SOME ASPECTS OF THE "AMPARO" PROCEEDING IN LATIN AMERICA AS A CONSTITUTIONAL JUDICIAL MEAN SPECIFICALLY ESTABLISHED FOR THE PROTECTION OF HUMAN RIGHTS*

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I

After a long history of human rights violations and disdain, and specifically, as a consequence of it, Latin American countries have developed a peculiar and comprehensive constitutional system for the protection of human rights, which can be identified through the following basic and important trends:

1. The first of all them, the longstanding tradition our countries have had, in contrast, for instance with the Bill of Rights in the United States, of very extensive declarations on human rights inserted in the Constitutions. This began in 1811, with the adoption, after the American and French Declarations, of the third formal constitutional declaration of rights by an independent State in constitutional history, the "Declaration of Rights of the People" adopted by the Supreme Congress of Venezuela, four days before the formal Venezuelan Independence Act of July 5th 1811 was approved.

That is why, although having been for three centuries Spanish Colonies, no Spanish constitutional influence can be found at the beginning of Latin American countries modern constitutionalism, which

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basically followed the North American and the French trend, which later were also followed by Spain.

2. The second trend of Latin American constitutional regime regarding human rights, and notwithstanding this declarative tradition, has also been a parallel and unfortunate process of human rights violations, which to our concern, even nowadays, at the beginning of the XXI century, is occurring for instance in countries as Venezuela, my own country. After four decades of democratic governments, the country is now ruled by an authoritarian government that has been progressively demolishing all the democratic institutions, centralizing the State and concentrating all power on the Executive which is controlling all braches of government, and crushing any sort of opposition, with out any kind of check and balances or judicial control. It is a government that has disposed, in a poor country and in an unlimited way, huge amounts of resources own by the very rich Oil State we have, due to the rising oil prices of the past years, trying to cover its undemocratic accomplishments and human rights violations, by a propaganda based on the fact that the government has been elected –although without a free and transparent electoral system- and that it is taking care of the poor –although the index of poverty and unemployment has increased in the past years-.

This is unfortunately, one example that in spite of all the constitutional declarations, some Latin American countries still faces a rather dismal situation regarding the effectiveness of the Judiciary as a whole, as an efficient and just protector of fundamental rights. In Venezuela, the Constitution declares the State as being not only a "democratic and social State submitted to the rule of law" but also "a *State of justice*"; declares "justice" as one of the uppermost values of the legal system and of the State's actions (Article 2); and even declares that "the State shall guarantee free, accessible, impartial, transparent, autonomous, independent, liable, fair and timely justice, without undue delay, and without senseless formalities or reversals" (Article 26).

This is the express wording of the Constitution, with phrases that are very difficult to find in any other Constitutions in the contempo-

rary world, but with no effect whatsoever, due to the political intervention and control over the Judiciary. As the Inter American Commission on Human Rights has observed, since 2003 almost 90% of the judges, after being dismissed without due process guaranties, have been replaced by provisionally or temporarily appointed judges (*Informe sobre la Situación de los Derechos Humanos en Venezuela*, OEA/Ser.L/V/II.118, d.C. 4 rev. 2, 29 de Diciembre de 2003, Párr. 11, p. 3; See also, "Observaciones finales del Comité de Derechos Humanos de la ONU: Venezuela, GENERAL CCPR/CO/71/VEN, 26 de abril de 2001) which are now being granted permanent status without any public competition for their appointment, as required in the Constitution. So the gap between theory and practice is abysmal since the "State of Justice" is in the hands of an openly governmental controlled Judiciary; and if the Government controls the courts and judges, no effective guaranty can exist regarding constitutional rights, particularly when the offending party is a governmental agency. In this case, and in spite of all constitutional declarations, it is impossible to speak of rule of law.

3. But notwithstanding this punctual situation that we still face in some countries, the third trend regarding the Latin American system of constitutional protections of rights, is the continuous effort the countries have made to assure the constitutional guarantee of human rights, by progressively enlarging the declarations and adding to the classical list of civil and political rights and liberties, the economic, social, cultural, environmental and indigenous rights.

Connected with this trend, another trend is the progressive and continuous incorporation in the Constitutions of the "open clauses" of rights, in the sense of the IX Amendment (1791) to the United States Constitution which refers to other human rights not enumerated but "retained by the people". This clause can be found in all Latin American countries except in Cuba, Chile, Mexico and Panama, but emphasising in a more wide sense, that the declaration of rights in the Constitution shall not be understood to be a denial of others inherent to the human person or to human dignity, or derived from the nature of the human person.

4. The fourth trend of the human right constitutional regime in Latin America is the progressive expansion of the content of the constitutional declarations, by the incorporation in the Constitutions of the rights enumerated in international treaties and conventions on human rights. For this purpose, the Constitutions have given different ranks to international instruments on human rights regarding internal law: not only the general admitted statutory rank similar to the United States system, but in some cases, supra-legal rank, constitutional rank and even in some cases supra-constitutional rank.

