EMIGRACION AND PRACTICE OF FUNDAMENTAL RIGHTS IN LATIN AMERICA:

EMIGRATION AND FREEDOM IN RELATION TO RESIDENCE*

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It is really a privileged to be able to participate in the *2008 Summer Course of High Qualification* organized by Professor Andrea Romano, Dean of the Law School of the University of Messina, in Montalbano Elicona, Sicily.

My thanks to him for the unique opportunity to participate in one of his distinguishable efforts to gather students and scholars from different countries to study, with a comparative approach, subjects of constitutional law, like this on the "Enunciation and practice of fundamental rights: Emigration and Freedom in relation to Residence." It is also a privilege to have the opportunity to be, for such purpose, in a unique and notable place for constitutional lawyers, like the medieval village of Montalbano Elicona, in a setting dominated by the splendid Castle originally built by Frederick II of Swabia (1209-1250). This King of Sicily has been considered as the founding father of the Modern Absolute State or the Administrative centralized State, after issuing in 1231, the *Constitutions of Melfi*, considered to be the first code of law designated to organize a centralized the State, regulating in 255 clauses and in three books, all aspects of public law, judicial procedure, and feudal, private, and criminal law. This *Liber Augustalis*, was intended to be applicable to all

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the peoples of the realm (Lombards, Greeks, Arabs, Germans, Jews), through which the power of the king where strengthened and the power of his feudatories diminished.

The subject of our Lessons is related to freedom of residence and right to movement in Latin America, which are rights that have been essentially part of the constitutional tradition not only of our countries, but also of the North American countries, all characterized as being countries of immigrants, used to receive flow of foreigners and to promote their integration in society.

Regarding in particular the Latin America, since the origins of the countries, their Constitutions have established provisions for such purpose. For instance, in the first of all the Latin American Declarations of Human Rights, the "Declaration of the Rights of the Peoples" issued by the General Congress of Venezuela for the Province of Caracas in July 1811, in the section "Rights of people in Society", it was stated that:

> Art. 25: All foreigners from any Nation will be received in the Province of Caracas.
>
> Article 26: The persons and the properties of foreigners will enjoy the same guaranties than those of the other citizens, provided that they recognized the sovereignty and independence of the country and respect the Catholic Religion, the only one in the country.

The same sort of declarations can be found in the first of all Latin American Constitutions, the Federal Constitution for the States of Venezuela of December 1811, sanctioned after the declaration of independence from Spain almost two centuries ago, where it was also declared that:

> Article 169. All foreigners, from any Nation whatsoever, will be welcomed in the State. Their persons and properties will have the same guaranties than those of citizens, providing that they respect the Catholic Religion, the only in the country, and that they recognize the independence of these countries, their sovereignty and the authorities established by the popular will of their inhabitants.

Of course, a few years latter, the regulations regarding citizenship or nationals of each country began to be incorporated in the Constitutions, with the provisions for foreigners to obtain citizenship in order to exer-

cise political rights, disappearing from the Constitutions all references regarding the Catholic Religion as the only one permitted.

But the sense of the provisions remained in general in the same trend of countries opened to receive immigration.

In these Lessons I want to refer to some aspects related to the constitutional framework of "emigration and freedom in relation to residence" in Latin America, and particularly in Venezuela. With this in mind, I will divide the Course in four Lessons:

In the *First Lesson*, I will analyze some general aspects of the regulation of fundamental rights in Latin America; in the *Second Lesson*, I will specifically study the general trends of the constitutional regime on civil rights and their guaranties in Latin America, also enjoyed by foreigners and migrants, and in particular, the legal regime established in Venezuela regarding aliens and migrants; in the *Third Lesson* I will examine the general trends of the judicial protection of human rights in Latin America, including freedom in relation to residence, particularly by means of the specific proceeding established for the purpose of protecting constitutional rights, known as action or suit of amparo; and in the *Fourth Lesson,* I will study the general classification of the judicial system of judicial review in Latin American constitutional comparative law.

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But before, I want to highlight some general aspects of the Latin American system for the protection of constitutional rights, which can be identified through a few basic and important trends:

The first is the longstanding tradition our countries have had of inserting in their Constitutions, a very extensive declaration of human rights. This trend, for instance, contrasts with the relatively reduced content of the United States Bill of Rights (First Ten Amendments).

This Latin American declarative trend also began, as aforementioned, two hundred years ago with the adoption in 1811, of the "Declaration of Rights of the People" by the Supreme Congress of Vene-

zuela, four days before the declaration of the Venezuelan Independence from Spain.[1] 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.[2]

But in parallel to this declarative tradition, a second aspect of the Latin American constitutional situation regarding human rights can be identified, 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 governments have been installed in defraudation of democracy and of the Constitution.

Precisely because of that, the third trend of this Latin American system of constitutional protection of human rights, has been 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

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1 See the text in Allan R. Brewer-Carías, *Las Constituciones de Venezuela*, Academia de Ciencias Políticas y Sociales, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas, 1997, pp 279 ff.; and in Allan R. Brewer-Carías, *Los Derechos Humanos en Venezuela: Casi 200 Años de Historia*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 1990, 462 pp

2 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 Tomás Polanco Alcántara*, Estudios de Derecho Público, Universidad Central de Venezuela, Caracas 2005, pp. 101-189..

existence of other rights "retained by the people" that are not enumerated in the constitutional text.

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-legal rank, constitutional rank and even supra-constitutional rank.

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 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, following the Spanish and Portuguese constitutional trend, 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 (similar to the European Convention on Human Rights), whose impact is not only referred to the contents 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 the Convention in 1977, it has not yet ratified it.[3]

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, similar to what has happened in Europe.

For instance on matters of emigration and freedom in relation to residence, the Convention set forth provisions as the following:

> Article 22. Freedom of Movement and Residence
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> 1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
>
> 2. Every person has the right lo leave any country freely, including his own.
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> 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
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> 4. The exercise of the rights recognized in paragraph 1 (to move) may also be restricted by law in designated zones for reasons of public interest.
>
> 5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
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> 6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
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> 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
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> 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life

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[3] 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

or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

But in addition to all these trends which characterize the Latin American constitutional system of protection of human rights, the other main feature of the system is the express provision in the Constitutions of the judicial guarantee of human rights, by regulating a 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.

The provision of this amparo remedy contrasts, for example, with the constitutional system of the United States and of almost all European countries, 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 perhaps 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.

First Lesson

GENERAL PRINCIPLES REGARDING FUNDAMENTAL RIGHTS IN LATIN AMERICA, PARTICULARLY IN VENEZUELA

In Latin America we undoubtedly have a set of very advance, rich and important Constitutions sanctioned during the past two decades, like the Brazilian, the Colombian and the Venezuelan ones. I cannot refer here to all the 19 Latin American Constitutions in force in the Continent, so I will only refer to some of them, and in particular to the Constitution of Venezuela, which is one of the most advanced constitutional texts in

Latin America, with a complete the set of provisions regarding fundamental rights and liberties and their guaranty.[4]

This does not mean, of course, that the rights and liberties in my country are nowadays completely enjoyable and that their guaranties are always satisfied. It is clear that for a system of civil and political rights and freedoms to be effective, it is not enough to have extensive constitutional rights declarations, and to have a complete set of judicial means of protections of such rights, but above all it is necessary to have a functioning and effective democratic constitutional state based on the rule of law, separation of powers and judicial independence. Only in democracies is possible to have effective guaranties for the protection of fundamental rights and liberties.[5]

The case of Venezuela thus, is pathetic, with a very modern Constitution that embodies all the main trends of contemporary constitutionalism and freedoms, but with an authoritarian regime developed in defraudation of the same Constitution and in defraudation of the democratic principles.[6] That is, since its enactment in 1999, the Constitution has

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4 See Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezolano*, 2 vols. Caracas 2004. These provisions were draft by the autor in the hational Constituent Assembly in 1999. See Allan R. Brewer-Carías, *Debate Constituyente*, Vol II, Fundación de Derecho Público, Caracas 1999.

