. Las sentencias recaídas en el "amparo" no causarán estado.

anties set forth in the Constitution or in statutes or in imminent danger of being, by means of an authority or individual obviously illegitimate act or an omission, provided that because of the urgency of the case, the situation cannot be resolved through the ordinary judicial means. The procedure will be brief, succinct and without cost, and a popular action will be accepted in the cases allowed by the statute.

The judge will have the power to safeguard the right or guaranty or to immediately restore the infringed legal situation.

In electoral matters or related to political organizations, the jurisdiction will correspond to the electoral judiciary.

The Constitution sets forth that the "amparo" will not be admissible in judicial proceedings, nor against judicial decisions, nor in the procedure of formation, sanction and promulgation of statutes.

Finally, regarding the habeas data recourse, Article 135 of the Constitution[170], declares that any person may have access to the information and data referring to himself or to his properties that are in official or private public registries, and to know about the use and purpose of such information. The interested party can also ask from the competent judge, the update, the rectification or the destruction of the registries if they are erroneous or when they illegitimately affected his rights.

The statutory regulations regarding "amparo" are set forth in the "amparo" Statute (*Ley 341/71 reglamentaria del "amparo"*) de 1971.

15. "Amparo", habeas corpus and habeas data in Perú

The Constitution of Peru enumerates the constitutional guaranties in its Article 200, and among them, in particular, the actions of habeas corpus, "amparo" and habeas data[171].

The action of habeas corpus is admissible regarding any fact or omission of any authority, public official or person that harms or threatens the individual freedom or the related constitutional rights.

The action of "amparo" is admissible against any fact or omission of any authority, public official or person, which harms or threatens the other rights recognized in the Constitution. Nonetheless, according to the Constitution, the action of "amparo" is not admissible against legal norms or against judicial decisions adopted in a regular proceeding.

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170 **Artículo 135.- Del habeas data.** Toda persona puede acceder a la información y a los datos que sobre si misma, o sobre sus bienes, obren en registros oficiales o privados de carácter público, así como conocer el uso que se haga de los mismos y de su finalidad. Podrá solicitar ante el magistrado competente la actualización, la rectificación o la destrucción de aquellos, si fuesen erróneos o afectaran ilegítimamente sus derechos.

171 **Artículo 200.-** Son garantías constitucionales:

La Acción de *Hábeas Corpus*, que procede ante el hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza la libertad individual o los derechos constitucionales conexos.

La Acción de "*amparo*", que procede contra e hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza los demás derechos reconocidos por la Constitución. No procede contra normas legales ni contra resoluciones judiciales, emanadas de procedimiento regular.

La Acción de *Hábeas Data*, que procede contra el hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza los derechos a que se refiere el artículo 2o, incisos 5, 6, y 7 de la Constitución….

Regarding the habeas data action, the same Article 200 of the Constitution regulates its admissibility against the fact or omission of any authority, public official or person, which harms or threatens the following rights declared in Article 2, sections 5,6 and 7 of the Constitution:

First, the right to request without expressing motives, and to receive required information from any public entity, in the legal delay, with the due cost implied; exception is made regarding the information referred to the personal privacy and those expressly excluded by statute or because of national security reasons.

Second, to secure that the information services, computerized or not, public or private, do not provide information affecting the personal and familiar intimacy.

Third, to honor and good reputation, to personal and familiar intimacy and to one's own voice and image.

The Constitution expressly states that the habeas corpus and "amparo" actions would not be suspended during exception constitutional regimes (art. 137). In such cases, when these actions are filed regarding restricted or suspended rights, the competent court will examine the reasonability and proportionality of the restrictive act, but is not allowed to challenge the state of emergency or of site declaration.

All the constitutional guaranties, including the habeas corpus, "amparo" and habeas data actions have been regulated in the Constitutional Procedure Code (*Codigo Procesal Constitucional*) of 2005.

16. Habeas corpus in Dominican Republic

The Constitution of the Dominican Republic is one of the very few Latin American Constitution which does not expressly regulate the "amparo" action as a specific judicial mean for the protection of constitutional rights. Nonetheless, as mentioned above, this omission did not impede the Supreme Court of Justice from admitting and regulating the "amparo" action, applying for that purpose the Inter American Convention on Human Rights.

The basis procedure rules for amparo where established by the Supreme Court in its 1999 decision declaring the amparo recourse as a public positive law institution.

Regarding constitutional guaranties, the Constitution only sets forth the judicial guaranties for the protection of personal safety, by means of the action of habeas corpus. In this respect, Article 8 of the Constitution[172] provides that being "the effective protection of human rights the principal purpose of

172 **Artículo 8.-** Se reconoce como finalidad principal del Estado la protección efectiva de los derechos de la persona humana y el mantenimiento de los medios que le permitan perfeccionarse progresivamente dentro de un orden de libertad individual y de justicia social, compatible con el orden público, el bienestar general y los derechos de todos. Para garantizar la realización de esos fines se fijan las siguientes normas:

1. La inviolabilidad de la vida. En consecuencia no podrá establecerse, pronunciarse ni aplicarse en ningún caso la pena de muerte, ni las torturas, ni ninguna otra pena o procedimiento vejatorio o que implique la pérdida o la disminución de la integridad física o de la salud del individuo;
2. La seguridad individual. En consecuencia:
   a) No se establecerá al apremio corporal por deuda que no proviniere de infracción a las leyes penales;
   b) Nadie podrá ser reducido a prisión ni cohibido en su libertad sin orden motivada y escrita de funcionario judicial competente, salvo el caso de flagrante delito;

the State", the habeas Corpus statute will provide the way to proceed in a succinct way in order to secure, among others, with the compliance of the following individual safety rights: a. Not to be subject to corporal constraint because of debts not originated in violation of criminal statutes; b. Not to be imprisoned or to have restricted his freedom without motivated written judicial order, except in cases of flagrant crime; c. To be immediately freed at ones request or by any other person on one's behalf when deprived from one's freedom without due cause or without the legal formalities, on cases not set forth in the statutes; d. In case of detention, to be brought before a judicial authority within a 48 hour delay or to be freed; e. To be freed or to be subjected to prison within a delay of 48 hours after the detainee is brought before the judicial authority; f. Not to be transported from one prison to another without written and motivated judicial order.

The habeas corpus action has been regulated by the 1978 Habeas Corpus statute (*Ley de habeas corpus*).

17. Habeas corpus in Uruguay

The Constitution of Uruguay, even if it is true that it does not provide expressly for the action or recourse of "amparo", it can be deducted from its Article 7 when it declares the right of all inhabitants of the Republic "to be protected in the enjoyment of their life, honor, freedom, safety, work and property" [173].

Nonetheless, similarly to the Dominican Republic Constitution, the Uruguayan Constitution only regulated the action of habeas corpus, in Article 17[174], which states:

> **Article 17**.- In case of undue imprisonment, the interested party or any person can file before the competent judge the habeas corpus recourse in order to have the authority that has ordered the apprehension to immediately explain and justify its legal motive, being subjected to what the judge decides.

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c) Toda persona privada de su libertad sin causa o sin las formalidades legales, o fuera de los casos previstos por las leyes, será puesta inmediatamente en libertad a requerimiento suyo o de cualquier persona;

d) Toda persona privada de su libertad será sometida a la autoridad judicial competente dentro de las cuarenta y ocho horas de su detención o puesta en libertad;

e) Todo arresto se dejará sin efecto o se elevará a prisión dentro de las cuarenta y ocho horas de haber sido sometido el arrestado a la autoridad judicial competente, debiendo notificarse al interesado dentro del mismo plazo, la providencia que al efecto se dictare;

f) Queda terminantemente prohibido el traslado de cualquier detenido de un establecimiento carcelario a otro lugar sin orden escrita y motivada de la autoridad judicial competente;

g) Toda persona que tenga bajo su guarda a un detenido estará obligada a presentarlo tan pronto como se lo requiera la autoridad competente. La Ley de Hábeas Corpus, determinará la manera de proceder sumariamente para el cumplimiento de las prescripciones contenidas en las letras a), b), c), d), e), f) y g) y establecerá las sanciones que proceda; …

173 **Artículo 7º.-**Los habitantes de la República tienen derecho a ser protegidos en el goce de su vida, honor, libertad, seguridad, trabajo y propiedad. Nadie puede ser privado de estos derechos sino conforme a las leyes que se establecen por razones de interés general.

174 **Artículo 17.-** En caso de prisión indebida el interesado o cualquier persona podrá interponer ante el Juez competente el recurso de "habeas corpus", a fin de que la autoridad aprehensora explique y justifique de inmediato el motivo legal de la aprehensión, estándose a lo que decida el Juez indicado.

Notwithstanding, the "amparo" recourse has been regulated in the 1988 "Amparo" Law No, 16011 (*Ley de "amparo"*).

18. "Amparo" in Venezuela

The Venezuelan Constitution since 1961 has regulated the "amparo" not as a specific judicial means for the protection of constitutional right, but as a constitutional right in itself, of all persons to be judicially protected in the enjoyment of all human rights. This tradition has been followed in the 1999 Constitution, which guaranties the right of every person to have access to the Judiciary in order to have enforced his rights and interest, including the collective or diffuse ones, and to have the effective protection of the same, and to obtain in a speedy way the corresponding decision. For such purpose, "the State must guarantee a free justice, accessible, impartial, suitable, transparent, autonomous, independent, responsible, equitable, expeditious, without delay, without formalisms and useless repositions" (art. 26).

But in particular, regarding "amparo", Article 27 of the Constitution [175] sets forth the right to legal protection as follows:

> **Article 27.** Everyone has the right to be protected by the courts in the enjoyment and exercise of constitutional rights and guarantees, including even those inherent to persons not expressly mentioned in this Constitution or in international instruments on human rights.
>
> Proceedings on the action of constitutional "amparo" shall be oral, public, brief, free of charge and unencumbered by formalities, and the competent judge shall have the power to immediately restore the infringed legal situation infringed or the closest possible equivalent thereto.
>
> All time shall be available for the holding of such proceedings, and the court shall give priority to constitutional claims over any other matter. The action of "amparo" regarding freedom or safety, may be exercised by any person and the detainee shall be immediately transferred to the court, without delay. The exercise of this right shall not be affected in any way by the declaration of a state of exception or restriction of constitutional guarantees.

From this regulation, the "amparo" in conceived in Venezuela, as a constitutional right that all individuals have, to be protected on their human rights, even on those not expressly declared in the Constitution or in international treaties, but that are inherent to human beings, against any harm or threat from public officials or individuals. The action of "amparo" is thus expressly regulated, comprising the protection of individual freedom and safety.

But additionally, the Venezuelan Constitution has also set forth the habeas data recourse, by stating in its Article 28[176]:

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175 **Artículo 27.-** Toda persona tiene derecho a ser amparada por los tribunales en el goce y ejercicio de los derechos y garantías constitucionales, aun de aquellos inherentes a la persona que no figuren expresamente en esta Constitución o en los instrumentos internacionales sobre derechos humanos.

El procedimiento de la acción de "amparo" constitucional será oral, público, breve, gratuito y no sujeto a formalidad, y la autoridad judicial competente tendrá potestad para restablecer inmediatamente la situación jurídica infringida o la situación que más se asemeje a ella.

Todo tiempo será hábil y el tribunal lo tramitará con preferencia a cualquier otro asunto. La acción de "amparo" a la libertad o seguridad podrá ser interpuesta por cualquier persona, y el detenido o detenida será puesto bajo la custodia del tribunal de manera inmediata, sin dilación alguna. El ejercicio de este derecho no puede ser afectado, en modo alguno, por la declaración del estado de excepción o de la restricción de garantías constitucionales.

Article 28. Anyone has the right of access to the information and data concerning him or his goods which are contained in official or private registries, with the exceptions that may be established by statute, as well as to know what use is being made of the same and the purpose thereof, and to petition the competent court for the updating, rectification or destruction of erroneous records and those that unlawfully affect the petitioner's right. The petitioner may also have access to documents of any nature containing information whose knowledge could be of interest to communities or groups of persons. The foregoing is without prejudice to the confidentiality of sources from which information is received by journalists, or secrecy in other professions as may be determined by statute.

According to these constitutional provisions, the "*amparo*" has been consequently regulated *as a constitutional right* of the people, to require the protection of courts to ensure the enjoyment and exercise of *all the rights and guarantees* established by the Constitution or being inherent to the human being, against any distress, whether by public authorities or individuals, by means of proceedings that should be brief and summary, and that allow the judge to immediately restore the infringed legal situation[177].

Hence, the Constitution does not establish only "one" action or writ of protection as a particular remedy, but rather a "right to protection" as a fundamental right which can, and in fact is, exercised through a variety of legal actions and recourses, including a direct "action for protection" of a subsidiary nature.

Thus, the Constitution does not establish just a particular constitutional *adjective* "guarantee" of constitutional rank to protect constitutional rights, but moreover, what it has established is a true "constitutional right", the right of everyone to be protected by the courts in the enjoyment and exercise of their constitutional rights and guarantees. This character of the *amparo*, as a "constitutional right" is the basic element that identifies the Venezuelan institution[178] and that leads to its consideration not as a single action or complaint, but as a right. This criterion was the one that in our opinion, as abovementioned, led the Supreme Court in 1983, to change its criterion established in 1970, regarding the possibility of the exercise of the action for protection, even in the absence of the law regulating and developing the constitutional dispositions on the matter.[179]

The question could be stated as follows: If the norm of Article 49 were to establish an "action or recourse" for protection, then Article 50 of the Constitution which lays down that the absence of laws regulating the exercise of "constitutional rights" would not impede their exercise, would not be appli-

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176 **Artículo 28.**- Toda persona tiene derecho de acceder a la información y a los datos que sobre sí misma o sobre sus bienes consten en registros oficiales o privados, con las excepciones que establezca la ley, así como de conocer el uso que se haga de los mismos y su finalidad, y a solicitar ante el tribunal competente la actualización, la rectificación o la destrucción de aquellos, si fuesen erróneos o afectasen ilegítimamente sus derechos. Igualmente, podrá acceder a documentos de cualquier naturaleza que contengan información cuyo conocimiento sea de interés para comunidades o grupos de personas. Queda a salvo el secreto de las fuentes de información periodística y de otras profesiones que determine la ley.

177 The right of protection (Art. 27 Constitution) is thus different to the broader right to access to justice specifically regulated in Articles 26 and 48 of the Constitution

178 See Allan R. Brewer-Carías, "El derecho de *amparo* y la acción de *amparo*", in *Revista de derecho público,* nº 22, Editorial Jurídica Venezolana, Caracas, 1985, pp. 51-61.

179 See Supreme Court of Justice in Político-Administrative Chamber, October 20, 1983, in *Revista de derecho público,* nº 16, Editorial Jurídica Venezolana, Caracas, 1983, p. 169.

cable[180] on the contrary, if Article 49 of the Constitution was to establish a "fundamental right", as it is done, then Article 50 of the Constitution would be applicable,[181] and even without the law of the right of *amparo*, this right could be constitutionally exercised. The latter is the predominant criterion followed by the courts, and in our opinion is the most distinguishable feature of the *amparo* institution in Venezuela.

II. THE INTERNATIONALIZATION OF THE "AMPARO" IN THE LATIN AMERICA

As can be deducted from the constitutional regulations of the "amparo" right, action or recourse in all Latin American Countries, additional to the regulations of the habeas corpus and habeas data recourses, the existence of special judicial means for the protection of human rights can be considered as a general feature of Latin American constitutionalism; with Latin American origin and without real precedents in the historical European regimes.

That is why this characteristic institution of Latin American constitutionalism, was originally regulated in the American Declaration of the Rights and Duties of Man approved by the Ninth International Conference of American States, held in Bogotá, Colombia, in April 1948, in which Article 18 set forth:

> **Article XVIII**. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him (*lo ampare*) from acts of authority that, to his prejudice, violate any fundamental constitutional rights[182].
>
> A similar regulation was later incorporated in Article 8 of the Universal Declaration of Human Rights adopted by United Nations in December the same year 1948. In the English version of the Declaration, Article 8 just states that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law". Nonetheless, in the Spanish version, the wording is nearest to the American Declaration wording:
>
> **Article 8,** Toda persona tiene derecho a un recurso efectivo, ante los tribunales nacionales competentes, *que la ampare* contra actos que violen sus derechos fundamentales reconocidos por la constitución o por la ley.

A free English translation of this text will show not only a right to an effective remedy but a right to an effective remedy for the protection of human rights: "Every person has the right to an effective recourse before the national competent courts, for his protection (*que la ampare*) against acts that violate his fundamental rights recognized in the Constitution and in statutes".

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180 See the opinion stated by the Attorney's General Office in *Doctrina de la Procuraduría General de la República 1970*, Caracas, 1971, p. 35.

181 See J.R. Quintero "Recurso de *amparo*. La cuestión central en dos sentencias y un Voto Salvado" in *Revista de la Facultad de Derecho*, nº 9, Universidad Católica Andrés Bello, Caracas, 1969-1970, pp. 161-162-166. See the judicial decision and its dissident opinion in pp. 180-206. See the text also in O. Marín Gómez, *Protección procesal de las garantías constitucionales de Venezuela. Amparo y Habeas Corpus*, Caracas, 1983, pp. 229-250.

182 The Spanish vesion of article 18 is as follow: Derecho de justicia: Artículo XVIII: Toda persona puede ocurrir a los tribunales para hacer valer sus derechos. Asimismo debe disponer de un procedimiento sencillo y breve por el cual la justicia *lo ampare* contra actos de la autoridad que violen, en perjuicio suyo, alguno de los derechos fundamentales consagrados constitucionalmente.

After this first International Declarations, in 1950 the European Convention on Human Rights, which was the first international convention on human rights, also regulated the right to effective recourses in cases of violations of human rights, as follows:

> **Article 13.** Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity[183].

The 1966 International Covenant on Civil and Political Rights of the United Nations, Article 2,3 also regulated the right to an effective remedy in case of violations of human rights, as follows, by obligating the Stats parties to undertake:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c) To ensure that the competent authorities shall enforce such remedies when granted[184].

Finally, the 1969 American Convention on Human Rights declared the right to judicial protection, or more precisely, to the "amparo" recourse, as follows:

> **Article 25.** *Right to Judicial Protection*
>
> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection (que la ampare) against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
> 2. The States Parties undertake:
>   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

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183 The Spanish version of article 13 is: **Artículo 13. Derecho a un recurso efectivo**. Toda persona cuyos derechos y libertades reconocidos en el presente Convenio hayan sido violados tiene derecho a la concesión de un recurso efectivo ante una instancia nacional, incluso cuando la violación haya sido cometida por personas que actúen en el ejercicio de sus funciones oficiales.

184 The Spanish version is: Article 2,3. Cada uno de los Estados Partes en el presente Pacto se compromete a garantizar que:

a) Toda persona cuyos derechos o libertades reconocidos en el presente Pacto hayan sido violados podrá interponer un recurso efectivo, aun cuando tal violación hubiera sido cometida por personas que actuaban en ejercicio de sus funciones oficiales;
b) La autoridad competente, judicial, administrativa o legislativa, o cualquiera otra autoridad competente prevista por el sistema legal del Esta do, decidirá sobre los derechos de toda persona que interponga tal recurso, y desarrollará las posibilidades de recurso judicial;
c) Las autoridades competentes cumplirán toda decisión en que se haya estimado procedente el recurso.

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted[185].

1. The "amparo" in the American Convention on Human Rights

This article of the American Convention regulates the "amparo" recourse for the protection of human rights, as their judicial guarantee *par excellence*, both those regulated in the Constitutions and other internal legal regulations of the Party States, as well as those listed in international declarations. That is why the Inter American Court on Human Rights has considered this Article 25 as a "general provision that gives expression to the procedural institution known as "amparo", which is a simple and prompt remedy designated for the protection of all of the rights recognized in the Constitution and laws of the States parties and by the Convention"; thus, that "can be applied to all rights" [186].

But the American Convention, in Article 7 regarding the right to personal liberty and security, also provides for the recourse of habeas corpus as follows:

> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court decides without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it decides on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person on his behalf is entitled to seek these remedies.

Examining the habeas corpus and the "amparo" together, it is possible to conclude, as asserted by the Inter American Court on Human Rights,

> "that '"amparo"' comprises a whole series of remedies and that habeas corpus is but one of its components. An examination of the essentials aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States parties, indicates that in some instances habeas corpus functions are an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened

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185 The Spanish version is as follows: **Artículo 25. Protección Judicial.** Toda persona tiene derecho a un recurso sencillo y rápido o a cualquier otro recurso efectivo ante los jueces o tribunales competentes, *que la ampare* contra actos que violen sus derechos fundamentales reconocidos por la Constitución, la ley o la presente Convención, aun cuando tal violación sea cometida por personas que actúen en ejercicio de sus funciones oficiales.

Los Estados partes se comprometen:

a) a garantizar que la autoridad competente prevista por el sistema legal del Estado decidirá sobre los derechos de toda persona que interponga tal recurso;

b) a desarrollar las posibilidades de recurso judicial, y

c) a garantizar el cumplimiento, por las autoridades competentes, de toda decisión en que se haya estimado procedente el recurso.

186 See Advisory Opinion OC-8/8 Habeas corpus in emergency situations), paragraph 32. (El artículo 25,1 de la Convención es una disposición de carácter general que recoge la institución procesal del "amparo", como procedimiento sencillo y breve que tiene por objeto la tutela de los derechos fundamentales").

with detention. In other circumstances, however, habeas corpus is viewed either as the ""amparo" of freedom" or as an integral part of "amparo"[187].

These regulations can be considered the culmination of the process of internationalization of the constitutionalization of human rights, in particular regarding the provision of specific judicial means for their protection. So, if it is true that since the XIX Century, the "amparo" and habeas corpus recourses or actions, were initially regulated in many Latin American Constitutions; since the seventies, they have now passed to be regulated in a general way in an International Convention that has been ratified by all Latin American Countries, where, in general terms -as has been previously analyzed, it has been recognized as having constitutional o supra statutorily rank. Regarding both guarantees the Inter American Court of Human Rigts, has considered "the writs of habeas corpus and of "amparo" among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27 (2) and that serve, moreover, to preserve legality in a democratic society"[188].

After its ratification, it has been the Convention the one that has pushed for the subsequent process of constitucionalization of the internationalization of the "amparo", being the inspiration for many of the new Latin America constitutionals reforms or regulations, sanctioned during the last two decades, particularly regarding the "amparo" recourse.

Nowadays, therefore, the right to a judicial guaranty of human rights ("amparo" and habeas corpus) set forth in the American Convention is also an international obligation imposed on the States Parties to guarantee their peoples these effective protective remedies of their human rights. This goes so far as to the point that lack of internal regulations and effective function, constitutes a breach of the Convention.

Referring in particular to the "amparo", from what it is set forth in Article 25 of the American Convention, as well as from the regulations of the other international instruments on human rights, the internationalization of the "amparo" recourse has concluded in the design of a specific remedy for the protection of human rights, considered by the Inter American Court on Human Rights, as "one of the basic pillars not only of the American Convention, but of the rule of Law in a democratic society"[189]; which can be characterized by the following elements:

First, in the American Convention the "amparo" is conceived as a specific judicial recourse or action, that is, as a judicial guaranty; but it is also conceived as a fundamental human right in itself, that is to say, the right of citizens to be protected by the Judiciary;

Second, the remedy is conceived to protect all human rights recognized in the Constitutions, in the statutes or in the international instruments;

Third, the recourse in order to seek the judicial protection must be simple, brief and effective;

Fourth, the recourse can be brought before the competent courts, which must be independent and autonomous according to the general terms of the international instruments;

Fifth, the protection refers to any kind of violations of human rights, thus produced by acts issued by private individuals as well as by public officials, even when acting in the course of their official duties;

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187 Advisory Opinion OC-8//87 of January 30, 1987 (Habeas Corpus in Emergency Situations), paragraph 34

188 Advisory Opinion OC-8/87 of January 30, 1987 (Habeas Corpus in Emergency Situation), paragraph 42; Advisory Opinion OC-9/87 of October 6, 1987 (Judicial Guarantees in Status of Emergency), paragraph 33.

189 See Case: *Castillo Páez,* p. 83; Caso: *Suárez Roseo,* p. 65 and caso: *Blake,* p. 102. See the referentes in Cecilia medina Quiroga, *La Convención Americana: teoría y jurisprudencia*, IIDH, San José, 2003, p. 358

Sixth, the effectiveness of the recourse is related to the effective repair of the offence by means of the enforcement of the judicial decision by the competent authorities.

The most important consequence of the internationalization of the "amparo", is that according to Article 1,1 of the Convention, the States Parties are obligated not only "*to respect*" the right to "amparo" recognized herein, but also "*to ensure* to all persons subject to their jurisdiction the free and full exercise" of such right, without any discrimination. This "implies the duty of States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights"[190].

The actions of the State Parties in order to comply with this obligation are not only formal ones, in the sense that it "is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation, it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights"[191]. On the contrary, as stressed by the Inter American Court on Human Rights, referring to the "amparo" as a judicial guaranty of human rights,

> "for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress"[192].

2. The meaning of the regulation of the "amparo" in the American Convention

As mentioned before, Article 25 of the Convention provides that everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection (*que la ampare*) against acts that violate his fundamental rights recognized by the Constitution or laws of the state concerned and by the American Convention itself.

From this precise provision derives the framework that this action for the protection of fundamental rights should have in internal law[193] and which demands constitutionalization strategies for different countries in which Constitutions establish what could be considered restrictions to the exercise of the right to "amparo".

3. The "amparo" as a Human Right

Firstly, the American Convention conceives the "amparo" as a human right in itself, when providing that everybody "has the right" to a recourse. This does not mean that people only have a specific adjective law instrument for the protection of other rights, but that everyone has a human right in itself to obtain constitutional protection or "amparo" regarding all human rights.

Thus, we are in fact in the presence of a human right of the people to have at their disposal an effective, simple and prompt judicial means for the protection of their rights; which additionally, is con-

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190 Case: *Velásquez Rodríguez,* Judgement July, 29, 1988, Paragraph 166.

191 *Idem*, paragrapf 167

192 Advisory Opinión OC-9/87 of October 6, 1987 (Judicial Guarantees in Status of Emergency), paragraph 24. See in similar sense, Case: *Comunidad Mayagna (Sumo) Awas Tingni,* paragraph 113; Caso: *Ivcher Bronstein,* paragraph 136; Caso: *Cantoral benavides,* paragraph 164; caso: *Durand y Ugarte,* paragraph 102.

193 *Véase* Allan R. Brewer-Carías, "El "*amparo*" en América Latina: La universalización del régimen de la Convención Americana sobre Derechos Humanos y la necesidad de superar las restricciones nacionales" in *Ética y Jurisprudencia*, 1/2003, Enero-Diciembre, Universidad Valle del Momboy, Facultad de Ciencias Jurídicas y Políticas, Centro de Estudios Jurídicos "Cristóbal Mendoza", Valera, Estado Trujillo, 2004, pp. 9-34.

sidered in the Convention as one of the "fundamental" rights that cannot be suspended or restricted in cases of state of emergency.

Article 27 of the Convention allows that in time of war, public danger, or other emergency that threatens the independence or security of a State Party, certain measures to be taken derogating its obligations under the Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. In paragraph 2 of the same article, it set forth that

> "The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to juridical personality), Article 4 (Right to life), Article 5 (Right to humane treatment), Article 6 (Freedom from slavery), Article 9 (Freedom from ex post facto laws), Article 12 (Freedom of conscience and religion), Article 17 (Rights of the family), Article 18 (Right to a name), Article 19 (Rights of the child), Article 20 (Right to nationality), and Article 23 (Right to participate in Government), or of the judicial guarantees essential for the protection of such rights".