In this regard, some Constitution also expressly grants pre-emptive status to international treaties on human rights regarding internal law, whenever they provides for more favourable rules for the exercise of a human rights. In some cases, this pre-emption is even established with respect to the Constitution itself, as it is for example the case of the Venezuelan Constitution, which states 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 (Article 23).

In this matter, the 1969 American Convention on Human Rights ratified by all Latin American countries, except Cuba, has had an exceptional importance for the development of the judicial protection of human rights in the Continent, not only because the declarations of rights it contained but because the creation of the Inter American Court on Human Rights whose jurisdiction has been recognized by the States. The only American country that did not sign the Convention was Canada, and even though the United States signed the Convention in 1977, it has not yet ratified it, as has been the case of Antigua and Barbuda, Bahamas, Belize, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines. Trinidad and Tobago ratified the Convention but in 1998 denounced it.

5. As mentioned, this American Convention has been extremely important in Latin America, consolidating, as a reaction against the effects of authoritarian regimes a very rich minimal standard regulation on civil and political rights, common to all countries, which are enumerated and extensively defined in the text of the declaration. Consequently, in the cases in which the Constitutions have given constitutional rank to international treaties, including the American Convention, the rights declared in it are also out of the reach of the legislative body, which cannot legislate diminishing in any way the enforcement or scope of such rights.

To realize the meaning of this legal effect, it is enough, for example, to mention the due process of law rights set forth in the American Convention, like the right to a fair trial "with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, (Article 8,1); the right of every person not to "be deprived of his physical liberty except for the *reasons and under the conditions established beforehand by the Constitution* of the State Party or by a law"(Article 7,2 and 7,5); and the right of "any person detained" to "*be brought promptly before a judge or other officer authorized by law to exercise judicial power*" and to "be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings".

These rights, for instance, imply the prohibition to create special commissions to try any kind of offenses; and also prohibits for civilians to be tried by ordinary military courts, and of course, by military commissions. It also prohibits the creation of special courts to hear some criminal procedures after the offenses have been committed, in the sense that every person has the right to be heard only before courts existing prior to the offenses. All those unconstitutional practices which were in the past widely apply by authoritarian governments, now forbidden in the Convention have been the object of very important rulings by Inter American Court on Human Rights, against Member State of the Convention, for it violations.

For instance, in the *Cantoral Benavides* Case (2000), the Inter American Court on Human Rights condemned Peru for the violation of Arti-

cle 8,1 of the Convention because Mr. Cantoral Benavides, who was a civilian, was prosecuted by a military judge, which was not the "competent independent and impartial judge" provided for in the Convention. Consequently the Court considered that Peru also violated Article 7.5 of the Convention, because the victim was brought before a criminal military court (Case *Cantoral Benavides*, Augst 18, 2000. Paragraph 75), ruling that only judges that are the "natural" ones (*juez natural*) in the case, can examine the legality and reasonability of a detention.

And this is in fact one of the cores of the due process of law rights according to the Convention, the right to be heard by a competent court set forth not only by statute but by a statute that must be sanctioned previously to the offense. This is a provision tending to proscribe any *ad hoc* courts or commissions.

The Inter American Court has also referred to this due process of law right in the *Ivcher Bronstein* Case (2001), also regarding Peru. In such case, weeks before the government issue a resolution depriving Mr. Bronstein, who was the owner of a television network, of his Peruvian citizenship –needed for the ownership of TV stations-, the Peruvian Commission of the Judiciary altered the composition of a Chamber of the Supreme Court and empowered it to create specialized Superior chambers and Public Law specialized courts, to hear specific recourses, including those filed by Mr. Bronstein. The Inter American Court ruled that doing that, the Peruvian State "did not guarantee to Mr. Ivcher Bronstein the right to be heard by judges or courts "previously established by law", as stipulated in Article 8 (1) of the American Convention" (Case *Ivcher Bronstein*, February 6, 2001. Paragraph 114)

The Inter American Court also ruled in the *Castillo Petruzzi et al.* Case (1999), that "a basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law", declaring that the States are not to create "tribunals that do not use the duly established procedures of the legal process […] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals (Case *Castillo Petruzzi el al*., May 30, 1999, paragraph 129). The Court considered that "due process of law rights are violated when ordinary common offenses are

transferred to the military jurisdiction; that judging civilians for treason in such courts imply to exclude them from their "natural judge" to hear those proceedings; and that because military jurisdiction is set forth for the purpose of maintaining order and discipline within the Armed Forces, civilians cannot engage in behavior contrary to such military duties. The Court ruled that "Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases". The Inter American Court concluded by stating that "military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process is violated" (Case *Castillo Petruzzi et al,* May 30, 1999, Paragraph 128).

Finally, in the *Durand and Ugarte* Case (2000), the Inter American Court ruled that "in a democratic rule of law, the criminal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by the commission of crime or offenses that by its own nature attempt against legally protected interests of military order" (Case *Durand and Ugarte*, August 16, 2000, paragraph 117).