5 See Allan R. Brewer-Carías, "Democracia: sus elementos y componentes esenciales y el control del poder", in Nuria González Martín (Compiladora), *Grandes temas para un observatorio electoral ciudadano, Tomo I, Democracia: retos y fundamentos,***)**, Instituto Electoral del Distrito Federal, México 2007, pp. 171-220; *Separation of Powers and Authoritarianism in Venezuela,* Paper written for the lecture given in the Constitutional Comparative Law Course of Prof. Ruti G. Teitel, ***Fordham Law School,*** New York City, 11 de febrero de 2008, in www.allanbrewercarias.com (Section I,1, 2008)

6 See Allan R. Brewer-Carías, "Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", en *Lateinamerika Analysen*, 19, 1/2008, GIGA, Germa Institute of Global and Area Studies, Institute of Latin American Studies, Hamburg 2008, pp. 119-142; "El autoritarismo establecido en fraude a la Constitución y a la democracia y su formalización en "Venezuela mediante la reforma constitucional. (De cómo en un país democrático se ha utilizado el sis-

been systematically violated and used in defraudation to its provisions and to its democratic foundations, to impose the centralized authoritarian government we now have, with a the President of the Republic, who after being originally elected with an important majority, now wants to perpetuate himself in power, griping all the branches of government. Fur such purpose even a constitutional reform was proposed and sanctioned in 2007, although fortunately rejected by popular vote in a referendum held last December 2007,[7] which in addition contained regressive regulations on matters of fundamental rights.[8]

Therefore, in the case of Venezuelan we have one of the richest enunciation Constitutional or Fundamental rights in comparative law, but unfortunately, in contrast, we have a week practice regarding their

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tema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional)" in *Temas constitucionales. Planteamientos ante una Reforma*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74.

7 See Allan R. Brewer-Carías, "The 2007 Venezuelan Constitutional Reform Draft (Sanctioned in a unconstitutional manner by the National Assembly on November 2nd 2007, for the establishment of a Socialist, Centralized, Repressive and Militarist State)", November 2007, in www.allanbrewercarias.com (Section I,2, 2007); "Estudio sobre la propuesta de Reforma Constitucional para establecer un Estado Socialista, Centralizado Y Militarista (Análisis del Anteproyecto Presidencial, Agosto de 2007)", in *Cadernos da Escola de Direito e Relações Internacionais da UniBrasil,* nº 07, Curitiba, 2007; La Reforma Constitucional de 2007 (Comentarios al proyecto inconstituicolnalmente sancoionado por la Asamblea nacional el 2 de noviembre de 2007), Editorial Jurídica Venezolana, Caracas 2007.

8 See Allan R. Brewer-Carías, "El carácter regresivo de las reformas en materia de derechos humanos en el proyecto de reforma constitucional en Venezuela. Análisis de las propuestas formuladas en el Informe de la Comisión Mixta para el estudio del Proyecto de Reforma de la Constitución de la República Bolivariana de Venezuela para tercera discusión, 13 de octubre de 2007", 16-10-2007, in www.allanbrewercarias.com (Section I,2, 2007)

effective protection due to the absence of an independence judiciary[9] and to the confiscation of democratic principles.

In the Venezuelan 1999 Constitution, as in all Latin American Constitutions, notable innovations have been incorporated, not only by expanding the list of constitutional rights, adding to the more traditional civil and political rights, the social, economic, cultural and environmental rights as fundamental ones in the Constitution, but also by establishing general principles to assure the guaranty of all such rights.

Among these progressions that are common in Latin American constitutionalism, I want to highlight three, to which I want to refer: *first,* the principle of progressive interpretation of the constitutional rights; *second,* the provision of the open clause of rights and freedoms; and *third,* the constitutional hierarchy given to international treaties on human rights.

I. THE PRINCIPLE OF PROGRESSIVE INTERPRETATION OF CONSTITUTIONAL RIGHTS

The first of the articles of the 1999 Constitution contained in the Title devoted to "Constitutional Duties, Rights and Guarantees," declares as a duty of the State to guarantee each person the enjoyment and exercise of his or her inalienable, interdependent and indivisible human rights "pursuant to the principle of progressiveness and without any form of discrimination."

This principle of progressiveness[10], mean that no interpretation of statutes related to human rights can be admitted if the result of the interpretation is to diminish the effective enjoyment, exercise or guarantee of constitutional rights; and also that in cases involving various

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9 See Allan R. Brewer-Carías, "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57.

10 See Pedro Nikken, *La protección internacional de los derechos humanos: su desarrollo progresivo*, Madrid 1987.

provisions, the one that should prevail is the one that contains the more favorable regulation.[11]

In Latin America, other Constitutions also expressly establish the principle, as is the case of the Ecuadorian Constitution, providing that "... in matters of constitutional rights and guarantees, the interpretation that most favors its effective enforcement shall be the one upheld." (Article 18).

This principle of the progressiveness has also been called as the *pro homines* principle of interpretation, which implies that in resolving a case, the courts must always prefer the provisions that are in favor of man (*pro homine*)"[12], also incorporated in the Ecuadorian Constitution (Article 18).[13] It also has been deduced as incorporated in other Constitutions, as is the case of the Constitution of Chile (article 5) and of Peru (article 1), when they provide as one of the essential purposes of the State, the protection of human rights.[14]

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11 See the former Supreme Court of Venezuela Decision of July, 30, 1996, in *Revista de Derecho Público*, nº 67-68, Editorial Jurídica venezolana, Caracas, 1996, p. 170. See Pedro Nikken, *La protección internacional de los derechos humanos. Su desarrollo progresivo,* Instituto Interamericano de Derechos Humanos, Ed. Civitas, Madrid, 1987.

12 See Mónica Pinto, "El principio pro homine. Criterio hermenéutico y pautas para la regulación de los derechos humanos", in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales,* Centro de Estudios Legales y Sociales, Buenos Aires, 1997, p. 163. Also see, Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio pro homine", en *Revista IIDH*, Instituto Interamericano de Derechos Humanos, nº 39, San José 2004, p. 92; See Florentín Meléndez, *Instrumentos internacionales sobre derechos humanos aplicables a la administración de justicia. Estudio constitucional comparado*, Cámara de Diputados, México 2004, pp. 118 ff.

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

14 See Iván Bazán Chacón, "Aplicación del derecho internacional en la judicialización de violaciones de derechos humanos" in *Para hacer justicia. Reflexiones en torno a la judicialización de casos de violaciones de derechos humanos*, Coordinadora Nacional de Derechos Humanos, Lima, 2004, p.27; Humberto Henderson, "Los

This has led, for instance, the Constitutional Tribunal in Peru, to define "the *pro homine* principle as the one according to which a constitutional provision referred to human rights must be interpreted 'in the most favorable way for the person, that is, for the beneficiary of its application."[15]

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tratados internacionales de derechos humanos en el orden interno: la importancia del principio pro homine", in *Revista IIDH,* Instituto Interamericano de Derechos Humanos, nº 39, San José 2004, p. 89, nota 27. As it has been indicated by Henderson, the *pro homine* principle has various application forms: first, when various provisions on human rights can be applied in the case, the one to be chosen is the one with the best and must favorable provisions regarding the individual; second, in cases rulings succession, it must be understood that the last provision does not repeal the previous one if this has better and more favorable provisions which must be preserved; and third, when it is a matter of application of just one legal provision on human rights, the same must be interpreted in the way resulting more favorable to the protection of the person. *Idem,* pp. 92-96.

15 See decision 1049-2003-AA/TC of January 30, 2004 in Alfonso Gairaud Brenes, "Los Mecanismos de interpretación de los derechos humanos: especial referencia a la jurisprudencia peruana", in José F. Palomino Manchego, *El derecho procesal constitucional peruano. Estudios en Homenaje a Domingo García Belaunde*, Editorial Jurídica Grijley, Lima 2005, Tomo I, p.138. See in general, Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio pro homine", in *Revista IIDH*, Instituto Interamericano de Derechos Humanos, nº 39, San José 2004, pp. 92-96

This principle of progressivism[16], regarding the interpretation of constitutional rights, has also been incorporated in the American Convention on Human Rights by providing rules (Article 29) in order to guarantee that "no provision of this Convention shall be interpreted" as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided in it; or to preclude other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.[17]

The principle also implies that if a constitutional right is regulated with different contexts in the Constitution and in international treaties, then the most favorable provision must prevail and be applicable to the interested party."[18]

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16 In a certain way this *pro homine* interpretation was the one that guided *Chief Justice Warren* of the United States Supreme Court in its 1954 opinion in *Brown vs Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). in which, when referring to the XIV Amendment, he said that: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Fersugon* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws". From this he concluded saying: "We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment".

17 See Florentín Meléndez, *Instrumentos internacionales sobre derechos humanos aplicables a la administración de justicia. Estudio constitucional comparado*, Cámara de Diputados, México 2004, pp. 124 ff.

18 It was the case, for instance of an "amparo" decision issued by the former Supreme Court of Justice of Venezuela on December 3, 1990, the Court applied

II. THE DECLARATIVE NATURE OF THE CONSTITUTIONAL DECLARATIONS OF RIGHTS AND FREEDOMS AND THE OPEN CONSTITUTIONAL CLAUSES

The second general principle I want to mention is the express provision in some Constitutions of the fact that the human rights protected and guaranteed by the Constitution are not limited to those listed or enumerated (as constitutional or fundamental rights) in the text, but also include other rights that are inherent in the human person or human being.