The Inter American Court on Human Rights has issued two Advisory Opinions on the matter regarding the possibility of the suspension of the "amparo" and habeas corpus provisions, having concluded that "the suspension of the legal remedies of habeas corpus or of "amparo" in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention"[194], being incompatible with "legality in a democratic society" which must be preserved[195].

But in spite of the American Convention provision considering the "amparo" as a human right, it is true that in the majority of internal legislation of Latin American Countries, the "amparo" has not been provided as a constitutional right in itself and it has taken the form of, rather, been regulated as an specific adjective action. In other words, the "amparo" has been regulated as a specific remedy or judicial means of protection, either a recourse of "amparo", "tutela" or protection, or as an action of *habeas corpus* or *habeas data*.

Instead, the American Convention sets forth the judicial protection of human rights, by mean of a prompt, simple and effective remedy that could be not only the specific action of "amparo" or habeas corpus, but another judicial mean, such as it occurs in countries where an "action of "amparo"" is not specifically regulated, as it is the case in the United States, England, France or Italy; but where although no legal means called "action of "amparo"" exist, there are nevertheless adequate mechanisms for the effective protection of human rights by means of ordinary judicial remedies. Nonetheless, it can be said that in some Latin American countries, following the orientation of the American Convention and, moreover, in advance of the adoption of such Convention, the "amparo" was conceived as a constitutional right in itself, and it has been developed with those characteristics, such as in the case of Mexico and Venezuela and also in the case of Colombia.

4. The "amparo" as a judicial guarantee

Secondly, the recourse of "amparo" enshrined in Article 25 of the Convention devoted to regulate the "Right to judicial protection", must of course always be a judicial mean of protection. This feature differentiates the provisions of the American Convention from those of the International Covenant on

194 Advisory Opinion OC-8//87 of January 30, 1987 (Habeas Corpus in Emergency Situations), paragraph 43.

195 *Idem*, paragraph 42

Civil and Political Rights (Article 2,3) and of the European Convention on Human Rights, which only provides for an effective recourse, without qualifying it as "judicial".

The judicial protection mechanisms referred to such article of the American Convention is undoubtedly inspired in the Latin American action of "amparo", but it can be said that its scope may be wider. It comprises of course the Colombian action of tutela and the Chilean action of protection, but it also comprises all other judicial remedies that in an effective, simple and prompt way can protect human rights. The Convention speaks of an effective, prompt and simple means that may be of any type. Therefore, in fact, it can be any effective judicial means, and not necessarily a single and unique action of "amparo". In other words, the Convention not necessarily refers to an only and single judicial remedy, but rather that there can and must be a collection also effective, of ordinary legal means for the protection of human rights. That is why, regarding "amparo", in general terms most of the Latin American legislations set forth that this specific means has a subordinate nature, in the sense that it proceeds only when there are no other effective judicial means that can protect human rights; in similar sense than the subordinate character the Anglo-American injunction has.

On the other hand, referring to the judicial character of the action or recourse, the Convention also set forth that they can be brought before the "competent courts", thus being the intention of the Convention to set forth an essential function of the Judiciary, as also happens, for instance, under the Anglo-American systems, where the "amparo" exists in the various writs of injunctions, but without being named as such. In these systems judges routinely issue *mandamus*, *injunction* and *prohibition* orders or decisions, equivalent to the ""amparos" in Latin America. However, this is part of the routine actions of the Judiciary, without it being a specific judicial mean.

On the other hand, when the American Convention refers to the "competent courts" in order to decide "amparo" remedies, it is not referring to only one specific court, but to all the Judiciary. That is why, pursuant to the Convention and Latin American tradition, competence in "amparo" matters are in general essentially belonging to the Judiciary, in the sense that such competence shall belong to "the tribunals" - to all of them and not just one of them-, which is in fact a characteristic of the European model, in particular that of Germany and Spain, where competence in "amparo" matters is held by one single Tribunal, the Constitutional Tribunal.

Unfortunately, however, this reduction of the judicial competence to constitutionally protect through an "amparo" has occurred in some Latin American countries, upon assigning it to one single tribunal, particularly the Supreme Court. This is the case of the Supreme Court of Justice of Panama, and of the Constitutional Chamber of the Supreme Courts of Costa Rica, El Salvador and Nicaragua, where such courts are the exclusively competent to hear the recourse of "amparo".

Whatever the case, and apart from the examples mentioned, in all other countries of Latin America, judicial competence in matters of "amparo" is diffused, in the sense that it is a power that is attributed, generally speaking, to the courts of first instance or circumscription courts, but it is not concentrated in one single institution. What the concentration of the hearing of the "amparo" in one single judicial institution finally does is to restrict access to justice for the effective protection of rights.

5. The "amparo" as a simple, prompt and effective judicial guarantee

Thirdly, in any case, the judicial recourse that the Convention guarantees, as set forth in Article 25 and as has been stressed by the Inter American Court on Human Rights, must be all together "simple, prompt and effective"[196].

196 Case: *Suárez Romero,* Paragraph 66.

Regarding the simplicity, it refers to a procedure that must lack the dilatory procedural formalities of ordinary judicial means, imposed by the need to grant a constitutional –not ordinary- protection; and regarding the prompt character of the recourse, the Inter American court has argued about the need for a reasonable delay for the decision, not considering "prompt" recourses which were resolved after "a long time"[197].

The effective character of the recourse refers to the fact that it will be capable to produce the results for which it has been created[198]; in words of the Inter American Court on Human Rigths,

> "it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy" [199].

Thus, it is not enough for being effective that a recourse be regulated in internal law for the purpose of protecting human rights, being necessary the existence of basic conditions to function and be applied with the expected results. In this regard, for a judicial recourse to be effective, above all is necessary for the Judiciary to be really independent and autonomous, so for instance in the case Ivcher Bronstein, the Inter American Court decided that in Peru at the time, the conditions of independence and autonomy of the court were not satisfied in the national proceeding, so the recourses that the plaintiff had had not been effective"[200]. The Inter American Court has also considered that a recourse is not effective when impartiality lacks in the corresponding court[201].

6. The "amparo" as a judicial guarantee for the protection of everyone's rights and guarantees

Fourthly, it should be emphasized that the Convention regulates a right that is guaranteed to "everyone", that is to say, everybody in the very broadest sense, without distinction or discrimination of any kind: individuals, nationals, foreigners, legally able or not, corporations or entities of public or private law.

It is true that Article 1,2 of the Convention sets forth that "for the purposes of this Convention, "person" means every human being". Nonetheless, Article 25 when guaranteeing the judicial protection right refers to such rights as corresponding to everyone and not to every person, so that regarding internal national law, artificial persons or legal entities have the right to the "amparo" recourse for the protection of their rights, like for instance, the due process of law and non discrimination rights.

But setting forth the "amparo" as a judicial remedy for the protection of any person or entity, that is to say, as a personal remedy, its results in principle, benefit the plaintiff, so that the effects of the "amparo" do not extend to third parties.

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197 Case: *Ivcher Bronstein,* paragraph 140.

198 Inter American Court on Human Rights, case: *Velásquez Rodríguez,* paragraph 66.

199 Advisory Opinión OC-9/87 of October 6, 1987 (Judicial Guarantees in Status of Emergency), paragraph 24.

200 Case: *Ivcher Bronstein*, paragraph 139.

201 Case: *Tribunal Constitucional* paragraph 96

This feature gives rise, firstly, to the problem of the protection of collective rights, an initiative attributed in some legislation to the Ombudsmen or Defenders of Human Rights. But the fact is that it has been progressively admitted in much internal statutes, the possibility for the communities to exercise the action of "amparo", when collective constitutional rights are being violated. Additionally, as a consequence of reforms tending to increase citizens access to justice, some statutes have set forth remedies for the protection of diffuse or widespread interests, particularly in regard to third generation rights, such as the protection of the environment or consumers rights.

In this sense, the standing to bring the action before the courts has being gradually constructed to allow interested parties to act in representation of diffuse or collective interests, when dealing with constitutional rights, the violation of which affects the community as a whole. In certain Constitutions, such as the Venezuelan Constitution of 1999, there is already no question regarding the possibility of exercising the recourse of "amparo" to protect collective and diffuse rights, already widely developed by case law. Some statutes have even expressly provided such protection, as occurs with the Organic statute for the Protection of the Child and the Teenagers, where a "recourse of protection" is regulated. This recourse may be brought before the Tribunal for the Protection of the Child and the Teenagers "against facts, acts or omissions of individuals, public and private entities and institutions that threaten or violate collective or diffuse (widespread) rights of the children and teenagers" (Article 177,5 and 318).

Another aspect related to the standing to file the action of "amparo", as previously mentioned, related to the assertion of the American Conventions that the right to "amparo" is held by everyone, is the question of whether the public entities can be plaintiff on matters of "amparo". Public entities also have constitutional rights, such as the right to non discrimination, right to due process or right to own defence. Therefore, public entities are perfectly entitled to bring actions, so that the action of "amparo" is not only conceived as actions against the State.

In some countries it may even be considered that there is a constitutional "amparo" set forth in benefit of political entities, as the States and Municipal government in a Federation, when the respective Constitution guarantees their autonomy. In these cases, the constitutional guarantee set forth in the constitutional texts with respect to territorial autonomy, can also be the object of an action for protection, as has been admitted in Mexico and Germany.

But in other countries, as has been the case in Venezuela, even if the constitutional guarantee of municipal autonomy has been judicially discussed at the Supreme Court, the Constitutional Chamber in a restrictive interpretation has rejected the admissibility of the "amparo" action for such purposes, adopting a restrictive scope rule confining "amparo" only to constitutional rights and not to constitutional territorial guaranties[202].

7. The "amparo" as a judicial guarantee for the protection of all constitutional rights and guarantees

Fiftly, pursuant to the Convention this right to an effective judicial means of protection before the courts, is established for the protection of all the constitutional rights contained in the Convention, the Constitution and statutes or those that are inherent to the human person. Therefore all rights established in international instruments are also entitled to protection. Thus the open clauses of the constitutional rights acquires here all their value, protecting them even when they are not listed in the texts,

202 See Decision nº 1395 of November 11, 2000 (Case: *Gobernación del Estado Mérida y otros vs. Ministerio de Finanzas*), in *Revista de Derecho Público,* nº 84, Editorial Jurídica Venezolana, Caracas, 2000, pp. 317 ff.

but which are subject to constitutional protection since they are inherent to the human person and human dignity.

Consequently, according to the American Convention, all rights can be protected by means of "amparo" actions. As mentioned, those declared in the texts of the Constitutions, of the statutes, of the American Convention, as well as those that are inherent to the human person. As has been stated by the Inter-American Court of Human Rights in its *Advisory Opinion* (OC-8/87) analyzing Article 25,1 of the Convention: "The above text is a general provision that gives expression to the procedural institution known as "amparo"," which is a simple and prompt remedy designed for the protection *of all of the rights* recognized by the constitutions and laws of the States Parties and by the Convention."[203]

Therefore, pursuant to the Inter-American system, there is a complete and unlimited catalogue of the rights to be protected. However, in some cases, perhaps because of the influence of the European model of "amparo" recourse, particularly the one regulated by Germany and Spain, the rights protected by mean of "amparo" have been reduced to some of the rights listed in the constitutional text. Is the case, for example, of the German Constitution, which only admits the action of "amparo" for what it calls "fundamental rights," which constitutes only one species of the constitutional rights. In Spain too, the rights that may be protected by an "amparo" recourse are those expressly listed as "fundamental".

None of the above can be derived from the American Convention or from the majority of Latin American Constitutions, wherein all constitutional rights are subject to "amparo". Therefore it may be said that the Constitutions that establish a determined array of rights that are to be protected by means of a recourse to "amparo", are incompatible with the international obligations that are imposed on such States by the Convention. The American Convention does not allow the exclusion of constitutional protection by means of the "amparo" of determined constitutional rights, or in other words, it does not allow that the "amparo" be reduced to a protection only in respect of determined rights declared in a Constitution.

Consequently, systems such as those regulated by the constitutional texts of Chile and Colombia may be considered to be incompatible with the American Convention. In fact, in the case of Chile, the Constitution lists the rights that may be the object of recourse to protection (Article 20), and in the case of Colombia, the Constitution also includes a list of the "fundamental rights" that may be the object of protection. However, the courts in Colombia have fortunately been gradually correcting this restriction through constitutional interpretation, in such a way that today, due to the interrelation, universality, indivisibility and interdependence of rights, there are almost no constitutional rights that can not be protected by means of the action of "tutela".

In contrast to such cases of restrictive constitutional provisions on constitutional rights that may be the object of protection by means of a recourse to "amparo", "tutela" or protection, there are other Constitutions that expressly set forth as being within the scope of protected rights not only all constitutional rights, but also those that are declared in the international system of protection of human rights. This is the case, for example, of the Constitution of Costa Rica, which lists among the rights subject to protection by recourse of "amparo" those rights "of a fundamental nature established in the international instruments on human rights, applicable to the Republic" (Article 48).

In an even broader sense, the 1999 Constitution of Venezuela expressly states that the right to "amparo" includes protection of "constitutional rights and guarantees, even those that are inherent to the human person and which do not expressly figure in this Constitution or in the international instruments of human rights" (Article 27), which must be interpreted to mean that not only the constitu-

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203 Advisory Opinion OC-8/87 (Habeas Corpus in Emergency Situations), paragraph 32

tional rights and guarantees and those listed in international instruments are subject to protection, but also all those inherent to the human person, even when they are not expressly listed in the Constitution itself or in international instruments.

8. The "amparo" as a judicial guarantee for the protection of all constitutional rights and guarantees, against any violation or harm from the State or individuals

Sixthly, the protection that the Convention regulates is against any act, omission, fact or action that violates human rights and, of course, which threatens to violate them too, because it is not necessary to wait for the violation before being able to have recourse to the means of protection. This implies that this means of protection has to be able to exist before the violation occurs, when there is a real threat of such violation and, of course, before any violation or threat of violation, no matter who is the author. This is to say that no action or omission that could imply a violation of rights, shall be excluded from the "amparo", whether it emanates from individuals or from the authorities under any guise whatsoever, be it a statute, an administrative act, a judicial decision, a *fait accompli*, an action or an omission, or just a fact.

All this implies that the recourse of "amparo" can be brought before the courts against any persons. It must be remembered that the recourse of "amparo" was always originally conceived as a judicial means of protection against the State, precisely because human rights were initially conceived regarding the State, and as a limit to the actions of public entities. However, the progressive universalization of human rights as inherent to the human person, independently of who must respect them, the scope of protection has been widening, to the point of admitting that the "amparo" can also be a recourse against private individuals. Thus, pursuant to the American Convention, which makes no distinction in this regard, the "amparo" proceeds not only against impairment of human rights originated by a public entity, but also by a private individual.

In this regard, it may be said that the action of "amparo" against individuals in Latin America is broadly admitted, following a trend that began in Latin America, more precisely in Argentina in the 50s, when the possibility of exercising a recourse of "amparo" against individuals was admitted. This situation is in sharp contrast with what occurs in Europe where the "amparo" is essentially only exercised against the public authorities.

Nevertheless, certain restriction of this principle of universality of "amparo" that is a characteristic of Latin America can be found in some Constitutions that set forth that "amparo" can only proceed regarding certain individuals, such as those who act as agents exercising public functions, or who exercise some kind of prerogative, or who are in a position of control, for example, when rendering public services, by mean of a concession.. This is the case, for example, in Costa Rica, Guatemala and Colombia.

Other countries following the European model as is the case of Mexico, Brazil, Panama, El Salvador and Nicaragua simply excluded any possibility of filing a recourse of "amparo" against private individuals; a situation distant itself from the orientation of the American Convention.

But regarding the constitutional protection against actions of the State, another scope of reduction of "amparo" that contrasts with the universality deriving from the American Convention, refers to the acts of the authorities that may be challenged by means of a recourse of "amparo". Pursuant to the American Convention and the universal shaping of the recourse of "amparo", there cannot and must not exist a single State act that escapes its scope. If the "amparo" is a legal means for the protection of human rights, it is and has to be against any public action that violates them, and therefore it cannot be conceived that there can be certain acts of the State that are excluded from the possibility to be challenged by amparo.

Nevertheless, a tendency towards exclusions can be identified in Latin America in different aspects:

In some cases, the exclusion refers to actions of certain public authorities, such as the electoral authorities, whose actions, in some countries like Peru, Costa Rica and Uruguay, are expressly excluded from the recourse of "amparo".

In other cases, Peru also as an example, exclusion from the scope of constitutional protection of the "amparo" is provided with respect to the acts of the National Council of the Judiciary.

On the other hand, the exclusion from the scope of protection of the recourse of "amparo" can refer to certain State actions, as happened with regard to the statutes and judicial decisions. Some countries, for example, Colombia, Brazil and Uruguay, exclude the possibility of filing the recourse of "amparo" against statutes, that is, in general terms against regulations. In contrast, in other countries "amparo" against statutes is admitted as is the case of Mexico, where the "amparo" against statutes began, even if in certain cases this requires self-application of the statute. In Venezuela, even though according to the Organic Statute of "amparo" the recourse is widely admitted against statutes, the Supreme Court has also developed the need for the statute to be self-applicable, in order to admit the "amparo" remedy.

In other cases, the restriction of "amparo" refers to judicial decisions. In principle, when judges decide particular cases, they too can infringe constitutional rights; and no judge is empowered to violate a constitutional right in his decisions. Therefore the recourse of "amparo", must also be admitted against judicial decisions. Nonetheless, in some countries the recourse of "amparo" against judicial decisions is expressly excluded, as is the case of Argentina, Uruguay, Costa Rica, Panama, El Salvador and Nicaragua. Yet, in other countries, like Colombia, although it is expressly regulated the admission of "amparo" against judicial decisions, in 1992, an unfortunate decision considered its admissibility as contrary to the principle of *res judicata*, so the Constitutional Court annulled the respective article of the statute[204]. But in spite of the annulment, progressively, all the main courts and the Council of State have admitted the action of "amparo" against judicial decisions, on the grounds of their arbitrary content (judicial *voi de fait*)[205].

9. The "amparo" as a judicial guarantee that can be filed at any time, including in situations of emergency

Seventhly and finally, the "amparo" recourse as well as the habeas corpus, are judicial means of protection that can be filed by the interested party at any time, without exception. Particularly, the right cannot be limited because of exceptional situations or states of emergency.

In particular, it must be mentioned that Article 27,1 of the American Convention allows that in time of war, public danger, or other emergency that threatens the independence or security of a State Party, "it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin".

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204 See Decision C-543, September 24, 1992 in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá, 2001, pp. 1009 ff.

205 See Decision T-231, May 13, 1994 in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá, 2001, pp. 1022 ff..

Nonetheless, in Article 27,2 it is expressly provided that no suspension at all is allowed regarding the following rights: right to juridical personality (Article 3); right to life (Article 4); right to humane treatment (Article 5); freedom from slavery (Article 6); freedom from ex post facto laws (Article 9); freedom of conscience and religion (Article 12); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20): and right to participate in Government (Article 23), "or of the judicial guarantees essential for the protection of such rights". Thus, the right to judicial protection of all those rights by means of "amparo" and habeas corpus cannot be suspended in situations of emergency.

The Inter-American Court of Human Rights in its *Advisory Opinion* (OC-8/87) of January 30, 1987 (Habeas Corpus in Emergency Situations) has referred to the question of whether habeas corpus as a judicial remedy "may remain in effect as a means of ensuring individual liberty even during states of emergency, despite the fact that Article 7 is not listed among the provisions that may not be suspended in exceptional circumstances". The Court concluded that if the exercise of State powers even in states of emergency has limits, "it follows that writs of habeas corpus and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society". Therefore, the Court ruled that "the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of "amparo" in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention"[206].

Afterwards, the Inter-American Court of Human Rights in its *Advisory Opinion* (OC-9/87) of October 6, 1987 (Judicial Guarantees in States of Emergency) emphasizes its ruling, holding that "the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees"[207]. Thus, the final Opinion of the Court was:

1. That the "essential" judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), "amparo", and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.
2. That the "essential" judicial guarantees which are not subject to suspension, include those judicial procedures, inherent to representative democracy as a form of government (Art. 29(c)), provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights referred to in Article 27(2) of the Convention and whose suppression or restriction entails the lack of protection of such rights.
3. That the above judicial guarantees should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention[208].

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206 Advisory Opinion oc-8/87 of January 30, 1987 (Habeas corpus in emergency situations), Paragraph 37, 42 and 43.

207 Advisory Opinion oc-9/87 of October 6, 1987 (Judicial Guarantees in States of Emergency), Paragraph 38.

208 *Idem*, paragraph 41

In general terms, the foregoing is the parameter that the American Convention establishes for the "amparo", and this is precisely what should prevail in the internal legal systems, where a huge effort has to be made from the constitutional perspective in order to adapt the internal regulations to such international system of protection of human rights.

CHAPTER V

THE AMPARO AS A CONSTITUTIONAL RIGHT AND AS A CONSTITUTIONAL REMEDY (ACTION FOR "AMPARO")

I. THE CITIZENS RIGHT TO THE SUPREMACY OF THE CONSTITUTION AND THE CONSTITUTIONAL RIGHT TO ITS PROTECTION

As has been mentioned before, the supremacy of the Constitution in a democratic society, as the product of the people's will expressed by means of the constituent power, implies that the Constitution cannot be modified except only by means of the constitutional revision process enshrined by the people in the same Constitution. The people as creator of the Constitution have a right to its preservation and to its supremacy.

The consequence of such right to he supremacy of the Constitution is the set of guaranties the Constitution set forth in order to protect it, by means of the judicial review power attributed to the Judiciary or by means of the actions for protection of the Constitution that can be filed before the courts.

In both cases, if people have a constitutional right to the supremacy of the Constitution and its contents, it also has a constitutional right to the protection of such supremacy, referred not only to the organic part of the Constitution (State organization and division and separation of powers) but also regarding its dogmatic side, that is, the constitutional rights and freedoms declared in the Constitution as pertaining to the people. Thus, everyone has rights guarantied in the Constitution, and everyone has the constitutional right to be effectively protected by the Judiciary in the enjoyment and exercise of such constitutional rights.

The consequence of such approach is that there is a fundamental right that can be distinguished, above all, and it is the right to the judicial control for the enforcement of the Constitution, in order to assure the submission of the State organs to the latter.

Concerning the organic part of the Constitution, this right implies: first, the right to judicial review of legislation (statutes), by means of direct actions of unconstitutionality brought before a constitutional court in a concentrated method of judicial review or by mean of the diffuse method of judicial review where the constitutionality of statutes can be challenge before any court; second, the right to judicial review of administrative action, generally by special administrative courts, on ground of constitutionality and legality; and third, the right to judicial review of judicial decisions through ordinary (appeals) or extraordinary (cassation) means of review.

Moreover, regarding the dogmatic part of the Constitution, this fundamental right to effective judicial protection of constitutional supremacy is also manifest in a right to judicial protection of the constitutional rights and freedoms of the people, either by ordinary judicial effective actions or recourses, or by means of specific actions or recourses of "amparo" or other judicial means of immediate

protection of such rights. These provision of constitutional guarantees to the constitutional rights and freedoms are an essential characteristic of contemporary democratic constitutionalism, the basis of which continues to be the unequivocal statement of Article 16 of the 1789 Declaration of the Rights of Man and the Citizen:

> Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.

The consequence of this fundamental right to constitutional supremacy and the right to its judicial protection undoubtedly implies the power/duty attributed to the courts for the purpose of guaranteeing constitutional supremacy, either by annulling State acts (statutes, administrative acts, judicial resolutions) that are contrary to the Constitution, or by re-establishing constitutional rights and freedoms impaired by illegitimate actions, both by State entities and by private individuals.

Such citizens' constitutional right, as all rights of the people guaranteed in the Constitution, can only be limited by the same Constitution. That is why statutory legal restrictions to this right to Constitutional supremacy and to "amparo" protection would be incompatible with their fundamental right character, whether manifested for instance in the exclusion of some State act to be challenged or of some constitutional rights whose violation cannot be immediately protected by the "amparo" action. Constitutional supremacy is an absolute notion that admits no exception, and therefore neither of the constitutional right could be excluded from the judicial protection guarantees, unless, of course, provided by the Constitution itself.

Anyway, as already mentioned, regarding the Latin American "amparo", the national constitutional and statutory regulations allow to distinguish two general systems according to whether the "amparo" of constitutional rights and freedoms is conceived to be *per se* a *constitutional right*, at the same time being a judicial guarantee in multiple ways; or as a specific judicial remedy for the protection of constitutional rights.

II. THE NATURE OF THE "AMPARO" AS A CONSTITUTIONAL RIGHT

Firstly, the "amparo" of constitutional rights and freedoms may be conceived in the constitutional system *as a constitutional right of the citizens, derived from the right to the supremacy of the Constitution and to obtain judicial protection from all courts regarding such rights and freedoms.* Such means of judicial protection may be *ordinary* judicial means, or a specific judicial means of immediate protection.

In these cases, therefore, the amparo has been regulated as a constitutional right, hence originating not just one judicial guarantee (action or recourse) of "amparo", but *multiple judicial proceedings, both ordinary and specific, for the protection of constitutional rights and freedoms*. Such is the case of Mexico and Venezuela where, in addition, no distinction is made between an amparo action and an habeas corpus action, being the latter just an amparo directed to protect personal freedom and safety.

III. THE MEXICAN SUIT OF "AMPARO"

As has been mentioned before, under Article 25 of the 1847 Act of Constitutional Reforms, Mexico introduced *the right of all inhabitants of the Republic to be legally protected by the courts* of the Federation regarding the rights and guarantees granted to them by the Constitution, against any attack by the Executive or Legislative Authorities, thereby establishing that the federal courts had the duty to provide protection only in concrete cases, without making general declarations concerning the act in question. This is how it arose the figure of constitutional "amparo", as a constitutional right of all

people to the protection of their constitutional rights and freedoms, the subsequent development of which, has shaped the so-called "judgment or trail of amparo".

This amparo suit, according to Article 1,1 of the Amparo Law, is set forth in order to resolve any controversy arisen from statutes and authorities' acts which violate individual guaranties. But also, according to the same article, it also has the purpose of resolving any controversy produced by federal statutes or authorities acts harming or restricting the States sovereignty or by States statutes of authorities' acts invading the sphere of federal authority.

In this case of amparo, the judicial protection is granted by means of a quick and efficient procedure, characterized by the absence of formalisms, the intermediary role the judge has between the parties, the inquisitorial character of the procedure which grants the judge with wide and inclusive *ex officio* powers to conduct and direct the process and the concentration of the procedure in only one hearing[209].

This "trial of amparo", if it is true that is the only judicial means that can be used for the judicial protection of constitutional rights and guarantees and also for judicial review of the constitutionality of statutes, does not only have that purpose, being a very complex procedural institution which comprises at least five different judicial actions and proceedings which are generally differentiated processes in the other countries with a civil law tradition.

These five different aspects of the trial for *amparo*, have been systematised by Professor Héctor Fix-Zamudio[210], as follows:

The first aspect of the trial for *amparo* is the so called "*amparo de la libertad"* (protection of freedom) in which the "*amparo"* proceeding functions as a judicial means for the protection of fundamental rights established in the Constitution. In this respect the trial for *amparo* could be equivalent to the request for a writ of *habeas corpus* when it seeks the protection of personal liberty, but can also serve as the protection of all other fundamental rights established in Articles 1 to 29 when violated by an act of an authority[211].