According to all this doctrine, not only the processing of civilians by military courts is excluded, but additionally the possibility to assign to military courts cases of common felonies committed by military, even in the exercise of its functions.

6. In contrast with the aforementioned constitutional regulations, perhaps the absence of similar constitutional provisions in the United States, could be the cause allowing legal discussions to con-

tinue, for instance, regarding the validity of military commissions to try non-citizens for "acts of international terrorism" after the September 11 terrorist attacks, like those set up by *the Military Order* of November 13, 2001. In this matter, the Supreme Court has only decided in June 29, 2006, that "the military commission at issue lacks the power to proceed because its structure and procedure violate" both the Uniform Code of Military Justice and the Geneva Convention (*Hamdan v. Rumsfeld*, Case nº 05-184); with out any reference to constitutional violations.

The lack of the aforementioned constitutional provisions in the United States could has also led to the possibility for the Congress to sanction the *Detainee Treatment Act* of December 2005, excluding the jurisdiction of federal courts to hear habeas corpus petitions filed by detainees at the United States naval base at Guantánamo Bay, Cuba. In this matter, the Supreme Court has only ruled in June 29, 2006 (*Hamdan v. Rumsfeld* Case nº 05-184), that such exclusion cannot be applied to pending cases, also without any substantive constitutional declarations.

On the same matter, the Congress, on September 2006, passed the *Military Commission Act*, also preventing the Guantánamo detainees of the habeas corpus right to challenge their detention in court. On this regard, the Supreme Court must now hear the pending cases *Boumediene v. Bush* (Case No. 06-1195), and *Al Odah v. United States* (Case. N. 06-1196), in which it is hoped that it will refer to the constitutionality or unconstitutionality of the *Military Commission Act of 2006*, which strips the federal courts of jurisdiction to hear cases brought by the detainees.

On the other hand, the absence of express regulations referred to the aforementioned constitutional rights derived from the due process as established in the American Convention, could have also led in the United States to the denial for some detainees to have access to a lawyer and to keep them in an open-ended detention. In this matter, the Supreme Court in the *Rumsfeld v. Padilla* Case, decided in April 2006, denied the request of Mr. Padilla to hear his case, which left standing a decision by a federal appeals court in Richmond, Virginia, that endorsed the government's power to seize a citizen on United States soil

declared as "enemy combatant" and keep him in into indefinite detention, even though remaining in civilian custody.

These cases can serve to highlight what can happen in situations where there is no express constitutional rank given to some of these judicial guaranties and particularly to the right to be tried by judicial competent independent and impartial courts established before the offenses were committed, as is set forth in the American Convention on Human Rights. With those regulations, the matter cannot legally be discussed. Conversely, in the absence of such regulations, those discussions evidencing the struggle on the supremacy between the courts and the Government, with the intervention of Congress, can finished by excluding any injunctive protection of constitutional rights in such cases.

7. The fact is that in Latin America, after so many cases, experiences and stories referred to irregular *ad hoc* commissions or special courts established by authoritarian governments to try people with no due process of law rights, the provisions of the American Convention and those set forth in the Constitutions do not allow the discussion even to be sustained. The violations of the Constitution unfortunately can occur and have occur in a *de facto* way, but not with legal support, because the due process of law, with all its content, is a right declared in the Constitution out of the reach of Congress, so no legislation can be passed to restrict the courts jurisdiction.

Consequently, the exclusion of due process of law rights, for instance in situation of emergency or of exceptional circumstances, can only be formally established through a constitutional reform providing for the elimination of such rights, for instance of the amparo and habeas corpus actions.

For our astonishment his is currently occurring in Venezuela (October 2007), where the National Assembly in the discussions of the Draft constitutional reform proposals formulated by the President of the Republic, has approved to expressly exclude from the list of human rights that cannot be suspended in situations of emergency according

to article 337 of the Constitution, precisely, the due process of law rights. If such constitutional reform is definitively approved, not only it will be a regressive regulation regarding human rights, but a violation of the International Convention of Human Rights.

8. But even in the absence of express constitutional regulations regarding the hierarchy of international treaties on human rights, in some Latin American countries such treaties have also acquired constitutional value and rank by means of constitutional interpretation, in particular, when the Constitutions establish, for example, that on the matter of constitutional rights their interpretation must always be done according to what it is set forth in international treaties on human rights.

This is the case, for instance, of the Colombian Constitution in which it is expressly established that the rights provided in it, "shall be interpreted pursuant to the international treaties on human rights ratified by Colombia" (article 93). The same interpretative technique of human rights according to what is established in international instruments on the matter has also been established in the Peruvian Constitutional Procedural Code (article V). This has led the Constitutional Court in Colombia and Peru to decide in cases of judicial review of statutes, considering 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 it is prescribed in the international treaties.

8. But in addition to all these trends characterizing the Latin American system of constitutional protection of human rights, the other main trend on the matter is the express provision in the Constitutions of the judicial guarantee of such rights, that is, of an specific judicial remedy for the protection of constitutional rights, called the "amparo" action, "amparo" suit or "amparo" proceeding, following different adjective rules when compared to the general protective judicial remedies the legal systems provides for the protection of personal or property rights.

