# THE LATIN AMERICAN "AMPARO". A GENERAL OVERVIEW[*]

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## I. THE LATIN AMERICAN AMPARO PROCEEDING

1. The *amparo* proceeding is a Latin American extraordinary judicial remedy specifically conceived for the protection of constitutional rights that can be filed against harms or threats inflicted to such rights not only by authorities but also by individuals.

Although being common and indistinctly called as an action, a recourse or a suit of amparo, it has always been configured as a whole judicial proceeding which normally concludes with a judicial order or writ of "protection" (word that in Spanish is equivalent to *amparo, protección* or *tutela*).[1] That is

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1 See Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Edit. Porrúa, México 2006; Allan R. Brewer-Carías, *El amparo a los derechos y libertades constitucionales. Una aproximación comparativa*, Cuadernos de la Cátedra de Derecho Público, n° 1, Universidad Católica del Táchira, San Cristóbal 1993, 138 pp.; also published by the Inter American 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. 2.695-2.740; Allan R. Brewer-Carías, *Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano)*, Instituto Interamericano de Derechos Humanos, San José 2005; and Allan R. Brewer-Carías, *Judicial Protection of Human Rights in Latin America. A Constitutional Comparative Law Study on the Latin American Injunction for the protection of constitu-*

why in Latin America the amparo is not only just a writ or a judicial protective order but a whole judicial proceeding subjected to specific procedural rule, being the most important aspect of it, the formal judicial decision or order issued by the courts for the protection of the threatened rights or for the restoration of the enjoyment of the harmed one. This order can consists, for instance, in an decision commanding or preventing an action, or commanding someone to do, not to do or to undo some action. It is a decision or writ that is framed according to the circumstances of the case commanding an act which the courts regard as essential in justice, or restraining an act which it deems contrary to the Constitution.

Consequently, the function of the amparo courts' decisions is, on the one hand, to prevent the defendant from inflicting further injury on the plaintiff, that can be of a prohibitory or mandatory character; or on the other hand, to correct the present by undoing the effects of a past wrong.

That is why, the amparo judicial order in Latin America, even without the distinction between equitable remedies and extraordinary law remedies, is very similar in its purposes and effects not only to the United States' injunction, but also to the other equitable and non equitable extraordinary remedies, like the mandamus, prohibition and declaratory legal remedies. Accordingly, for instance, the amparo order can be first, of a prohibitory character, similar to the prohibitory injunctions, issued to restrain an action, to forbid certain acts or to command a person to refrain from doing specific acts. Second, it can also be of a mandatory character, that is, like the mandatory injunction requiring the undoing of an act, or the restoring of the *statu quo*; and like the writ of

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*cional rights (" Amparo" Proceeding),* Edited for the Students of the Columbia Law School,

mandamus, issued to compel an action or the execution of some act, or to command a person to do a specific act. Third, the amparo order can also be similar to the writ of prohibition or to the writ of error when the order is directed to a court, which normally happens in the cases of amparo actions filed against judicial decisions. And forth, it can also be similar to the declaratory legal remedy through which courts are called to declare the constitutional right of the plaintiff regarding the other parties.

Consequently, in the amparo proceeding, the Latin American courts have very extensive powers to provide for remedies in order to effectively protect constitutional rights, issuing orders to do, to refrain from doing, to undo or to prohibit. The problems of its success, of course, lay in the effectiveness of the judicial functions based on the autonomy and independence of the courts.

2. This remedy has a long tradition in Latin America. It was introduced in the 19th century in Mexico and from there it spread in all the other countries. Although similar remedies were established in some European countries, like Austria, Germany, Spain and Switzerland in the 20th century, the institution remains more as a Latin American one, adopted in addition to the other two classical protective remedies, the *habeas corpus* and *habeas data* actions.

The consequence of this process is that in Latin America, without doubts, the amparo is one of the most distinguishable features of our constitutional law, and without doubts, the most important piece of the comprehensive constitutional system our countries have established for the protection of constitutional rights, particularly because the long and unfortunate history many of our countries have had regarding their violations and disdain.

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## II. THE LATIN AMERICAN SYSTEM FOR THE PROTECTTION OF CONSTITUTIONAL RIGHTS

1. This system of constitutional protection of constitutional rights in Latin America, can be identified through a few basic and important trends, being the first, the longstanding tradition the countries have had of inserting in their Constitutions, a very extensive declaration of human rights, comprising not only civil and political rights, but also social, cultural, economic and environmental rights. This trend, for instance, contrasts with the relatively reduced content of the United States Bill of Rights.