The second aspect of the trial of *amparo* is that it also proceeds against judicial decisions (Art. 107, III, V Constitution) when it is alleged that they have incorrectly applied legal provisions, which results in the so called "*amparo judicial"* or "*amparo casación"*, that is to say, in a judicial recourse very similar to the recourse of cassation that exists in civil and criminal procedural law in the civil law countries, to seek control of the legality or constitutionality of judicial decisions by the Supreme Courts of Justice. The institution is called *recurso de casación* following the French word *casation*, being in general the attribution of the Court on cassation or of the Supreme Court in their Civil, Labour and Criminal Cassation Chambers. It is an extraordinary judicial recourse which proceeds against definitive and final judicial decisions issued after the exhaustion of all ordinary appeals, and that can only be

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209 Héctor Fix-Zamudio, *Ensayos sobre el derecho de amparo,* Universidad Nnacional Autónoma de México, Editorial Porrúa, México, 2003.

210 H. Fix-Zamudio, *El juicio de amparo*, México 1964, p. 243, 377; H. Fix-Zamudio, "Reflexiones sobre la naturaleza procesal del amparo", *Revista de la Facultad de Derecho de México*, 56, 1964, p. 980. H. Fix-Zamudio, "Algunos aspectos comparativos del derecho de amparo en México y Venezuela", *loc. cit.*, p. 345; H. Fix-Zamudio, "Lineamientos fundamentales del proceso social agrario en el derecho mexicano" in *Atti della Seconda Assemblea. Istituto di Dirito Agrario Internazionale a Comparato*, Vol I, Milán, 1964, p. 402; Eduardo Ferrer Mac-Gregor, *La acción constitucional de* amparo *en México y España, Estudio de Derecho Comparado*, 2nd Edition, Edit. Porrúa, México D.F., 2000; Ignacio Burgoa O., *El juicio de amparo*, Twenty-eighth Edition, Editorial Porrúa S.A., México, 1991.

211 *Cf.* R.D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, Texas, 1971, p. 92.

founded on violations of the Constitution and statutes or of the judicial procedural formalities. By this judicial mean, the Supreme Court assures the uniformity of legal interpretation and judicial application of law. As mentioned, in all Latin American countries it is a specific extraordinary judicial recourse, except in México, where it is one of the modalities of the amparo trail.

The third aspect of the trial for *amparo* is the so-called "*amparo administrativo*" through which it is possible to impugn administrative acts that violate the Constitution or the statutes (Art. 107, IV Constitution . This aspect of the trial for *amparo* results in a mean for judicial review of administrative action, equivalent to the French born *contentieux administratif* extended to almost all civil law countries.

It must be also stressed that in the majority of Latin American countries, in some way influenced by the French administrative law doctrine, some kind of special courts and recourses have been created in order to control the legality and constitutionality of Public Administration's actions and in particular, of administrative acts, seeking their annulment. Even in some countries, such as Colombia, a *Consejo de Estado* has been created following the *Conceil d'État* French model, as the head of a Judicial Review of Administrative Action separate Jurisdiction. In the other countries, the head of the Jurisdiction has been located in the Supreme Court, and the main purpose of it, as mentioned, is to challenge administrative acts seeking their annulment, when being considered unconstitutional or illegal. The important trend of such Jurisdiction is that it is not only devoted to protect human or constitutional rights, but in general, the legality of the administrative actions.

Again in this regard, the Mexican system is also an exception in the sense that for controlling the legality of administrative action and for the protection of individual constitutional rights and guaranties, the administrative amparo has been developed. Consequently, in similar way to the Anglo-American tradition, the ordinary courts are in charge of controlling the Public Administration, but in the case of México, by means of the amparo suit.

The fourth aspect of the trial for *amparo* is the so called *amparo agrario* which is set up for the protection of peasants against acts of the agrarian authorities which could affect their agrarian rights, regulated by the agrarian reform provisions particularly referred to collective rural property (Art. 107, II).

Finally, the fifth aspect of the trial for *amparo*, is the so called *amparo contra leyes* (*amparo* against laws), which can be used to challenge statutes that violate the Constitution, which results in a means of judicial review of the constitutionality of legislation, exercised in a direct way in the absence of any administrative act of enforcement or judicial act of application of the statute considered unconstitutional. This aspect of the trial for *amparo* has been considered as the most specific in constitutional justice aspects.[212]

In all these five aspects of the trial for *amparo*, this particular means of constitutional judicial protection can be used as a means of judicial review of the constitutionality of legislative acts, in which cases they have the common trends of the diffuse system of judicial review, the fifth aspect of the *amparo* against laws, but have additional peculiarities.

In effect, all the four first mentioned aspects of the trial for *amparo* can be used as a means for judicial review of legislation when a constitutional question, having been raised in a particular proceeding, the courts decide the case, based on a statute considered to be unconstitutional. In such cases, the party which alleges being injured in his rights or interests by the decision, can exercise a recourse of

212 H. Fix-Zamudio, "Algunos problemas que plantea el amparo contra leyes", *Boletín del Instituto de Derecho Comparado de México*, UNAM, 37, 1960, 15, 20.

amparo against the judicial decision, seeking judicial review of legislation.[213] In these cases, the recourse of *amparo*, being a review of a judicial decision, must be brought before a Collegiate Circuit Court or the Supreme Court of Justice, according to their respective jurisdictions (Art. 107, V,VI).[214]

In cases of this direct *amparo* brought before the Collegiate Circuit Courts, the constitution confers the power of reviewing the decisions taken to the Supreme Court, only when constitutional issues are involved, In particular, the article 107, IX of Constitution sets forth:

> Decisions in direct amparo rendered by a Collegiate Circuit Court are not revisable unless the decision involves the unconstitutionality of a law or establishes a direct interpretation of a provision of the constitution, in which case it may be taken to the Supreme Court of Justice, limited exclusively to the decision of actual constitutional questions.

Nevertheless, the same constitutional provision states that the Collegiate Circuit Courts decisions in direct *amparo* are not revisable if they are based "on a precedent established by the Supreme Court of Justice as to the constitutionality of a law or the direct interpretation of a provision of the constitution."

Anyway, in all these cases of *amparo*, judicial review of legislation has an incidental character regarding a concrete judicial proceeding in which the constitutional question is raised and which brings about the use of the "recourse" of *amparo*, against the judicial decision which applied the unconstitutional statute.

Judicial review of legislation through the trial for *amparo*, therefore, has the general trends of the diffuse systems of judicial review according to the North American model,[215] even though with a few very important particular features which result from this unique judicial proceeding.

First of all, as we mentioned, the jurisdiction for a trial for *amparo* is reserved to the federal courts. Judicial review of the constitutionality of legislation in Mexico is not a power of all courts but attributed only to the federal courts.

Secondly, since the *amparo* trial is initiated either through a recourse of *amparo* in its first four aspects or through an action in the fifth aspect of the *amparo* against laws, it is always developed against a "public authority", whether it be the judge who has dictated the judicial decision or the administrative authority that has produced the administrative act which are both the object of the recourse of *amparo*; or the legislative authorities that have approved the statute which is the object of the *amparo* against laws action. This aspect reveals another substantial difference between the Mexican system and the general diffuse system, in which the parties in the process in where a constitutional question is raised, continue to be the same.[216]

As we have said, in the first four aspects of the trial for *amparo,* the proceedings are initiated through a recourse of *amparo* normally exercised against a judicial decision, the situation being different in the fifth aspect of the trial for *amparo,* so called *amparo* against laws, in which judicial review of constitutionality of legislation is sought through an "action of unconstitutionality", rather than

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213 H. Fix-Zamudio, "Aspectos comparativos del derecho de amparo en México y venezuela..." *loc. cit.* p. 358, 359; "Algunos problemas que plantea el amparo contra leyes...", *loc. cit*., p. 22, 23.

214 *Cf*. H. Fix-Zamudio, "Algunos problemas que plantea el amparo contra leyes...", *loc. cit*., p. 22

215 J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la ciencia política", *Revista de la Facultad de Derecho de México*, 45, México 1962, p. 657.

216 *Idem*, p. 657-661.

through a recourse, where the action is exercised against the legislative bodies that approved the challenged statute.

In effect, as we have said, one of the five aspects of the trial for *amparo* is the so called "*amparo* against laws", whose peculiarity regarding the other aspects of the trial for *amparo* consists in the fact that in this case, it is a proceeding initiated through a direct action brought before a federal district court (Art. 107, XII) by a plaintiff, against a particular statute. The defendants being the supreme organs of "the state" which intervened in the process of formation of the statute, namely, the Congress of the Union, or the state Legislatures which produced it; the President of the Republic or the Governors of the states which enacted it, and the Secretaries of state which countersigned it and ordered its publication.[217] In these cases, the federal district courts decisions are revisable by the Supreme Court of Justice. (Art. 107, VIII,a).

The *amparo* against laws, therefore, is a direct action against a statute, and the existence of a concrete administrative act or judicial decision for its enactment or its application is not necessary to its exercise.[218] Nevertheless, the constitutional question involved in this action is not an abstract one, and that is why only the statutes that inflict a direct injury on the plaintiff, without the necessity of any other intermediate or subsequent state act, can be the object of this action.[219] Therefore, the object of this action is self-executing statutes, that is to say, statutes that with their sole enactment, cause personal and direct prejudice to the plaintiff. That is why, in principle, the action seeking the *amparo* against laws must be brought before the court within 30 days after their enactment. Nevertheless, the action can also be brought before the Court within 15 days after the first act of enactment of the said statute so as to protect the plaintiff's rights to sue (Art. 21. Amparo Law).[220]

Regarding the effects of the judicial decision on any of the aspects of the trial for *amparo*, in which judicial review of constitutionality is sought whether in a pure incidental way or through the action to request an "*amparo* against laws", the constitution has expressly established (since the institution of the trial for *amparo* in the middle of the last century) that the courts cannot "make any general declaration as to the law or act on which the complaint is based", the judgment affecting "only private individuals" and limited to affording them shelter and protection in a special case to which the complaint refers" (Art. 107, II).[221] Therefore, a decision in a "trial for *amparo*" in which judicial review of legislation is accomplished, can only have *inter partes* effects, and can never consist of general declarations with *erga omnes* effects.

Therefore, the courts in their decisions regarding the unconstitutionality of a statute do not annul or repeal it; therefore, the statute remains in the books and can be applied by the courts, the only effect of the declaration of its unconstitutionality being directed to the parties in a concrete process.

On the other hand, it must be said that the decisions of the trials for *amparo*, whether or not referred to judicial review, do not have general binding effects even regarding other courts, and are only obligatory to other courts in cases of established *jurisprudencia,* that is to say, of obligatory precedent.

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217 H. Fix-Zamudio, "Algunos problemas que plantea el amparo...", *loc. cit.*, p. 21.

218 *Cf.* R.D. Baker, *op. cit.*, p. 164.

219 Self-executed Statutes (auto-aplicativas). *Cf.* R.D. Baker, *op. cit.* p. 167; H. Fix-Zamudio, "Algunos problemas que plantea el amparo...", *loc. cit.* p. 24.

220 *Cf.* H. Fix-Zamudio, "Algunos problemas que plantea el amparo...", *loc. cit.*, p. 32. *Cf.* R.D. Baker, *op. cit.* p. 171.

221 The principle is named the "Otero formula" due to its inclusion in the 1857 constitution under the influence of Mariano Otero. *Cf.* H, Fix-Zamudio, "Algunos aspectos comparativos del derecho de amparo..." *loc. cit.,* p. 360; and H. Fix-Zamudio, "Algunos problemas que plantea el amparo...", *loc. cit.*, p. 33, 37.

The constitution does not expressly establish when an obligatory precedent exists and refers to the special Organic law of the Constitutional Trial to specify "the terms and cases in which the *jurisprudencia* of the courts of the federal judicial power is binding, as well as the requirements for modifying it"(Art. 107, XIII, 1). According to that Organic law *jurisprudencia* is established by the Supreme Court of Justice or by the Collegiate Circuit Courts when five consecutive decisions to the same effect, uninterrupted by any incompatible rulings are rendered (Art. 192, 193) but it can be modified when the respective Court pronounces a contradictory judgment with a qualified majority of votes of its members(Art. 194).[222]

Nevertheless, as *jurisprudencia* can be established by the federal Collegiate Circuit Courts and by the Supreme Court, contradictory interpretations of the constitution can exist, having binding effects upon the lower courts. In order to resolve these conflicts, the constitution establishes the power of the Supreme Court or of the Collegiate Circuit Court to resolve the conflict, when the contradiction is denounced by the Chambers of the Supreme Court or another Collegiate Circuit Court; by the Attorney General or by any of the parties to the cases in which the *jurisprudencia* was established (Art. 107, XIII).[223] Anyway the resolution of the contradiction between judicial doctrines, has the sole purpose of determining one single *jurisprudencia* on the matter, and does not affect concrete juridical situations, derived from the contradictory judicial decisions adopted in the respective trials (Art. 107, XIII).[224]

Finally, regarding the practical effects of the trial for *amparo*, it must be stressed that the constitution establishes a particular preliminary remedy during the trial for *amparo*, which consists of the possible suspension of the application of the contested state act, which in certain aspects is similar to the injunction in the North American system but reduced to an *injunction pendente litis*.[225] In this respect, Article 107 of the constitution established that:

Contested acts may be subject to suspension in those cases and under conditions and guaranties specified by law, with respect to which account shall be taken of the nature of the alleged violation, the difficulty of remedying the damages that might be incurred by the aggrieved party by its performance, and the damages that the suspension might cause to third parties and the public interest (Art. 107, X).

The amparo suit, if against definitive judicial decisions of a District Court, must be filled before another District Court in the same District or before the Collegiate Circuit Courts when there is no other ordinary available recourse to modify it (Articles 40 and 158, Amparo Law). In all other cases, the action must be brought before the District judges with jurisdiction in the place where the challenged act is executed or is trying to be executed (Article 36 Amparo Law). In places where there is no District court, the First Instance courts can receive the complaint, being authorized to order the facts to be maintained as they are and to ask for the relevant reports on the case, before sending the files to the respective District Court (Article 38).

According to Article 114 the petition of amparo must be brought before the District Courts when they are filled: 1) against federal or local statutes, international treaties, national executive regulations or State's Governors regulations or any other administrative regulations which causes prejudices to the plaintiff by its enacting or due to their first applicatory act; 2) against acts issued by judicial, administrative or labour courts; 3) against acts issued by judicial, administrative or labour courts executed outside the trial or after its conclusion; 4) against execution of judicial acts regarding persons of

222 See the quotations in R.D. Baker, *op. cit.* p. 263.

223 See the comments, in R.D. Baker, *op. cit.*, p. 264.

224 See the comments in J.A.C. Grant, *loc. cit.* p. 662.

225 J.A.C. Grant, *loc. cit.*, p. 652, note 33.

assets which are of impossible to repair; 5) against acts issued within or outside the trial that affect persons not involved in it; 6). against federal statutes or authority acts; and 7) against the Public prosecutor resolutions confirming the not filling or desisting from criminal claims.

It must be also mentioned that according to a constitutional reform passed in 1983, based in the experience of the North American writ of certiorari, the Supreme Court was vested with a discretionary competency to select to review the cases of amparo of constitutional importance; and according to another constitutional reform on 1988, the Supreme Court was attributed the competency to decide in last instance all cases of amparo where the constitutionality of a statute were at stake. Both attributions allow the Supreme Court to give final interpretation of the Constitution in a uniform way[226].

As we can see, although having peculiarities that cannot be reproduced in any other legal system, the trial for *amparo* remains within its own particular trends, a means for judicial review that follows the features of the diffuse system of judicial review.

The above implies that in the case of Mexico, the amparo is not reduced to one single guarantee (action or recourse) of the protection of constitutional rights, but is rather a varied range of judicial procedures that make it more of a constitutional right than a specific guarantee.

Finally, it must be mentioned that regarding judicial review of constitutionality of statutes, the 1994 Mexican constitutional reform, for the first time in Mexico, introduced an abstract judicial review proceeding of statutes, by attributing to the Supreme Court the power to decide with general binding effect, actions regarding the constitutionality of statutes. In this respect, Article 105,II of the Constitution assigns to the Supreme Court of the nation the power to decide judicial actions raising contradictions between a general norm (regulation) and the Constitution, for instance, a federal statute, when filed within 30 days after its publishing, by a number equivalent to the 33% of the members of the Chamber of Representatives or of the Senate; by the Attorney General of the Republic; or against electoral statutes by the national representatives of the political parties. In these cases, the Supreme Court resolution can declare the invalidity of the statute with *erga omnes* effects when approved by not less than 8 of the 11 votes[227].

IV. THE RIGHT TO "AMPARO" IN VENEZUELA

As Héctor Fix Zamudio himself pointed out in 1970, when Venezuela incorporated Article 49 regulating the *right to* amparo in its 1961 Constitution, "... it definitively enshrined the right to amparo as a procedural instrument to protect all the constitutionally enshrined fundamental rights of the human person," in what he described as "one of the most outstanding achievements of the very advanced Magna Carta of 1961"[228].

In fact, the great contribution of the Venezuelan constitutional text of 1961, a concept that is followed under Article 27 of the 1999 Constitution, in relation to fundamental rights, was the establishment of the amparo as one more fundamental right, and not just as a sole dependent guarantee of the

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226 See Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*), Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México, 2005, p. 153-155.

227 See Joaquín Brage Camazano, "El control abstracto de la constitucionalidad de las leyes en México" in Eduardo Ferrer Mac Gregor (Coordinador), *Derecho Procesal Constitucional,* Editorial Podrúa, MéxicoVol I, 2003, pp. 919 ff.

228 See Héctor Fix Zamudio, "Algunos aspectos comparativos del derecho de amparo en México y Venezuela", *Libro Homenaje a la Memoria de Lorenzo Herrera Mendoza,* UCV, Caracas, 1970, Volumen II, pp. 333-390.

rest of the constitutional rights[229]. Therefore, the Constitution of Venezuela not only established an "action of amparo" to protect constitutional rights, but what it provided was "a constitutional right to amparo" and the subsequent obligation of all Tribunals to provide amparo to the people of the Republic in the enjoyment of the rights and freedoms enshrined in the Constitution, or which, when not listed in the text, are inherent to the human person.

That is why Article 1 of the Organic Law of Amparo of Constitutional Rights and Guarantees states the following:

> Any individual living in the Republic or artificial person domiciled therein, may request from the competent courts the amparo provided in Article 49 of the Constitution, of the enjoyment and exercise of constitutional rights and guarantees, even of those fundamental rights of the human person that are not expressly provided in the Constitution, in order that the infringed juridical situation or the situation most resembling such situation be reestablished immediately.
>
> The guarantee of personal freedom that regulates the constitutional habeas corpus, shall be governed by this Law[230].

By regulating and establishing the *action of* amparo of all constitutional rights and freedoms, even for the protection of personal freedom and safety (Article 38), the Organic Law of the Amparo of Constitutional Rights and Guarantees, in force since January 22, 1988[231], expressly recognized that the exercise of the right of amparo is not exhausted nor it is exclusively incurred by such procedural means, but that it can *also* be exercised through other actions or recourses established in the legal order.

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229 See Héctor Fix-Zamudio, "La teoría de Allan R. Brewer-Carías sobre el derecho de amparo latinoamericano y el juicio de amparo mexicano" in *El Derecho Público a comienzos del Siglo XXI. Libro Homenaje al profesor Allan R. Brewer-Carías*, Volumen I, Instituto de Derecho Público, Editorial Civitas, Madrid, 2003, pp. 1125 *et seq*.

230 On the action of amparo in Venezuela, in general, see: Gustavo Briceño V., *Comentarios a la Ley de Amparo,* Editorial Kinesis, Caracas, 1991; José Luis Castillo Marcano *et al*., *El amparo constitucional y la tutela cautelar en la justicia administrativa,* Fundación Estudios de Derecho Administrativo (FUNEDA), Caracas, 2000; Rafael J. Chavero Gazdik, *El nuevo régimen del* amparo *constitucional en Venezuela,* Editorial Sherwood, Caracas, 2001; Rafael J. Chavero Gazdik, *La acción de* amparo *contra decisiones judiciales*, Fundación Estudios de Derecho Administrativo (FUNEDA)-Editorial Jurídica Venezolana, Caracas, 1997; *El* amparo *constitucional en Venezuela (Doctrina, Jurisprudencia, Legislación)*, Volumen I, Instituto de Estudios Jurídicos del Estado Lara, Colegio de Abogados del Estado Lara, Diario de Tribunales 1987; *El amparo constitucional en Venezuela (Doctrina, Jurisprudencia, Legislación)*, Volumen II, Instituto de Estudios Jurídicos del Estado Lara, Colegio de Abogados del Estado Lara, Diario de Tribunales 1987; Gustavo José Linares Benzo, *El proceso de amparo en Venezuela*, Editorial Jurídica Venezolana, Caracas, 1993; Gustavo José Linares Benzo, *El Proceso de Amparo*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Caracas, 1999; Otto Marín Gómez, *La protección procesal de las garantías constitucionales de Venezuela. Amparo y Hábeas Corpus*, Universidad Central de Venezuela, Ediciones de la Biblioteca, Colección Ciencias Jurídicas y Políticas VI, Caracas, 1983; Nicolás Vegas Rolando, *El amparo constitucional y jurisprudencias*, Ediciones Librerías Destino, Caracas, 1991; Francisco José Utrera and Luis A. Ortiz Álvarez, *El amparo constitucional contra sentencias,* Editorial Torino, Caracas, 1997; Hildegard Rondón De Sansó, *Amparo Constitucional*, Caracas, 1988; Hildegard Rondón De Sansó, *La acción de amparo contra los poderes públicos*, Editorial Arte, Caracas, 1994.

231 See *Gaceta Oficial* n° 33.891 of January 22, 1988. See Allan R. Brewer-Carías and Carlos M. Ayala Corao, *Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales,* Caracas, 1988. See also Allan R. Brewer-Carías, *El derecho y la acción de amparo,* Tomo V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 163 *et seq*.

This was definitively resolved by the Supreme Court decision of July 7, 1971 (Caso Yarjetas Banvenez)[232] referred to by the same Supreme Court in decision dated June 1oth 1992, in which the Court stated:

> "The Amparo Law set forth two adjective mechanisms: the (autonomous) action for amparo and the jointly filing of such action with other actions or recourses, which differs in their nature and legal consequences. Regarding the latter, that is to say, the filing of such action of amparo jointly with other actions or recourses, the Amparo Law distinguishes tree mechanism: a) the action of amparo filed jointly with the popular action of unconstitutionality against statutes and State acts of the same rank and value (Article 3); b) The action of amparo filed jointly with the judicial review of administrative act recourse or against omissive conducts of Public Administration (article 5); and c) the amparo action filed jointly with ordinary judicial actions (article 6,5).
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> The Court has also sustained that the action for amparo in neither of these cases is an autonomous action of amparo, but a subordinate one, accessory to the action or recourse to which it has been joined, subject to its final decision. Being joined actions, the case must be heard by the competent court regarding the principal action"[233].

This decision, definitively clarified that the intention of the Amparo Law was to distinguish between the autonomous action for amparo and the amparo claim filed jointly with other existing actions, in which cases, the amparo is a claim dependant on the principal action, having the amparo decision a preliminary protective nature[234]

According to these provisions, Article 3 of the Amparo law provided the possibility for the claim of amparo to be filed jointly with the popular action of unconstitutionality of statutes, which is exercised before the Constitutional Chamber of the Supreme Tribunal of Justice. In these cases, when the popular action is founded on the violation of a constitutional right or guarantee, due to the nullity that such claim implies, the Organic Law authorizes the Supreme Tribunal to *suspend the effects of the disputed statute* in respect of the specific case, while the nullity popular action is decided.

On the other hand, Article 5 of the Amparo law expressly establishes that the claim of amparo against administrative acts and against Public Administration omissions may also be brought jointly with judicial review of administrative actions recourses. In such cases, when the cause of such recourse is the violation of a constitutional right by the challenged administrative act, the requirement of previously exhausting administrative procedures and the lapse for expiry that are common in judicial review of administrative actions recourses have been eliminated; and the courts are allowed to adopt immediate procedures for the abbreviation of lapses, as well as the power to suspend of the effects of the challenged act while the nullity judicial action is decided (Articles 5, and 6,5).

Finally, Article 6, Number 6, when establishing the causes of inadmissibility of the action of amparo, implicitly recognizes that the claim of amparo may also be brought jointly with other "ordinary judicial procedures" or "pre-existing judicial means," wherein the "violation or threat of violation of a constitutional right or guarantee may be alleged.". For instance, it can be filed jointly with the recourse of cassation, when the claim against the challenged judicial decision consists in its alleged violation of

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232 See the text in *Revista de Derecho Público,* nº 47, EJV, Caracas, 1991, pp. 169-174.

233 See in *Revista de Derecho Público,* nº 50, Editorial Jurídica Venezolana, Caracas, 1992, pp. 183-184.

234 See regarding the inadmisibility of the action, decision of First Court on Judicial Review of Administrative Action (CPCA: Corte Primera de lo Contenciosao Administrativo), December 14, 1992, en FUNEDA, *15 años de Jurisprudencia, Corte Primera de lo Contencioso-Administrativo 1977-1992. Amparo Constitucional,* Caracas, 1994, p. 121.

a constitutional right or guarantee. In such cases, the Cassation Chambers of the Supreme Tribunal shall follow the procedure and lapses established in the Organic Law of Amparo (Article 6,5), and the recourse will anyway have the effect of suspending the challenged decision.

In all these cases of amparo claims filed jointly with other judicial means, the Supreme Court of Justice has clearly set forth the proceeding rules, as follows:

> The amparo claims filed jointly with another action or recourse have all the inherent adjective character of the actions' joint proceedings, that is: it must be decided by only one court (the one competent regarding the principal action), and both claims (amparo and nullity or other) must be heard in only one proceeding that has two stages: the preliminary one regarding the amparo, and the contradictory one that necessarily include in its final decision, the preliminary one which ends in such time, as well as the decision on the requested nullity. In other words, if because the above analyzed characteristics the amparo order is reduced only and exclusively to the preliminary suspension of a challenged act, the decision which resolves the nullity requested leaves without effects the preventive preliminary measure, whether the challenged act is declared null or not.[235].

Of course, the action for amparo can also by brought before the first instance courts in an autonomous way, not being in such cases attached or dependent to any other proceeding. As the former Supreme Court of Justice pointed out in the already mentioned decision of July 10th, 1991 that undoubtedly:

> This action that is filed autonomously because of its re-establishing nature and its capability, sufficient and adequate nature to obtain the requested amparo mandamus, is a sufficient judicial mean in itself in order to return the things to the situation they had when the right was harmed and to make definitively disappear the offender act or fact, without the need to file any other judicial proceedings.
>
> That is why this Court has reiteratively sustained that in such cases, the plaintiff must invoke and demonstrate that it is a matter of flagrant, vulgar, direct and immediate constitutional harm, which must not be understood as saying that the constitutional rights and guaranties must not be regulated by statutes, but only that in order to decide, the courts must not base its ruling only on the violation of such statutes. On the contrary, it will not be a constitutional action for amparo but rather another type of recourse, for instance, the judicial review action against administrative acts, whose annulatory effects does not correspond with the restitutory effects of the amparo; and if such substitution be allowed, the amparo would arrive to substitute not only those actions but all the other procedural means set forth in the legal order, losing its extraordinary character[236].

Even regarding administrative acts, Article 5 of the Organic Amparo law states that:

> The action for amparo proceeds against any administrative act, material actions, factual actions (vía de hecho), abstentions or omissions that violate or threaten to violate constitutional rights and guarantees, provided that no other brief, summary and efficient mean exist according to the constitutional protection.

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235 *Idem.* p. 171.

236 *Idem.* pp. 169-170. 95

And of course, a judicial mean of that sort is precisely to joint the amparo claim to the judicial review action to challenge the administrative act, provided that a competent court of the judicial review of administrative actions jurisdiction exists in the place where the administrative acts has been issued.