This can be considered as the Latin American most important legal feature on this matter, particularly when contrasted with other legal systems like the one of the United States, that although effectively protecting human rights, it do so by means of the general judicial actions or equitable remedies, also used to protect any kind of rights or interest.

Consequently, the judicial protection and guaranty of rights and freedoms embodied in the constitutional declarations, in general terms can be achieved in two ways: First, by means of the general established (ordinary or extraordinary) suits, actions, recourses or writs prescribed in procedural law; and second, in addition to those adjective means, by means of a specific judicial suit, action or recourse particularly established only to protect and enforce constitutional rights and freedoms and to prevent and redress wrongs regarding those rights.

II

This last solution is the one that can be considered as the general trend in Latin America due perhaps, to the traditional insufficiencies of the general judicial means for granting effective protection to constitutional rights. This is what has provoke the development of the "amparo" action for the protection of human rights, since it was initially established in Mexico in 1857, subsequently spreading across all Latin America, although with a very different shape.

1. The Mexican suit of "amparo", the only generally know in the United States, is really a unique and very complex institution, which is found exclusively in Mexico, which comprises in addition to the protection of human rights (*amparo libertad*), a wide range of other protective judicial actions than can be filed against the State, that in all the other countries are separate actions or recourses. They include, the actions for judicial review of the constitutionality and legality of statutes (*amparo contra leyes*), for judicial review of administrative actions (*amparo administrativo*), for judicial review of judicial decisions (*amparo casación*), and the actions for protection of peasant's rights (*amparo agrario*). In the other Latin American countries, the "amparo" actions or

recourses are only conceived as specific judicial remedies for the exclusive purpose of protecting constitutional human rights and freedoms, which justify its name as "amparo", which in English means "protection" or "shelter". In Spanish, the expressions "tutela" and "protección" are also equivalent to "amparo" and that is why the action is named as action for "*tutela*" in Colombia, action for "*protección*" in Chile) or order to secure (*mandado de segurança*) in Brazil.

After the Mexican amparo was initially established in the Constitution following the trends of United States system of judicial review of the constitutionality of statutes (1803) as it is the unanimous opinion of Mexican scholars, the amparo action was progressively introduced in the other Latin American, during the same XIX century, in the Constitution of Guatemala (1879), El Salvador (1886) and Honduras (1894); and during the 20th century, in the Constitutions of Nicaragua (1911), Brazil (*mandado de securança*, 1934), Panama (1941), Costa Rica (1946), Venezuela (1961), Bolivia, Paraguay, Ecuador (1967), Peru (1976), Chile (*recurso de protección*, 1976) and Colombia (*acción de tutela*, 1991).

In 1994 it was included in the Argentinean Constitution, but in this country, in fact, the amparo action was admitted since 1957 through court decisions and in 1966 was regulated in a special statute. In Dominican Republic, since 2000 the Supreme Court also admitted the amparo action, also regulated in a special statute in 2006.

So currently, in all Latin American countries, with the exception of Cuba, the habeas corpus and amparo suits, actions or recourses are regulated as a specific judicial means exclusively designed for the protection of constitutional rights.

2. In all the Latin American countries, with the exception of the Dominican Republic, the provisions for the action for amparo are embodied in the Constitutions; and in all of them, exception made of Chile, the amparo proceeding is expressly regulated in statutes. In general, those statutes are special legislation passed for the specific regulation of the amparo which in some case are regulated together with other judicial means for the protection of the Constitution. Only in

Panamá and Paraguay, the amparo proceeding is regulated within the General Procedural Judicial Code.

3. The amparo action is conceived in some Constitutions, like the Guatemalan, Mexican and Venezuelan Constitutions, to protect all constitutional rights and freedoms, including the protection of personal liberty or freedom, so the habeas corpus action is considered a type of the general amparo, also regulated as recourse for personal exhibition (Guatemala) or as an amparo for the protection of personal freedom (Venezuela).

In contrast, all the other Latin American Constitutions, in addition to the amparo action, a different recourse of habeas corpus for the specific protection of personal freedom and integrity has been expressly established. It is the case of Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panamá, Paraguay, Peru and Uruguay.

In recent times, some Constitutions have also provided for a recourse called of *habeas data*, as it is established in the Constitutions of Argentina, Ecuador, Paraguay, Peru and Venezuela, by which any person can file a suit in order to ask for information regarding the content of the data referred to himself, contained in public or private registries or data banks, and in case of false, inaccurate or discriminatory information, to seek for its suppression, rectification, confidentiality and up dating.

4. So, in general terms it can be said that the constitutional regulations on the protection of constitutional rights in Latin America, are established in the Constitutions in three different ways: First, providing for three different remedies, the amparo, the habeas corpus and habeas data, as is the case of Argentina, Brazil, Ecuador , Paraguay and Peru; second, establishing two remedies, the amparo and the habeas corpus, as is the case of Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, El Salvador, Honduras, Nicaragua, Panama and Uruguay, or the amparo and habeas data as is the case of Venezuela; and

third, just establishing one amparo action also comprising the protection of personal freedom as is the case of Guatemala and Mexico.