This Latin American declarative trend began two hundred years ago with the adoption in 1811, of the "Declaration of Rights of the People" by the Supreme Congress of Venezuela, four days before the declaration of the Venezuelan Independence from Spain.[2] That is why, although having been Spanish Colonies for three centuries, no Spanish constitutional influence can be found at the beginning of the 19th century Latin American modern State, which was conceived following the American and the French 18th century constitutional revolutionary principles, which also were subsequently followed in Spain, but after the 1812 Cádiz Constitution was sanctioned.[3]

2. But in parallel to this declarative tradition, the second feature of the Latin American constitutional system regarding human rights, has been the unfortunate process of their violations, which even nowadays and in a more sophisticated way, continues to occur in some countries where authoritarian

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2 See in Allan R. Brewer-Carías, *Las Constituciones de Venezuela*, Academia de Ciencias Políticas y Sociales, caracas, 1997, pp 279 ff.

3 See Allan R. Brewer-Carías, "El paralelismo entre el constitucionalismo venezolano y el constitucionalismo de Cádiz (o de cómo el de Cádiz no influyó en el venezolano" in *Libro Homenaje a*

governments have been installed in defraudation of democracy and of the Constitution.

3. The third trend of this Latin American system of constitutional protection of human rights, is the continuous effort the Latin American countries have made to assure their constitutional guaranty, by progressively enlarging the declarations, adding economic, social, cultural, environmental and indigenous peoples rights to the classical list of civil and political rights and liberties.

In this sense, other important Latin American trend in these matters has been the progressive and continuous incorporation in the Constitutions, of "open clauses" of rights, in the same sense of the IX Amendment (1791) to United States Constitution which refers to the existence of other rights "retained by the people" that are not enumerated in the constitutional text. The fact is that a similar clause can be found in all Latin American Constitutions, except in Cuba, Chile, Mexico and Panama, although in a wider sense referring to others rights 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 also related to the progressive expansion of the content of the constitutional declarations of rights, is the express incorporation in the Constitutions, in addition to the rights therein listed, of the rights listed in international treaties and conventions. For such purpose, international treaties and covenants not only have been given statutory rank, similar to the United States and to the general constitutional solution on the matter, but in many cases, supra-

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legal rank, constitutional rank and even supra-constitutional rank. In the latter case, inclusive, some Constitutions grant pre-emptive status to international treaties on human rights regarding the Constitution itself, whenever they provides for more favorable rules for their exercise. This is the case, for example, of the Venezuelan Constitution (Article 23).

5. But regarding the hierarchy of international treaties on human rights, even in the absence of express constitutional regulations on the matter, in some Latin American countries such treaties have also acquired constitutional value and rank, through constitutional interpretation in particular when the Constitutions themselves establish, for example, that on matter of constitutional rights that their interpretation must always be made according to what it is set forth in those international treaties on human rights. This is the case, for instance, of the Colombian Constitution (article 93) and of the Peruvian Constitutional Procedural Code (article V).

Within this process of internationalization of human rights, one particular international treaty on the matter has had an exceptional importance in the Continent: it is the 1969 American Convention on Human Rights, whose importance is not only referred the content of the declaration of rights, but also to the judicial protection of human rights, even at the international level by the creation of the Inter American Court of Human Rights, whose jurisdiction has been recognized by the Member States.

This Convention was signed in 1969 and was ratified by all Latin American countries, except Cuba. The only American country that did not sign the Convention was Canada, and even though the United States of America signed

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Caracas 2005, pp. 101-189..

the Convention in 1977, it has not yet ratified it. This has also been the case of many Caribbean States, in particular, 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.

The importance of the ratification of this Convention by all the Latin American countries, has been that is has contributed to develop a very rich minimal standard of regulation on civil and political rights, common to all countries.

6. But in addition to all these trends which characterize the Latin American constitutional system of protection of human rights, as aforementioned, the other main feature of the system is the express provision in the Constitutions of the judicial guarantee of human rights, precisely by regulating the specific judicial remedy for their protection called the amparo proceeding, which has different procedural rules regarding those provided in the general procedural Codes for the protection of personal or property rights..