From all that has been mentioned above, it may be said that the Venezuelan right to amparo as a constitutional protection set forth in Article 27 of the 1999 Constitution, has certain peculiarities that distinguish it from the majority of similar institutions of protection of the constitutional rights and guarantees established nowadays, both in Europe and in Latin America[237].

Therefore, pursuant to this constitutional norm and the Organic Amparo Law regulations, it may be stated that in Venezuela, the amparo is enshrined as *a right* of the inhabitants of the country to seek from courts that they protect and guarantee the enjoyment and exercise of all the rights and guarantees established by the Constitution or that are inherent to the human person, against any disruption, whether by public or private entities, by means of a procedure that shall be brief and summary, and that allows the judge to immediately reinstate the impaired juridical situation.

Therefore, the Constitution does not establish 'one' action or recourse of amparo as a particular means of judicial protection, but rather a right to amparo or "right to be subject to amparo," as a fundamental right that may materialize and which in fact materializes, through an "*autonomous action of* amparo"[238] which can, in principle, be exercised before any court or tribunal, irrespective of their hierarchy (Article 7); or by means of ordinary legal actions, when by means of brief and summary proceedings, the judge is empowered to immediately re-establish infringed legal situations. In all such cases, it is not that the ordinary means substitute the constitutional right of protection (or diminish it), but that they can serve as the judicial means for protection.

Thus, the "right to amparo" can be ensured by a variety of existing legal means (actions and recourses), in which case, the "right to protection" is not identified with any specific legal action. But in the case of the "action for amparo" -which, as it has been said, is of a subordinate nature in the sense that it is admissible only when there is no other judicial means of protection or relief formally provided for in the legal system-, this subordinate "action for amparo" does appear as differentiated from other means for the legal protection of rights and guarantees, and for the defence of the Constitution itself.

Indeed, this leads us to point out the substantial difference that exists between the Venezuelan "right to protection"- and even the subsidiary "action for amparo" contemplated in the Constitution, and the Mexican "trial for *amparo*", which is really a mixture, under one name, as we have seen, of five legal actions which in the Venezuelan legal system are completely different. These actions that in Mexico are covered by the heading *juicio de amparo* are: firstly, the protection of personal liberty, which is basically the remedy of *habeas corpus*; secondly, what is known as the "*amparo* against laws", which complements the direct action for judicial review of unconstitutionality of laws; thirdly, the "*amparo* cassation", which is really the same as the recourse of cassation; fourthly, what is known as "administrative protection", which leads to judicial review of administrative actions; and fifthly, the Mexican

237 See, in general, H. Fix Zamudio, *La protección procesal de los derechos humanos ante las jurisdicciones nacionales,* Madrid, 1982, pp. 366.

238 See Allan R. Brewer-Carías, "El derecho de amparo y la acción de amparo", *Revista de Derecho Público,* n° 22, Editorial Jurídica Venezolana, Caracas, 1985, pp. 51 *et seq*.

system of protection also includes what is known as "agrarian *amparo*" for the protection of the rights of peasants.[239]

By contrast with the Mexican situation, the right to protection contemplated in the Venezuelan Constitution, as we have pointed out, firstly ensures the possibility of protection when fundamental rights are infringed by state acts by means of the action of unconstitutionality of statutes (popular action), or through the power attributed to any judge to not apply a statute when it is considered unconstitutional (diffuse system of judicial review); by means of the recourse of cassation before the Cassation Chambers of the Supreme Tribunal with respect to judicial decisions; and by means of the administrative actions that can be exercised against administrative acts before the judicial review of administrative action Jurisdiction. Additionally, it ensures the possibility of protection of fundamental rights against infringement by other individuals through ordinary judicial means.

To ensure the effectiveness of all these ordinary judicial means to serve as means for protecting fundamental rights, the Amparo statute of 1988 has perfected them. For instance, in cases of the popular action seeking abstract judicial review of legislation, when its grounds are the infringement of a constitutional right or guarantee, an "amparo" joined petition can be filed, and due to the absolute nullity implied, seeking the Supreme Tribunal to decide the suspension of the effects of the challenged statute while the case is being decided.

In the procedure of the recourse of cassation, when the complaint against the challenged judicial decision is based on the violation of a fundamental right, the motives for the admissibility of the recourse could be widened, as well as the judicial decisions that could be impugned.

In the proceeding of judicial review of administrative action, when the grounds of the actions are the violation of fundamental rights, according to Article 5 of the Amparo Organic Statute, the expiry delay for the actions to be exercised is eliminated, due to the absolute nullity involved, and the judge is allowed to use his powers more freely to declare the emergency situation of the process, shortening delays, and to promptly suspend the effects of the challenged administrative act while the final decision of the case is produced.

However, as we have said, additional to all the ordinary means, the right to protection allows adequate protection to be achieved for constitutional rights and guarantees, by means of an "action for amparo" which has been regulated in the Amparo Organic Law, as a judicial means, completely different from the popular action for judicial review of unconstitutionality of statutes, the recourse of cassation, and from actions for judicial review of administrative actions, that can be brought before the first instance courts with jurisdiction in the site[240].

In this case, the "action for amparo" appears as a much broader action for protecting absolutely all constitutional rights and guarantees including the enjoyment and exercise of personal freedom.

Now, one of the features of this autonomous constitutional action, called the "action for amparo", is that it does not presuppose that other previous legal judicial or administrative means have to be exhausted before it can be exercised. This differentiates the institution of the "action for amparo" in Venezuela from the "recourse of *amparo* or the "constitutional complaint" developed in Europe, particularly in Germany and in Spain. In these countries, the protective remedy is really an authentic "re-

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239 Héctor Fix-Zamudio, "Algunos aspectos comparativos del derecho de *amparo* en México y Venezuela", *Libro Homenaje a la Memoria de Lorenzo Herrera Mendoza*, Universidad Central de Venezuela, Caracas, 1970, Vol. II, pp. 344-356.

240 See: Allan R. Brewer-Carías and Carlos M. Ayala Corao, *Ley Orgánica de Amparo a los Derechos y Garantías Constitucionales,* Editorial Jurídica Venezolana, Caracas, 1988; Hildegard Rondón De Sansó, *Amparo Constitucional,* 1991.

course" that is brought, in principle, against judicial decisions. In Germany, for example, to bring a constitutional complaint for the protection of constitutional rights before the Federal Constitutional Tribunal, the available ordinary judicial means need to be previously exhausted, which definitively entails a recourse against a final judicial decision, even though, in exceptional cases, a direct complaint for protection may be allowed in certain specific cases and with respect to a very limited number of constitutional rights.[241] In Spain, all legal recourses need to be exhausted in order to bring a "*recurso de amparo*" of constitutional rights before the Constitutional Tribunal, and, particularly when dealing with protection against administrative activities, the ordinary means for judicial review of administrative decisions must be definitively exhausted. For this reason, the recourse for protection in Spain is eventually a means for judicial review of decisions taken by the Administrative Judicial review courts.[242]

On the contrary, the "action for amparo" in Venezuela is not conditioned to previously exhausting other legal means, and thus it does not result as recourse against judicial decisions either. It is, as it has been pointed out, a judicial action that it is only admissible when no other legal action in the legal system exists to seek the protection of fundamental rights and their immediate reestablishment by means of brief, summary proceedings.

In this sense, in order to adequately understand the character of the "action for amparo", as an autonomous action, it must be borne in mind the protective character of other judicial means, among which are the actions for judicial review of administrative acts. It is not the case that the action for amparo requires the previous exhaustion of the actions for judicial review of administrative acts, when these violate fundamental rights, but that the action for judicial review can itself be considered as a means for protection of fundamental rights, in which case a petition in this regard can be joined to it. Thus, only when no judicial means for protection exists, and in the case of administrative acts, when actions for their judicial review are not effective as a means for protection due to the particular circumstances of the case, the "action for amparo" would be admissible.

On the other hand, it should be noted that according to the Constitution, the right to protection may be exercised according to the law, before "the Courts", and thus, as it has been said, the organization of the legal and procedural system does not provide for one single judicial action to guarantee the enjoyment and exercise of constitutional rights to be brought before one single Court.

The legal system may, and indeed does, regulate systems for the protection of constitutional rights and guarantees by means of ordinary actions, through brief and summary proceedings in which the judge has power to re-establish the infringed subjective legal situations immediately, which distinguishes the system from those in Europe, particularly from the action for protection in Germany or in Spain which is one, single action, to be brought before one, single Court, and which serves as a mechanism for the protection of certain constitutional rights and guarantees.[243.]

In Venezuela, according to Article 7 of the Organic Law on Amparo, the competent courts to decide amparo actions are the First Instance Courts with jurisdiction on matters related to the constitutional rights or guarantees violated, in the place where the facts, acts of omission have occurred. Re-

241 K. Schlaich, "Procedures et techniques de protection des droits fondamentaux. Tribunal Constitutionnel Fédéral allemand", in L. Favoreu (ed.), *Cours constitutionnelles européenes et droits fondamentaux*, Paris, 1982, pp. 105-164.

242 See, J.L. García Ruíz, *Recurso de amparo en el derecho español*, Madrid, 1980. F. Castedo Álvarez, "El recurso de amparo constitucional" in Instituto de Estudios Fiscales, *El Tribunal Constitucional*, Madrid, 1981, Vol. I, pp. 179-208.

243 *Cf.* H. Fix-Zamudio, "El derecho de amparo en México y en España. Su influencia recíproca", *Revista de estudios políticos*, nº 7, Madrid, 1979, pp. 254-255.

garding amparo of personal freedom and security the competent courts should be the Criminal First Instance courts (Article 40). Nonetheless, when the facts, acts or omissions harming or threatening to harm the constitutional right or guarantee occurs in a place where no First Instance court exists, the amparo action may be brought before and judge of the place, which must decide according to the law, and in a 24 hour delay it must send the files for consultation to the competent First Instance court (Article 9).

Only in cases in which facts, actions or omissions of the President of the Republic, his Cabinet members, the National Electoral Council, the Prosecutor General, the Attorney general and the General Comptroller of the Republic are involved, the power to decide the amparo actions correspond in only instance to the Constitutional Chamber of the Supreme Tribunal of Justice (Article 8).

Nonetheless, in all the other cases, the Constitutional Chamber of the Supreme Court has the power to review all "amparo" highest instance decisions by means of the extraordinary recourse of revision that the interested party can file before it, in which the Chamber can decide at its discretion, in a similar way as the North American writ of certiorari.

On the other hand, and independently of the autonomous action of amparo, the right to constitutional protection in Venezuela is expressed in several legal judicial means which may be brought before all the Courts, and which may serve as a protection by means of pre-existing actions and remedies, so long as provision is made for brief, summary proceedings with powers for the judge to restore the infringed subjective legal situations. For this reason, and given this all-inclusive characteristic, the "action for amparo" is not the only action or recourse admissible for protection but that, rather, it may also be obtained by other legal means regulated by the legal system.

However, whether by use of pre-established judicial means or through the autonomous action, the right to protection as expressed in the Venezuelan Constitution is to protect all the rights and guarantees that the Constitution establishes. This protection constitutes a fundamental guarantee of human rights, which in turn entails certain implications. Above all, the objective of the right to protection, according to the Constitution, is to protect the enjoyment and exercise of constitutional rights and guarantees, and thus, it applies not only to individuals as holders of such rights, but also to cases in which these rights are exercised by companies or corporations. There can be no doubt that, given the scope with which the Constitution declares the "right to amparo", the expression "all the inhabitants" cannot be understood to refer solely to human beings, rather, it also refers to all entities or organizations, since the rights established in the Constitution are moreover not only rights of individuals, but many of them are also rights of collective entities or artificial persons.

At the same time, however, the protection of the enjoyment and exercise of constitutional rights and guaranties is embodied in the Constitution not only regarding public actions, which may disrupt the enjoyment and exercise of such rights, but also regarding disruptions, which may originate from other private individuals. The Constitution makes no distinction in this respect, and thus the action for amparo is perfectly admissible against actions by individuals, the action for amparo has doubtlessly been conceived as a traditional means of protection against actions by the state and its authorities. However, despite this tradition of conceiving the action for protection as a means of protecting rights and guarantees against public actions, in Venezuela, the scope with which this is regulated by Article 27 of the Constitution allows the action for amparo to be brought against individual actions, that is to say, when the disruption of the enjoyment and exercise of rights originates from private individuals or organizations.

This also differentiates the Venezuelan system from that which exist in other systems such as Mexico or Spain, in which the "action for amparo" is solely conceived against public actions.[244] For this reason, as we have said, in Spain the recourse of amparo is expressed as a review of decisions by the administrative judicial court when reviewing administrative acts.[245]

On the other hand, in the case of protection from disruption originating from public authorities, it should be affirmed, without doubt, that as regulated by Article 27 of the Constitution, this protection is admissible against all public actions, that is to say, against all state acts as well as against any other action by public officials. The right to protection has, of course, been regulated, in many cases in this field, by judicial means already established in the legal system. For example, as far as unconstitutional statutes, which affect constitutional rights and guarantees, are concerned, it is admissible to bring a popular action before the Supreme Tribunal of Justice, which can be considered a means for protection. Also, when a judge decides not to apply a law, under Article 334 of the Constitution or Article 20 of the Civil Procedural Code, because he decides that it infringes a constitutional right, he also ensures protection of that right.[246] The same occurs with actions brought before the administrative judicial Tribunals against administrative acts, which constitute a means for the protection of constitutional rights and guarantees when the basis for impugning the administrative act is the violation of the enjoyment and exercise of such rights and guarantees, and the judicial suspension of the effects of the challenged act may be obtained immediately, and is admissible against any type of administrative act, both express and implied.[247]

Additionally, it must be said that the subordinate action for amparo is admissible against any activity by the Public Administration, even when this does not constitute a formal administrative act and is thus not open to actions before the administrative jurisdiction. That is to say, it would be admissible, for example, against material acts by the administration; its *de facto proceedings*; its failure to act or to fulfil an obligation; in short, against any action or omission by the Administration, and even, of course, against specific acts which may not be contested before the administrative judicial courts.

Indeed, the subordinate action for amparo may also be admissible against actions by the legislative body against which there are no legal means for objection, and may even be brought against judicial decisions against which no legal means of appeal exist or have been contemplated, or the recourse of cassation could not be exercised.

We have said, however, that the action for amparo also constitutes a means for the protection of the enjoyment and exercise of *all* rights and guarantees established in the Constitution: individual, social, cultural, economic, environmental and political rights.

By virtue of the Constitutional provision, there is nothing to suggest that the right to protection in Venezuela constitutes a means for the protection of only certain rights, but that rather, it relates, on the contrary, to all rights and guarantees established in the Constitution. This, of course, leads to the assertion that the right to protection and the subordinate "action for amparo" are means for protecting, not only those rights and guarantees listed in the Constitution, but also all the rights inherent to the human person, even when not specified in the Constitution. As abovementioned, this give sub-

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244 *Idem*, pp. 254-255. On the contrary in Argentina is accepted the recourse of "*amparo*" against individual actions. Kot case: *of 5.9.1958*. See G.R. Carrio, *Algunos aspectos del recurso de amparo*, Buenos Aires, 1959, p. 13.

245 *Cf.* J. González Pérez, *Derecho procesal constitucional*, Madrid, 1980, p. 278.

246 See Allan R. Brewer-Carías, *El control de la constitucionalidad de los actos estatales*, Caracas, 1978.

247 Allan R. Brewer-Carías, "Tipos de acciones y recursos contencioso-administrativos y el tema de la legitimación", in *Conferencia sobre la reforma de la justicia administrativa en Costa Rica*, Corte Suprema de Justicia, Marzo, 1986.

stantial importance to the series of human rights listed in the Universal Declaration of the Rights of Man, and in the International Conventions that regulate human rights, such as those of the American Human Rights Convention, or the International Covenants on Civil and Political, and Economic and Social Rights, which are, moreover, laws of the Republic, because they have been approved in Congress by special laws.[248] But, though limiting our comments to the rights described in the Constitution, however, we must stress the fact that what is termed *amparo* is the right to a judicial means for protecting the enjoyment and exercise of absolutely all those constitutional rights, which means that a difference is established with respect to other *amparo* institutions particular to Latin America.

In fact, if the situation in Latin America is analyzed comparatively, the following criteria can, in general, be identified. In the first place, the system that identifies *amparo* with judicial protection from arbitrary detention (*habeas corpus*) always entails a writ requiring that the person detained be shown. This was the legal tradition, for example, in Chile. Secondly, there is the system that identifies *amparo* as a means for the protection of all rights, except that of personal liberty, which is granted a special means of protection, such as the remedy of *habeas corpus*. This system, in fact, distinguishes between the two types of actions, the action for protection and the writ of *habeas corpus*, and is for example, the tradition in the Argentinean, and Brazilian systems.

Thirdly, *amparo* is also seen as a means for the protection of all rights and guarantees enshrined in the Constitution, and it has been the tradition in Central America, particularly in Guatemala, Honduras and Nicaragua, in contrast to the situation in Europe, for example, in which the remedy is established for the protection of certain rights only.[249] This happens, for example, in Spain, where the recourse of protection is reserved for the protection of a limited group of constitutional rights only, equivalent to what the Venezuelan Constitution has characterized as "individual rights."[250]

We have pointed out that *amparo* is conceived in Venezuela as the right to a legal means (action or remedy) for the protection of absolutely all constitutional rights and guarantees, not only, of course, of individual rights, but also of the social, cultural, environmental, political and economic rights declared in the Constitution. Also, as *amparo* is intended for the protection of all the rights and guarantees enshrined in the Constitution, this implies that what is known as the right of *habeas corpus* is really a part of the right to protection, or if preferred, one manifestation of the *amparo*.

That is why the right to seek protection against any deprivation or restriction to personal freedom is regulated in the Organic Amparo Law, setting forth that the action must bring before the First Instance Criminal court with jurisdiction in the place where the aggrieving act is enforced or where the aggrieved person is, court that must issue an habeas corpus mandamus (Article 39).

From the terms of Article 27 of the Constitution, it can be said that the objective protected by the right to amparo is the enjoyment and exercise of constitutional rights and guarantees, and of course, protection for the enjoyment and exercise of such rights and guarantees is admissible, not only when some *direct* violation of a constitutional rule occurs, but also of course, when there is a violation of the legal rules that regulate the enjoyment and exercise of such rights. We consider that there is no foundation whatsoever in Venezuela for wishing to restrict the exercise of the subordinate action for protection only to cases in which a "direct violation" of the Constitution occurs [251].

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248 See *Gaceta Oficial* nº 31.256 de 14-6-77 and nº 2.146 Extra. de 28-1-78.

249 Allan R. Brewer-Carías, *Garantías constitucionales de los derechos del hombre*, Caracas, 1976, p. 69.

250 Art. 53, ord. 2. Spanish Constitution 1978.

251 See the decision of the Supreme Court in Politico-Administrative Chamber of October 28, 1983, in *Revista de Derecho Público*, nº 16, Editorial Jurídica Venezolana, Caracas, 1983, p. 169. See the comments of René De So-

In effect, we must bear in mind that the regulation of constitutional rights and guarantees in Venezuela is not uniform, and that the manner in which they are embodied in the Constitution gives rise to differing effects of such rights and guarantees.[252] In fact, we may identify, in the first place, the "absolute rights", among which are the right to life, the right not to be held incommunicado, not to be subjected to torture or other procedures that cause moral or physical suffering, which is the same thing as the right to personal integrity, and the right not to be condemned to prison for life, or to punishments that are defamatory or that restrict personal freedom for more than 30 years. These rights are expressed in the Constitution in such a way that it can be said that they are rights that can neither be limited nor regulated even by the legislator, and that are, moreover, the rights which may not be restricted by executive decision based on the powers attributed to the President of the Republic in cases of emergency or disturbances that may disrupt the peace of the Republic, or in serious circumstances which affect its economic or social life. With the exception of these absolute rights, all other rights and guarantees, by contrast, are liable to limitation or regulation by the Legislator, and may be subject to measures for their restriction or suspension (art. 241 Constitution).

A second type of constitutional rights comprises those whose exercise may be restricted by the President of the Republic, even though, in principle, the legislator may not limit them. This stems from the manner in which the Constitution expresses the rights, for example, to protection of honour, reputation and privacy; the right not to take an oath or to make self-incriminating statements; not to remain imprisoned once officially released from jail; not to be punished twice for the same crime; the right to equality and freedom from discrimination; the right to religious freedom and to freedom of thought; the right to petition and to receive timely response; the right to be judged by one's ordinary judges; the right to defence; the right of association; the right to health protection; the rights to education and to work; and the right to vote.

A third category of rights, stemming from the Constitution, is that composed of those rights which may be limited by the legislator, although in a restricted way. This category contains, for instance, the prisoner's right, before being sentenced, to be heard "as indicated by the law"; the right to inviolability of the home, except in cases of search "according to the law and the decision of the courts"; the right to inviolability of correspondence, except in cases of inspection or fiscal supervision of accounting documents "according to the law"; the right to take public office, with the only restrictions being conditions of aptitude "required by law."

The fourth category comprises a series of constitutional rights that can be regulated and limited by the legislator in a wider form. Among such rights would be the right not to be detained unless caught *in fraganti*; "in the cases and with the formalities established in the law"; the freedom of movement "with the condition established by law"; the right to exercise a cult under the "supreme inspection of the State according to the law"; the right to carry on economic activities with no other limitations than those established by statute by reasons of security, health or other social interests; the right to property, submitted to the "contributions, restrictions and obligations established by law based on public or social interests"; the right to political association and to public demonstration "according to the formalities established by law." In all such cases, the exercise of rights is definitively subject to what the legislator stipulates, and within quite considerable margins.

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la, "Vida y vicisitudes del recurso de amparo en Venezuela", *Revista del Instituto Venezolano de Derecho Social*, 47, Caracas, 1985, p. 58, (also published in *Revista SIC*; 472, Caracas, 1985, 74.

252 Allan R. Brewer-Carías, *Instituciones políticas y Constitucionales*, Vol IV, *Derechos y garantías Constitucionales*, Universidad Católica del Táchira, Editorial Jurídica venezolana, Caracas-san Crietóbal, 1996.

The fifth and final category of constitutional rights and guarantees is formed by those established in such a manner that their exercise is definitively subject to legal regulation. Among such rights would be, for example, that of using the organs for the administration of justice "under the terms and conditions established by the law"; that of joining associations "according to the law"; and the right to strike "under the conditions set by the law". In all such cases, the manner in which the Constitution expresses the rights and guarantees requires that they be regulated by the Law so as to be exercised at all. From this classification of rights and guarantees into five groups, according to the Constitution, it is evident that there is no sense in holding that the right to protection, and in particular, the subsidiary "action for amparo", can only be admissible when the Constitution is "directly violated", since many rights are not only embodied in the Constitution, but rather, by virtue of the Constitution itself, their exercise is subject to provisions and regulations established by the Legislator. The right to protection is thus also admissible against violations of laws, which regulate the enjoyment, and exercise of rights.

We have pointed out that the right to protection, as regulated by the Constitution, has the definitive aim of ensuring the *enjoyment and exercise* of constitutional rights and guarantees. Precisely for this reason, the Constitution grants the competent judge the power to immediately "re-establish the infringed juridical situation", and precisely for this reason, also provides that "the procedure should be brief and summary."

This aim of the remedy of ensuring the enjoyment and exercise of constitutional rights and guarantees entails that the judge, of course, has power to adopt preventive and cautionary measures, but bearing in mind that the legal means of protection and even the subordinate action for amparo, are not necessarily exhausted thereby.

In other words, the protection for the enjoyment and exercise of constitutional rights and guarantees does not only entail, nor is it exhausted by the adoption of some immediate measure, by means of a brief and summary proceeding which re-establishes the infringed legal situation, but rather that the action or remedy for amparo by means of legal proceedings needs the judge in the case of *amparo* to decide on the substantive issue and give a verdict as to the legality and legitimacy of the "violation" of the right in question, without prejudice to the fact that, by means of brief and summary mechanisms, decisions may be adopted during the proceedings to immediately re-establish the infringed legal situation.

In our opinion and after analyzing the Venezuelan right for amparo, the following conclusions can be formed:

First, the Constitution consecrates a *right to amparo*, and not any particular "action" or "remedy" before a particular Court. This right is established as a fundamental right of individuals and collective persons.

Second, the right to protection implies an *obligation* of all Courts to protect according to the law, against disturbances of the enjoyment and exercise of rights and guarantees. Thus, the development the legislator has made regarding this right to amparo may take the form, as has happened, of pre-existing actions or remedies, or may consist of a subordinate action for protection, which is admissible when pre-existing actions and remedies cannot be effective by means of a brief and summary procedure with powers for the judge to protect fundamental rights and immediately re-establish the infringed legal situation.

Third, the right to protection may thus be guaranteed by means of *actions and recourse* contemplated in the legal order (the popular action of unconstitutionality; the power of all judges to decide not to apply a law considered unconstitutional; actions for judicial review of administrative actions;

the provisional system of *habeas corpus*), or by means of the subordinate and autonomous action for protection[253] and that can be brought before any court according to its subject of attributions.

Fourth, the right of amparo is admissible to guarantee the enjoyment and exercise of *all* constitutional rights and guarantees. It may be put into effect with respect to disturbances of individual rights, as well as those of social, economic, cultural environmental and political rights.

Fifth, the right to amparo seeks to assure protection of constitutional rights and guarantees against *any disturbance* in their enjoyment and exercise, whether this is originated by *private* individuals or by *public* authorities. In the case of disturbance by public authorities, the right of protection is admissible against legislative, administrative and judicial acts, by means of the actions and recourses contemplated in the legal order (the action of unconstitutionality, the recourse of cassation, or actions for judicial review of administrative actions) when they allow a legal situation which has been infringed, to be re-established by means of a brief and summary procedure, or by means of the subsidiary autonomous action for protection. Moreover, this action for protection is admissible against material acts or courses of action of the administration, thus it is not then admissible only against administrative acts.

Sixth, by virtue of the different ways in the Constitution for regulating fundamental rights, the right to amparo can be exercised to protect the enjoyment and exercise of constitutional rights and guarantees, *not only when there has been some direct violation of the Constitution*, but also when what has been violated are the legal developments which, by virtue of the Constitution, regulate, limit and even allow the exercise of such rights. Of course, protection must be exercised against an activity that directly violates a fundamental right established in the Constitution, whether it be regulated by statute or not, and whether or not the violation is contrary to what the law developing the right establishes.

Seventh, the decision of the judge as a consequence of the exercise of this right to amparo, whether this be pre-existing actions or recourses or by means of the subordinate and autonomous "action for protection", should not limit himself to precautionary or preventive measures, but should re-establish the infringed legal situation. To this end he should make a pronouncement on the substantive issue brought before him, namely the legality and legitimacy or otherwise the disturbance of the constitutional right or guarantee that has been reported as infringed.

Eighth, the Venezuelan system of judicial review, being a mixed one (can be exercised by all courts in whatever kind of judicial proceeding), where the diffuse system of judicial review has been fully developed, it is obvious that judicial review of legislation is a power that can be exercised by the courts when deciding action for amparo" of fundamental rights, when for instance, their violation is infringed by a public authority act based on a statute deemed unconstitutional. In such cases, if the judge gives the protection requested through an order similar to the writs of mandamus or to the injunctions, he must previously declare the statute based on which the challenged action was taken, inapplicable on the grounds of it being unconstitutional. Therefore, in such cases, judicial review of the constitutionality of legislation is also exercised when an action for amparo of fundamental rights is filed.