III

All this process of constitutionalization of the amparo action within the Stated, lead to the drafters of the American Convention on Human Rights (1969) to also incorporate in its provisions, for the amparo recourse as "the right to judicial protection, that is, as stated in article 25, the right everyone has "to a simple and prompt recourse, or any other effective recourse, before 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 or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties". In order to guarantee such right, the Convention imposes the States Parties the duty "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"; to develop the possibilities of judicial remedy"; and "to ensure that the competent authorities shall enforce such remedies when granted".

This article of the American Convention, in the words of the Inter American Court on Human Rights is 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" (*Advisory Opinion OC-8/8*, Habeas corpus in emergency situations, paragraph 32).

The American Convention, regarding the right to personal freedom and security, also provides for the recourse of habeas corpus, in favor of anyone who is deprived of his liberty, to be filled before "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" (Article 7).

Examining both, the habeas corpus and the "amparo" recourses, it is possible to conclude, as asserted by the same 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 as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the 'amparo' of freedom or as an integral part of 'amparo'" (*Advisory Opinion OC-8//87* of January 30, 1987, Habeas Corpus in Emergency Situations, paragraph 34).

All these provisions of the American Convention can also be considered as the conclusion of the process of internationalization of the protection of human rights, in particular regarding the provision for the specific judicial means for their protection, considered by the Inter American Court of Human Rights "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" (*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).

As a consequence of this process, first of constitutionalization of the amparo, and second of the internationalization of human rights and its protection, the right to a judicial guaranty of human rights ("amparo" and habeas corpus) in Latin America, is also an international obligation imposed upon the States Parties to guarantee their peoples the effective protection of their human rights. As decided by the Inter American Court on Human Rights, 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" (Case: *Velásquez Rodríguez*, Decision of July, 29, 1988, Paragraph 166).

Consequently, the actions of the State Parties in order to comply with this obligation are not only formal ones, in the sense that, as expressed by the Inter American Court, it is not to be fulfilled only "by the existence of a legal system designed to make it possible", but that in order to comply with this obligation, it is also required that the government "conduct itself so as to effectively ensure the free and full exercise of human rights" (*Idem*, Paragraph 167). On the contrary, as decided by the Inter American Court, 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" (*Advisory Opinión OC-9/87* of October 6, 1987, Judicial Guarantees in Status of Emergency, paragraph 24; *Comunidad Mayagna (Sumo) Awas Tingni* Case, paragraph 113; *Ivcher Bronstein* Case, paragraph 136; Caso: *Cantoral Benavides* Case, paragraph 164; *Durand y Ugarte* Case, paragraph 102).

Now, from what it is provided in Article 25 of the American Convention, and referring in particular to the amparo action which has been 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" (See Case: *Castillo Páez,* p. 83; Caso: *Suárez Roseo*, p. 65 and Caso: *Blake*, p. 102); the following elements can be deducted characterizing such action in Latin America:

1. First, the "amparo" as a judicial means for protection, is conceived in the American Convention as a human right, and no just as a one single specific judicial recourse or action, so in many countries, the judicial guaranty can also be obtained by various judicial means. That is why in some cases is also conceived as a fundamental human right in itself, that is to say, the right of citizens to be protected by the Judiciary. This is for instance, the sense of the regulations in the Mexican and Venezuelan legal systems.

This right is thus considered in the American Convention as a "fundamental" one that cannot be suspended or restricted in cases of

state of emergency (article 27), which was confirmed by the Inter American Court on Human Rights in two important *Advisory Opinions* considering the suspension of habeas corpus or of "amparo" in emergency situations as "incompatible with the international obligations imposed on the States by the Convention" (*Advisory Opinion OC-8//87* of January 30, 1987, Habeas Corpus in Emergency Situations, paragraph 43). That is why, the constitutional reform currently discussed in Venezuela (October 2007) seeking to exclude the due process of law rights from the list of the rights that cannot be suspended or restricted in situation of emergency (Article 337), can be considered as a violation of the international obligations imposed on the Venezuelan State by the American Convention.

On the other hand, being a specific judicial remedy for the protection of human right, in general terms, the Latin American legislations in general establish the amparo action as an extraordinary remedy, in the sense that it is admitted only when there are no other effective judicial means that can protect human rights; in similar sense to the extraordinary character of the Anglo-American injunctions.

Being a judicial mean, the Convention refers to the amparo as an action that can be brought before the "competent courts", being the intention of the Convention to set forth an essential function of the Judiciary. That is why, in almost all the Latin American countries, the jurisdiction for amparo cases in general corresponds to the first instance courts, being exceptional the cases in which the competence on amparo is assigned to only one single court, as has been the case of the Constitutional Chamber of the Supreme Courts of Costa Rica, El Salvador and Nicaragua.