Consequently, judicial protection of human rights can be achieved in two ways: First, by means of the general established ordinary or extraordinary suits, actions, recourses or writs prescribed in the general procedural codes; and second, in addition to those adjective means, through specific and separate judicial suits, actions or recourses particularly established for the protection of the constitutional rights and freedoms. This latter case is precisely the solution adopted in Latin American countries, being considered one of their most important constitutional features regarding the protection of human rights.

The provision of this amparo remedy contrasts, for example, with the constitutional system of the United States, where the protection of human

rights is effectively assured through the general judicial actions and equitable remedies, that are also used to protect any other kind of personal or property rights or interests. In Latin America, on the contrary, and in part due to the traditional deficiencies of the general judicial means for granting effective protection to constitutional rights, the amparo proceeding has been developed to assure such protection.

## III. THE ORIGIN AND DEVELOPMENT OF THE AMPARO PROCEEDING

1. This amparo proceeding, as mentioned, was first introduced in Mexico, in 1857, being inspired, according to the unanimous opinion of all the Mexican scholars, in the American system of judicial review of constitutionality of statutes which was created just a few decades before by means of the case *Malbury v. Madison* U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803), as was then described by Alexis de Tocqueville (*Democracy in America,* 1835).[4]

2. Notwithstanding this influence, it can be said that the model was only partially followed, so in a quite different way the amparo suit evolved in Mexico into a unique and very complex institution, exclusively found in that country, which in addition to the protection of human rights (*amparo libertad*), it also comprises a wide range of other protective judicial actions than

4 See Alexis De Tocqueville, *Democracy in America* (Ed. by J.P. Mayer and M. Lerner), The Fontana Library, London, 1968, Vol. 1, p. 120-124.See Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas 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.

can be filed against the State, which in all the other countries are always separate actions or recourses. The Mexican amparo suit, in effect, also comprises the actions for judicial review of the constitutionality and legality of statutes (*amparo contra leyes*), the actions for judicial review of administrative actions (*amparo administrativo*), the actions for judicial review of judicial decisions (*amparo casación*), and the actions for protection of peasant's rights (*amparo agrario*).[5] That is why, without doubts, the Mexican amparo has a comprehensive and unique character, not to be found in any other Latin American country. Nonetheless, the Mexican amparo remains the most commonly referred to, outside Latin America.

3. After its introduction in Mexico, and during the same 19th century, the amparo proceeding as an specific mean for constitutional rights protection, subsequently spread across all Latin America giving rise in all the other countries to a very different specific judicial remedy established only with the exclusive purpose of protecting human rights and freedoms, becoming, in many cases, more protective that the original Mexican institution.[6]

Ii was then in the second half of the 19th century that in addition to the habeas corpus recourse, the amparo was introduced in the Constitutions 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).

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5 See Héctor Fix Zamudio, *Ensayos sobre el derecho de amparo*, Ed. Porrúa, Mexico 2003

It was also included in the 1994 Argentinean Constitution, but in this country since 1957 it was adopted through court decisions, being regulated in 1966 in a special statute. Finally, in the Dominican Republic, since 2000 the Supreme Court also has admitted the amparo action, which in 2006 was also regulated in a special statute.

4. The consequence of this constitutional process is that in all the Latin American countries, with the exception of Cuba, the habeas corpus and the amparo actions are regulated as specific judicial means exclusively designed for the protection of constitutional rights.

In all these countries, exception made of the Dominican Republic, the provisions for the action are expressly set forth in the Constitutions[7]; and in all of them, exception made of Chile, the proceeding has been the object of statu-