In this respect, some precisions must be made regarding the Venezuelan system of judicial review. Article 336 of the Constitution of 1999, following a constitutional tradition that can be traced back to the 1858 Constitution [254], sets forth the power of the Constitutional Chamber of the Supreme Tribunal, as Constitutional Jurisdiction, to review the constitutionality of statutes and other national, state or

253 Allan R. Brewer-Carías, "La reciente evolución jurisprudencial en relación a la admisibilidad del recurso de amparo", *Revista de derecho público*, nº 19, Caracas, 1984, pp. 207-218.

254 See J. G. Andueza, *La jurisdicción constitucional en el derecho venezolano*, Universidad Central de Venezuela, Caracas, 1955 p. 46.

municipal normative acts and acts of government adopted by the President of the Republic, when requested by means of a popular action. That is to say, it provides for judicial review of the constitutionality of all state acts issued in direct application of the Constitution, and particularly of statutes.

This judicial review power of the constitutionality of state acts allows the Supreme Tribunal of Justice to declare them null and void with *erga omnes* effects when they violate the Constitution. It thus constitutes a concentrated system of judicial review of the constitutionality of statutes and other state acts with similar rank or value.

Moreover, Article 334 of the same Constitution, also following a legal tradition that can be traced back to the 1897 Civil Procedure Code, sets forth the power of all courts to declare statutes or other normative state acts inapplicable in a given case, when they consider them unconstitutional and, hence, sets preference to constitutional rules, providing a diffuse system of judicial review.

Therefore, as also happens in the Portuguese system and in many Latin American countries, the Venezuelan system of judicial review of the constitutionality of statutes and other state acts, mixes the diffuse system of judicial review of the constitutionality of statutes with the concentrated systems.[255]

With respect to this mixed character of the Venezuelan system, the former Supreme Court has analyzed the scope of judicial review of the constitutionality of statutes, and has correctly pointed out that this is the responsibility:

> [N]ot only of the Supreme Tribunal of the Republic, but also of all the judges, whatever their rank and standing may be. It is sufficient that an official is part of the Judiciary for him to be a custodian of the Constitution and, consequently, to apply it's ruling preferentially over those of ordinary statutes. Nonetheless, the application of Constitution by the judges, only has effects in the concrete case at issue and, for that very reason, only affects the interested parties to the conflict. In contrast, when constitutional illegitimacy in a law is declared by the Supreme [Tribunal] when exercising its sovereign function, as the interpreter of the Constitution, and in response to the pertinent [popular] action, the effects of the decision extend erga omnes and have the force of law. In the first case, the review is incidental and special, and in the second, principal and general. When this happens -that is to say when the recourse is autonomous- the control is either formal or material, depending on whether the nullity has to do with an irregularity relating to the process of drafting the statute, or whether -despite the legislation having been correct from the formalist point of view- the intrinsic content of the statute suffers from substantial defects.[256.]

Consequently, the Venezuelan system of judicial review is a mixed one, in which the diffuse system functions in parallel with the concentrated system of judicial review assigned to the Constitutional Chamber of the Supreme Tribunal of Justice.

As previously stated, Article 334 of the Constitution following what was set forth in Article 20 of the Civil Procedure Code since 1897, states:

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255 See in general, Allan R. Brewer-Carías, *El control de la constitucionalidad de los actos estatales*, Caracas, 1977; and also "Algunas consideraciones sobre el control jurisdiccional de la constitucionalidad de los actos estatales en el derecho venezolano", *Revista de Administración Pública*, 76, Madrid, 1975, pp. 419-446.

256 See decisión of Federal Court (which in 1961 was substituted by the Supreme Court of Justice), June 19, 1953 *Gaceta Forense*, 1, 1953, pp. 77-78.

Art. 334. […] In case of incompatibility between this Constitution and a statute or other norm, the constitutional provisions will be apply, being the courts in any case, even ex officio, the ones to decide therein[257]

According to this norm, the diffuse system of judicial review allows any judge, from the lowest judicial rank to the Supreme Tribunal of Justice, to decide not to apply a statute in a concrete case that conflicts with any provision of the Constitution when the application of that statute is demanded by a party to litigation. This is, no doubt, the basic consequence of the principle of the supremacy of the Constitution, as considered since the beginning of the last century by all the commentators of the Civil Procedure Code.

According to this power attributed to all judges, the diffuse system of judicial review in Venezuela can be characterised by the following trends:

Firstly, as we have stated, the power attributed to all judges to control the constitutionality of legislation is the natural consequence of the principle of the supremacy of the Constitution. The judges are bound by the Constitution and have the duty to apply it; therefore, if a law is unconstitutional, they cannot apply it and must give preference to the Constitution, because an unconstitutional law can have no value.

It must be said that this was the basic principle established ever since the beginning of Venezuelan constitutionalism, in the 1811 Constitution where it has been considered that an implicit diffuse judicial review system was adopted.[258]

In effect, Article 227 of the 1811 Constitution set forth:

The present Constitution, the statutes to be adopted in its execution and the Treaties to be subscribed under the authority of the Union Government will be the supreme law of the state in the whole Confederation, and the authorities and inhabitants of the provinces are bound to religiously obey and observe them without excuse or pretext; but the statutes enacted against the text of the Constitution will have no value unless they fulfill all the required conditions for a just and legitimate revision and sanction.[259]

According to this norm, in the same sense as the North American model, unconstitutional laws were considered null and void, as they could have no effect whatsoever.

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257 Article 334: En caso de incompatibilidad entre esta Constitución y una ley u otra norma jurídica, se aplicarán las disposiciones constitucionales, correspondiendo a los tribunales en cualquier causa, aún de oficio, decidir lo conducente". The text of article 20 of the Civil Procedure Code says: "Cuando la ley vigente, cuya aplicación se pida, colidiere con alguna disposición constitucional, los jueces aplicarán ésta con preferencia." The text was originally adopted in the 1897 Code (Art. 10), followed by the 1904 Code (Art. 10) and the 1916 Code (Art. 7). In the 1985 Code the only change introduced in relation to the previous text, is the word "judges" which substituted the word "Tribunals". See the text of the 1897, 1904 and 1916 Codes in *Leyes y Decretos Reglamentarios de los Estados Unidos de Venezuela*, Caracas, 1943, Vol. V.

258 H. J. La Roche, *El control jurisdiccional de la constitucionalidad en Venezuela y Estados Unidos*, Maracaibo, 1971, p. 24; T. "El recurso de inconstitucionalidad en la Constitución venezolana de 1811", in *El pensamiento constitucional de Latinoamérica 1810-1830*, Congreso de Academias e Institutos Históricos, Actas y Ponencias, Caracas, 1962, Vol. 3, p. 208.

259 See in Allan R. Brewer-Carías, *Las Constituciones de Venezuela*, Instituto de Estudios de Administración Local, Centro de Estudios Constitucionales, Madrid, 1985, p. 203.

The guarantee of the Constitution in that case was the nullity of the unconstitutional act, and not its annulability. Thus the judges were not bound to apply unconstitutional laws and acts; on the contrary, as established in the 1830 Constitution, all public officials had the duty not to "obey or execute orders evidently contrary to the Constitution or the laws."[260]

Now concerning fundamental rights and freedoms, ever since the 1893 Constitution the *nullity* of the statutes which violated or harmed them, as their basic guarantee has been expressly established.[261] That is why the 1999 Constitution expressly set forth that:

> **Art. 25**: Every act of the Public Power which violates or impairs the rights guaranteed by this Constitution is void, and the public officials and employees who order or execute it shall be held criminally, civilly or administratively liable, as the case may be, and orders of superiors manifestly contrary to the Constitution and the laws may not serve as an excuse.

Consequently, it can be said that since the 1811 Constitution, the diffuse system of judicial review of legislation, based on the principle of the supremacy of the Constitution and the nullity and infectivity of unconstitutional acts, has existed in Venezuela following the implicit North American constitutional trends, particularly until 1897, when it was expressly established as a power of all judges in the Civil Procedure Code.

It must be mentioned also that in the 1901 Constitution, following the approval of the 1897 Civil Procedure Code, the power of all judges to control the constitutionality of statutes was ratified. In that Constitution, competence to declare which disposition would prevail in a concrete case, when a lower judge *motu proprio* or at party instance, would have referred a constitutional question to the Supreme Court, was attributed to the Supreme Court. Nevertheless, it was expressly established that this referral did not have suspensive effects on the procedure, and that the lower judge was empowered to decide the constitutional question if through the opportunity of adopting his own decision, the Supreme Court opinion was not received by the lower court.[262]

Anyway, historically and in the present constitutional system, Venezuela has always had, following the American model, a diffuse system of judicial review according to which all courts have the power to examine the constitutionality of statutes and not to apply them when considering them unconstitutional, giving preference to the Constitution. Of course, the expression "statute" (*ley*) used in the Constitution and in the Civil Procedure Code has always been interpreted in an extensive way, comprising not only formal statutes approved by Congress, but also all normative state acts, including executive regulations.

Following the general trends of all diffuse systems of judicial review, the Venezuelan system also has an incidental character, that is to say, the judge can only review the constitutionality of a statute and decide not to apply it, when deciding a concrete case brought before him by a party, in which the constitutional question is not, of course, the principal issue submitted for his decision, but only an incidental question regarding the law which the judge must apply for the resolution of the case as required by a party.

Therefore, the power of courts to control the constitutionality of legislation can only be exercised within a concrete adversary litigation (case and controversy), regarding the statute the application of

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260 Art. 186. See in Allan R. Brewer-Carías, *Las Constituciones ...*, *cit*., p. 353.

261 Art. 17. See in Allan R. Brewer-Carías, *Las Constituciones...*, *cit*., p. 531.

262 Art. 106, 8 in Allan R. Brewer-Carías, *Las Constituciones ...*, *cit*., pp. 579-580. See the comments regarding this norm in R. Feo, *Estudios sobre el Código de procedimiento civil venezolano*, Caracas 1904, Vol. I, pp. 32-33

which is demanded by a party, and when the constitutional issue is relevant to the case and necessary to be resolved in their decision. But in the Venezuelan system, the constitutional issue itself can be raised *ex officio* by the judge when deciding the concrete case so it is not necessarily required, as happens in the North American system, to be alleged by a party. Therefore, the Venezuelan diffuse system of judicial review although incidental, is not a control that is exclusively exercised through an "exception of unconstitutionality"[263] risen by a party. On the contrary, it can be exercised by the judge, *motu proprio* as stated since the 1901 Constitution (art. 106,8).

On the other hand, the nullity of unconstitutional laws, particularly those that violate fundamental rights; being the guarantee of the Constitution, the decision of the courts in the diffuse system of constitutional control has declarative effects. That is to say, the judge when deciding not to apply a statute in a concrete case declares it unconstitutional and, therefore, considers it unconstitutional ever since its enactment (*ab initio*), thus as never having been valid and as always having been null and void. Consequently, the decision of the court in the concrete case evidently has *ex-tunc* and *pro pretaerito* or retroactive effects, preventing the unconstitutional and inapplicable statute from having any effect in the case. Thus, the judge's decision is not a declaration "of nullity" of the statute he considered unconstitutional, but rather a declaration that the statute "is unconstitutional." In declaring the statute inapplicable to the concrete case, the court considers that the statute could never have produced effects in the particular case; as it has never existed. In other words, when the court declares that the statute is inapplicable to a particular case which was supposed to have been governed, in the past, by a statute whose applicability is demanded by one of the parties to the case, the judge is "ignoring" the -in his opinion- unconstitutional law, and thus considering it never having had effects on the particular case brought before him.

Of course, these declarative and *ex-tunc* effects of the decision, only refer to the concrete parties, in the concrete process in which the decision is adopted.

Thus, the decision only has *in casu et inter partes* effects,[264] as a consequence of the incidental character (*incidenter tantum*) control. Therefore, if a statute has been considered unconstitutional in a concrete judicial case decision, and the judge decided not to apply it to the case but gave preference to the Constitution, this does not mean that the law has been invalidated and is not enforceable and applicable elsewhere. According to the Civil Procedure Code, judges have no competence to make declarations of the nullity of the unconstitutional law, or to annul it, because these attributions are exclusively assigned in the Constitution to the Constitutional Chamber of the Supreme Tribunal. Thus, in the diffuse system of review, the decision in which the judge decides not to apply a statute in the concrete case only means that concerning that particular process and parties, the law must be considered unconstitutional, null and void, but with no effects regarding other cases, other judges or other individuals.

Therefore, the fact that a statute is declared inapplicable by reason of unconstitutionality by a judge in a particular case does not affect its validity nor is it equivalent to a declaration of nullity. The law as such continues to be valid, and will only lose its general effects if repealed by another law (art. 177, 1961 Constitution) or if annulled by the Supreme Tribunal of Justice (art. 215,3,4 1961 Constitution).

In this regard, it must be mentioned that the Organic law on the Supreme Tribunal of 2004 has incorporated a new provision imposing the Chambers of the Supreme Court, after ruling any statute as unconstitutional following the diffuse method of judicial review, to send the case to the Constitutional

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263 See a contrary opinion in H.J. La Roche, *op. cit.*, pp. 137, 140, 150, 162; and in J.G. Andueza, *op. cit.*, pp. 37-38.

264 See the Federal Court decision of June 19, 1953, in *Gaceta Forense* nº 1, 1953, pp. 77-78.

Camber to allow the latter to rule the matter, and if it proceeds, the statute can be annulled with *erga onmes* effects (article 5,1o, 22).

In any case, in the Venezuelan procedural system, the *stare decisis* doctrine has no application at all, the judges being sovereign in their decisions, only submitted to the Constitution and the law. Therefore, decisions regarding the inapplicability of a law considered unconstitutional do not have binding effects, neither regarding the same judge who may change his legal opinion in other cases, nor regarding other judges or courts, except in cases of decision issued by the Constitutional Chamber with obligatory effects.

On the other hand, like the American or Argentinean systems, in the Venezuelan system of constitutional judicial control, the 1999 Constitution has created an extraordinary means or review recourse that can be filed against judicial decisions in which constitutional questions are involved that can be brought before the Constitutional Chamber of the Supreme Tribunal.

Before 1999, judge's decisions on matters of unconstitutionality were only subject to the ordinary means of appeal and to the recourse of cassation, following the general rules established in the Civil Procedural Code. It was only in the 1901 Constitution that the Federal Court was assigned the power to establish general criterion in constitutional matters referred to by lower courts, when a constitutional issue was raised in concrete judicial cases, which power was eliminated in the subsequent constitutional reform of 1904.

Nevertheless, before 1999, the possible contradictions that could arise between different court decisions, with the consequent uncertainty in the legal order, were corrected ever since 1858, through the establishment, in parallel with the diffuse system of judicial review, of a concentrated system of constitutional control assigned now to the Constitutional Chamber of the Supreme Tribunal of Justice.

As mentioned, one of the important reforms introduced to the judicial review system by the 1999 Constitution was to give the Constitutional Chamber of the Supreme Tribunal, the power to "review the definitive decisions issued by the courts on amparo matters and on judicial review of statutes or other norms" (Article 336,10).

This power of the Constitutional Chamber was conceived as an extraordinary power to review, at its discretion, by means of an extraordinary recourse similar to the application to the writ of certiorari, highest instance courts decisions issued in matters of judicial review of legislation, and specifically on matters of amparo.

The essential trend of this attribution is its discretionary character [265], that allows the Constitutional Chamber to choose the cases to be reviewed. As the same Constitutional Chamber of the Supreme Tribunal pointed it out in its decision Nº 727 of April 8th, 2003, "in the cases of the decisions subject to revision, the Constitution does not provide for the creation of a third instance. What has set forth the constitutional provision is an exceptional and discretional power of the Constitutional Chamber that as such, must be exercised with maxim prudence regarding the admission of recourses for review final judicial decisions"[266].

In absence of the statute that must regulate the Constitutional Jurisdiction assigned to the Constitutional Chamber, it has been the same Constitutional Chamber the one that has modeled the frame-

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265 As mentioned, in a certain way similar to the *writ of cerciorari* in the Nort American system. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, *op. cit.*, p. 141; See also the comments of Jesús María Casal, *Constitución y Justicia Constitucional,* Caracas 2002, p. 92.

266 Case: *Revisión de la sentencia dictada por la Sala Electoral en fecha 21 de noviembre de 2002*, in *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003.

work of this recourse for revision of judicial decisions on constitutional matters. By the end of 2000, as a consequence of the Chamber rulings nº 1, 2, 44 and 714, the Supreme Court doctrine regarding the conditions that a judicial decision must have in order to be the object of the review recourse was as follows:

1º) The decision must have been issued in second instance, by means of an appeal or consultation, so that the review cannot be understood as a new instance.

2º) The constitutional revision is only admissible in order to preserve the uniformity of interpretation of constitutional norms and principles, or when it exists a deliberate violation of constitutional prescription, which will be analyzed by the Constitutional Chamber, in a facultative way

3º) As a consequence, and different to consultations, the recourse for revision is not *ipso jure* admissible, because it depends on the party's initiative, and not on the initiative of the courts that issued the decision, unless the Constitutional Chamber ex officio decides to accepted it bearing always in mind its purpose[267].

After, in decision Nº 93 of February 6th, 2001(Case: *Olimpia Tours and Travel vs. Corporación de Turismo de Venezuela*), the Constitutional Chamber began to extend its own review powers, adding to the recourse for revision other judicial decisions different to those issued in matters of amparo or on judicial review of constitutionality, as follows:

1. The last instance definitive judicial amparo decisions of any kind, issued by the other Chambers of the Supreme Tribunal of Justice and by any court or tribunal of the country.
2. The last instance definitive judicial decisions of courts and of the other Chambers of the Supreme Tribunal on judicial review of constitutionality of statutes or State regulations.
3. The last instance definitive judicial decisions issued by the other Chambers of the Supreme Tribunal or by the other courts and tribunals putting aside or expressly or tacitly by-passing the interpretations of the Constitution ruled in any Constitutional Chamber's decision issued before the impugned ruling, thus making an erroneous constitutional judicial review by erroneously applying the Constitution.
4. The last instance definitive judicial decisions issued by the other Chambers of the Supreme Tribunal of by the other courts and tribunals which, according to the Constitutional Chamber's criteria, would incur in a grotesque error regarding the interpretation of the Constitution or simply would disregard the interpretation of the constitutional provision; cases in which it would also be an erroneous judicial review of constitutionality[268].

According to this doctrine, the Constitucional Chamber has extended its review power regarding judicial decisions, that in the Constitution is reduced to "amparo" and judicial review decisions, including other judicial decisions, even those issued by the other Chambers of the Supreme Tribunal (Civil, Criminal and Social Chambers, Electoral Chamber and Administrative judicial review Cham-

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267 See decisión of November 2, 2000 (Case: *Roderick A. Muñoz P. vs. Juzgado de los Municipios Carache, Candelaria y José Felipe Márquez Cañizales de la Circunscripción Judicial del Estado Trujillo*) in *Revista de Derecho Público*, nº 84, (octubre-diciembre), Editorial Jurídica Venezolana, Caracas, 2000, p. 367.

268 See in *Revista de Derecho Público*, nº 85-88, Editorial Jurídica Venezolana, Caracas, 2001, pp. 414-415. See also decisión nº 727 of April 8th, 2003 (Caso: *Revisión de la sentencia dictada por la Sala Electoral en fecha 21 de noviembre de 2002)*, en *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003

ber) which is not authorized in the Constitution, and constitutes a violation to the constitutional right to res judicata, affecting legal stability and security

The Constitutional Chamber, in effect, after analyzing the due process of law guarantees regarding the extraordinary revision of judicial decisions, in decision Nº 93 of February 6th, 2001 (Case: *Olimpia Tours and Travel vs. Corporación de Turismo de Venezuela*), alter analyzing its constitutional role as guarantor of the supremacy or the Constitution and as the interpreter of the Constitution, concluded saying that "there are no doubts about the Constitution interpretative powers of the Chamber, whose decisions are obligatory for the other Chambers and the rest of the courts of the Republic. Thus, all the other Chambers of the Supreme Tribunal and the other courts and tribunal are obligated to decide accordingly to the interpretation of constitutional provisions issued by the Chamber…The Constitution gives the Constitutional Chamber the superior and unique power regarding the interpretation of the Constitution.".

The conclusion from the argument developed by he Constitutional Chamber has been the affirmation of its powers to be "the maxim interpreter of the Constitution" with the power to issue obligatory interpretations, from which resulted its power to review, even ex officio, any judicial decision of any other Chamber of the Supreme Tribunal or of any court, when contrary to the constitutional interpretation set forth by the Chamber[269].

This doctrine, particularly regarding to the others Chamber of the Supreme Tribunal decisions, has been incorporated in the Organic Law of the Supreme Tribunal (art. 5,4).

But just regarding the "amparo" definitive last instance judicial decisions, the power of the Constitutional Chamber of the Supreme Court to hear the extraordinary review recourse, is a very important instrument in order to provide uniformity to the judicial constitutional interpretation and enforcement of human rights made by ordinary courts.

269 *Idem*. pp. 412-414.

CHAPTER VI

THE AMPARO AND HABEAS CORPUS AS CONSTITUTIONAL REMEDIES WITHIN THE LATIN AMERICAN DIFUSSE AND CONCENTRATED SYSTEMS OF JUDICIAL REVIEW OF LEGISLATION

I. THE AMPARO AS A SPECIFIC JUDICIAL GUARANTEE FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS AND THE SYSTEMS OF JUDICIAL REVIEW OF LEGISLATION

In contrast to the Mexican and Venezuelan systems of amparo, which comprises the protection of personal freedom (habeas corpus), in the rest of Latin American countries, the amparo and the habeas corpus have been constitutionally regulated as judicial guarantees for the protection of constitutional rights and freedoms, by establishing in both cases a specific recourse or an action for such purpose. These specific means of judicial protection some times are only exercised before one single court; but in the majority of cases, they are exercised before the universe of courts of first instance.

Of course, such specific actions for the protection of constitutional rights and guarantees, are a substantial part of the judicial review systems of legislation that have been developed in Latin America since the XIX century, where it is possible to distinguish tree systems: the ones that apply the diffuse method ("American Model") of judicial review; and the ones that apply the concentrated method ("Austrian Model") of judicial review; and a last one, typically Latin American, that conforms a mixed system of judicial review in which the diffuse method of judicial review is combined with the concentrated one.

Judicial review of constitutionality[270] is the power of the courts to control the conformity of acts of the state with the Constitution, particularly of legislative acts, issued in direct application of the Constitution. Therefore, in principle, judicial review can only exist in legal systems in which there is a written Constitution, imposing limits on the state organs' activities and within such organs, on Parliament in particular. As a result, the power of the courts to control the constitutionality of state acts is not necessarily a consequence of the sole judicial power, but of the legal limitations imposed on state organs, particularly on Parliament and on the government, in a constitution established as a supreme law.

In this sense, judicial review of the constitutionality of state acts is the ultimate consequence of the consolidation of the *rule of law (État de Droit)* where the state organs are not sovereign, are subject to

270 See Allan R. Brewer-Carías, *Judicial Review in Comparative Law,* Cambridge University Press, Cambridge, 1989.

limits imposed by a constitution having the force of a superior law, and in particular, when the legislator is limited in his legislative action and there is judicial control over the "legality of laws.".[271]

Therefore, acts of Parliament or Congress must always be submitted to the law, and cannot be contrary to the law. Consequently, the spirit of legality imposes the existence and functioning not only of a control of legality of administrative acts, but also of a control of the legality of laws as acts of Parliament. Only in countries where this control exists, are there truly organized democracies and *Etat de Droit*.

Therefore, this judicial control of the "legality of laws" is, precisely, the judicial control of the constitutionality of legislation and of other state acts issued in direct execution of the constitution, in relation to which legality means "constitutionality." Thus, there is the existence of judicial review of constitutionality that we are now going to study.

This judicial review of constitutionality is normally possible, of course, not only in those legal systems that have a *written* constitution as a supreme rule embodying the fundamental values of society, but when that superior rule is established in a rigid or entrenched way, in the sense that it cannot be modified by ordinary legislation. In principle, it is in a system of this kind that all the organs of the state are limited by and subject to the constitution and must therefore pursue their activities according to this supreme law.

This implies therefore, that not only are the traditional state organs for executing the law –the administration and the judges– subject to the law (Constitution and "legislation"), but that the organs which create the "legislation", particularly the legislative bodies, are also subject to the constitution.

Of course, a written and rigid constitution, situated at the apex of a legal system, not only demands that all the acts issued by state organs in direct execution thereof should not violate the constitution, but must also provide a guarantee to prevent or sanction such violations.[272] Thus, the judicial review of constitutionality as the power of the judiciary to control the submission of state organs to the superior rule of the country.

Different criteria can be adopted for classifying the various systems of constitutional justice or judicial review of the constitutionality of state acts, particularly of legislation.[273] However, all of them are related to a basic criteria referring to the state organs that can carry out constitutional justice functions.

In effect, judicial review of constitutionality can be exercised by all the courts of a given country or only by the Supreme Court of the country or by a court specially created for that purpose.

In the first case, all the courts of a given country are empowered to judge the constitutionality of laws. This is the case in the United States of America, thus this system has been identified as the "American model", because it was first adopted in the United States particularly after the famous *Marbury* v. *Madison* case decided by the Supreme Court in 1803. This system is followed in many countries with or without a common law tradition. This is the case, for example, in Argentina, Mexico, Greece, Australia, Canada, India, Japan, Sweden, Norway and Denmark. This system is also qualified

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271 *Ibid*. p. 215.

272 *Cf.* H. Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)" *Revue du droit public et de la science politique en France et à 1'étranger*, T. XLV, 1928, p.197-257.

273 See in general M. Cappelletti, *Judicial Review in the Contemporary World*, Indianapolis 1971, p. 45 and M. Cappelleti and J.C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations", *Harvard Law Review*, 79, 6, April 1966, p. 1207.

as a diffuse system of judicial review of constitutionality,[274] because judicial control belongs to all the courts from the lowest level up to the Supreme Court of the country.

By contrast, there is the concentrated system of judicial review, in which the power to control the constitutionality of legislation and other state organs issued in direct execution of the Constitution is assigned to a single organ of the state, whether to its Supreme Court or to a special court created for that particular purpose. In the latter case, it is also called the Austrian system because it was first established in Austria, in 1920. This system is also called the "European model" and is followed, for instance, in Germany, Italy, and Spain. It is a concentrated system of judicial review, as opposed to the diffuse system, because the power of control over the constitutionality of state acts is given only to one single constitutional body that can be the Supreme Court of a given country or as in the Austrian or European model, to a specially created constitutional court or tribunal, that even though it exercises judicial functions, in general, it is created by the constitution outside ordinary judicial power, as a constitutional organ different to the Supreme Court of the country.

In regard to the judicial organs that can exercise the power of controlling the constitutionality of laws, other countries have adopted a mixture of the above mentioned diffuse and concentrate systems, in the sense that they allow for both types of control at the same time. Such is the case in Colombia and Venezuela where all courts are entitled to judge the constitutionality of laws and therefore decide autonomously upon their inapplicability in a given process, and the Supreme Court has the power to declare the unconstitutionality of laws in an objective process. One can say that these countries have a diffuse and concentrated parallel system of judicial review at one and the same time, perhaps the most complete in comparative law.

But regarding the so-called concentrated systems of judicial review, in which the power of control is given to the Supreme Court or to a constitutional court, other distinctions can be observed.

In the first place, in relation to the moment at which control of the constitutionality of laws is performed, it may be prior to the formal enactment of the particular law, as is the case in France, or the judicial control of the constitutionality of laws which can be exercised by the court after the law has come into effect, as is the case in Germany and Italy.

In this respect, other countries have established both possibilities as is the case Spain, Portugal and Venezuela. In the latter, a law sanctioned by Congress prior to its enactment, can be placed by the President of the Republic before the Supreme Court to obtain a decision regarding its constitutionality, and the Supreme Court can also judge the constitutionality of the law after it has been published and has come into legal effect.