2. The second element provided by the American Convention regarding the recourse or action for amparo, is that it must be a "simple, prompt and effective" instrument (*Suárez Romero* Case, Paragraph 66), that is an expedite remedy to effectively protect the violated or harmed rights.

The simplicity implies that the procedure must lack the dilatory procedural formalities of ordinary judicial means, imposing the need

to grant a constitutional -not ordinary- protection. 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 those resolved after "a long time" (*Ivcher Bronstein* Case, paragraph 140).

The effective character of the recourse refers to the fact that it must be capable to produce the results for which it has been created (*Velásquez Rodríguez* Case, paragraph 66); that is, 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", adding that "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" (*Advisory Opinion OC-9/87* of October 6, 1987, *Judicial Guarantees in Status of Emergency)*, paragraph 24).

Thus, it is not enough in order to be effective, that a recourse be regulated in internal law for the purpose of protecting human rights, being necessary the existence of other basic conditions in order to function and to be applied with the expected results, particularly the existence of really independent and autonomous courts. That is why, for instance, in the *Ivcher Bronstein* Case, the Inter American Court decided that in Peru at the time (2000), 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" (*Ivcher Bronstein* Case, paragraph 139). The Inter American Court has also considered that a recourse is not effective when impartiality lacks in the corresponding court (Case: *Tribunal Constitucional*, paragraph 96).

3. Third, the remedy for amparo is conceived to protect everybody's rights -in the very broadest sense, without distinction or discrimination of any kind, whether individuals, nationals, foreigners, legally able or not, recognized not only in the Constitutions, but in the statutes and in the Convention. The protective tendency regarding the implementation of the amparo has also gradually allow interested parties to act in representation of diffuse or collective rights, like the right to safe environment or to health, the violation of which affects the community as a whole, as it has been expressly established in the Argentinean, Brazilian, Colombian and Venezuelan Constitutions.

On the other hand, if it is true that the American Convention is devoted to declare human rights in the strict sense of rights belonging to human persons, the internal regulations of the countries have assured private corporations (artifical persons) an public entities the right to file "amparo" actions for the protection of their constitutional rights, such as the right to non discrimination, right to due process or right to own defence.

4. Fourth, the amparo action is conceived for the protection of all constitutional rights contained in the Convention, the Constitutions and statutes and of those that are inherent to the human person. Therefore according to the open clauses of constitutional rights, all rights declared in international instruments are also entitled to protection, as well as all rights inherent to the human person and human dignity.

Consequently, according to the American Convention, all rights can be protected by means of "amparo" actions. Nonetheless, in the same sense as the german and Spanish "amparo" recourses, the Chilean and the Colombian Constitutions have establish a reduced list of rights that can be protected by means of the actions for "tutela" or "protección", which are referred only to those considered "fundamental rights". This regulations can be considered incompatible with the international obligations that are imposed on such States by the Convention, because the American Convention does not allow the exclusion of determined constitutional rights from the protection by means of the "amparo" action.

However, in spite of this restriction, it must be highlighted that the courts in Colombia have fortunately been gradually correcting it, through constitutional interpretation, in such a way that today, due to the interrelation, universality, indivisibility, connexion and interdependence of rights, there are almost no constitutional rights that can not be protected by means of the action of "tutela".

Anyway, in contrast to such cases of restrictive constitutional provisions regarding the rights to be protected by means of a amparo recourse, other Constitutions expressly set forth that the rights to be protected are not only all those declared in the Constitution, but also those that are declared in the international system of protection of human rights, as is the case of Argentina, Colombia, Costa Rica and Venezuela.

5. Fifth, the constitutional judicial protection guaranted in the American Convention by mean of the amparo, is against any act, omission, fact or action that violates human rights and, of course, which threatens to violate them, without specifying the origin or the author of the harm or threat. This implies that the recourse of "amparo" can be brought before the courts against any persons in the sense that it must be admitted not only against the State or public authorities, but also against private individuals and corporations.

Consequently, and in contrast for instance, to the Spanish amparo action, the action for "amparo" against individuals has been broadly admitted in Latin America, following a trend that began fifty years ago in Argentina, when the possibility of exercising a recourse of "amparo" against individuals was initially admitted. Nowadays the amparo action against individuals in expressly recognized in the Constitutions of Argentina, Bolivia, Paraguay and Peru. In other Constitutions is admitted only 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 Colombia, Ecuador and Honduras. In other countries, is the legislation which provides for the amparo against individuals, as is the case of

Costa Rica, Nicaragua, Dominican Republic, Uruguay and Venezuela; or it has been accepted by courts decisions (Chile).

In other few countries, as is the case of Brazil, El Salvador, Guatemala, Mexico and Panama, any possibility of filing a recourse for "amparo" against private individuals is excluded; a situation that is distant from the orientation of the American Convention.