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

7 ARGENTINA. Constitución Nacional de la República Argentina, 1994; BOLIVIA. Constitución Política de la República de Bolivia, 1967 (Last reform, 2005); BRAZIL. Constitução da República Federativa do Brasil, 1988 (Last reform, 2005); COLOMBIA. Constitución Política de la República de Colombia, 1991 (Last reform 2005); COSTA RICA. Constitución Política de la República de Costa Rica, 1949 (Last reform 2003); CUBA. Constitución Política de la República de Cuba, 1976 (Last reform, 2002); CHILE. Constitución Políitica de la República de Chile, 1980 (Last reform, 2005); ECUADOR. Constitución Política de la República de Ecuador, 1998; EL SALVADOR. Constituticón de la República de El Salvador, 1983 (Last reform, 2003); GUATEMALA. Constitución Políitica de la República de Guatemala, 1989 (Last reform 1993); HONDURAS. Constitución Política de la República de Honduras, 1982 (Last reform, 2005); MÉXICO. Constitución Política de los Estados Unidos Mexicanos, 1917 (Last reform, 2004); NICARAGUA. Constitución Política de la República de Nicaragua, 1987 (Last reform 2005); PANAMA. Constitución Política de la República de Panamá, 1972 (Last Reform, 1994); PARAGUAY. Constitución Política de la República de Paraguay, 1992; PERÚ. Constitución Política del Peru, 1993 (Last reform, 2005); REPÚBLICA DOMINICANA. Constitución Política de la República Dominicana, 2002; URUGUAY. Constitución Política de la República Oriental del Uruguay, 1967 (Last reform, 2004); VENEZUELA. Constitución de la República Bolivariana de Venezuela, 1999

tory regulation.[8] These statutes are, in general, special ones passed for the specific purpose of providing for the amparo proceedings. Nonetheless, in some countries the special legislation also contains regulations regarding other judicial means for the protection of the Constitution like the judicial review methods, and the petitions for habeas corpus and habeas data, as is the case in Bolivia, Guatemala, Peru, Costa Rica, Ecuador, El Salvador and Honduras. Only in Panama and in Paraguay, the amparo proceeding is regulated in a specific Chapter of the General Procedural Judicial Code.

5. In some Constitutions, like the Guatemalan, Mexican and Venezuelan ones, the amparo action is conceived to protect all constitutional rights and freedoms, including the protection of personal liberty, in which case, the habeas corpus is considered as a type of amparo, named for instance, recourse for personal exhibition (Guatemala) or amparo for the protection of personal freedom (Venezuela). But in general, in all the other Latin American countries, as is the case of Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Pana-

8 ARGENTINA. Ley Nº 16.986. Acción de Amparo, 1966; BOLIVIA. Ley Nº 1836. Ley del Tribunal Constitucional, 1998; BRAZIL. Lei Nº 1.533. Mandado de Segurança, 1951; COLOMBIA. Decretos Ley N° 2591, 306 y 1382. Acción de Tutela, 2000; COSTA RICA. Ley Nº 7135. Ley de la Jurisdicción Constitucional, 1989; CHILE. Auto Acordado de la Cortre Suprema de Justicia sobre tramitación del recurso de protección, 1992; ECUADOR. Ley Nº 000. RO/99. Ley de Control Constitucional, 1997; EL SALVADOR. Ley de Procedimientos Constitucionales, 1960; GUATEMALA. Decreto Nº 1-86. Ley de Amparo. Exhibición personal y Constitucionalidad, 1986; HONDURAS. Ley sobre Justicia Constitucional, 2004; MÉXICO. Ley de Amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política, 1936; NICARAGUA. Ley Nº 49. Amparo, 1988; PANAMA. Código Judicial, Libro Cuarto: Instituciones de Garantía, 1999; PARAGUAY. Ley Nº 1.337/88. Código Procesal Civil, Titulo II. El Juicio de Amparo, 1988; PERÚ. Ley Nº 28.237. Código Procesal Constitucional, 2005; REPÚBLICA DOMINICANA. Ley Nº 437-06 que establece el Recurso de Amparo, 2006; URUGUAY. Ley Nº 16.011. Acción de Amparo, 1988; VENEZUELA. Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales, 1988.

ma, Paraguay, Peru and Uruguay, in addition to the amparo action, a different recourse of habeas corpus has always been expressly established in the Constitutions for the specific protection of personal freedom and integrity.

In recent times, in some countries (Argentina, Ecuador, Paraguay, Peru and Venezuela), in addition to the amparo and habeas corpus recourses, the Constitutions have also provided for a separate recourse called of habeas data, 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.

6. As a result of this human rights protective process, currently, the constitutional regulations regarding the protection of constitutional rights in Latin America are established in three different ways: First, by 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, by establishing two remedies: or 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 the habeas data* as is the case of Venezuela; and third, by just establishing one general *amparo action* comprising the protection of personal freedom as is the case of Guatemala and Mexico.

## IV. THE AMPARO PROCEEDING AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

I mentioned the importance of the American Convention on Human Rights (1969) regarding the consolidation of the amparo proceeding, which in

fact, nowadays in Latin America, not only is an internal constitutional law institution, but also of international law one. In this sense, it was conceived in the Convention as a "right to judicial protection", that is, the right of everyone to have

> "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" (article 25).