This principle which was contained in Article 50 of the Venezuelan Constitution of 1961, allowed the incorporation in it by means of judicial decisions (*jurisprudencia),* of many non enumerated human rights assigning them constitutional rank[19]. This clause has also been

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the principle regarding the rights of a pregnant public employee not to be unjustifiably dismissed of her job during pregnancy. The matter was not regulated at that time in the Statute on Labor, and it was only set forth in the Covenant nº 103 of the Labor International Organization and in the Convention eliminating all forms of discrimination against women. Notwithstanding the Supreme Court in the particular, after analyzing the protection asked for by the employee whose dismissal impeded her from enjoying the maternity leave, admitted the "amparo" and declared the requested protection, considering such right as inherent to human beings. In its decision, the Supreme Court ruled as followed: "Based in such clear and conclusive dispositions, this Court considers that any attempt from the employer to diminish the right of the pregnant woman not to be dismissed without justification or disciplinary reasons, and the consequent effect of denying the right to maternity leave, constitute an evident and flagrant violation of the constitutional principle set forth in Articles 74 and 93 of the Constitution…". See in *Revista de Derecho Público*, nº 45, Editorial Jurídica venezolana, Caracas, 1991, pp. 84-85. See the references in decision of July 30, 1996 in *Revista de Derecho Público*, nº 97-98, Editorial Jurídica Venezolana, Caracas, 1996, p 170.

19 The last important example was the definition of the right to political participation as a right inherent in the person in the decision of the Supreme Court of Justice of January 19, 1999 which opened the way, constitutionally, to the election of the National Constituent Assembly in 1999. See the text in Allan R. Bre-

incorporated, broadened, in Article 22 of the 1999 Venezuelan Constitution.

This sort of clauses has its origin in the United States IX Amendment (1791) that establishes that "the enumeration in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people". According the list of constitutional rights does not end with those that are expressly listed in the constitutional declaration, but include all others rights which are inherent to the human person. As was argued by the Supreme Court in *United Public Workers v. Mitchell*, 330 R.S. 75, 94-95:

> "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments…"

That is, the concept of "liberty" "protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."[20]

All Latin American Constitutions, with the exception of Cuba, Chile, Mexico and Panamá, contain open clauses of this kind, emphasising that the declaration or enunciation of rights made in the Consti-

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wer-Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente,* Caracas 1999, p. 41.

[20] *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 94-95. In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]… as to be ranked as fundamental". *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' …" *Powell v. Alabama*, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society". *Poe v. Ullman*, 367 U.S. 497, 517.

tution shall not be understood to be a denial of others not listed therein that are inherent to the human person or to human dignity.[21]

These rights inherent to human persons, for instance, have been defined by the former Supreme Court of Justice of Venezuela (decision of January 31, 1991, Case: *Anselmo Natale*), as:

> …natural, universal rights which find their origin and are direct consequence of the relationships of solidarity among men, of the need for the individual development of mankind and for the protection of the environment.

The same Court concluded by stating that

> ...such rights are commonly enshrined in Universal declarations and in national and supranational texts, and their nature and content as human rights shall leave no room for doubt, since they are the very essence of a human person and shall therefore be necessarily respected and protected.22

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21 Clauses of this type are found in the Constitutions of Argentina (Article 33), Bolivia (Article 33), Colombia (Article 94), Costa Rica (Article 74), Dominican Republic (article 10), Ecuador (Article 19), Guatemala (Article 44), Honduras (Article 63), Nicaragua (Article 46), Paraguay (Article 45), Peru (Article 3), Uruguay (Article 72) and Venezuela (Article 22).

22 See the reference in Carlos Ayala Corao, "La jerarquía de los instrumentos internacionales sobre derechos humanos", en *El nuevo derecho constitucional latinoamericano, IV Congreso venezolano de Derecho constitucional*, Vol. II, Caracas, 1996, and in *La jerarquía constitucional de los tratados sobre derechos humanos y sus consecuencias*, México, 2003. Accordingly, Article 22 of the Constitution of Venezuela, following the tradition of previous Constitutions, expressly establishes that "the enunciation of the rights and guarantees contained in this Constitution and in the international instruments on human rights shall not be understood to be a denial of others that being inherent to the human person, are not expressly set forth in those texts"; adding that "the absence of the regulating statute of such rights do not impede its exercise" (Article 22). This article, like Article 94 of the 1991 Colombian Constitution and Article 44 of the Guatemalan Constitution, refers to the "inherent rights of a human person", thus incorporating notions of a natural right, in the sense that human rights precede the State and the Constitutions themselves. The Constitution of Paraguay, in the same sense, refers to "rights inherent to human personality" (Article 45).

In some cases like in Colombia and Venezuela, the open clause allows for the identification of rights inherent to human persons, not only regarding those not listed in the Constitution, but also not listed in international human rights instruments, thus considerably broadening their scope.

According to this open clause, for instance, the former Supreme Court of Justice of Venezuela, on judicial review annulled statutes founding its rulings on rights not listed in the Constitution but listed in the American Convention on Human Rights, considering them as rights inherent to human beings.

It was the case in 1996, in a decision issued deciding a judicial review action that was brought before the Court against a statute sanctioned in the State of *Amazonas*, a member State of the Venezuelan Federation mainly populated by indigenous people, establishing its territorial internal division.

The Court considered that the sanctioning of such legislation without hearing the opinion of the indigenous peoples, violated the constitutional right to political participation. Such right was not expressly regulated in the 1961 Constitution, so the Court founded its ruling in the open clause (Article 50), considering the right to political participation as inherent to human being, and as a "general principle of constitutional rank in a democratic society", adding, regarding the case, that "because of being a minorities rights (indigenous peoples in the case), they must be judicially protected.[23]

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23 See decision of December 5, 1996. Case: *Antonio Guzmán, Lucas Omashi ey al.*, in *Revista de Derecho Público*, nº 67-68, Editorial Jurídica Venezolana, Caracas, 1996, pp. 176 ff. In another case, in 1997, the same former Supreme Court of Justice of Venezuela, annulled a national (federal) statute referred to wicked and crooked persons (*Ley de vagos y maleantes*) which was considered unconstitutional, because allowed executive detentions without due process guarantees. The decision was issued considering that the challenged statute was unconstitutional because it omitted the guaranties for a fair trail set forth in Articles 7 and 8 of the American Convention on Human Rights and Articles 9 and 14 of the International Covenant on Civil and Political Rights, and because it was discrimi-

In Ecuador, for instance, the Constitution also protects the rights "derived from the nature of the human person which are necessary for his or her full moral and material development (Article 19).[24]

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natory violating Article 24 of the same American Convention (See in *Revista de Derecho Público* nº 71-72, Editorial Jurídica Venezolana, Caracas, 1997, pp. 177 ff). More recently, in 1999 and regarding the challenge of the proposed call for a consultative referendum for the convening of a National Constituent Assembly which was not regulated in the Venezuelan 1961 Constitution, the former Supreme Court also issued two rulings deciding interpretative recourses, allowing the convening of the referendum for such Constituent Assembly based on the right of the people to political participation, also basing its decisions in the open clause on human rights, considering it as an implicit, constitutionally non enumerated right inherent in the human person. See in *Revista de Derecho Público,* nº 77-80, Editorial Jurídica Venezolana, Caracas, 1999, p. 67. The conclusion of the Court's decision was that it was not necessary to previously reform the Constitution in order to recognize the referendum or popular consultation on whether to convene a Constituent Assembly as being a constitutional right". See the comments in Allan R. Brewer-Carías, "La configuración judicial del proceso constituyente o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinction", in *Revista de Derecho Público,* nº 77-80, Editorial Jurídica Venezolana, Caracas, 1999, pp. 453 ff.

[24] This provision is complemented by Article 18 in which it is stated that the rights and guaranties enshrined in the Constitution and in the international instruments, are directly and immediately applicable by and before any court or authority; and that the absence of regulatory statutes can not be alleged in order to justify the violation or the ignorance of the rights set forth in the Constitution, or to reject the action for its protection, or to deny the recognizance of such rights. In Nicaragua, the Constitution is more detailed regarding the listing of international instruments and, as such, more limitative, when its Article 46 provides as follows: "Article 46.- Every person in the land shall enjoy State protection and the recognition of the rights inherent to the human person, of the unrestricted respect, promotion and protection of human rights, and of the full enforcement of the rights consigned in the Universal Declaration of Human Rights; in the American Declaration of the Rights and Duties of Man; in the International Covenant on Economic, Social and Cultural Rights; in the United Nations' International Covenant on Civil and Political Rights; and in the American Convention on Human Rights of the Organization of American States".

In other cases, such as the Constitution of Brazil, the open clause, without referring to the inherent rights of human persons, indicates that the listing in the Constitution of right and guaranties, does not exclude others "derived from the regime and principles adopted by the Constitution or by international treaties to which the Federative Republic of Brazil is a party" (Article 5.2)

The Constitution of Costa Rica also extend the constitutional protection to rights deriving "from the Christian principle of social justice" (Article 74), an expression that can be interpreted in the sense of human dignity and social justice.