6. But regarding the constitutional protection against actions of the State, another scope of internal law reduction of "amparo" that contrasts with the universal scope deriving from the American Convention, refers to the acts of the authorities that may be challenged by means of recourse of "amparo". Pursuant to the American Convention, there cannot exist a single State act that could escapes from its scope, as it is expressly declared, for instance in the Guatemalan Constitution. If the "amparo" is a judicial means for the protection of human rights, it is an action that can be filed against any public conduct or acts that violates them, and therefore it cannot be conceived that certain State acts are excluded from the possibility to be challenged through the amparo action.

Nevertheless, in this regard, a tendency towards exclusions can also 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 acts are expressly excluded from the recourse of "amparo", as it is established in Costa Rica, Mexico, Nicaragua, Panama, Peru and Uruguay.

In other cases, like in Peru, an 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 other cases, the exclusion refers to certain acts of the State, as happened with regard to statutes and to judicial decisions. Only in a few countries, like Guatemala, Honduras, Mexico and Venezuela the possibility of filing the recourse of "amparo" against statutes is admitted, even though requiring the statute to be of a self executing character. Therefore, contrary to the trend set forth by the American Conven-

tion, the exclusion of statutes from the scope of the amparo, is the general trend of the Latin American regulations.

In other cases, the restriction of "amparo" refers to judicial decisions, notwithstanding that when judges decide particular cases, they too can infringe constitutional rights. As a matter of principles, 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, only in some countries like Colombia, Honduras, Guatemala, Mexico, Panama, and Venezuela, the recourse of "amparo" is expressly admitted against judicial decisions. On the contrary it has been excluded in other countries like Argentina, Uruguay, Costa Rica, Dominican Republic, Panama, El Salvador, Honduras, Nicaragua and Paraguay.

The case of Colombia must be highlighted, because in spite of the tutela action being statutorily admitted against judicial decisions, the Constitutional Court in 1992 considered contrary to the principle of *res judicata*, annulling the respective article of the statute (See Decision C-543, September 24, 1992). Nonetheless, and in spite of such annulment, all the main courts and the Council of State have progressively admitted the action of "tutela" against judicial decisions when considered arbitrary or the product of a judicial *voi de fait* (Decision T-231, May 13, 1994) It is also the case in Peru, where the amparo action against judicial decisions is admitted when they are issued outside a regular procedure.

7. And sixth, the "amparo" recourse as well as the habeas corpus, are judicial means for protection of constitutional rights that can be filed by the interested party at any time, without exception, and also in cases of exceptional situations or states of emergency.

In contrary sense, for instance, the 1988 Venezuelan Amparo Law use to establish that the amparo action was inadmissible "in case of suspensions of rights and guaranties" when in cases of interior or exterior conflict, or a situation of emergency was declared (article 6,7). This provision was, of course, tacitly repealed, due to the prevalent rank of the American Convention on Human Rights regarding internal law

(Article 23 of the 1999 Constitution) which on the contrary provides that even in cases of emergency, the judicial guaranties of constitutional rights cannot be suspended.

Consequently, the prevalent regulation in Latin America is that the action for amparo can always be filed even in situations of exception, as it is for instance expressly provided in Colombia. Regarding the habeas corpus, in a similar sense, the Nicaraguan Law of Amparo sets forth that in case of suspension of the constitutional guaranties of personal freedom, the recourse for personal exhibition will remain in force (Article 62). The Peruvian Constitutional Procedural Code also establishes the principle that during the emergency regimes, the amparo and habeas corpus, as well as all the other constitutional proceedings, will not be suspended (article 23). It is also the case of Argentina, regarding the habeas corpus guaranty, where the statute provides that in case of state of siege when personal freedom is restricted, the habeas corpus proceeding is admissible although within certain parameters.

All these regulations, of course, have their roots in past experiences of massive violations of rights, preciselly in situations of emergency or State of siege.

Anyway, the matter was definitively resolved in October 1986 by the Inter American Court of Human Rights by means of an *Advisory Opinion*, which was requested by the Inter American Commission of Human Rights seeking the interpretation of Articles 25,1 and 7,6 of the American Convention on Human Rights, in order to determine if the writ of habeas corpus was one of those judicial guaranties that, pursuant to the last clause of Article 27,2 of that Convention, may not to be suspended by a State Party to the Convention (*Advisory Opinion OC-8/87* of January 30, 1987, Habeas Corpus in Emergency Situations). In it, the Inter American Court on Human Rights declared that if it is true that "in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State…it is imperative that "the judicial guaranties essential for (their) protection" remain in force (Article 27(2) (*Advisory Opinion OC-8/87* of January 30, 1987, Habeas corpus in emergency situations, Paragraph 27). There-

fore, the Court ruled that "the Constitutions and the 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" (*Advisory Opinion OC-8/87 of January 30, 1987, Habeas corpus in emergency situations*, Paragraph 37, 42 and 43).