In order to guarantee such right, the Convention imposes the Member States 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".

In the words of the Inter American Court on Human Rights, this article of the American Convention 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 Member States and by the Convention"[9]. The American Convention also provides for the recourse of habeas corpus for the protection of the right to personal freedom and security, established in favor of anyone deprived of his liberty in cases of lawful arrests or detentions (Article 7).

Examining both, the habeas corpus and the "amparo" recourses, the Inter American Court on Human Rights has declared that the "'amparo' comprises

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9 See Advisory Opinion OC-8/87, of January 30, 1987 (Habeas corpus in emergency situations), paragraph 32. See in Sergio García Ramírez (Coord.), *La Jurisprudencia de la Corte Interamericana de Derechos Humanos*, Universidad Nacional Autónoma de México, Corte Interamericana de Derechos Humanos, México, 2001, pp. 1.008 ff.

a whole series of remedies and that habeas corpus is but one of its components", so that in some instances "habeas corpus is viewed either as the 'amparo' of freedom or as an integral part of 'amparo'"[10]. In any case, the amparo in the American Convention has been considered by the Inter American Court of Human Rights, as "one of the basic pillars not only of the American Convention, but of the rule of Law in a democratic society"[11]

Consequently, being an obligation of all the Member States of the Convention to guarantee their peoples the effective protection of their human rights, the Inter American Court on Human Rights, has ruled that the Convention imposes "the duty of the Member States 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"[12].

Bearing this in mind, then, for the purpose of giving a general overview of the Latin American amparo proceeding, I will try to elaborate the general principles which derives on the matter from the provisions of the American Convention on Human Rights comparing them with the national regulations[13], in order also to determine how the member States have conducted themselves

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10 *Idem*, Paragraph 34.

11 See Case: Castillo Páez, (Peru) 1997, Paragraph 83; Case: Suárez Roseo, (Ecuador) 1997, Paragraph 65 and Case: Blake, (Guatemala) 1998, Paragraph 102, *Idem*. pp. 273 ff., 406 ff. and 372 ff. See also the *Advisory Opinion OC-8/87 of January 30, 1987 (Habeas Corpus in Emergency Situation)*, Paragraph 42; and the *Advisory Opinion OC-9/87 of October 6, 1987 (Judicial Guarantees in Status of Emergency)*, Paragraph 33. *Idem*, pp. 1.008 ff., and pp. 1.019 ff

12 Case: Velásquez Rodríguez, Decision of July, 29, 1988, Paragraph 166.

13 See Allan R. Brewer-Carías, "El amparo en América Latina: La universalización del régimen de la Convención Americana sobre los Derechos Humanos y la necesidad de superar las restricciones nacionales" en *Etica 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

"so as to effectively ensure the free and full exercise of human rights"[14]. In this regard, of course, it is always important to remain, as the same Inter American Court ruled when referring to the "amparo" as a judicial guaranty of human rights, that "for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by statute 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"[15] In this regard, of course, the existence of an autonomous and independent Judiciary is essential.

## V. THE GENERAL TRENDS OF THE LATIN AMERICAN AMPARO

Now, from what it is provided in Article 25 of the American Convention, regarding the amparo action, the following six elements can be said to characterize such action in Latin America:

1. First, that according to the American Convention, the amparo action is conceived for the protection of all constitutional rights considering as such not only those contained in the Convention, the Constitutions of the Member States and on statutes, but also all those that can be considered inherent to the human person and human dignity, which allows, according to the open clauses of constitutional rights, that all rights declared in international instruments are also entitled to be protected.

Nonetheless, it must be said that if it is true that this is the rule, not all the Latin American countries follow this general trend of the American Convention, in the sense that in some countries not all constitutional rights can be pro-

14 Idem, Paragraph 167

15 *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 Brons-

tected by means of "amparo" actions. This is the general trend, for instance, in Germany and Spain regarding the individual protection action and "amparo" recourse, which are only established to protect "fundamental rights", that is, basically, civil rights and individual liberties. In Latin America it is also the case of the Chilean and of the Colombian Constitutions which have reduced the list of rights that can be protected by means of the actions for *tutela* or *protección*, also to those considered as "fundamental rights". It is also the case of Mexico where the amparo suit is conceived only for the protection of individual guaranties.