Moreover, in relation to the concentrated systems of judicial review, two other types of control can be distinguished regarding the manner in which review is required either incidentally or through an objective action. In the first place, the constitutional question is not considered justiciable unless it is closely and directly related to a particular process, in which the constitutionality of the concrete law is not normally necessary to the unique issue in the process. In this case, judicial control is incidental, and the Supreme Court or constitutional tribunal can only decide when it is required to do so by the ordinary court that has to decide the case. In this situation, it is basically the function of the ordinary courts, upon hearing a concrete case, to place the constitutional issue before the constitutional court.

Of course, the incidental nature of judicial review is essential to diffuse control systems and, therefore, to all legal systems that follow the American model.

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274 M. Cappelletti, "El control judicial de la constitucionalidad de las leyes en el derecho comparado", *Revista de la Facultad de Derecho de México*, 61, 1966, p. 28.

But in the field of the concentrated system of judicial review, the control granted to the constitutional court can also be exercised through direct action where the constitutionality of the particular law is the only issue in the process, without reference or relation to a particular process.

In this latter case, another distinction can be made, in relation to the *locus standing* to exercise the direct action of unconstitutionality: in most countries with a concentrated system of judicial review, only other organs of the state can place the direct action of constitutionality before the constitutional court, for instance, the head of government, or a number of representatives in Parliament.

Other systems of concentrated judicial review grant the action of constitutionality to individuals, whether requiring that the particular law affect a fundamental right of the individual, or by means of a popular action, in which any citizen can request the constitutional court or Supreme Court to decide upon his claim concerning the constitutionality of a given law, without particular requirement regarding his standing.

As we have seen, the basic division we can establish regarding the various systems of judicial review, depends in our opinion, upon the concentrated or centralized or diffuse or decentralized character of judicial control of constitutionality, that is to say, when the power of control is given to all the courts of a given country or to one special constitutional court or to the Supreme Court of that country. We have also said that some countries have even adopted both systems of judicial review that developed in parallel. Related to this main classification, as we said, other criteria can be adopted to identify the various systems of judicial control of the constitutionality of laws: the incidental and the principal or objective action systems.

But in relation to the main distinction between the diffuse and concentrated systems of judicial review, we can also distinguish other criteria for classifying the various systems, according to the legal effects given to the particular judicial decision of review.

Within this scope, we can distinguish decisions with *in casu et inter partes* or *erga omnes* effects, that is to say, when the judicial decision has effects only within the parties in a concrete process, or when it has general effects applicable to everyone.

For instance, in the diffused systems of judicial review, according to the American system, the decision of the courts in principle, only has effect relating to the parties of the process; effects that are closely related to the incidental character of judicial review.

Whereas in the concentrated system of judicial review, following the Austrian model, when the judicial decision is a consequence of the exercise of an objective action, the effects of such a decision are general, with *erga omnes* validity.

Thus, in the diffuse systems of judicial review a law declared unconstitutional with *inter partes* effects, is in principle considered null and void, with no effect whatsoever. Therefore, in this case the decision in principle is retroactive in the sense that it has *ex tunc*, or *pro pretaerito* consequences; that is to say, the law declared unconstitutional is considered never to have existed or never to have been valid. Thus, this decision, in principle, has "declarative" effects, in the sense that it declares the pre-existing nullity of the unconstitutional law.

In the concentrated systems of judicial review, on the contrary, a law declared unconstitutional, with *erga omnes* effect, is in principle considered annullable. Therefore, in this case, the decision is prospective, in the sense that has *ex nunc*, *pro futuro* consequences, that is to say, the law declared unconstitutional is considered as having produced its effect until its annulation by the court, or until the moment determined by the court subsequent to the decision. In this case, therefore the decision has "constitutive" effects, in the sense that the law will become unconstitutional only after the decision has been made.

Nevertheless, this distinction related to the effects of the judicial decision regarding the unconstitutionality of a law is not absolute. On the one hand, if it is true that in the diffuse systems of judicial review, the decision has *inter partes* effects, when the decision is adopted by the Supreme Court, as a consequence of the *stare decisis* doctrine, the practical effects of the decision, in fact, are general, in the sense that it binds all the lower courts of the country. Therefore, as soon as the Supreme Court has declared a law unconstitutional, no other court can apply it.

On the other hand, in concentrated systems of judicial review, when a judicial decision is adopted on an incidental issue of constitutionality, some constitutional systems have established that the effects of that decision are only related in principle, to the particular process in which the constitutionality question was raised, and between the parties of that process, even though this is not the general rule.

In relation to the declarative or constitutive effects of the decision, or its retroactive or prospective effects, the absolute parallelism with the diffuse and concentrated systems has also disappeared.

In the diffuse systems of judicial review, even though the effects of the declarative decisions of unconstitutionality of the law, are *ex tunc*, *pro pretaerito*, in practice, exceptions have been made in civil cases to allow for the invalidity of the law not to be retroactive. In the same manner, in the concentrated systems of judicial review, even though the effects of the constitutive judicial decisions of unconstitutionality of the law are *ex nunc*, *pro futuro*, in practice, exceptions were needed to be made in criminal cases to allow for the invalidity of the law to be retroactive, and benefit the accused.

Our purpose in the following parts of the course is to study all these systems of judicial review of constitutionality of state acts, and particularly of legislation in comparative law. To that end we will analyze the most important legal systems in contemporary constitutional law, classifying them in accordance with the main distinctions we have made between the diffuse and the concentrated systems of judicial review.

Following the main distinction of methods of judicial review, and since also the specific actions for protection of constitutional rights and guaranties are means that can serve for judicial review of legislation, we will analyze the regulation of the amparo and habeas corpus actions or recurses in Latin America, clasifying the Countries in accordeance to the method of judicial review that exists in each of them, as follows:

a) The amparo action in countries with only a diffuse system of judicial review: the case of Argentina.

b) The amparo action in countries with only a concentrated system of judicial review: the case of Costa Rica, El Salvador, Bolivia, Chile, Honduras, Panama, Paraguay and Uruguay.

c) The amparo action in countries with mixed systems (diffuse and concentrated) of judicial review: in addition to Mexico and Venezuela, the case of Nicaragua, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala and Peru.

II. THE AMPARO ACTION IN COUNTRIES WITH ONLY A DIFFUSE SYSTEM OF JUDICIAL REVIEW: THE CASE OF ARGENTINA

Argentina is the only Latin American country where the diffuse method of judicial review remains as the only one established to control the constitutionality of legislation. The other Latin American Countries that have the diffuse method of judicial review, have it mixed with the concentrated method, as is the case of Mexico and Venezuela, already studied, and of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala and Peru.

Thus the amparo and habeas corpus actions in Argentina are essential adjective tools for judicial review, at present fully regulated by the Argentinean Constitution through the constitutional reform of 1994 (Article 43), following the guidelines of the American Convention on Human Rights, and having, moreover, developed the action of *habeas data*[275].

As above mentioned, the recourse of amparo was developed in Argentina as was the judicial review itself, as a result of a judicial doctrine[276] set forth by the Supreme Court in the Angel Siri Case of 27 December 1957,[277] in which the competence of ordinary courts to protect the fundamental rights of citizens, against violation from public authorities actions or from individuals was definitively accepted[278]. Prior to that date, in 1984, when interpreting Article 18 of the Constitution, which set forth the guarantee of all persons not to be arrested except by virtue of a written warrant of the competent authority, Congress, through Law 23.098, regulated the *habeas corpus* for the protection of physical and personal freedom against illegal or arbitrary detentions[279].

Insofar as other constitutional rights are concerned, they were protected through the ordinary judicial means, considering the courts that the habeas corpus could not be used for such purpose. Thus, in the absence of a legal provision, the Supreme Court of the Nation rejected the application of *habeas corpus* to obtain judicial protection to other constitutional rights. That is why in the Case *Bartolo* in 1959 the Supreme Court ruled that "nor in the text, or in the spirit, or in the constitutional tradition of the habeas corpus institution, can be found any basis for its application to the right of property, the freedom of commerce and industry …; against the abuses or infringements of individuals or public officers regarding rights, the statutes and court decisions set forth administrative and judicial remedies"[280].

This situation radically changed in 1957, as a result of the resolution of the case of *Angel* Siri, who was director of the Newspaper (Mercedes) in the Province of Buenos Aires. After the Government closure of the Newspaper, Mr Siri brought before a criminal court a petition requesting amparo of the freedom of press and his right to work declared in the Constitution. The court rejected the claim arguing that the petition filed was a habeas corpus, which only protected physical and personal freedom. Once the judicial decision was confirmed by a superior court, an extraordinary recourse was filled against the decision before the Supreme Court, which in a decision of December 27, 1957 admitted the action of amparo. The argument of the Supreme Courts was that in the case, it was alleged the violation of the constitutional guarantee of freedom of press and the right to work; and that the arbitrary governmental decision violated those rights being proved, they have to be protected by the courts and

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275 See: Juan F. Armagnague *et al*., *Derecho a la información, hábeas data e Internet*, Ediciones La Roca, Buenos Aires 2002; Miguel Ángel Ekmekdjian *et al*., *Hábeas Data. El derecho a la intimidad frente a la revolución informática*, Edic. Depalma, Buenos Aires, 1998; Osvaldo Alfredo Gozaíni, *Derecho Procesal Constitucional, Hábeas Data. Protección de datos personales. Ley 25.326 y reglamentación (decreto 1558/2001)*, Rubinzal-Culzoni Editores, Santa Fe, Argentina, 2002

276 *Cf*. G. R. Carrio, *Algunos aspectos del recurso de amparo,* Buenos Aires, 1959, p. 9; J. R. Vanossi, *Teoría constitucional*, *cit*., Vol. II, p.277.

277 See G. R. Carrio, *op. cit*., p.10.

278 See the Samuel Kot Ltd. case of 5 September, 1958, S.V. Linares Quintana, *Acción de amparo*, Buenos Aires, 1960, p. 25.

279 See: Néstor Pedro Sagües, *Derecho Procesal Constitucional. Hábeas Corpus*, Volumen 4, 2nd Edition, Editorial Astrea, Buenos Aires, 1988.

280 See the referente in Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*), Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México, 2005, p. 66

so the absence of a statutory regulation on the amparo recourse is not a valid argument to reject the judicial protection,. In brief, the Supreme Court argued that the constitutional rights and guaranties of peoples, once embodied in the Constitution, must always be judicially protected regardless of the existence of a regulatory statute on the matter[281].

The second important decision of the Argentinean Supreme Court was issued the next year in the *Case Kot*, of October 5th, 1958. In this case, the action of amparo was brought before a court by Samuel Kot, the owner of a factory whose premises had been occupied by its workers on strike. Having been initially rejected, eventually the action of amparo was admitted by the Supreme Court ordering the restitution of the factory to his owner. The Court decided that in any case in which it appears clear and in a manifest way the illegitimacy of a restriction to any of the essential constitutional rights, and also the grave and irreparable damages that can be caused if the question is referred to be resolved by the judicial ordinary means; the courts must immediately re-establish the restricted right, applying the habeas corpus procedure, by means of the prompt amparo recourse.

Nonetheless, in the case, the Court warned the whole Judiciary that in these cases of constitutional protection, the judicial power had to be exercised in a prudent way in order to avoid the complete substitution of the ordinary judicial means; that is to say, that by means of the prompt amparo guarantee, all the ordinary controversies where contradictory rights must be discussed, resulted being resolved. The Supreme Court resolved in the case, precisely that it was not wise to compel the plaintiff, whose property was taken, to seek for its restitution by mean of the ordinary judicial proceedings.

The other very important issue decided by the Supreme Court in the *Kot Case*, was that the amparo not only protected against acts of authorities but also against private individuals illegitimate actions based on the principle that in spite of the existence of an ordinary procedure, it was nevertheless admissible if the processing of the latter could cause serious and irreparable harm[282].

The judicial creation of the amparo lead to the approval of the 1966 Law 16.986[283] on the action of amparo, which nevertheless only regulates the action of amparo against acts of the State; so the amparo action against private parties is filed by means of the provisions of the Code of Civil and Commercial Procedure of the Nation (Article 32,1, Sub-sections 2 and 498)[284].

Thus, pursuant to Article 1st of Law 16.986, the action of amparo can be brought before a court against any act or omission of a public authority which in an overtly arbitrary or illegal manner, currently or imminently harms, restricts, alters or threatens, the rights or guarantees that are explicitly or implicitly recognized by the National Constitution, with the exception of individual freedom protected by *habeas corpus*.

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281 See the referencee in José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 26 ff y 373 ff.; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires, 1987, pp. 5.

282 See the references in José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 243 ff; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires, 1987, pp. 6.; Susana Albanese, *Garantías Judiciales. Algunos requisitos del debido proceso legal en el derecho internacional de los derechos humanos,* Ediar S.A. Editora, Comercial, Industrial y Financiera, Buenos Aires, 2000; Augusto M. Morillo *et al*., *El amparo. Régimen procesal*, 3rd Edition, Librería Editora Platense SRL, La Plata, 1998, 430 pp.; Néstor Pedro Sagües, *Derecho Procesal Constitucional. Acción de Amparo*, Volumen 3, 2nd Edition, Editorial Astrea, Buenos Aires, 1988.

283 See José Luis Lazzarini, *El juicio de amparo,* Buenos Aires, l987; Néstor Pedro Sagüés, *Derecho Procesal Constitucional. Acción de Amparo,* Buenos Aires, 1988.

284 J. L. Lazzarini, *op. cit*., p. 229.

Therefore, this is an action that can be brought before any judge of First Instance with jurisdiction over the place where the act takes place or where it has or could have effect, following the rules of jurisdiction attached to the concerned matter (Article 4, Amparo Law), for the protection of all constitutional rights and freedoms (even those implicitly recognized in the Constitution) against acts or omissions of the public authorities, except for those decisions or acts emanating from the Judiciary or against statutes. On the other hand, it is an action that is admissible only when no other judicial or administrative recourses or remedies exist to assure the protection. Thus, in order to bring the action of amparo, all judicial or administrative recourses or remedies that may assure the constitutional protection of the right or guarantee in question must be exhausted, since if they in fact exist, then the amparo is inadmissible, unless they are incapable of redressing the damage and their processing can lead to serious and irreparable harm. Thus the amparo is considered an exceptional proceeding.

The same regulatory trend is set forth in Article 321 of the Civil Procedure Code regarding the amparo against private damaging actions, in which it is also stressed that the action is only admissible in cases in which the urgent reparation of the damages or the immediate end of the challenged actions are needed, and always if the controversy, because of its nature, cannot be resolved by means of the ordinary judicial procedure.

On the other hand it must be stressed that even thought the actions of amparo are in general exercised before the judges of first instance, the cases can reach the Supreme Court of the Nation, by means of an extraordinary recourse when in the judicial decision a matter of judicial review of constitutionality is resolved[285].

This leads us to make a few comments regarding the judicial review system in Argentina[286], which follows very closely the North American model, also founded in the supremacy clause of the 1860 Constitution which set forth:

> **Article 31.** This constitution, the laws of the Nation that the Congress consequently approves and the treaties with foreign powers, are the supreme law of the Nation, and the authorities of each Province are obliged to conform to it, notwithstanding any contrary disposition which the provincial laws or Constitutions might contain.
>
> On the other hand, Article 100 referring to judicial power, set forth:
>
> The Supreme Court and the inferior Courts of the Nation, are competent to try and decide all cases related to aspects ruled by the constitution, by the laws of the Nation and by the Treaties with foreign nations.

Therefore, in terms similar to the American constitution, the Argentinean Constitution does not expressly confer any judicial review power upon the Supreme Court or the other courts; being also judicial review a creation of the Supreme Court, based on the principles of supremacy of the Constitution and judicial duty when applying the law.

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285 See Elias Guastavino, *Recurso extraordinario de inconstitucionalidad,* Ed. La Roca, Buenos Aires, Argentina, 1992

286 See in general Néstor Pedro Sagüés, *Derecho procesal Constitucional,* Tomo I, Cuarta edición, 2002; Ricardo Haro, *El control de constitucionalidad,* Editorial Zavalia, Buenos Aires, Argentina, 2003; Juan Carlos Hitters, "La jurisdicción constitucional en Argentina" en García Belaunde, Domingo y Fernández Segado, Francisco (Coordinadores), *La jurisdicción constitucional en Iberoamérica,* Ed. Dykinson, Madrid, España, 1997; Maximiliano Toricelli, *El sistema de control constitucional argentino,* Editorial Lexis Nexis Depalma, Buenos Aires, Argentina, 2002.

The first case in which judicial review power was exercised regarding a federal statute was the *Sojo* case, (1887), also concerning the unconstitutionality of a law that tried to enlarge the original jurisdiction of the Supreme Court[287] as was the *Marbury* v. *Madison* case.

Nevertheless, the question of the powers of the judiciary to control the constitutionality of legislation was a matter of discussion in the Parana Constitutional Convention in 1857-1858, where the predominant opinion on the subject was: first, the character of the Constitution as a supreme law and the power of the courts to maintain its supremacy over the statutes which infringed it; second, the limits imposed over the constituted powers by popular sovereignty, so that statutes contrary to the principles embodied in the Constitution, could not be binding on the courts; and third, that the Judiciary was precisely the branch of government which ought to have enough power to interpret the Constitution regarding the other of the State.[288]

Therefore, through the work of the courts, the Argentinean system of judicial review was developed over more than a century ago as a diffuse system[289] in which all the courts have the power to declare the unconstitutionality of legislative acts, treaties,[290] executive and administrative acts and judicial decisions, whether at national or provincial levels.[291] This power of judicial review is, of course, reserved to the courts and the executive cannot decide not to apply a statute on unconstitutional grounds.

Therefore, in Argentina, the power to control the constitutionality of state acts is not reserved to one single judicial body or a group of them; it concerns all courts, of course, within the scope of the jurisdiction that each of them has.

Argentina, being a federal state, has two court systems established from their origin following the American model in the organization of the judiciary:[292] National and provincial courts. The provincial courts have jurisdiction over all matters of "ordinary law," (*derecho común*) like civil, commercial, criminal, labour, social security, and mining law and public provincial law (constitutional and administrative provincial law). In each Province there are courts of first and second instances, and at their apex a Superior Provincial Court.

At the national level, the national courts have jurisdiction over all matters regulated by "federal law"; particularly concerning constitutional and administrative law cases and in all cases in which the

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287 *Cf.* A.E. Ghigliani *Del control jurisdiccional de constitucionalidad*, Buenos Aires, 1952., p. 5; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires, 1958. p. 41, 43, 179 who speaks about a "pretorian creation" of judicial review by the Supreme Court, *op. cit.,* p. 179. *Cf.* J.R. Vanossi and P.F. Ubertone, *Instituciones de defensa de la Constitución en la Argentina*, UNAM, Congreso Internacional sobre la Constitución y su defensa, México, 1982, (mimeo), p. 4 (also Publisher as "Control jurisdiccional de constitucionalidad". en *Desafíos del control de constitucionalidad,* Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996), H. Quiroga Lavie, *Derecho constitucional*, Buenos Aires, 1978, p. 481. Previously in 1863 the firsts Supreme Court decisions where adopted in constitutional matters but refered to provincial and executive acts. *Cf.* A.E. Ghigliani, *op. cit.*, p. 58.

288 *Cf.* A.E. Ghigliani, *op. cit.*, p. 58.

289 N.P. Sagües, *Recurso Extraordinario*, Buenos Aires, 1984, Vol. I, p. 91. J.R. Vanossi and P.F. Ubertone, *op. cit.* p. 2, 14. See also J.R. Vanossi, *Teoría constitucional*, Buenos Aires, Vol. II, *Supremacía y control de constitucionalidad*, Buenos Aires, 1976, p. 155.

290 In particular, regarding the unconstitutionality of Treaties and the posibility of the Courts to control them, A.G. Ghigliani, *op. cit.*, p. 62; J.R. Vanossi, *Aspectos del recurso extraordinario de inconstitucionalidad*, Buenos Aires, 1966, p. 91, and *Teoría constitucional*, *op. cit.,* Vol. II, p. 277.

291 *Cf.* R. Bielsa, *op. cit.*, pp. 120-148. J.R. Vanossi and P.F. Ubertone, *doc. cit.*, p. 6.

292 *Cf.* R. Bielsa, *op. cit.*, p. 57; A.E. Ghigliani, *op. cit.*, p. 55.

Nation is a party or foreign diplomatic agents are involved. The organisation of the national courts is as follows: National courts with territorial jurisdiction in the first instance; national chambers of appeals, in the second instance, and at the apex the Supreme Court of Justice, that also acts as a third instance.[293]

The Supreme Court of Justice, the only judicial body created in the Constitution, considers itself "final interpreter of the Constitution" or "the defendant of the Constitution",[294] and has two sorts of jurisdiction: original and appellate. The original jurisdiction is established in the Constitution and, therefore, is not extendeblae by statute, and concerns all matters related to ambassadors, ministers and foreign consuls and to which the Provinces are party (art. 101).

In its appellate jurisdiction, the Supreme Court has jurisdiction through two sorts of appeals: ordinary and extraordinary. In its appellate jurisdiction through ordinary appeals, the Supreme Court has the power of reviewing the decisions of the national chambers of appeal in the following cases: 1. Cases in which the Nation is a party according to an amount fixed periodically; 2. Cases concerning extradition of criminals sought by foreign countries; and 3. Cases concerning the seizure of ships in time of war and other cases concerning maritime law.[295]

In these cases of appellate jurisdiction through ordinary appeal, the Supreme Court acts as a court of third instance and last resort reviewing the whole case decided by the national chambers of appeals.

However, as we have said, the appellate jurisdiction of the Supreme Court of Justice can also be exercised through what has been called an "extraordinary recourse" that the party in a case decided by the national Chambers of appeals and by the Superior Courts of the Provinces can bring before the Supreme Court, in particular cases related to constitutional issues and with special conditions. This is, undoubtedly, the judicial mean through which the Supreme Court normally decides upon the final interpretation of the Constitution when reviewing the constitutionality of state acts, and consequently it is the most important mean for judicial review.

Before analyzing this "extraordinary recourse", reference has to be made to the general trends of the incidental character of the Argentinean diffuse system and its consequences.

In effect, as a diffuse system of judicial review, the Argentinean system is essentially an incidental one, in which the question of constitutionality is not the principal object of a process; thus the constitutional issue can be at any moment and at any stage of any proceeding. This incidental character has led to considering the Argentinean system of judicial review, as an "indirect" control system,[296] because the constitutional issue can only be raised in a judicial controversy, case or process, normally through an exception, at any moment before the decision is adopted by the court, and therefore not necessarily in the *litis contestatio* of the proceeding.[297]

The principal condition for raising constitutional questions is that they can only be raised in a "judicial case" or litigation between parties;[298] therefore, they cannot be raised as an abstract question before a court, and the courts cannot render declarative decisions upon unconstitutional matters.[299]

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293 *Cf.* J.R. Vanossi and P.F. Ubertone, *doc. cit.*, p. 14-18; A.E. Ghigliani, *op. cit.*, p. 76.

294 R. Bielsa, *op. cit.*, p. 270; J.R. Vanossi and P.F. Ubertone, *doc. cit.*, p. 18.

295 *Cf.* R. Bielsa, *op. cit.*, p. 60-61; J.R. Vanossi and P.F. Ubertone, *doc. cit.*, p. 19.

296 A.E. Ghigliani, *op. cit.*, p. 75.

297 A.E. Ghigliani, *op. cit.*, p. 76.

298 Art. 100 of the constitution; *Cf.* R. Bielsa, *op. cit.*, p. 213, 214; A.E. Ghigliani, *op. cit.*, p. 75; J.R. Vanossi and P.F. Ubertone, *doc. cit.*, p. 23.

Nevertheless, the existence of a case or controversy in which the constitutional question could be raised is not only necessary, it is also indispensable that the question be raised by a party in the process with due interest in the matter, that is to say, which alleges a particular injury in his own right caused by the statute considered invalid.[300]

Consequently, the court on its own cannot raise constitutional issues in the Argentinean system. Thus, even if the court is convinced of the unconstitutionality of a statute, if a party has not raised the question, the Court is bound to apply the Statute to the decision of the case.[301] In this respect, it must be stressed that even though this has been the judicial doctrine invariably applied by courts, some authors have considered that the constitutional questions can be decided by courts without being raised by a party, based on the principle of constitutional supremacy and the notion of "public order."[302]

Nevertheless, an exemption to the need for party intervention when raising the constitutional issue has been established by the Supreme Court, allowing the court to consider constitutional questions on its own, only in matters concerning the jurisdiction of the courts themselves and their functional autonomy. Consequently, the Supreme Court decided upon the unconstitutionality of a statute that enlarged its original jurisdiction of the supreme Court of Justice established in the Constitution, although not being raised by a party.[303]

Furthermore and related to the incidental or indirect character of judicial review in the Argentinean system, the constitutional question raised in a case particularly due to the presumption of constitutionality of all statutes,[304] must be of an unavoiding character, in the sense that its decision must be essential to the resolution of the case which depends on it.[305] Moreover, the constitutional question must be clear and undoubted. Therefore, the declaration of unconstitutionality being considered an act of extreme gravity and the last ratio of the legal order, the court must abstain its consideration when there are doubts about the issue.[306] Thus when an interpretation of the statute avoiding the consideration of the constitutional question is possible the court must follow this path.[307]

Finally, it must be said that in the Argentinean system, the Supreme Court of the Nation has developed the same exception to judicial review established in the North American system, concerning political questions, even though the Constitution does not expressly establish anything on the matter.[308] These political questions are related to the "acts of government" or "political acts" doctrine developed in continental European law, and within which we can mention the following: the declaration of state of siege; the declaration of federal intervention in the provinces; the declaration of "public use" for means of expropriation; the declaration of war; the declaration of emergency to approve certain direct tax contributions; acts concerning foreign relations; the recognition of new foreign states or

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299 *Cf.* R. Bielsa, *op. cit.*, p. 213, 214; A.E. Ghigliani, *op. cit.*, p. 80; S.M. Lozada, *Derecho Constitucional Argentino*, Buenos Aires, 1972, Vol. I, p. 342.

300 S.M. Lozada, *op. cit.*, p. 342; A.E. Ghigliani, *op.cit.*, p. 82; J.R. Vanossi and P.E. Ubertone, *doc. cit.*, p.23.

301 R. Bielsa, *op. cit.*, p. 198, 214; H. Quiroga Lavie, *op. cit.*, p. 479.

302 G. Bidart Campos, *El derecho constitucional del poder*, Vol. II, Chap. XXIX; J.R. Vanossi, *Teoría constitucional*, *op. cit.*, Vol. II, p. 318, 319.

303 *Cf.* J.R. Vanossi and P.E. Ubertone, *doc. cit.*, 25; .R. Bielsa, *op. cit.*, 255; H. Quiroga Lavie, *op. cit.*, p. 479.

304 A.E. Ghigliani, *op. cit.*, p. 89, 90.

305 A.E. Ghigliani, *op. cit.*, p. 89; S.M. Losada, *op. cit*, p. 341.

306 H. Quiroga Lavie, *op. cit.*, p. 480.

307 A.E. Ghigliani, *op. cit.*, p. 91.

308 J.R. Vanossi and P.E. Ubertone, *doc. cit.*, p. 11.

new foreign state governments; the expulsion of aliens, etc., In general, within these political questions there are acts exercised by the political powers of the state in accordance with powers exclusively and directly attributed to them in the Constitution,[309] which can be considered the key element for their identification.