Also in 1986, the Government of Uruguay requested from the Inter American Court an *Advisory Opinion* regarding the scope of the prohibition of the suspension of the judicial guaranties essential for the protection of the rights mentioned in Article 27,2 of the American Convention; resulting in the issue of the *Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States Of Emergency*, in which the Court, following its aforementioned *Advisory Opinion OC-8/97*, empathized that "the declaration of a state of emergency… cannot entail the suppression or ineffectiveness of the judicial guaranties that the Convention requires the Member States to establish for the protection of the rights not subject to derogation or suspension by the state of emergency"; concluding that "therefore, any provision adopted by virtue of a state of emergency which results in the suspension of those guaranties is a violation of the Convention" (*Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency*, Paragraphs 25, 26).

The Inter American Court also indicated that the "essential" judicial guaranties 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 Member States 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"; and that "the above judicial guaranties should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention." (*Idem*, paragraph 41,2 and 41,3)

This doctrine of the Inter American Court, without doubt, is a very important one regarding the protection of human rights in Latin America, particularly when considering the unfortunate past experiences

that some countries have had in situations of emergency or of state of siege, especially under military dictatorship or internal civil war cases. In such cases, no effective judicial protection was available regarding persons' life and physical integrity; being at some times impossible to prevent their disappearance or their whereabouts to be kept secret; and being impossible in other times to have effective means to protect persons against torture or other cruel, inhumane, or degrading punishment or treatment.

8. So after such past experiences, according to the Inter American Court on Human Rights doctrine following the provisions of the American Convention, for instance, now, in Latin America, a discussion similar to the one held in the United States regarding the possibility to exclude the habeas corpus protection to the so called "combatant enemies" which have been kept for years in custody without any judicial guaranty to protect their rights, could not be held. This can happen and has happened in Latin America in a *de facto* way, but cannot be sustained as constitutional; or it can be expressly established in the Constitution by an authoritarian regime, as it has been formally proposed in Venezuela in the constitutional reform announced by the President of the Republic and approved by the National Assembly of in October 2007 (Article 337).

The matter in the United States has been decided by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548; 2004 in a case referred to aliens captured abroad (2002) during hostilities with the Taliban regime in Afghanistan, and that were held in executive detention at the Guantanamo Naval Base, in Cuba. The detainees filed various habeas corpus actions in the United States District Court for the District of Columbia against the United States and some federal and military officials, alleging that they were being held in federal custody in violation of the laws of the United States, that they had been imprisoned without having been charged with any wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court's jurisdiction was invoked under the federal

habeas corpus provision (28 USCS § 2241(c)(3)) that authorized Federal District Courts to entertain habeas corpus applications by persons claiming to be held in custody "in violation of the Constitution or laws or treaties of the United States".

Nonetheless, the District Court dismissed the actions for want of jurisdiction, on the asserted ground that aliens detained outside the sovereign territory of the United States could not invoke a habeas corpus petition; and the United States Court of Appeals for the District of Columbia Circuit, in affirming, concluded that the privilege of litigation in United States courts did not extend to aliens in military custody who had no presence in any territory over which the United States was sovereign (355 US App DC 189,321 F3d 1134). On certiorari, the United States Supreme Court reversed and remanded, holding that the District Court had jurisdiction, under 28 USCS § 2241, to review the legality of the plaintiffs' detention.

But notwithstanding this Supreme Court decision, the Senate of the United States voted on November 2005, an amendment to a military budget bill, to strip captured "enemy combatants" at Guantánamo Bay, of the legal tool given to them by the Supreme Court when it allowed them to challenge their detentions in United States' courts.

As mentioned before, a law banning the habeas corpus action could not be sanctioned by the Legislative body in Latin American countries, due to its regulation in the Constitutions and in the American Convention on Human Rights as a right that cannot be suspended even in situations of emergency. The same occurs, for instance, regarding personal freedom related to the length of administrative detention that in general terms is established in the Latin American Constitutions. Thus no legal regulation or amendments can be approved extending police custody length, as for instance has occurred in Europe also due to the war against terrorism. In Latin America, on the contrary, due to the constitutional rank of the regulation, the only way to extend police custody length restriction is through a constitutional amendment or reform; or through *de facto* ways.

IV

Even with all the existing constitutional and international regulations, which in Latin America conforms a unique and impressive set of norms, the possibility for an effective protection of constitutional rights really depends on the existence of an effective independent and autonomous Judiciary which can only be possible in democracy.

That is way, as a matter of principle, it can be said that if it is true that the declaration in the Constitutions of human rights and the provision in the same text of judicial means for their protection, can be an effective tool in order to guarantee their enforcement, the sole provisions for the amparo action in the Constitutions do not assure the effective protection of human rights.

Conversely, the absence of such guarantees and even the absence of constitutional declarations of rights, are not at all an impediment for independent and autonomous Judiciary to effectively protect human rights.

It all really depends on the existence of a democratic political system based on the rule of law, on the principle of the separation of powers, on the existence of a check and balances system between the branches of government, and on the possibility for the State powers to be effectively controlled, among other means, by the Judiciary. Only in such situations, it is possible to say that a democratic government exists, and then that it is possible for a person to effectively have his rights protected.

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