This restrictive configuration of the amparo is nowadays exceptional in Latin America, and even in those countries where the restrictive approach exists, as is the case of Colombia, the restriction has been overcome through constitutional interpretation, allowing the courts to develop the doctrine of the interrelation, universality, indivisibility, connection and interdependence of human rights, with the result that in fact, almost all constitutional right can be protected by the action of *tutela*. That is how, for instance, the right to health has been protected because its connection to the right to life.

Anyway, in contrast with all these cases of restrictive constitutional provisions regarding the rights to be protected by means of a amparo recourse, the majority of the Latin American Constitutions expressly set forth that the rights to be protected are those declared in the Constitution, whether civil, political, economic, social, cultural or environmental rights. In addition, some Constitutions like the ones of Argentina, Colombia, Costa Rica and Venezuela, ex-

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tein Case, paragraph 136; Caso: Cantoral Benavides Case, paragraph 164; Durand y Ugarte Case, paragraph 102.

pressly include within the rights protected those declared in the international system of protection of human rights.

2. The second trend of the Latin American amparo proceeding is that it is always conceived as a judicial means for protection of constitutional rights.

A. Following the American Convention provisions, in some countries it is conceived as a human right in it self, and not only as one single specific judicial recourse, action or remedy, which mean that the judicial guaranty can also be obtained through other various judicial means, as is the case, for instance, of the Mexican and Venezuelan legal systems.

B. This right to amparo or to protection is considered in the American Convention, as a "fundamental" one, to the point that it cannot be suspended or restricted in cases of state of emergency (article 27), a provision that has had great importance in Latin America. Applying it, the Inter American Court on Human Rights has considered the suspension of both, habeas corpus and "amparo" in emergency situations as completely "incompatible with the international obligations imposed on the States by the Convention"[16]; empathizing 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"[17].

16 Advisory Opinion OC-8//87 of January 30, 1987, Habeas Corpus in Emergency Situations, paragraphs 37, 42, 43)

17 Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency, Paragraphs 25, 26)

This doctrine of the Inter American Court, without doubt, has been very important 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 former 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.

C. On the other hand, considering the amparo as a specific judicial remedy for the protection of human right, as it is the general trend in Latin American countries, the internal legislations in the countries have always conceived the amparo action as an extraordinary remedy, in the sense that it is to be admitted only when there are no other effective judicial means available for the immediate protection of human rights; in similar sense, for instance, to the extraordinary character of the Anglo-American injunctions. Also, in general terms, the statutes on amparo provide that if a previous action has been filed seeking the protection of the constitutional right, then the extraordinary mean cannot be filed.

D. On the other hand, being a judicial mean for protection of rights, the American Convention refers to the amparo as an action that can be brought before the "competent courts", in the sense of considering the protection of human rights as an essential function of the Judiciary. That is why, in almost all Latin American countries the jurisdiction for amparo cases corresponds in general terms to all the first instance courts, being exceptional the

cases in which the competence on amparo is assigned to one single court. This happens only in Costa Rica, El Salvador and Nicaragua where the Constitutional Chamber of the Supreme Courts of these countries is the only court with exclusive power to decide amparo cases. In this same sense, the individual action for protection and amparo recourse in Germany and Spain can only be filed before the respective Constitutional Court or Tribunal.

E. Of course, as aforementioned, in any case, in order to guaranty the effective protection of human rights, what is essential and necessary is that the courts empowered to decide the amparo must really be independent and autonomous ones. That is, the amparo will be no more than an illusion if the general conditions prevailing in the country, particularly regarding the Judiciary cannot assure its effectiveness. This is the case, as was ruled by the Inter American Court of Human Rights, "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"[18].