In other Constitutions, instead of referring to the rights inherent to human beings, the open clauses refers to the sovereignty of the people and to the republican form of government and therefore, more emphasis is made regarding political rights, than on the inherent rights of human persons. This is the case of Argentina, where Article 33 of the Constitution states that:

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

Similar regulations are contained in the Constitutions of Bolivia (Art. 55) and of Uruguay (Article 72).

In Peru (Article 3) and Honduras (Article 63) , in a more comprehensive way, the Constitutions refers to other rights of an analogous nature or that are based on the "dignity of man, or on the sovereignty of the people, of the democratic rule of law and of the republican form of government".

In all these cases, the incorporation of open clauses in the Constitution regarding human rights, implies that the absence of statutory regulation of such rights cannot be invoked to deny or undermine its exercise by the people, as it is expressed in many Constitutions (Argentina, Bolivia, Paraguay, Venezuela, and Ecuador). This, of course responds to the principle of the direct applicability of the Constitution in

human rights matters, which excludes the traditional concept of the so-called "programmatic clauses" which were constructed under the constitutionalism of some decades ago, particularly regarding social rights, which impeded their being fully exercised and judicially protected until legally regulated.

III. THE CONSTITUTIONAL RANK OF INTERNATIONAL HUMAN RIGHTS TREATIES

The third important principle on the progressive protection of fundamental rights and freedom, has been the process of constitutionalization of international law in matters of human rights, express in the fact that the national Constitutions have now expressly determined the value and rank given to the international instruments on human rights,[25] regarding the same Constitution as well as regarding statutes, even determining in some cases, which shall prevail in the event of there being a conflict among them.

This process has resulted in the incorporation in some Constitutions, of provisions giving the international instruments on human rights regarding internal law, not only the traditional statutory rank or a supra-legal rank, but most important, constitutional rank and even-supra-constitutional rank.[26]

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25 See Ariel Dulitzky "Los tratados de derechos humanos en el constitucionalismo iberoamericano" en Thomas Burgental et al, *Estudios especializados de derechos humanos*, Vol I, Instituto Interamericano de Derechos Humanos, San José 1996, pp. 158 ff.; Humberto Nogueira Alcalá, "Los derechos fundamentales y los derechos humanos contenidos en los tratados internacionales y su ubicación en las fuentes del derecho: doctrina y jurisprudencia", in *Revista Peruana de Derecho Público*, No, 12, Lima 2006, pp.67 ff.

26 For a general comment regarding this classification, see Rodolfo E. PIZA R., *Derecho internacional de los derechos humanos: La Convención Americana*, San José 1989; Carlos Ayala Corao, "La jerarquía de los instrumentos internacionales sobre derechos humanos", in *El nuevo derecho constitucional latinoamericano, IV Congreso venezolano de Derecho constitucion*al, Vol. II, Caracas, 1996 and *La jerarquía constitucional de los tratados sobre derechos humanos y sus consecuencias*, Méxi-

The latter is the case of Venezuela, where article 23 of the Constitution, as one of its innovations, establishes,[27] first, the constitutional rank of treaties, pacts, and conventions on human rights; second, the preference of these instruments over the national Constitution and statutes if they should establish more favorable provisions; and, third, the immediate and direct application of these treaties on human rights by the courts.

Similar constitutional provisions are established in the Constitutions of Colombia (Article 93), Guatemala (Article 46), Honduras (Article 16).[28] This supra constitutional rank given to international treaties,

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co, 2003; Florentín Meléndez, *Instrumentos internacionales sobre derechos humanos aplicables a la administración de justicia. Estudio constitucional comparado*, Cámara de Diputados, México 2004, pp. 26 ff.; and Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", In *Revista IIDH*, Instituto Interamericano de Derechos Humanos, nº 39, San José 2004, pp. 71 ff. See also, Allan R. Brewer-Carías, *Mecanismos nacionales de protección de los derechos humanos, Instituto Internacional de Derechos Humanos*, San José, 2004, pp.62 ff.

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

28 The Constitution of Guatemala, set forth in Article 46 the general principle of pre-eminence of International law, by stating that in declaring that "in human rights matters, the treaties and conventions accepted and ratified by Guatemala shall have pre-eminence over internal law", in which it must be included other than the statutes, the Constitution itself". In Honduras, Article 16 of the Constitution sets forth that the all treaties subscribed with other States (not only related to human rights), are part of internal law; and Article 18 establishes the pre-eminence of treaties over statutes in case of conflict between them. In addition, the Honduran Constitution admits the possibility of ratification of treaties contrary to what is set forth in the Constitution, in which case they must be approved according to the procedure set forth for constitutional revision (Article 17).A similar regulation is established in Article 53 of the Peruvian Constitution. In Colombia, the Constitution has also established a similar provision, with Article 93 providing that: "international treaties and conventions ratified by Congress, which recognize human rights and forbid their limitation in states

for instance, has allowed the Supreme Courts or the Constitutional Court, to decide cases by directly applying the American Convention.

It was the case, for instance, of a decision of the Constitutional Court of Guatemala issued on May 27, 1997 regarding the freedom of expression and the rectification rights. Even though the right to seek for rectification in cases of press information affecting the honor, reputation and privacy of a person was not expressly declared in the Constitution, the Constitutional Court applied Articles 11, 13 and 14 of the American Convention which guarantee to any person affected by information published in newspapers, to seek for "rectification and answer (response) that must be published in the same newspaper", considering such provisions as forming part of the constitutional order of Guatemala.[29]

In Colombia (article 93), based on the pre-eminence of treaties over statutes, the Constitutional Court has, for instance, in a decision nº T-447/95 of October 23, 1995, recognized the right of everybody to have an identity as a right inherent to human beings, even though it is not expressly declared in the Constitution. The Court based its ruling on what is established in the international treaties and covenants, particularly the International Covenant on Civil and Political Rights and

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of emergency, shall prevail over internal law." In this case, also, internal law must be understood to comprise not only statutes but the Constitution itself.

29 See in *Iudicum et Vita*, *Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997, pp. 45 ff.. Nonetheless, in other decision, the Constitutional Court of Guatemala has considered that "the international treaties on human rights are incorporated in the internal legal order with the character of constitutional norm but without reformatory of derogatory powers" See the reference to decision of 10-10-1990 in See Ariel Dulitzky "Los tratados de derechos humanos en el constitucionalismo iberoamericano" en Thomas Burgental et al, *Estudios especializados de derechos humanos*, Vol I, Instituto Interamericano de Derechos Humanos, San José 1996, p. 158; and in Humberto Nogueira Alcalá, "Los derechos fundamentales y los derechos humanos contenidos en los tratados internacionales y su ubicación en las fuentes del derecho: doctrina y jurisprudencia", in *Revista Peruana de Derecho Público*, No, 12, Lima 2006, p. 89.

the American Convention on Human Rights, effectively recognizing their supra constitutional rank. [30]

The Court concluded that being "the right to have an identity implicitly set forth in all the international covenants and conventions, and thus, legally protected" it is possible to affirm such right "as being in-

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30 The Court ruled that those covenants ratified by Colombia, prevail in the internal order (Article 93 Constitution) and imposes on the State the duty to adopt "legislative or other measures in order to make human rights effective" (Article. 2, American Convention; Article 2,2, International Covenant on Civil and Political Rights). Among these "measures", the judicial rulings, particularly those issued by the Constitutional Court, were considered to count for the enforcement of rights, the Court said, because "it is for legitimate courts and in particular, for the Constitutional Court, when deciding cases, to consider within the legal order the rights recognized in the Constitution and in the Covenants." The Court began by referring to previous ruling of the former Supreme Court of Justice which had determined their supra-legal value, by arguing: "Since 1928 the Supreme Court of Justice has given prevalent value to international treaties regarding legislative internal order; due to the fact that such international norms, by will of the Colombian state, enter to form part of the legal order with supra legal rank, setting forth the coactive force of provisions the signing State has the obligation to enforce. The supra legal value has been expressly established in article 93 of the Constitution of Colombia, as has been recognized by the Supreme Court of Justice, arguing that it must be added that such superiority has been sustained as an invariable doctrine that "is a public law principle, that the Constitution and the international treaties are the superior law of the land and their dispositions prevail over the legal norms contrary to their provisions even if they are posterior laws". See the text in *Derechos Fundamentales e interpretación Constitucional, (Ensayos-Jurisprudencia),* Comisión Andina de Juristas, Lima, 1997; and in Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional", *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 ff. See, also, Decision C-225/95 of the Constitucional Court in which the Court considered that internacional treaties had preemptive status, forming part of the "constitutional block", in Humberto Nogueira Alcalá, "Los derechos fundamentales y los derechos humanos contenidos en los tratados internacionales y su ubicación en las fuentes del derecho: doctrina y jurisprudencia", in *Revista Peruana de Derecho Público*, No, 12, Lima 2006, p.87.

herent to human person fully is guaranteed due to the obligatory force of the international covenant".