The Supreme Court of the Nation is vested in the Argentinean system, like it is in the United States, with two sorts of jurisdiction: original and appellate jurisdiction, and in the latter two other sorts can be distinguished: ordinary appellate jurisdiction and "extraordinary appellate jurisdiction" that can be exercised by the Supreme Court through the so called "extraordinary recourse", which accomplishes a similar result to the request for writ of *certiorari* in the United States Supreme Court.

But of course, the "extraordinary recourse" is quite different to the American request for writ of *certiorari*, in the sense that the Supreme Court of the Nation does not have discretionary powers in accepting extraordinary recourses. Thus, in the Argentinean system, the appellate jurisdiction of the Supreme Court, whether ordinary or extraordinary, is a mandatory jurisdiction, exercised as a consequence of a right the parties have, whether to appeal or to introduce the extraordinary recourse.

When the extraordinary recoruse is filed, the Supreme Court does not act as a mere third instance court,[310] particularly because the Court does not review the motives of the judicial decision under consideration, regarding the facts; its power of review being concentrated only in aspects of law regarding constitutional questions. That is why it has been said that the Supreme Court, as a consequence of an extraordinary recourse, "does not act *jure litigatoris*" but *jure constitutionis*, does not judge a *questio facti*, but a *questio juris*."[311]

This substantive difference between the function of the Supreme Court as a consequence of the exercise of an appeal or an extraordinary recourse is followed by another formal difference, particularly, that contrary to the appeal, the extraordinary recourse must be motivated and founded on constitutional reasons.[312]

Even though it is called "extraordinary" it must be said that the ordinary appeal being reduced to the review of very few decisions of the National Chambers of Appeals, the "extraordinary recourse" is the judicial means through which the parties can most commonly reach the Supreme Court of Justice in order to obtain judicial review of constitutionality of state acts.[313] Particularly because, as we have mentioned, not only the definitive decisions of the National Chambers of Appeals can be the object of an extraordinary recourse but also the definitive decisions of the Superior Courts of the Provinces where the generality of ordinary law cases reach.

Now, the exercise of this extraordinary recourse is submitted to various particular rules, which must be stressed:

First of all, the extraordinary recourse can only be exercised in connection with constitutional matters, thus its importance regarding judicial review. In this respect, the extraordinary recourse can be exercised in three cases:

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309 *Cf.* A.E. Ghigliani, *op. cit.,* p. 85; H. Quiroga Lavie, *op. cit.,* p. 482; S.M. Losada, *op. cit.,* p. 343; J.R. Vanossi and P.E. Ubertone, *doc. cit.*, p. 11, 12.

310 *Cf.* N. P. Sagües, *op. cit.,* p. 270; pp. 185, 221, 228, 275.

311 R. Bielsa, *op. cit.,* p. 222

312 *Cf.* R. Bielsa, *op. cit.*, pp. 245, 252.

313 *Cf.* J.R. Vanossi and P.E. Ubertone, *doc. cit.*, p. 19.

a. When in a case the question of validity of a treaty, an act of Congress or of another authority exercised in the Nation's name has been raised, and the judicial decision has been against the validity of the particular act;

b. When the validity of an act or decree of the Provincial authorities has been questioned on the grounds of its repugnance to the Constitution, treaties or acts of Congress, and the judicial decision has been in favour of the validity of the particular act.

c. When the interpretation of a clause of the Constitution, of a treaty or of an act of Congress or another national act has been questioned, and the judicial decision has been against the validity of a title, right, privilege or exemption founded in said clause which has been a matter of the case.[314]

As a creation of the Supreme Court of the Nation doctrine, the extraordinary recourse against "arbitrary judicial decisions" has also been accepted. Arbitrary judicial decisions are considered those in which the right to defend one self in a proceeding is said to have been violated. It has also been accepted in cases of so called "institutional gravity", when the Supreme Court can be reached even though the extraordinary recourse would be normally inadmissible; and in cases when an "effective deprivation of justice" has been committed.[315]

The second rule referred to the admissibility of the extraordinary recourse states that the constitutional question must have been discussed in the proceeding in the lower courts, and considered in its decision, before it can be brought before the Supreme Court through the extraordinary recourse.[316] Therefore, the Supreme Court has rejected the recourse when the constitutional issue has not been discussed in the lower courts and has not been considered in the decision.[317] Furthermore, the constitutional issue must have been maintained in the various judicial instances in the lower courts and not abandoned by the interested party. On the contrary, the Supreme Court would reject the extraordinary. Recourse.[318]

In third place, all the other aspects of the incidental character of judicial review already mentioned apply, of course, to the admissibility of the extraordinary recourse, and particularly the fact that it must be exercised by a party with direct interests in the matter, whose rights are affected by the decision regarding the invalidity of a statute, and that the solution of the constitutional question must be unavoidable and indispensable for the decision of the case. Regarding standing, it must be pointed out that in the Argentinean system, it is expressly accepted that public bodies whose acts have been questioned on the grounds of unconstitutionality and also the Public Prosecutor, are considered party regarding the exercise of the extraordinary recourse.[319]

Finally, in the Argentinean system of judicial review, as a pure diffuse system, we must refer to the effects of the decision adopted by the courts when exercising their powers of judicial review of constitutionality.

First of all, it must be said that judicial decisions adopted on matters of constitutionality, when they consider a statute to be unconstitutional, whether adopted by inferior courts or by the Supreme

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314 Statute 48, Art. 14. *Cf.* J.R. Vanossi and P.E. Ubertone, *cit.* p. 20; R. Bielsa, *op. cit.*, p. 210, 211; N.P. Sagües, *op. cit.,* p. 272.

315 *Cf.* J.R. Vanossi and P.E. Ubertone, *doc. cit.*, p. 20.

316 *Cf.* R. Bielsa, *op. cit.*, pp. 190, 202, 203, 205, 209.

317 *Cf.* R. Bielsa, *op. cit.*, p. 204.

318 *Cf.* R. Bielsa, *op. cit.*, p. 260.

319 *Cf.* R. Bielsa, *op. cit.,* pp. 237, 238.

Court, they simply do not apply the invalid statute by giving preference to the Constitution, but there is no annulment. The courts in Argentina do not have the power to annul or repeal a law. That power is reserved to the legislator, and the only thing they can do is to refuse its application in the concrete case when they consider it unconstitutional.[320] The statute, therefore, when considered unconstitutional and non-applicable by the judge, is considered null and void, with no effect whatsoever[321] in the particular case. This leads to the consideration of the retroactive effect of the decision, bearing in mind its declarative character, thus *ex tunc, pro praeterito.* We insist, however, that the statute remains valid and generally applicable and even the same court can change its criteria about its unconstitutionality and apply it in the future.[322]

That is why these effects of the judicial decision on constitutional matters, in the Argentinean system are strictly *inter partes* effect, a consequence of the diffuse character of the system. Thus the decision considering the nullity of a statute has effect only in connection with the particular process where the question has been raised and between the parties which have intervened in it and, therefore, has no *erga omnes* effects at all.[323]

On the other hand, in the Argentinean system, the decision on judicial review, even the decisions of the Supreme Court on constitutional issues are not obligatory for the other courts or the inferior courts.[324] Moreover, even though in the 1949 constitutional reform it was expressly established that the interpretation adopted by the Supreme Court of Justice upon the articles of the Constitution would be considered binding on the national and provincial courts,[325] this article of the constitution was later repealed and the situation today is the absolute power of all courts to render their judgment autonomously with their own constitutional interpretation.

Nevertheless, it is certain that the Supreme Court of Justice, because it is the highest court in the country with wide appellate jurisdiction, particularly through the extraordinary recourse, its decisions have a definitive influence upon all the inferior courts particularly when a doctrine has been clearly and reiteratedly established by the Court.

Finally, regarding the Argentinean system, discussions have arisen concerning the possibility of the exercise of the diffuse system of judicial review, by the courts, when deciding recourse for *amparo* brought before them for the protection of fundamental rights.

Now since its acceptance and despite the diffuse system of judicial review followed in Argentina, the Supreme Court established the criteria of the incompetence of the *amparo* judge to review the constitutionality of legislation, reducing the powers of the judge of *amparo* to decide only on acts or facts that could violate fundamental rights. Thus it was established that the *amparo* could not be granted when the complaint contained the allegation of unconstitutionality of a law on which the relevant acts or facts were based. Thus, the Supreme Court considered that the judicial decision in cases of recourse for *amparo* could not have declarative effects regarding the unconstitutionality of statutes, due to the summary nature of its proceeding.[326] This doctrine was followed later by law 16.986 of 18 October 1966 about the recourse for *amparo*, in which it was expressly established that the "action for *amparo*

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320 *Cf.* R. Bielsa, *op. cit.*, pp. 197, 198, 345; N.P. Sagües, *op. cit.,* p. 156.

321 *Cf.* A.E. Ghigliani, *op. cit.*, p. 95.

322 *Cf.* R. Bielsa, *op. cit.*, p. 196; A.E. Ghigliani, *op. cit.*, p. 92, 97; N. P. Sagües, *op. cit.,* p. 177.

323 *Cf.* H. Quiroga Lavie, *op. cit.*, p. 479.

324 *Cf.* R. Bielsa, *op. cit.*, pp. 49, 198, 267; A.E. Ghigliani, *op. cit.*, pp. 97, 98.

325 Art. 95 of the 1949 Constitution. *Cf.* C.A. Ayanagaray, *Efectos de la declaración de inconstitucionalidad*, Buenos Aires, 1955, p. 11; R. Bielsa, *op. cit.,* p. 268.

326 See the *Aserradero Clipper SRL* case (1961), J. R. Vanossi *Teoría constitucional*, *cit.*, Vol. II, p. 286.

will not be admissible when the decision upon the invalidity of the act will require.... the declaration of the unconstitutionality of statuyes, decrees or ordinances."(art. 2,d).

Nevertheless, in 1967, the Supreme Court, without declaring the unconstitutionality of the above mentioned disposition of law 16.986 in the *Outon* case,[327] in an implicit way, decided its inapplicability and accepted the criteria that when considering *amparo* cases, the courts have the power to review the unconstitutionality of legislation, which has been supported by the leading constitutional law authors of the country.[328]

Anyway, the acceptance of this means of judicial review of legislation, through the action for *amparo*, could lead to a direct action of unconstitutionality, although of a diffuse character, which differs from the incidental normal character of the constitutional review system, which is commonly exercised as a consequence of an exception raised by a party in a concrete process, whose main objective is not the constitutional question.

On the contrary, in the action of *amparo,* when founded on reasons of unconstitutionality of a statute on which the concrete act that violates the fundamental right that the petitioners seek to be protected is based, the unconstitutionality of the laws becomes a direct issue of the action itself. That is why it has been said that by accepting this feature of the action for protection, the Supreme Court has opened the way to a new direct means of judicial review of constitutionality of legislation.[329]

III. THE AMPARO ACTION IN COUNTRIES WITH ONLY A CONCENTRATED SYSTEM OF JUDICIAL REVIEW

Argentina is the only Latin American country that has kept the diffuse method of judicial review as the only one in order to control the constitutionality of legislation.

Others Latin American countries have also followed the trend of adopting only one system of judicial review, but on the opposite side, attached only to the concentrated method. It is the case of Bolivia, Chile, Costa Rica, El Salvador, Honduras, Panama, Paraguay and Uruguay, countries that have the concentrated method of judicial review as the only existing one in the country by reserving to the Supreme Court or to a Constitutional Tribunal the monopoly to control the constitutionality of legislation.

Notwithstanding, regarding the amparo and habeas corpus actions, the exclusive attribution of the Supreme Court or Constitutional Tribunal are not always empowered with judicial review, and on the contrary, in the majority of the countries with concentrated method of judicial review, the amparo jurisdiction corresponds to a universality of courts and judges.

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327 Outon case of 29 March 1967. J. R. Vanossi, *Teoría constitucional*, *cit.*, Vol. II, p. 288.

328 G. J. Bidart Campos, *Régimen legal del amparo,* 1969; G. J. Bidart Campos, "E1 control de constitucionalidad en el juicio de amparo y la arbitrariedad o ilegalidad del acto lesivo", *Jurisprudencia argentina*, 23-4-1969; N. P. Sagües, "El juicio de amparo y el planteo de inconstitucionalidad", *Jurisprudencia argentina*, 20-7-1973; J. R. J. R. Vanossi, *Teoría constitucional*, *cit.*, Vol. II, pp.288-292; José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 80, 86;Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires, 1987, p. 58; Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*), Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México, 2005, pp. 71, 117.

329 J. R. Vanossi, *Teoría constitucional*, *cit.*, Vol. II, p.291.

Thus, regarding amparo in countries with concentrated method of judicial review, the systems can be classified distinguishing those where amparo is also attributed to the judicial review concentrated organ or is attributed to the whole judiciary.

1. The amparo action or recourse in concentrated systems of judicial review exercised before one single tribunal: the Constitutional Chamber of the Supreme Court in Costa Rica and El Salvador

Perhaps the most common trend of the amparo in Europe, existing only in countries with a concentrated system of judicial review as a means of judicial protection of constitutional rights and guarantees, is to consider it as a single action or recourse that can only be brought before one single Tribunal specialized in constitutional matters. This is the case of the actions or recourses of amparo established in Germany[330], Austria[331] and Spain[332].

This system is also followed in some Latin American countries with concentrated systems of judicial review, when setting forth a sole and exclusive court to hear the actions of amparo and habeas corpus, as is the case of the Constitutional Chamber of the Supreme Court of Costa Rica and El Salvador.

This is also the case of the Supreme Court of Justice of Nicaragua, but with the basic distinction that in this country there is a mixed system of judicial review.

A. The recourse of amparo in Costa Rica

In Costa Rica, as mentioned above, every person has a right the file the recourse of *habeas corpus* in order to guarantee his personal freedom and safety, and the recourse of amparo to maintain or reestablish the enjoyment of the other rights set forth in the Constitution, as well as the fundamental rights established in international instruments on human rights that are applicable to the Republic (Article 48, Constitution).

According to the 1989 Constitutional Jurisdiction Law, both recourses can only be brought before the Constitutional Chamber of the Supreme Court of Justice[333]. Articles 2,a and 4 of such statute provide the specific attribution of that Constitutional Chamber to "guarantee by means of the recourses of habeas corpus and amparo, the rights and freedoms set forth in the Constitution and the human rights recognized by international law applicable in Costa Rica".

Regarding the habeas corpus recourse, Article 15 of the Law set forth that its purpose is to guaranty personal freedom and integrity, against acts or omissions from an authority of any kind, including judicial, against that freedom's threats and against the unduly disturbance and restrictions to such

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330 See I. V. Munch. "El recurso de amparo constitucional como instrumento jurídico y político en la República Federal de Alemania", *Revista de Estudios Políticos,* nº 7, Madrid, 1979, pp. 269-289; Klaus Schlaich, "El Tribunal constitucional alemán", in L. Favoreu *et al*., *Tribunales Constitucionales Europeos Derechos Fundamentales,* Madrid, 1984, pp. 133-232.

331 See F. Ermacora, "El Tribunal Constitucional Austríaco" in the *Tribunal Constitucional,* Dirección General de lo Contencioso del Estado, Instituto de Estudios Fiscales, Madrid, 1981, Volumen I, pp. 409-459.

332 See Joan Oliver Araujo, *El recurso de amparo,* Palma de Mallorca, 1986; Antonio Moya Garrido, *El recurso de amparo según la doctrina del Tribunal Constitucional,* Barcelona, 1983; José L. Cascajo Castro and Vicente Gimeno Sendra, *El recurso de* amparo, Madrid, 1985; Antonio Cano Mata, *El recurso de amparo,* Madrid, 1983.

333 See, in general, Rubén Hernández Valle, *La tutela de los derechos fundamentales*, Editorial Juricentro, San José 1990.

freedom adopted by authorities, as well as against illegitimate restrictions regarding the right to move from one place to another within the Republic, or the right to stay, to leave and to come back to its territory (Art. 15).

Pursuant to this same Law, and regarding the recourse of amparo, it is stated that it proceeds against any provision, agreement or resolution and, in general, against any action, omission or simple material action that is not founded on an effective administrative act, of the services or public institutions that have violated, violate or threatens to violate any of such rights (Article 29). The amparo not only proceeds against arbitrary acts, but also against actions or omissions founded on norms which are arbitrarily interpreted or unduly applied.

However, the Law excludes the amparo action against statutes or other regulatory provisions, unless they are challenged together with the individual acts that apply them or when the contents of the norms are automatically applicable, in the sense that their provisions become immediately obligatory simply upon their passing. It also excludes the amparo against the judicial resolutions and actions of the Judiciary, against acts carried out by the authorities upon executing judicial decisions, and against the acts or provisions of the Supreme Tribunal of Elections in electoral matters (Article 30).

Costa Rica's Law also regulates the action of amparo against actions or omissions of those private law subjects, but in a way similar to the Colombian regulation, only when they act or should act in exercise of public functions or powers or are by law or by fact in a position of power against which ordinary judicial remedies are clearly insufficient and tardy in guaranteeing the fundamental rights and freedoms established in the Constitution and the human rights recognized by International Law in force in Costa Rica (Article 57).

In particular, the same Law of Constitutional Jurisdiction specifically regulates the recourse of amparo to guarantee the right of correction or response to any person affected by incorrect or harmful report issued against him or her by the mass media, in order that it be rectified or responded by the same broadcaster. The Law regulates a specific procedure for such purpose (Articles 66 *et seq.*).

The recourse of amparo of Costa Rica, therefore, is conceived as a judicial means of constitutional protection against actions of the Public Administration, against individual's actions when exercising Public Authority, and against self-applicable laws or regulatory acts, which is brought directly before the Constitutional Chamber of the Supreme Court of Justice against the agent or titleholder of the institution or representative of the entity that appears to be the author of the offence, without it being necessary to exercise any administrative recourse prior to bringing the action.

On the other hand, the Constitutional Chamber of the Supreme Court of Costa Rica before which are filed the amparo recourses, was created as a result of the constitutional reform of 1989, with additional powers to declare the unconstitutionality of statutes and other State acts, with annulatory effects (Art. 10). Accordingly, in Costa Rica and following a long legislative tradition of absence of diffuse method of judicial review, a concentrated system of judicial review was established attributing exclusively to the Constitutional Chamber by mean of different judicial instruments like the action of unconstitutionality and the judicial referrals[334].

Article 73 of the Constitutional Jurisdiction Law sets forth the action of unconstitutionality that can be brought before the Chamber against any statute or regulation, when in their drafting it violates any essential constitutional formality, when a constitutional amendment has been approved in violation of the constitutional procedure, when a statute is contrary to the Constitution because opposing an international treaty or agreement, when an international convention or agreement is signed, approved or ratified in a contrary way to the Constitution provisions or when an international conven-

334 *Véase* en general Rubén Hernández Valle, *El Control de la Constitucionalidad de las Leyes*, San José, 1990.

tion or agreement in its contents and effects infringe the Constitution or a constitutional principle. The decisions of the Chamber when declaring the unconstitutionality of the challenged statute have annulatory and erga omnes effects. The decisions also have declarative and retroactive ex tunc effects, except regarding bona fide acquired rights or consolidated legal situations by means of prescription, caducity of a judicial decision (Article 92).

This action can be exercise in an incidental or principal way. The incidental way may be brought before the Constitutional Chamber by any party in a judicial procedure, even in cases of habeas corpus and amparo, and in administrative procedures before Public Administration in which case the constitutional question must be raised as a reasonable mean for the protection of the rights and interest of the affected parties (Article 75).

The principal unconstitutionality action can only be brought before the Constitutional Chamber by the General Comptroller, the Attorney General, the Public Prosecutor an the Peoples' Defendant (Article 75). Nonetheless, the action can also be brought before the Chamber in cases of absence of individual harm or in cases devoted to the defense of diffuse or collective interests, in which cases, the action is brought against regulation or auto applicable statutes which do not require additional State actions for its enforcement. In these cases, no individual interest must be raised being then the constitutional action similar to a popular action.[335]

In addition to the action of unconstitutionality, the other important mean for judicial review is the judicial referrals on constitutionality matters that the courts can raise before the Constitutional Chamber when there are doubts regarding the constitutionality of the regulation or the statute that they must apply for the resolution of the case (Article 120). In these cases, the court must prepare a resolution where it must raise the constitutional questions to be sent to the Constitutional Chamber. The judicial procedure must be suspended until the Chamber decision is taken, which has obligatory character and res judicata effects (articles 104 and 117).

B. The recourse of amparo in El Salvador

In a similar way to the Costa Rican regulations, also in El Salvador, the Constitutional Chamber of the Supreme Court of Justice is the judicial body with the exclusive power to decide recourses of amparo for the protection against all the violations of the rights granted by the Constitution (Article 247). Also, regarding the *habeas corpus* recourses to protect personal freedom, the power to decide them is likewise attributed to the Constitutional Chamber of the Supreme Court of Justice.

Nonetheless, when the aggressive action takes place outside the capital, the habeas corpus recourse can be filed before the Chambers of Second Instance (article 42). In such cases, the decision of the Chambers that denies the liberty of the aggrieved party may be subject to review, at the request of the interested party, by the Constitutional Chamber of the Supreme Court of Justice.

Both actions, amparo and habeas corpus, have been regulated in the 1960 Law nº 2996 of Constitutional Proceedings, amended in multiple occasions up to 1997, setting forth that the action of amparo proceeds against any kind of actions or omissions of any authority, public official or decentralized bodies or of the judicial definitive decisions issued by the Judicial review of administrative action Chambers which violate the rights guaranteed in the Constitution or impede its exercise. When the State is the aggrieved party, the Constitutional Chamber must order the suspension of the challenged act (Article 12).

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335 See Rubén Hernández Valle, *El Control de la Constitucionalidad de las Leyes*, San José, 1990..

The Law disposed that the action of amparo can only be filed when the act against which it is formulated, cannot be reparable within the procedure by means of other remedies.

In cases in which the amparo is funded in the illegal detention or undue restriction of personal freedom, the protection must be sought through the habeas corpus recourse. In this regard, Article 38 of the same Law set forth the right of everyone to dispose of himself, considering that such right is harmed, when the person is detained against his will, due to threats, to fear to injury, constraint or other material obstacles, in which cases it is understood that the person is reduced to prison and in custody of authority or of the private persons that made the detention (Art. 38).

In all these cases of non-legally authorized prison, confinement, custody or restriction, or which is exercised in a way not legally authorized, the aggrieved party has the right to be protected by writ of personal exhibition (article 40).

In El Salvador, also a concentrated system of judicial review has been set forth in the Constitution, resulting from the creation of the Constitutional Chamber of the Supreme Court by means of the constitutional reforms of 1991-1992. The Constitution attributed to the Chamber the general and exclusive power not only to resolve the amparo and habeas corpus recourses but to declare the unconstitutionality of statutes, decrees and regulations, also with erga omnes effects. The unconstitutionality action is conceived in the Constitutional Proceeding Law as a popular action that can be brought before the Chamber by any citizen (Articles 2 and 10).

2. The amparo action or recourse in concentrated systems of judicial review exercised before a universality of courts: the case of Bolivia, Chile, Honduras, Panama, Paraguay and Uruguay

With the exception of the tree abovementioned cases of Costa Rica, El Salvador and Nicaragua, where the judicial protection of constitutional rights is concentrated in the Supreme Court, in all the other Latin American countries the actions or recourses of amparo and habeas corpus, as a specific judicial guarantees of constitutional rights and freedoms, are regulated in a diffuse way in the sense that it can be filled before a wide universe of courts instead of being concentrated in one sole Tribunal. This is the case of all other Latin American countries. In addition to the Mexican and Venezuelan systems already analyzed of the amparo as a constitutional right and as a remedy, it is also the case of Argentina, Bolivia, Brazil, Colombia, Chile, Dominican Republic, Ecuador, Guatemala, Honduras, Panama, Paraguay, Peru and Uruguay.

But regarding the countries where a concentrated system of judicial review exists as the only method to control the constitutionality of legislation, like Bolivia, Chile, Honduras, panama, Paraguay and Uruguay, the jurisdiction to decide amparo and habeas corpus actions is attributed to multiple courts.

A. The recourse of amparo in Bolivia

According to the Constitution of Bolivia, the recourse of constitutional amparo can be brought before the High Courts in the Department capitals or before the District Judges in the Provinces, against any illegal act or unlawful omission of officials or private individuals that restrict, suppress or threaten to restrict or withhold personal rights and guarantees recognized by the Constitution and the statutes (Art. 19).

The recourse of amparo must be brought by the person who believes to have been wronged or by another sufficiently authorized person in his name, being extremely summarily processed. The Public Prosecutor may also bring, *ex officio*, this recourse when the affected party does not or is unable to do

so. In these cases the amparo can only be conceded, provided there is no other means or legal recourse for the immediate protection of the restricted, suppressed and threatened rights and guarantees.

The Constitution also set forth the habeas corpus that can be filed by any person who believes to be illegitimately prosecuted, detained, or imprisoned or by another in his name, with or without power of attorney, Superior Courts of District or any Local judge, asking that the formalities be observed (Article. 18).

Regarding the recourse of habeas data it can also be brought before Superior Courts of District or any Local judge, by any person who believes himself to be illegitimately impeded from knowing, or to object or obtain the removal or rectification of data registered in any physical, electronic, magnetic or computerized in public or private files or data banks, that could affect his fundamental right to personal or familiar intimacy and privacy, self image, honor or reputation recognized in the Constitution (Article 23)

The tree recourses had been developed by Law 1.836 of 1998 on the Law of the Constitutional Tribunal, which states that the constitutional amparo shall be admitted "against any unlawful resolution, act or omission of an authority or official, provided there is no other procedure or recourse available to immediately protect the rights and guarantees, and also against any unlawful act or omission of a person or group of private individuals that restricts, suppresses or threatens the rights or guarantees recognized by the Political Constitution of the State and the Laws" (Article 94).

In Bolivia, according to the Constitution (Article 120,7), and the Law of the Constitutional Tribunal (Article 7,8), all the judicial decisions issued on amparo or habeas corpus must be sent to the Constitutional Tribunal in order to be reviewed. According to Articles 93 and 102,V of the Law on the Constitutional Tribunal, the decisions on amparo and habeas corpus must be sent ex officio to the Constitutional Tribunal in a 24 hours delay for their revision, without causing any suspension on its enforcement.

The revision, in the case of Bolivia, different to the Argentinean, Brazilian, Colombian and Venezuelan extraordinary recourses for revision, is not a recourse, but an obligatory revision that the Constitutional Tribunal must do, to which the decisions must be sent by the courts.

Even though the 1861 Constitution introduced in Bolivia the diffuse system of judicial review following the North American model, by means of the 1994 constitutional reform, the judicial review system in Bolivia was transformed into an exclusively concentrated one[336], corresponding to the Constitutional Tribunal, which began its functioning in 1999, the exclusive power to declare the nullity of statutes declared unconstitutional, with *erga omnes* effects[337].

Therefore, the Constitutional Tribunal has the attribution to control the constitutionality and to guaranty the supremacy of the Constitution, the respect and enforcement of fundamental rights and guarantees as well as the constitutionality of conventions and treaties (Art. 1 of the Law). Thus the

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336 See in general José Antonio Rivera Santivañez, "La jurisdicción constitucional en Bolivia. Cinco años en defensa del orden constitucional y democrático" en *Revista Iberoamericana de Derecho Procesal Constitucional* nº 1, enero, junio 2004, Ed. Porrúa, 2004; José Antonio Rivera Santivañez, "El control constitucional en Bolivia" en *Anuario Iberoamericano de Justicia Constitucional*. Centro de Estudios Políticos y Constitucionales nº 3, 1999, pp. 205–237; José Antonio Rivera Santivañez, "Los valores supremos y principios fundamentales en la jurisprudencia constitucional" in *La Justicia Constitucional en Bolivia 1998-2003*, Ed. Tribunal Constitucional–AECI, Bolivia, 2003. pp. 347 y ss.; Benjamín Miguel Harb, "La jurisdicción constitucional en Bolivia" en *La Jurisdicción Constitucional en Iberoamérica,* Ed. Dykinson, Madrid, España, 1997, pp. 337 y ss, p. 131.