3. The third element provided by the American Convention regarding the recourse or action for amparo, is that it must be a "simple, prompt and effective" instrument[19], that is, from the adjective point of view, an expedite remedy to effectively protect the violated or harmed rights. This simplicity implies that the procedure must lack the dilatory procedural formalities of ordinary judicial means, imposing the need to grant immediate constitutional

18 Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in Status of Emergency), paragraph 24

19 Suárez Romero Case, Paragraph 66.

protection. Regarding the prompt character of the recourse, the Inter American Court, for instance, has argued about the need for a reasonable delay for the decision, not considering "prompt" recourses those resolved after "a long time"[20]. 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[21]; that is, in words of the Inter American Court on Human Rights, "it must be truly effective in establishing whether there has been a violation of human rights and in providing redress".[22]

For these purposes, many Latin American Amparo Laws expressly provide for some general principles that must govern the procedure. For instance, in Colombia, the Tutela Law refers to "the principles of publicity, prevalence of substantial law, economy, promptness and efficacy" (Art 3); in Ecuador, the Law refers to "the principles of procedural promptness and immediate [response]" (*inmediatez*) (Art 59); in Honduras, mention is made to the "principles of independence, morality of the debate, informality, publicity, prevalence of substantial law, free, promptness, procedural economy, effectiveness, and due process" (Article 45); and in Peru, the Code refers to "the principles of judicial direction of the process: free regarding the plaintiff's acts, procedural economy, immediate and socialization" (Article III). It is in this sense that Article 27 of the Venezuelan Constitution also expressly provides that the procedure of the constitutional "amparo" action must be oral, public, brief, free and not subject to formality.

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20 Ivcher Bronstein Case, paragraph 140.

21 Velásquez Rodríguez Case, paragraph 66.

22 Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in Status of Emergency), paragraph 24.

That is why, in the "amparo" proceeding, as a general rule and due to its brief character, the procedural terms cannot be extended, nor suspended, nor interrupted, except in cases expressly set forth in the statute; any delay in the procedure being the responsibility of the courts. In this same regard, in the "amparo" proceeding, no procedural incidents are generally allowed[23], and in some cases no recuse or motion to recuse the judges are admitted or they are restricted. In other cases, some Amparo Laws provides for specific and prompt procedural rules regarding the cases of impeding situations of the competent judges to resolve the case.

4. The fourth trend of the Latin American regulations regarding the remedy for amparo is that it is conceived to protect everybody's rights -in the very broadest sense of the term-, without distinction or discrimination of any kind, whether individuals, nationals, foreigners, legally able or not. The protective tendency regarding the implementation of the amparo has also gradually allowed 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, although the American Convention declares human rights in the strict sense of the term as rights belonging to human persons, the internal regulations of the countries have also assured private corporations or 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 defense.

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23 See Honduras, Article 70; Uruguay, Article 12; Panama, Article 2610; Paraguay, Article 586; Uruguay, Article 12.

5. The fifth general trend of the constitutional amparo protection guaranteed in the American Convention on Human Rights is its universal scope in the sense that it can be filled 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 "amparo" action can be brought before the courts against any persons in the sense that it can be admitted not only against the State or public authorities, but also against private individuals and corporations.

A. In its origins, the amparo proceeding was only conceived for the protection of constitutional rights regarding public authorities' harms or threats. It is still the case of Brazil, El Salvador, Guatemala, Mexico and Panama, where the possibility to file a recourse for "amparo" against private individuals is excluded; a situation that is now distant from the orientation of the American Convention.

B. In contrast to this restrictive approach of the amparo only conceived to protect against authorities, the amparo against individuals has been broadly admitted in the majority of Latin American countries, following a trend that began fifty years ago in Argentina, where the Supreme Court admitted such possibility (1958). Nowadays, the amparo action against individuals in expressly recognized in the Constitutions of Argentina, Bolivia, Paraguay and Peru. In other countries the amparo against individuals is provided in the legislation, as is the case of Costa Rica, Nicaragua, Dominican Republic, Uruguay and Venezuela; or it has been accepted by courts decisions (Chile).

C. 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 public 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.

D. Now, specifically regarding the amparo action against unlawful acts of public authorities, according to the American Convention of Human Rights, it can be said that there cannot exist a single State act that could escape from the amparo protection, 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 must be a petition or action that can be filed against any public conduct or act that violates them, and therefore no act must be 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:

(i) In some cases, the exclusion refers to actions of certain public authorities, such as the electoral bodies, whose acts are expressly excluded from the recourse of "amparo", as is the case of 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 only with respect to the acts of the National Council of the Judiciary.

(ii) In other cases, the exclusion refers not to certain authorities but to certain State acts, as happened with regard to statutes and to judicial decisions.

Regarding Statutes, 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. Nonetheless, the exclusion of statutes from the scope of the amparo, can be considered as the general trend of the Latin American regulations.