Regarding the 1999 Constitution of Venezuela provision on the supra-constitutional hierarchy of human rights contained in treaties,[31] it can be considered as one of the most important articles on matters of human rights in all the Latin American system, not only because it establishes the supra-constitutional rank of human rights treaties, but also because it prescribes the direct and immediate applicability of such treaties by all courts and authorities of the country.

Based on this constitutional provision, in Venezuela, the Constitutional Chamber of the Supreme Tribunal of Justice, in 2000, gave prevalence to the American Convention regulations in this case, regarding the "the right to appeal judgments before a higher court" (Article 8,2,h), considered as forming part of internal constitutional law of the country. In a decision nº 87 of March 13, 2000, interpreting in an extensive way what is provided in the Convention, the Chamber compared the provision of its Article 8,2,h, with Article 49,1 of the Constitution where the right to appeal was only granted to those who have been declared guilty in criminal cases. Consequently, the Supreme Tribunal concluded by saying that "the provision of the Convention is more favorable to the exercise of such right, due to the fact that it guarantees the right of everybody to be heard on appeal not only regarding criminal procedures, but also regarding rights and obligations in civil, labor, taxation or any other procedure, in which the right to appeal without any exception is established". Based on these arguments, the Court then compared the international provision of the American Convention with one article (185) of a Statute regulating the Administrative Jurisdiction procedure (Supreme Court of Justice 1976 Statute), which excluded the appeal in certain cases on Administrative Jurisdiction

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[31] Article 23: 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.

courts' decisions, interpreting "that the latter is incompatible with the former, because it denies in absolute terms, the right that the Convention guarantees."[32]

Based on the aforementioned, the Constitutional Chamber concluded its ruling by stating that the right to appeal recognized in Article 8,1 and 2,h of the American Convention on Human Rights, which is "part of the Venezuelan constitutional order", is more favorable regarding the exercise of such right in relation to what is set forth in Article 49,1 of the Constitution; and that such provisions are of direct and immediate application by courts and authorities."

Nonetheless, three years later, after a few decisions and protective preliminary orders were issued by the Inter American Commissions on Human Rights against the Venezuelan State, in cases where the right to free expression of thoughts were denounced as violated, the same Constitutional Chamber of the Supreme Tribunal interpreted the article in a very different way, as a reaction against the effects of the constitutionalization of the internationalization of human rights contained in this very clear constitutional provision of article 23. In a ruling nº 1942 of July 7th, 2003, it denied the powers of all courts to directly apply international conventions, and declared that the Chamber itself was the only court with powers to "determine which norms on human rights contained in treaties, covenants and conventions, prevail in the internal legal order."[33] By doing this, the Tribunal also assumed the

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

33 The Chamber ruled: "Once the human rights substantive norms contained in Conventions, covenants and treaties have been incorporated to the constitutional hierarchy, the maximum and last interpreter of them, vis-à-vis internal law, is the Constitutional Chamber, which determines the content and scope of the constitutional norms and principles (Article 335), among them are the treaties, covenants and conventions on human rights, duly subscribed and ratified by Venezuela" ; adding: "This power of the Constitutional Chamber on the matter, derived from the Constitution, cannot be diminished by adjective norms contained in the treaties or in other international texts on human rights

monopoly to determine which human rights not incorporated in such international instruments but considered inherent to human being, have effects in Venezuela." With this ruling, the effects of the supra constitutional rank of treaties when establishing more favorable regulations regarding human rights that can be applied by any court, was suddenly eliminated by the Constitutional Chamber. By assuming the absolute monopoly of Constitution interpretation, the Tribunal limited the general powers of all the other courts to resolve by means of judicial review on the matter and to directly apply and give prevalence to the American Convention regarding constitutional provisions.[34]

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subscribed by the country, allowing the Member States to ask international institutions for the interpretation of rights referred to in the Convention or covenant, as established in Article 64 of the Approbatory statute of the American Convention of Human Rights, San José Covenant, because otherwise, the situation would be of a constitutional amendment, without following the constitutional procedures, diminishing the powers of the Constitutional Chamber, transferring it to international or transnational bodies, with the power to dictate obligatory interpretations." See in *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 136 ff.

34 Contrary, for instance, to what was resolved in Argentina, once the Inter American Commission determined that the amnesty statutes (*Punto Final* and *Obediencia Debida*) and the pardon measures adopted regarding the crimes committed by the military dictatorship were contrary to the American Convention, some courts began to consider such statutes as unconstitutional because they were in violation of international law. See Decisión de 4-03-2001, Juzgado Federal nº 4, caso Pobrete Hlaczik. Cit., por Kathryn Sikkink, "The transnational dimension of judicialization of politics in latin America", in Rachel Sieder et al (ed), *The Judicalization of Politics In Latin America,* Palgrave Macmillan, New York, 2005, pp. 274, 290. The Venezuelan Constitutional Chamber, in any case, concluded its restrictive interpretation by stating: that: "A different interpretation means giving the Commission a supranational character which weakened the Member State's sovereignty, something that is prohibited by the Constitution" (Decision nº 1942 of July, 15, 2003, in *Revista de Derecho Público,* nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 136 ff. i). Anyway, after the Constitutional Chamber's ruling, the Penal Code was reformed but not in the relevant parts regarding the crimes referred to as "*leyes de desacato*". This decision was contrary to what was decided in 1995 by the Argentinean Con-

Other Latin American Constitutions have granted International Treaties on Human Rights, constitutional rank, in which cases the Supreme Courts of Constitutional Courts in many cases have applied the international instruments on human rights in order to control the constitutionality of internal legislation.

This is the case in Argentina, where the Constitution grant such constitutional hierarchy to a group of instruments that are expressly listed in Article 75.22, namely: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child.

According to this constitutional provision, the Supreme Court of the Nation of Argentina has also applied the American Convention on Human Rights, giving prevalence to its provisions regarding internal statutes, as was the case of the same right to appeal declared in the American Convention, which the Criminal Procedural Code excluded in some judicial decisions depending upon the duration or gravity of

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

the punishment. The Supreme Court of the Nation declared the invalidity of the said Code's provisions on the grounds of its unconstitutionality, applying the American Convention.[35]

Additionally, in Argentina, and in contrast to the Venezuelan Supreme Tribunal reaction, the courts have also considered the decisions of the Inter American Commission and of the Inter American Court as obligatory,[36] considering "as a guide for the interpretation of constitutional provisions"[37]; and for instance, repealing lower court decisions when considering that their interpretation was made in an incompatible way regarding the decision's doctrine of the Inter American Commission on Human Rights.[38]

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35 Decision of April, 4, 1995, *Giroldi, H.D. et al*. See the references in Aida Kemelmajer de Carlucci and Maria Gabriela Abalos de Mosso, "Grandes líneas directrices de la jurisprudencia argentina sobre material constitucional durante el año 1995", in *Anuario de Derecho Constitucional Latinoamericano 1996*, Fundación Konrad Adenauer, Bogotá, 1996, pp. 517 ff.; in Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" in *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 ff.; and in Humberto Nogueira Alcalá, "Los derechos fundamentales y los derechos humanos contenidos en los tratados internacionales y su ubicación en las fuentes del derecho: doctrina y jurisprudencia", in *Revista Peruana de Derecho Público*, No, 12, Lima 2006, pp.67 ff

36 Decisión of July 7, 1992. Case: *Miguel A. Ekmkdjiam, Gerardo Sofivic et al*, in Ariel E. Dulitzky, "La aplicación de los tratados sobre derechos humanos por los tribunales locales: un studio comparado" in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales*, Centro de Estudios Legales y Sociales, Buenos Aires, 1997. See Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" en *Revista del Tribunal Constitucional*, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 y ss

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

38 Case: Bramajo, September 12, 1996, in Jurisprudencia Argentina, Nov. 20, 1996. See Carlos Ayala Corao, "Recepción de la jurisprudencia internacional sobre derechos humanos por la jurisprudencia constitucional" en *Revista del Tribunal*

In Panama, even though the Constitution has no express provision regarding the normative rank of treaties, the Supreme Court has deduced such rank by considering that any violation of an international treaty must be considered as a violation of Article 4 of the Constitution, which only establishes that "The Republic of Panama respects the norms of international law". Such norm has allowed the Supreme Court of Justice to consider as unconstitutional any violation of norms of international treaties. For instance, this was the case in a decision of March 12, 1990, where the Supreme Court declared the unconstitutionality of an Executive Decree which established general arbitrary conditions for the exercise of the rights to free expression and press (censorship), ruling that "such act violates article 4 of the Constitution that obliges the national authorities to respect the international law norms" considering that in the case there was a "violation of the International Covenant on Human Rights and of the American Convention on Human Rights", which "rejects any prior censorship regarding the exercise of the freedoms of expression and press, as fundamental human rights."[39]

One of the consequences of giving constitutional rank to international treaties, such as to the American Convention, is that the rights declared in it are out of the reach of the legislative body, which cannot legislate diminishing in any way the enforcement or scope of such rights.