337 Jorge Asbún Rojas, "Control constitucional en Bolivia, evolución y perspectivas" en *Jurisdicción Constitucional,* Academia Boliviana de Estudios Constitucionales. Editora El País, Santa Cruz, Bolivia, 2000, p. 86.

courts, except by means of amparo, habeas corpus and habeas data, cannot rule on constitutional matters, and can only refer the control of constitutionality of statutes to the Constitutional Tribunal.

In such character of the Constitutional Tribunal as having the monopoly of judicial review, it also has the power to review the judicial decisions on amparo and habeas corpus, and consequently to seek for the uniform interpretation of the Constitution.

B. The "recourse of protection" in Chile

Chile's 1980 Constitution, with antecedents in Constitutional Act nº 3 (Decree-Law 1.552) of 1976, sets forth the recourse of protection of certain constitutional rights and freedoms that may be brought before the competent Courts of Appeals to immediately adopt the rulings they consider appropriate for re-establishing the rule of law and assuring the due protection of the affected party, without prejudice to the other rights that may be enforced before the corresponding authority or tribunals (Article 20)[338].

According to the Constitution, as we have analyzed, this recourse of protection is only set forth to protect the specific rights enshrined in "Article 19, Numbers 1; 2; 3 Subsection 4; 4; 5; 6; 9 Final Subsection; 11; 12; 13; 15; 16 related to the freedom to work and the freedom of free choice and free contracting, and the terms established in Subsection 4; 19; 21; 22; 23; 24 and 25". The recourse of protection is also admitted in the case of Article 19, Number 8, when the right to live in an environment free of contamination is affected by an arbitrary and illegal act attributable to a determined authority or person.

Pursuant to Article 21 of the Constitution, also in matters of constitutional rights protection, specifically regarding to personal freedom and safety, any individual who is under arrest, detained or imprisoned with infringement of the provisions of the Constitution or the statutes, by himself or by any one in his name, may request from the competent court, to order that legal formalities be observed and to immediately adopt the necessary provisions for the re-establishment of the rule of law and to assure the due protection of the affected party.

The court may order that the person be brought before it and its decree shall be precisely obeyed by those in charge of the prisons or places of detention. Once instructed of the antecedents, it shall order the immediate release or the correction of any legal defects, or order that the person be placed at the disposal of the competent judge, proceeding summarily and promptly, and correcting itself such defects or instructing whoever it corresponds to correct them.

The same recourse, in likewise, may be brought in favor of any person who illegally suffers any other deprival, disturbance or threat to the right to personal freedom and individual safety. In such cases, the respective court shall pronounce the above-mentioned measures it deems appropriate for re-establishing the rule of law and ensuring due protection of the affected party.

It must be noted that Chile is one of the few Latin American countries where the recourse of amparo or protection has not been regulated by a special statute. This lack of special statute does not im-

338 See (in general): Pedro Aberastury *et al*., *Acciones constitucionales de* amparo *y protección: realidad y prospectiva en Chile y América Latina*, Editorial Universidad de Talca, Talca 2000, Chile; Juan Manuel Errazuriz Gatica *et al*., *Aspectos procesales del recurso de protección,* Editorial Jurídica de Chile, Santiago de Chile, 1989; Sergio Lira Herrera, *El recurso de protección. Naturaleza Jurídica, Doctrina, Jurisprudencia, Derecho Comparado,* Editorial Jurídica de Chile, Santiago de Chile, 1990; Enrique Paillas, *El recurso de protección ante el derecho comparado,* Editorial Jurídica de Chile, Santiago de Chile, 1990.

pede its exercise in an efficient way, not only against public authorities harmful's actions but against individuals too. Some cases decided during the eighties', reported by Paillas[339] may illustrate this fact.

For instance, in a case, a farmer brought before a court an action for protection against a neighbor that had demolished the fence dividing their land, and by rebuilding it in another place it affected the plaintiff property rights. The court ordered the re-establishing of the fence to its original place, considering that the arbitrary action of the defendant threatened the property rights of the plaintiff. The decision sought to maintain the existing legal factual situation, in the sense that the recourse of protection was not set forth to resolve property controversies and to establish the real land division, for which the ordinary judicial means are regulated.

In other case, protection was granted to a physician and Medicine professor whose incorporation to the National Health Service was banned, because violation of the non discrimination constitutional guaranty. In other case, a protection was granted against a factory, ordering to halt the production of human consuming products until a ventilation system was set in the premises, in order to expel the gases produced. In the case, the plaintiffs were the neighbors who alleged violation to their rights to a healthy environment. A recourse of protection was filed by the Universidad Austral because of the occupation of its buildings by students, in which case the protection was granted because a violation to the University's rights to teach and to use its own property was found. In all these cases, no decision was issued in order to resolve in a definitive way the legal controversy between parties regarding their respective rights. The decision of the recourse for protection was adopted just in order to resolve a factual problem and to preserve the situation affected by arbitrary actions, re-establishing the existing situation, in order for the interested parties to resolve their rights dispute by the ordinary judicial means.

Nevertheless, in other cases, the recourse for protection were brought before the courts in order to resolve controversies in a definitive way, for which no ordinary judicial mean were available for the resolution of the problem in a prompt an effective way. It is the case, for instance, of ignoring indubitable rights. It was the case of the owner of a land who sought protection to his property right against a railway Company authorized by the state to extract materials from the land for the building of a railway. The court granted the protection because the violation of property rights, not only by the Railway Company but also by the public body which authorized the seizure of the materials.

In all the cases, it can be said that the common denominator is always the urgency needed for the protection.

One aspect that must be highlighted is that in Chile, even though the judicial decisions regarding the recourses of protection are constitutional matters, when deciding the case, the courts cannot adopt any decision on judicial review of legislation. Since 1970 a Constitutional Tribunal was created in Chile, in charge of exercising a concentrated judicial review of statutes[340]; but since the 2005 constitutional reform, all sort of decisions on judicial review of legislation, even in concrete cases, have been concentrated in the Tribunal. Thus, when deciding a recourse of protection, if the court considers that

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339 See in Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile, l990, pp. 80 ff

340 See in general Raúl Bertelsen Repetto, *Control de constitucionalidad de la ley,* Editorial Jurídica de Chile, Santiago, Chile, 1969; Francisco Zúñiga Urbina, *Jurisdicción constitucional en Chile,* Tomo II, Ed. Universidad Central de Chile, Santiago, 2002; Humberto Nogueira Alcalá, "El Tribunal Constitucional chileno" en *Lecturas Constitucionales Andinas* nº 1, Ed. Comisión Andina de Juristas, Lima, Perú, 1991; Lautaro Ríos Álvarez, "La Justicia Constitucional en Chile" en *La Revista de Derecho* nº 1, Ed. Facultad de Derecho, Universidad Central, Santiago, Chile, 1988; Teodoro Rivera, "El Tribunal Constitucional" en *Revista Chilena de Derecho*, Volumen 11, nº 23, Santiago, Chile, 1984.

the applicable statute is unconstitutional, it cannot decide on the matter, but has to refer the case to the Constitutional Tribunal for its decision.

In this regard, Article 82, 6 of the Constitution assigns the Constitutional Tribunal the power to resolve the inapplicability of statutory provisions in any case before any ordinary or special court, when contrary to the Constitution. Thus, the Constitutional Tribunal has the monopoly of judicial review. In these cases, according to the same Article 82 of the Constitution, the question of unconstitutionality of a statute can be raised by any of the party to the case or by the court that is hearing the case. The Constitutional Tribunal through any of its Chambers may declare without any possibility to be challenged, the admissibility of the question as long as it verifies that a judicial action is pending before an ordinary or special court, that the application of the challenged statutory provision can be decisive to resolve the case and that the challenge is reasonably founded. The same Chamber can decide the suspension of the proceedings where the action of inapplicability on grounds of unconstitutionality has been raised.

When the Constitutional Tribunal has decided in a concrete case the inapplicability of a statutory provision, the decision has only *inter partes* effects. Following, by means of a public action, the question of the unconstitutionality of the provision can be brought before the same Constitutional Tribunal, seeking a ruling in order to annul the statute with general *erga omnes* effects (article 82,7).

C. The action of amparo in Honduras

Pursuant to Article 183 of its Constitution, in Honduras the State recognizes the guarantee of amparo; therefore, any offended party, or another in his or her name, shall be entitled to bring a recourse of amparo to uphold or reinstate the enjoyment or benefit of the rights or guarantees established by the Constitution; and in order that he or she declares in specific cases that a law, resolution, act or fact of authority does not apply to the petitioner, nor is it applicable, since it contravenes, diminishes or distorts one or other of the rights recognized by this Constitution. Also pursuant to Article 182 of the Constitution, the State recognizes the guarantee of *habeas corpus* (*exhibición personal*), consequently, any affected party or any other person in his or her name is entitled to bring such action when illegally imprisoned, detained or in any way deprived of the individual's right to enjoy freedom; and when in the course of the legal detention or imprisonment, torment, torture, humiliation, illegal extortion and any unnecessary force, restriction or molestation is applied for his or her individual safety or by order of the jail.

These actions were regulated by the 1936 Act of Amparo, until it was repeal by the 2004 Law of Constitutional Justice, in which the follow regulations should be highlighted [341]:

Regarding the purpose of the action of amparo and pursuant to the orientation of the American Convention on Human Rights (Article 25), its exercise is admitted against facts, acts, omissions or threats by any State Authority, including decentralized and de-concentrated entities, municipal corporations and autonomous institutes; those maintained by public funds and those that act through delegation of a State entity by reason of a concession, contract or other valid resolution (Article 42).

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341 See Allan R. Brewer-Carías, "La reforma del sistema de justicia constitucional en Honduras", en *Revista Iberoamericana de Derecho Procesal Constitucional. Proceso y Constitución* (Directores Eduardo Ferrer MacGregor y Aníbal Quiroga León), No. 4, 2005, Editorial Porrúa, México, pp. 57-77; and "El sistema de justicia constitucional en Honduras" in *El sistema de Justicia Constitucional en Honduras (Comentarios a la Ley sobre Justicia Constitucional)*, Instituto Interamericano de Derechos Humanos, Corte Suprema de Justicia. República de Honduras, San José, 2004, pp. 1-148

The power to hear the action of amparo is attributed to all levels of courts as follows:

According to Article 9 of the Law on Constitutional Justice, all actions of habeas data and the amparo recourses in cases of violation of fundamental rights perpetrated by the President of the Republic, the Appellate Courts, the Accounting Superior Tribunal, the General Attorney of the Republic, the Electoral Supreme Tribunal and by other officials with national jurisdiction, must be brought before the Constitutional Chamber of the Supreme Court of Justice which was created in the 2000 constitutional reform.

The Courts of Appeals are the competent courts to hear the amparo in cases of violation of fundamental rights perpetrated by the Departmental courts and sectional, executor judges and justices of peace, as well as by all political, administrative or military department or section employees (Article 10).

Finally, in the lower level of the Judiciary, the ordinary courts (Jueces de Letras) are competent to hear the amparo recourses in any other cases of violations of fundamental rights and particularly those perpetrated by lower level public officials, by municipal corporations or its members, comprising the police judges and auxiliary mayors (Article 11).

On the other hand, all the above mentioned courts have the power to hear and decide the habeas corpus or personal appearance recourse for the rights of personal freedom and safety (Article 13).

In matters concerning amparo, the most important characteristics of the Law's regulations are as follows:

The rights protected, pursuant to the guidelines of the American Convention, are those recognized in the Constitution and in the Treaties, covenants and other international instruments of human rights (Article 41,1).

Respecting the standing to sue, the action of amparo may be brought by any person without distinction, whether an individual or a legal entity, and it may also be brought by any person in representation of the aggrieved party (Article 44).

With respect to the defendant party, as has been said, the amparo shall be admitted against acts of any authority, such as norms, judicial decisions or administrative acts and also against omissions or threats of violation (Articles 13 and 41). The amparo shall also be admitted against private parties, although to a limited extent, in respect of institutions maintained by public funds and those acting by delegation of a State entity by virtue of a concession, contract or other valid resolution (Article 42).

The processing of the amparo, on the other hand, shall take preference over any other matter, except for cases of *habeas corpus* (Article 51).

A procedure of two instances is established in the Law and in all cases an obligatory consultation of the decisions is set forth. Regarding the decisions issued by the department courts, they must be sent in consultation before the Appellate Courts. The decision issued by these Appellate Courts can be subject to review by the Constitutional Chamber of the Supreme Court by means of the parties' request for study. In such cases the Constitutional Chamber has discretionary power to resolve the admissibility of the request (article 68). Regarding the decisions adopted in first instance by the Appeals Courts in questions of amparo, they must also be sent for consultation before the Constitutional Chamber of the Supreme Court (Article 69).

Thus, the Constitutional Chamber can always be the last resort to decide upon the matters of amparo. According to the Constitution, it can be said that the Honduran system of judicial review is conceived as a mixed one, combining the diffuse and the concentrated ones, the latter in the hands of the Constitutional Chamber. Regarding the diffuse method of judicial review of legislation, Article 320 of

the Constitution set forth that "In cases of incompatibility between a constitutional norm and an ordinary statutory one, the courts must apply the former". A constitutional provision regarding the diffuse method of judicial review cannot be clearer[342]. Notwithstanding, and following the legislative practice of the past, the final version of the Law on Constitutional Justice of 2004, failed to regulate such method, setting forth a one and only concentrated method of judicial review of legislation by attributing to the Constitutional Chamber the power to annul statutes on the grounds of their unconstitutionality. Nevertheless, the diffuse method always persists by means of the amparo recourse, because in it, precisely, the court decision can be can be a judicial declaration that in the specific cases, a law is not to be enforced against the claimant nor is it applicable, since it contravenes, diminishes or distorts a right recognized by this Constitution" (183,2 Constitution).

Regarding the concentrated method of judicial review, the Constitution sets forth that "The statutes can be declared unconstitutional on grounds of form or in its contents" (Article 184), corresponding to the Constitutional Chamber of the Supreme Court the exclusive hearing and resolution on the matter (Article 315,5). The most important aspects of this concentrated method of judicial review are the followings:

Regarding the object of judicial review, the actions of unconstitutionality that can be brought before the Constitutional Chamber are about the statutes and general applicable norms, except regulations, that must be challenged before the administrative action judicial review courts; constitutional amendments approved contrary to the formalities set forth in the Constitution; approbatory statutes of international treaties sanctioned without following the constitutional formalities (Article 17); and against statutes that contravene the provisions of an international treaty or convention in force in Honduras (article 76).

The action of unconstitutionality can be brought before the Constitutional Chamber in a limited standing rule, set forth in the Law on Constitutional Justice following the Constitution, reduced to those persons having a personal, direct and legitimate interest (Article 77).

The concentrated method of judicial review can also be exercised in an incidental manner, as an exception of unconstitutionality of a statute that can be raised in any process (Article 82), or by the referral of the case that any court can make to the Constitutional Chamber of the Supreme Court before deciding the case (Article 87). In such cases, the proceeding must continue in the lower court up to the stage of deciding the case, in which it must be suspended waiting for the Constitutional Chambers decision on the constitutional question (Article 77).

In both cases, whether through the action of unconstitutionality or by means of the incidental constitutional question, the decision of the Constitutional Chamber has erga omnes effects, with repealing character (Article 94).

D. The action of amparo in Panamá

The amparo action of constitutional guaranties is set forth in Article 50 of Panama's 1972 Constitution, reformed in 1978, 1983 and 1994, for the benefit of any person against whom an order to do or not to do is issued or enforced by any public servant, which violates the rights and guarantees enshrined in this Constitution. In such cases the person has the right to have the order revoked at his request or that of any other person on his behalf." According to the same article, "the recourse of am-

342 See Allan R. Brewer-Carías, "El sistema de justicia constitucional en Honduras" in *El sistema de Justicia Constitucional en Honduras (Comentarios a la Ley sobre Justicia Constitucional)*, Instituto Interamericano de Derechos Humanos, Corte Suprema de Justicia. República de Honduras, San José, 2004, pp. 27 ff..

paro of constitutional guarantees shall be brought by means of a summary procedure and shall be the competence of the judicial tribunals"[343].

Article 23 of the Constitution also sets forth the habeas corpus recourse in favor of any individual arrested in a manner or in cases other than those prescribed by the Constitution and the statute. In such cases, the person shall be released at his request or that of another person, by means of the recourse of *habeas corpus*, which may be brought immediately following the arrest and irrespective of the applicable punishment.

The regulation related to the amparo action and to the habeas corpus recourse is set forth in the Judicial Code of Panama. Regarding the amparo of constitutional guaranties, according to Article 2615 of the Code, it can be brought against any kind of acts that harm or injure the fundamental rights and guaranties set forth in the Constitution, having the form of an order to do or not no do, when the seriousness and imminence of the damage they cause requires an immediate repeal. It can also be brought against judicial decisions when all the existing judicial means to impugn it have been exhausted; but cannot refer to judicial decisions adopted by the Electoral Tribunal, the Supreme Court of Justice or any of its Chambers.

Pursuant to Article 2.616 of the Legal Code, the following are the competent courts to hear claims of amparo:

1. The Supreme Court of Justice, for acts issued by authorities or officials with rule and jurisdiction in the whole Republic or in two or more provinces.
2. The District High Courts, for acts issued by public servants with rule and jurisdiction in one Province; and
3. The Circuit Judges for acts issued by public servants with rule and jurisdiction in one district or part of such district.

The distribution of the judicial power to resolve in matters of amparo and habeas corpus among all levels of the Judiciary contrast with the judicial review system of Panama, conceived as a concentrated one, by attributing to the Supreme Court of Justice the exclusive power to decide upon the constitutionality of legislation.

Article 203,1 of the Panamanian Constitution gives the Supreme Court the exclusive role to protect the integrity of the Constitution and to control the constitutionality of legislation by means of two different methods: a direct popular action or by mean of a question of constitutionality that can be raised as an incident before a lower court.

Regarding the action of unconstitutionality, in similar terms as the Colombian and Venezuelan regulations, it is conceived as a popular action that can be brought before the Supreme Court by anybody in order to denounce the unconstitutionality of statutes, decrees, decisions or acts, founded in substantive or formal questions (Article 2556).

On the other hand, the question of the unconstitutionality of legal or executive norms applicable to a case can be raised by the parties to the case or ex officio by the respective court, in which case the incidental question must be sent to the Supreme Court for its decision. The procedure must be suspended at the stage previous to the decision that can only be issued once the Supreme Court has adopted its decision on the constitutional matters (Article 2557 Judicial Code).

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343 See: Lao Santizo P., *Acotaciones al* amparo *de garantías constitucionales panameño,* Editorial Jurídica Sanvas, San José, Costa Rica, 1987.

In both cases, the Supreme Court decision is final, definitive, obligatory and with non retroactive effects, and must be published in the Official Gazette (article 2573 Judicial Code).

E. The petition for amparo in Paraguay

The 1992 Constitution of Paraguay also expressly regulates as constitutional guarantees, the petition for amparo, the action of *habeas corpus* (Article 133)[344] and the action of *habeas data* (Article 135).

Regarding the petition for amparo, according to Article 134 of the Constitution, it can be filed by anyone who considers himself seriously affected by a clearly illegitimate act or omission, either by governmental authorities or individuals, or who may be in imminent danger that the rights and guarantees set forth in the Constitution or the statutes may be curtailed, and whom, in light of the urgency of the matter cannot seek remedy through regular legal means. In such case, the affected person may file a petition for amparo before a competent judge. Proceedings will be brief, summary, and free of charge, and of popular action in the cases set forth by legislation.

The judge is empowered to safeguard rights, guarantee, or immediately restore the legal situation that existed prior to the violation.

The amparo petition which has been regulated in the 1971 Law 341 of Amparo, is not admissible against judicial decisions and resolutions and when the matter refers to the individual freedom protected by the recourse of habeas corpus (Article 2).

According to Article 3 of the Law of Amparo, the petition for amparo can be filed before any first instance court with jurisdiction in the place where the act or omission could have effect. Nonetheless, the Constitution provides that, regarding electoral questions and matters related to political organization, the competent court will be that of the electoral jurisdiction (Article 134).

The recourses of habeas data and habeas corpus must also be filed before the judges of first instance (Article 133); and in some cases the habeas corpus recourse before the Supreme Court (Article 259,5).

Except for the resolutions of the amparo petition, habeas corpus recourse or habeas data action, which in general corresponds to all courts of first instance, all other constitutional matters dealing with judicial review of legislation are the exclusive attribution of the Constitutional Chamber of the Supreme Court of Justice. Therefore, in Paraguay, since the 1992 Constitution, a concentrated system of judicial review[345] has existed, by attributing the Supreme Court of Justice the power to decide actions and exceptions seeking to declare the unconstitutionality and inapplicability of statutes contrary to the Constitution. Article 260 of the Constitution, assigns the Constitutional Chamber created in 1995, the power to hear and resolve upon the unconstitutionality of statutes and other normative instruments, declaring in the concrete case, the inapplicability of their dispositions that are contrary to the Constitutions. The decision, thus, only has effects for the concrete case.[346]

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344 See: Evelio Fernández Arévalos, *Habeas Corpus Régimen Constitucional y legal en el Paraguay*, Intercontinental Editora, Asunción, Paraguay 2000.

345 See in general, Norbert Lösing, "La justicia constitucional en Paraguay y Uruguay" en *Anuario de Derecho Constitucional Latinoamericano 2002.* Ed. KAS, Montevideo, Uruguay, 2002; Luis Lezcano Claude, *El control de constitucionalidad en el Paraguay,* Ed. La Ley Paraguaya S.A. Asunción, Paraguay, 2000.

346 L.M. Argaña, "Control de la Constitucionalidad de las Leyes en Paraguay", *Memoria de la Reunión de Presidentes de Cortes Supremas de Justicia en Iberoamérica, el Caribe, España y Portugal*, Caracas, 1982, pp. 550, 551, 669, 671.

The Constitutional Chamber also has the power to decide upon the unconstitutionality of judicial definitive or interlocutory decisions, declaring their nullity when contrary to the Constitution. In all these cases, the procedure can be initiated by means of an action before the Constitutional Chamber of the Supreme Court or through an exception raised in any instance, in which case the files must be sent to the Constitutional Chamber.

This is confirmed by Article 18,a) of the Civil Procedure Code which set forth that the when a judge hearing a concrete case considers the applicable statute contrary to the Constitution, even ex officio, he may send the files to the Supreme Court of Justice, in order for the Court to decide the question of unconstitutionality.

In particular, regarding actions of amparo, Article 582 of the same Civil Procedure Code (Law nº 600, 1995), set forth that when in order to decide an action for amparo, the competent court must determine the constitutionally or unconstitutionality of a statute, decree or regulation, the court must send the files to the Constitutional Chamber of the Supreme Court of Justice, who as soon as possible, must declare the unconstitutionality when evident.

F. The action of amparo in Uruguay

Notwithstanding the general declarations contained in Articles 7,72 and 332 of the 1966 Constitution, the action of amparo in Uruguay was expressly regulated by Law 16.011 of 1988, which establishes that any person, human or artificial, public or private, may bring an action of amparo against any act, omission or fact of the state or public sector authorities, as well as of private individuals that in a illegitimate evident way, currently or imminently impair, restrict, alter or threaten unlawfully any of the rights and freedoms expressly or implicitly recognized by the Constitution (Article 72), except in those cases where an action of *habeas corpus* is admitted.

This action of amparo for the protection of all constitutional rights and freedoms may be brought before the judges of First Instance in the matter corresponding to the act, fact or omission under dispute and of the place where they produce effect (Article 3)[347].

However, Law 16.011 excludes from action of amparo, all judicial acts issued in judicial controversies, no matter their nature and irrespective of the court that issues them; also acts of the Electoral Court, whatever their nature; as well as the statutes and decrees of departmental governments that have force of statute in their jurisdiction (Article 1).

This action of amparo in the Uruguayan system is only admitted when there are no other judicial or administrative means available for obtaining the same result of protection or amparo, or when, if they were to exist, are clearly ineffective for protecting the right Article 2).

In the process of amparo, constitutional questions may arise regarding the unconstitutionality of statutes, but the ordinary court cannot resolve them, and a referral to the Supreme Court must be made. This is the consequence of the concentrated method of judicial review of legislation that exists in Uruguay[348].

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347 See (in general): Luis Alberto Viera *et al*., *Ley de Amparo. Comentarios, Texto Legal y Antecedentes legislativos a su sanción. Jurisprudencia sobre el* amparo, 2nd Edition, Ediciones IDEA, Montevideo, 1993; Miguel Ángel Semino, "Comentarios sobre la acción de amparo en el Derecha uruguayo", en *Boletín de la Comisión Andina de Jurista,* nº 27, Lima, 1986,

348 See in general José Korseniak, "La Justicia constitucional en Uruguay" en *La Revista de Derecho*, año III, enero-junio 1989, Facultad de Derecho, Universidad Central, 1989; Héctor Gros Espiell, "La jurisdicción constitucional en el Uruguay" en *La Jurisdicción Constitucional en Iberoamérica*, Ed. Universidad Externado de Co-

Article 256 of the Uruguayan Constitution, since 1934[349], assigns to the Supreme Court of Justice the exclusive and original power to declare the unconstitutionality of statutes and other State acts with force of statutes, whether founded on formal or substantive reasons.

This declaration of unconstitutionality of a statute and its inapplicability can be requested be means of an action of unconstitutionality that can be filed before the Supreme Court by all those who deem that their personal and legitimate interests have been harmed (Article 258)[350]. Thus, regarding standing, the Uruguayan regulation has similarities with the Honduran one.

The constitutional question can also be submitted to the Supreme Court in an incidental way by a referral made ex officio or as a consequence of an exception of unconstitutionality raised by a party to a concrete process, by an inferior court (art. 258). In such cases, the inferior court must send to the Supreme Court an abstract of the question, the case having to be suspended at the stage of deciding it. Once the Supreme Court has decided, the inferior court must then decide according to what the Supreme Court has ruled (Articles 258, 259).

In all cases, the decisions of the Supreme Court on matters of constitutionality only refer to the concrete case in which the question is raised (Article 259). This principle is clear regarding the incidental mean of judicial review where the question of constitutionality is raised in a concrete case, but originates doubts regarding the action of unconstitutionality. According to the Law nº 13747 of 1969[351], which regulates the procedures in matters of judicial review, the decision of the Supreme Court impede the application of the challenged norms declared unconstitutional regarding the plaintiff, authorize its use as an exception in all other judicial proceedings, including the judicial review of Public administration activities[352].

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349 Originally, the system was established in 1934, and latter in 1951. See H. Gross Espiell, *La Constitución y su Defensa*, Congreso, "*La Constitución y su Defensa*", UNAM, 1982 (policopiado), pp. 7,11. The siystem remained in the 1966 Constitution, in the "Acta Institucional nº 8 de 1977"and in the "Acta Institucional nº 12 de 1981".. *Idem*, pp. 16, 20.

350 Artículo 258. *Véase* H. Gross Espiell, *op. cit.*, pp. 28, 29; J.P. Gatto de Souza, "Control de la Constitucionalidad de los Actos del Poder público en Uruguay", *Memoria de la Reunión de Presidentes de Cortes Supremas de Justicia en Iberoamérica, el Caribe, España y Portugal*, Caracas, 1982, pp. 661, 662.

351 *Véase* H. Gross Espiell, *op. cit.*, p. 29.

352 *Idem*.

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