(iii) A similar trend can be identified regarding the amparo against to judicial decisions. As a matter of principles, judges are not empowered to violate a constitutional right in their decisions, and that is why in 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 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 statutory admitted against judicial decisions, the Constitutional Court in 1992 considered that possibility as contrary to the principle of *res judicata*, and consequently annulled the article of the statute which provided for it[24]. But, in spite of such annulment, also through constitutional interpretation, all the main courts of the country (Supreme Court, Constitutional Court and Council of State), progressively began to admit the action of "tutela" against judicial decisions in cases of arbitrary decisions[25]. In similar sense, in Peru, the amparo action against judicial decisions is admitted when they are issued outside a regular procedure.

6. Finally, the sixth general trend of the Latin American amparo recourse, as well as the habeas corpus, is that as judicial means for the protection of constitutional rights, they have a personal or subjective character which implies that in principle they must be filed by the injured party, that is the titleholder of the violated right. This implies that nobody else can file an action for amparo alleging in his own name a right belonging to another. Nonetheless, some Latin American amparo statutes authorize other persons different to

24 See Decision C-543, September 24, 1992

the injured parties or their representatives to file the amparo suit on their behalf, particularly, for instance, regarding minors. In this case, the Mexican Law exceptionally allow minors to act personally in cases when their representatives are absent or impaired (article 6); and in Colombia, when the representative of a minor is in a situation of inability to assume his defense, anyone can act on behalf of the injured party (Article 10).

Except in these cases where the representatives of incapacitated natural persons are called to act on their behalf, the general rule of standing is that the injured persons must act in their own defense and no other person can judicially act on their behalf, except acting through when legally appointed representatives.

Nonetheless, a general exception to this principle refers to the action of habeas corpus, in which case, since generally the injured person is physically prevented from acting personally because of detention or restrained freedom, the Amparo Law authorizes anybody to file the action on his behalf (Argentina, Bolivia, Guatemala, Honduras, México, Nicaragua, Peru, Venezuela).

In this same sense, some Amparo Laws, in order to guarantee the constitutional protection, also establish the possibility for other persons to act on behalf of the injured party and file the action in his name. It can be any lawyer or relative as established in Guatemala (Article 23), or it can be anybody, as is set forth in Paraguay (article 567), Ecuador, Honduras, Uruguay and Colombia, where anyone can act on behalf of the injured party when the latter is in a situation of inability to assume his own defense (Article 10). The same principle is established in the Peruvian Code on Constitutional Procedures. (article

25 Decision T-231, May 13, 1994

41). In México, the Law imposes on the injured party the obligation to expressly ratify the filing of the amparo suit, to the point that if the complaint is not ratified it will be considered as not filed (Article 17); and also in Mexico, the Law imposes on the injured party the obligation to expressly ratify the filing of the amparo suit, to the point that if the complaint is not ratified it will be considered as not filed (Article 17). .

## VI. THE AMPARO PROCEEDING AND THE JUDICIARY

As can be appreciate from the general trends of the amparo proceeding in Latin America, which derived not only from the provisions of the Constitutions of the Latin American countries and their Statutes on amparo, a unique and impressive set of norms have been established for the protection of constitutional rights.

But as aforementioned, these formal regulations of the amparo are not enough in order to assure the effectiveness of the said protection, which really depends on the existence of an effective independent and autonomous Judiciary which of course is only possible in democracy.

This is the basic condition for the enjoyment of constitutional rights and for their protection, to the point that the judicial protection of human rights can be achieved in democratic regimes even without the existence of formal constitutional declarations of rights or of the provisions for extraordinary means or remedies.

Conversely, even with extensive declarations of rights and the provision of the amparo proceeding in the Constitutions to assure their protection, the effectiveness of it depends on the existence of a democratic political system based on the rule of law, the principle of the separation of powers, the exist-

ence 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, by means of the Judiciary. Only in such situations, it is possible for a person to effectively have his rights protected.

This has been the historic struggle in Latin America and if it is true that nowadays the pendulum that intermittently has moved from democracy to authoritarian regimes, in the majority of our countries now stand in the democratic side, some neo authoritarian and plebiscitary regimes are beginning to appear in defraudation of the Constitutions and of democracy itself, threatening the whole Continent. In such regimes, of course, in spite of all the extensive declarations of rights and of the constitutional provisions for judicial remedies, the effective protection of rights is inconceivable, particularly when petitions are filed against State actions.

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