Constitucional, nº 6, Sucre, Bolivia, Nov. 2004, pp. 275 ff. On the contrary, the Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela has expressly ruled that: "It is a matter of prevalence of norms which conform treaties, covenants or Agreements referred to human rights, but not to reports or opinions of international bodies which pretend to interpret the scope of international instruments". See decision nº 1942, July 7, 2003 in *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 136 ff Idem y ss

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

This has been very important regarding the due process of law rights enshrined in the American Convention on Human Rights, 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). And regarding the right to personal liberty, Article 7,2 and 7,5 set forth 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 concerned or by a law established pursuant thereto"; and the right of "any person detained *shall be brought promptly before a judge or other officer authorized by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings".

In Latin America, these rights are also enshrined in the national Constitutions and due to their declaration in the Convention, have constitutional rank, prohibiting in Latin America any possibility for the creation of 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. In this regard, the Inter American Court on Human Rights has issued important rulings against Member State of the Convention, for it violations.

For instance, in the Cantoral Benavides case, the Inter American Court on Human Rights decided that Peru violated Article 8,1 of the Convention because Mr. Cantoral Benavides had been prosecuted by a military judge, which was not the "competent independent and impartial judge" provided for in that provision. Consequently the Court considered that Peru had also violated Article 7.5 of the Convention because the victim had been brought before a criminal military court.[40]

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40 Case *Cantoral Benavides*, Augst 18, 2000. Paragraph 75: Also, the Court considers that the trial of Mr. Luis Alberto Cantoral-Benavides in the military crimi-

By ruling this way it can even be considered that the Court has ruled that not any judiciary body can examine the legality and reasonability of a detention, but only those that do not violate the principle of "natural judge."[41]

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 ad hoc courts or commissions.

The Inter American Court has also referred to this due process of law right in the Ivcher Bronstein case. In such case, the Peruvian Executive Commission of the Judiciary, weeks before a resolution depriving Mr. Bronstein of his Peruvian citizenship was issued, altered the composition of a Chamber of the Supreme Court and empowered such Chamber to create, in a transitory way, specialized Superior chambers and Public Law specialized courts. The Supreme Court Chamber created one o such courts and appointed its judges, who heard the re-

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nal court violated Article 8(1) of the American Convention, which refers to the right to a fair trial before a competent, independent and impartial judge (infra para. 115). Consequently, the fact that Cantoral-Benavides was brought before a military criminal judge does not meet the requirements of Article 7(5) of the Convention. Also, the continuation of his detention by order of the military judges constituted arbitrary arrest, in violation of Article 7(3) of the Convention. Paragraph 76: The legal principle set forth in Article 7(5) of the Convention was not respected in this case until the accused was brought before a judge in the regular jurisdiction. In the file, there is no evidence of the date on which this occurred, but it can be reasonably concluded that it took place in early October 1993, since on October 8, 1993, the 43rd Criminal Court of Lima ordered that the investigation stage of a trial be opened against Cantoral-Benavides. See this case of the Inter American Court and all the others quoted below in Sergio García Ramírez (Coordinador), *La jurisprudencia de la Corte Interamericana de Derechos Humanos,* Universidad nacional Autónoma de México, México, 2001.

41 See Cecilia Medina Quiroga, *La Convención Americana: Teoría y Jurisprudencia,* Universidad de Chile, Santiago 2003, p. 231

courses filed by Mr. Bronstein. The Inter American Court ruled as follows:

> 114. The Court considers that by creating temporary public law chambers and courts and appointing judges to them at the time that the facts of the case sub judice occurred, the 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.42

The Inter American Court also ruled on these matters in the *Castillo Petruzzi et al.* Case, where it decided that:

> 129. 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. 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." 43

Particularly regarding the need of a competent court, and referring to the military courts, the Inter American Commission on Human Rights has considered that "to prosecute ordinary crimes as though they were military crimes simply because they had been committed by members of the military breached the guarantee of an independent and impartial tribunal" 44; and the Inter American Court ruled in the *Castillo Petruzzi et al*. case that due process of law rights were 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

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42 Case *Ivcher Bronstein*, February 6, 2001. Paragraphs 113-114

43 Case *Castillo Petruzzi el al*., May 30, 1999, paragraph 129. The quotation corresponds to Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Conference on the Prevention of Crime and Treatment of Offenders, held in Milan August 26 to September 6, 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

44 Case *Genie Lacayo*, January 29, 1997. Paragraph 53

and discipline within the Armed Forces, civilians cannot engage in behavior contrary to such military duties. The Courts ruled as follows:

> 128. The Court notes that several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then, only under certain circumstances. This was the definition in Peru's own law (Article 282 of the 1979 Constitution). 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. In effect, 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. That right to due process, in turn, is intimately linked to the very right of access to the courts."[45]

Finally, in the *Durand and Ugarte Case*, the Inter American Court ruled that:

> 117. In a democratic Government of Laws, the penal 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 commission of crime or offenses that by its own nature attempt against legally protected interests of military order.[46]

This excludes not only the processing of civilians by military courts, but additionally the possibility to assign to military courts cases of common felonies committed by military, even in the exercise of its functions. As was ruled by the same Inter American Court:

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45 Case *Castillo Petruzzi et al,* May 30, 1999, Paragraph 128 and 132

46 Case *Durand and Ugarte*, August 16, 2000, paragraph 117

> 118. In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate deaths. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not.[47]

In contrast with the aforementioned, the absence of similar constitutional provisions in the United States, for instance, allows legal discussions to continue regarding the validity of military commissions to try non-citizens for "acts of international terrorism" after the September 11 terrorist attacks [48]; the exclusion by statute for the federal court's jurisdiction to hear habeas corpus cases brought by detainees at the United States naval base at Guantánamo Bay, in Cuba[49]; the denial for detainees to have access to a lawyer and to keep them in an open-

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47 *Idem,* Paragraph 118

48 Like those set up by a military order of November 13, 2001 after the September 11 terrorist attacks. Nonetheless, the Supreme Court decided in June 29, 2006, in *Hamdan v. Rumsfeld* (Case nº 05-184), 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. See the report regarding the decision in Linda Greenhouse "Justices, 5-3, Broadly Rejects Bush Plan to Try Detainees", *The New York Times,* June 30, 2006, p. A1; A20. See also the previous information regarding the case in Linda Greenhouse "Detainee case Will Pose delicate Question for Courts. A White House Challenge to Jurisdiction", *The New York Times,* March 27, 2006, p. A12.

49 According to the Detainee Treatment Act sanctioned on December 2005, the federal courts' jurisdiction was excluded over cases brought by detainees at the United States naval base at Guantánamo Bay, Cuba, particularly regarding habeas corpus petitions filed by them. In the Supreme Court decision on June 29, 2006, in *Hamdan v. Rumsfeld* nº 05-184, the Court ruled that such exclusion cannot apply to pending cases. See in Linda Greenhouse "Justices, 5-3, Broadly Rejects Bush Plan to Try Detainees", *The New York Times,* June 30, 2006, p. A20; and Linda Greenhouse "Detainee case Will Pose delicate Question for Courts. A White House Challenge to Jurisdiction", *The New York Times,* March 27, 2006, p. A12. On June 12, 2008, finally the Supreme Court admitted the possibility of habeas corpus in all such cases.

ended detention[50]; or the use of specific interrogation techniques although complying with the Detainee Treatment Act and the Geneva Convention.[51]

The reference to the case is made in order to highlight what happens in cases such as the United States where there is no express constitutional rank given to some of the judicial guaranties and to the right to be tried by judicial competent independent and impartial courts established before the offenses were committed, as set forth in the American Convention on Human Rights; and where the discussions regarding the struggle on the supremacy between the courts and the Government can still be developed regarding, for instance, the exclusion of any injunctive protection of rights in such cases.

In Latin America, after so many cases and stories of ad hoc commissions or special courts 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 even the discussion to be sustained.

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50 See the reference to the case *Rumsfeld v. Padilla*, decided in April 2006, where the Supreme Court denied the request of Mr. Padilla to hear his case, which leaved 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 idefinite detention, even though remaining in civilian custody. See the reference in Linda Greenhouse, "Justice Decline Terrorism Case of U.S. Citizen". See Linda Greenhouse, *The New York Times,* April 4, 2006, pp. A1, A19, A22. See in general Joseph Margulies, *Guantánamo and the abuse of Presidential Power*, Simon & Schuster, New York 2006.

51 On the same matter, Congress on September 2006, passed a Military Commission Act, preventing the Guantánamo detainees of the habeas corpus right to challenge their detention in court. See Kate Zernike, "Senate Approves Broad New Rules to Try detainees", in *The New York Times,* September 29, 2006, pp. A1, A20. On December 13, 2006, a Federal District Court ruled that prisoner at Guantánamo could no longer contest his detention before a federal court because Congress explicitly eliminated his right to file a habeas corpus. See Neil A. Lewis, "Judge Sets Back Guantánamo Detainee. Rules that New Law Strip Them of Habeas Corpus Challenges", in *The New York Times,* December 14, 2006, p. A32. .

The due process of law, with all its content, is a constitutional right, and its enforcement is out of the reach of Congress and no legislation can be passed to restrict the courts jurisdiction. And being a constitutional right, the amparo and habeas corpus protection can always be filed by the affected party, and eventually reach the American Court on Human Rights for the protection, as shown in the aforementioned cases.

Second Lesson

SOME PRINCIPLES REGARDING CIVIL RIGHTS, INCLUDING FREEDOM IN RELATION TO RESIDENCE, AND THEIR CONSTITUTIONAL GUARANTY

As aforementioned, since the XIX century all Latin American countries have developed an important constitutional trend regarding extensive declarations of rights, as fundamental constitutional rights, including not only civil and political rights, but also social, economic, cultural, and environmental rights; and also, important constitutional provisions regarding the guaranty of such rights.

I want to review the scope of those declarations and to the constitutional guaranties, in particular, the judicial guaranties, by referring, as an example, to the 1999 Venezuelan Constitution. I will also refer to the Venezuelan legal system related to aliens and their rights and duties.

I. GENERAL SCOPE OF THE CONSTITUTIONAL DECLARATIONS ON CIVIL RIGHTS

Chapter IV, Title III of the 1999 Venezuelan Constitution is devoted to regulate "civil rights" in the sense of "individual rights," that corresponds to any person or individual, whether nationals or citizens of the country, or aliens located within its territory. All civil rights are rights of the human being without any distinction, and in particular,

without any kind of discrimination based on race, sex, cult, social condition or nationality.

Those civil or individual rights declared in the Venezuelan Constitution, in general terms, are the following:

The right to life, establish as "inviolable," and together with a prohibition of the death penalty (art. 43). In addition the Constitution specifically obliges the State to "protect the lives of persons who find themselves deprived of liberty in military or civil service, or subject to an authority in any other manner".

The Constitution also expressly regulates the right to one's name (art. 56); and the right to inviolable personal freedom; the latter through the following rights and guarantees (art. 44): first, the guarantees regarding arrest and detention that in principle must be always supported by judicial order. In case of exceptional administrative detentions (*in fraganty*) the Constitutions establish a limit of 48 hours (in contrast, in many European countries, this is a statutory matter); second, the right to not to be held *incommunicado*, and to have the possibility to get in touch with family; third, the rights of foreigners, when detained, for their consulates to be informed of the detention according to international treaties; fourth, the provision of express limits to punishment (no more than 30 years of prison) and of the prohibition of infamous and perpetual sanctions; fifth, the requirement for the authorities involved in detentions to identify themselves; sixth, the right to be released from incarceration when so decided by the competent authority; seventh, the prohibition of slavery or servitude *("esclavitud o servidumbre");* and, eighth, the prohibition of forced disappearance (art. 45).

The right of any person to physical integrity (art. 46), is also regulated in a detailed manner through these rights: the right to be free of torture or degrading punishments; in case of detention, the right to be treated with respect for the dignity of the human person; the right not to be treated to experiments and treatments except consenting them; and the guaranty of the personal liability of government officials that infringe such rights.

In addition, the Constitutional set forth the inviolability of the home and residence (art. 47); the inviolability of private communications (art. 48); the right to petition before the government and to obtain prompt response (art. 51); and the right to association (art. 52). With respect to this last right, Article 52 establishes that all persons have the right to associate with others for lawful purposes, in conformity with the law, and that the State is required to facilitate the exercise of this right. The right is, however, limited on the Venezuelan Constitution by Article 256 which prohibits judges from associating with one another, and Article 294 establishing the inconvenient intervention of the State in organizing the internal elections of professional associations.

The Constitution also guarantees the right of free assembly (art. 53); the right to free expression of thoughts (art. 57); the right to inform and to receive information that is qualified as "opportune, truthful, and impartial"; and the "rights to reply or to respond, and the right to seek for rectification" that are applicable when a person is directly affected by inexact or damaging information (art. 58).

Regarding the right to be inform, a long debate arose concerning the adjectives "opportune, truthful and impartial *("oportuna, veraz e imparcial")*. The constitutionalization of these requirements can be considered as an open door for the possibility to establish some sort of State control or monopoly of information in order to determine what "truthful, opportune and impartial" is, and with this, the possible creation of some "official truth"[52]. In a Constitution marked by the principle of progressive interpretation in the majority of individual rights, this can be considered as a regression creating a legal fissure that could serve authoritarianism.

In the Constitution, the express regulation of freedom of religion and cult can also be found (art. 59), as well as the right to the protection of honor and privacy (art. 60); the right to freedom of conscience (art.

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[52] See the author's negative vote with reasoning with respect to this norm in Allan R. Brewer-Carías, *Debate Constituyente [Constituent Debates}*, Tomo III, Caracas 1999, pp. 154 - 156.

61); and in general, the right of anybody to have his rights protected by authorities (art. 55).

Finally, the Constitution also establishes in article 59, the right of any person to have freedom of movement and travel by any mean within the national territory, to change domicile and residence, to travel abroad and to return to the country, to move his good within the country and to bring them to it, or to take them out; all without any other limits except those established by statute. No public authority act can order for a Venezuelan citizen to be expelled from the country, which cannot be imposed as a punishment.

II. THE GENERAL CONSTITUTIONAL REGIME ON GUARANTIES OF RIGHTS

1. The constitutional guaranties of fundamental rights

But in addition of enumerating fundamental rights, the latin American Constitutions have also included in the constitutional texts provisions establishing guarantees of such rights.

In this regard, the Venezuelan Constitution of 1999 incorporated a very import set of norms concerning the constitutional guarantee of human rights, including freedom to travel and of movement, and to establish residence; that is, the legal or judicial instruments and means that are designed to implement and allow the effective exercise of the protected rights.[53] As an example, the Venezuelan Constitution can also be highlighted.

The most important one of these guarantees is the right every person has to be equal before the law, and consequently, the prohibition established in the Constitution to any kind of discrimination based on race, sex, cult, social condition or any that could have the purpose of

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[53] See generally, R. Brewer-Carías, *El derecho y la acción de amparo, Instituciones Políticas y Constitucionales,* Tomo V, Caracas, 1998, pp. 11 ff..

annulling or diminishing the enjoyment and exercise of rights and freedoms in equal conditions (article 21).

In addition, the Constitution broadly regulates the proscription against *ex post facto* or retroactive laws (art. 24); the guarantees of the nullity of State acts issued in violation of the Constitution (supremacy principle), and of State officials' personal liability for such violations(art. 25); the guaranty of the judicial due process of law and the right to have access to the judicial system in order to obtain protection not only of personal rights, but also of collective and diffuse rights (article 26).[54] Also, the constitutional right to enjoy judicial protection (amparo) of constitutional right (article 27) [55]; and finally, the constitutional right to judicial review.

For these purposes, the Article 26 of the Constitution additionally establishes general principles for the judicial system, in the sense that the State must guaranty free, accessible, impartial, adequate, transparent, autonomous, independent, accountable, equitable, expeditious justice, with decisions that must be without undue or dilatory delay, or unnecessary formalism.

The most important of all of the constitutional guarantees, in addition to the accessibility to the justice system, is the requirement that justice must be decided according to the provisions established in the Constitution and laws, that is to say, through the application of the due process of law principles, which are set forth in a detailed manner in Article 49 of the Constitution, as follows: the right to self defense; the presumption of innocence; the right to be heard; the right to adjudication by a natural judge (*por su juez natural*), who must be competent, independent and impartial; guarantees of fair confession; the principle *nullum crimen nulla poena sine lege;* the principle non *bis in idem,* and the guarantee of State liability for judicial delays or errors.

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[54] With respect to collective and diffuse rights, see, Allan R. Brewer-Carías, *Jurisdicción contencioso-administrativa, Instituciones Políticas y Constitucionales,* Tomo VII, Caracas, 1997, pp. 83 ff.

[55] See Allan R. Brewer-Carías, *El Derecho y la acción de amparo, cit.* pp. 163 ff.

But among all of these constitutional guarantees of human rights, others important one is the guarantee of *reserva legal*, that is, that limitations and restrictions upon these rights can only be established through the enactment of formal legislation[56]. And "legislation" in the terms of this constitutional guarantee, can only be an act emanating from the National Assembly acting in its capacity as the Legislative Body (*Cuerpo Legislador*) (art. 202). Therefore, the only sort of government acts that can restrict or limit constitutional guaranties are the statutes, as it is also established in Article 30 of the American Convention on Human Rights.

Regarding this principle, the Inter-American Court of Human Rights, in its consultative opinion OC-6/86 of March 9th, 1986, has formally decided that the term *"leyes"* in Article 30 of the Convention means only legislation emanating from "constitutionally established and democratically elected legislatures"[57].

Unfortunately, this guaranty have been contradicted in the very text of the Venezuelan Constitution of 1999, by regulating the possibility for the national Assembly to "delegate legislative power" to the President of the Republic through the so-called "enabling laws" (art. 203). These confers upon the President the power to dictate "decree-laws" with legal rank and effect of national legislation (statutes) in any subject area (art. 236,8), and not only on economic and financial matters in case of urgency as was established in article 190,8 of the 1961 Constitution.

This new legislative delegation system has precisely opened up a constitutional pathway to the violation of the *reserva legal* that, as

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56 See Allan R Brewer-Carías, "Consideraciones sobre la suspensión o restricción de las garantías constitucionales", in *Revista de Derecho Público,* Nº 37, Caracas 1989, pp. 6 - 7.

57 See "La expresión "leyes" en el artículo 30 de la Convención Americana sobre Derechos Humanos" (Opinión Consultiva, OC-6/86) Corte Interamericana de Derechos Humanos, in *Revista IIDH*; Instituto Interamericano de Derechos Humanos Nº 3, San José 1986, pp. 107 ff.

stated, is the most important constitutional guarantee with regard to the legal protection of, and the protection of the exercise of, human rights. The fact is that in Venezuela, from 2002 to 2008, all the substantive important statutes have been sanctioned by decree-laws, without participation of the Assembly and without any sort of consultation of participation of civil society.

On the other hand, within the constitutional guarantees,[58] Article 29 of the Venezuelan Constitution compels the State to investigate and legally sanction offenses regarding violation of human rights committed by State authorities; and article 30 of the Constitution sets forth the obligation for the State to compensate the victims of violations of constitutional rights committed by authorities, including compensation for damages and losses for human rights violations. To this end, the Constitution also requires the State to adopt legislation to render effective this compensation.

The international effect of the constitutional guarantees is also established in Article 31 of the Constitution which regulates the people's right to access to the international justice system for the protection of human rights by providing the right of every person to file before international bodies established for the protection of human rights, petitions seeking protection.[59] In the same respect, the Constitution establishes the obligation of the State to adopt those necessary measures to fulfill decisions emanating from those international organs, in conformity with procedures established in the Constitution and laws.

Finally, among all the guarantees of constitutional rights, the fundamental and basic one is, of course, the judicial guaranty, that is, the possibility of bringing claims before the courts in order to assure that such rights are protected, preventing its violation or restoring the affected party in its exercise. For that purpose, many Constitutions also

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58 See Allan R. Brewer-Carías, *Debate Constituyente,* Tomo II, cit., pp. 104, 106, 107

59 See Carlos M. Ayala Corao, *Del amparo constitucional al amparo Interamericano como Institutos para la protección de los Derechos Humanos,* Editorial Jurídica Venezolana-Instituto Interamericano de Derechos Humanos, Caracas 1998.

expressly establishes as a constitutional right in itself, the citizens' right to have access to justice and to obtain judicial protection and enforcement of them. So in this matter, the very essence of the system of guarantees of constitutional rights is the existence of a Judiciary which in an independent and autonomous way, can effectively protect human rights.

2. *General Approach to the Judicial Guaranties of Human Rights*

This judicial protection and guarantee of constitutional rights and freedoms, as aforementioned, 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 law codes; and second, in addition to those general adjective means, through specific and separate judicial suits, actions, recourses or remedies specifically and particularly established for the protection of constitutional rights and freedoms and to prevent and redress wrongs regarding those rights.

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. Consequently, in these countries, the judicial guarantee of constitutional rights can be achieved through the general procedural regulations that are established in order to enforce any kind of personal or proprietary rights and interest, as for instance is the case in the United States and in Europe; or it can also be achieved by means of a specific judicial proceeding established only and particularly for the protection of the rights declared in the Constitution. This last solution can be considered as the general trend in Latin America, mainly because the traditional insufficiencies of the general judicial means for granting effective protection to constitutional rights.

In almost all the Latin American countries, the Constitutions have established an specific judicial mean for the judicial protection of human rights, and in some cases, like in Venezuela, by establishing the right of every person to be protected by the courts in the enjoyment

and exercise of constitutional rights and guarantees, including those inherent to persons not expressly mentioned in the Constitution or in the international instruments on human rights (article 27).

Accordingly, the action of amparo and habeas corpus for the protection of personal freedom and liberty, have been established in Latin American Constitutions, although some have used the term *tutela* or *protección* to name the amparo proceeding. Also, some Constitutions have also set forth for a separate "habeas data" recourse, in order to guaranty the peoples' right to have access to the information and data concerning the claimant contained in official or private registries or data banks, as well as to know about the use made of the information and about its purpose, and to petition before the competent court for the updating, rectification or destruction in cases of erroneous records and those that unlawfully affect the petitioner's rights (Article 28).

These particular trend of the judicial guaranties for the protection of human rights in Latin America, contrast with the situation in the United States and in Europe.

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

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

This distinction between Law and Equity in order to construct two judicial system of courts, traditionally inherent to the anglo-american legal system, is the consequence of the distinction between causes at law and actions in equity and between the legal remedies as opposed to equitable ones; the latter being the ones in which the judicial resolu-

tion "does not come from established principles but simply derives from common sense and socially acceptable notions of fair play"[60].

Both are used for the protection of al kind of rights[61], so that there are no specific remedies conceived for the protection of constitutional rights. They are all remedies that can and are also commonly used indistinctly for the protections of all rights, in the sense of being based on statutes or contracts or derived from common law, and also constitutional ones.

The most common of these remedies in the United States, are the equitable remedies, particularly the injunctions, through which a court of equity can adjudicate extraordinary relief to an aggrieved party, consisting of an order by the court commanding the defendant or the offender party to do something or to refrain from doing something. They are called coercive remedies because they are backed by the contempt power, that is to say, the power of the court to directly sanction the disobedient defendant.

Regarding the protection of civil or constitutional rights, these extraordinary coercive remedies are the ones that have been used in the United States, and among them, the writ of injunction,[62] that can be preventive (mandatory or prohibitory), and the restorative[63].

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

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

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

63 Regarding the preventive injunctions, they are "preventive" in the sense that they tend to avoid harm, so they are not equivalent to the preliminary injunctions. This is important to be stressed in order to avoid wrongs, particularly when comparing with the civil law countries institutions, because in Spanish language, the expression *medidas preventivas* (preventive measures) is used to identify what would be "preliminary or interlocutory injunctions" and not "preventive" injunctions. Thus, in our countries, preventive measures" ("*medidas cautelares o preventivas*") are judicial preliminary orders issued to preserve the status quo or to restore the factual situation during the development of the

But other than the injunctions for the protection of freedoms and constitutional right, particularly against government actions, the other extraordinary remedy in the United States -following the long British tradition-, has been the writ of habeas corpus, the oldest judicial mean for the protections of life and personal integrity, employed to bring a person before a court in order to proof or certify that he is alive and in good health, or to determine that his imprisonment is not illegal.

In conclusion, no specific judicial means are designated in the United States for the protection of human rights, contrary to what happens in Latin America with the "amparo" action.

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

The same occurs, in general, in Europe, where the protection of human rights is also assured by the general judicial means, and in particular by the extraordinary preliminary and urgent proceedings established in the Procedural Codes devoted to prevent an irreparable injury from occurring, which can be issued before or during a trail and before the court has the chance to decide the merits on the case. Only in Austria, Germany, Switzerland and Spain it can be found a judicial mean similar to the Latin American "amparo" recourse for the protection of fundamental rights.

Except these cases, in general terms the courts in Europe generally protect rights by mean of the ordinary or extraordinary judicial procedures, like the French *référé*, the Italian extraordinary urgent measures and the precautionary measures ("*medidas cautelares*") regulated in the Civil Procedure Codes, all of them, conceived as procedural institution used for the protection of presonal rights, including constitutional rights.

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specific trial, similar to the interlocutory injunctions (preliminary injunctions and temporary restraining orders) in the United States.

For instance, the *référés*, in general terms, are designated to preserve the status quo in order to prevent irreparable damages before the court decides the substantive merits of a dispute[64]; and also to prevent imminent damages or to stop illicit actions, including orders issued to the plaintiff to accomplish particular duties if the obligations is proved.

These *référés* in France are general procedural means to seek judicial protection of any rights, and not only constitutional or human rights; but regarding the latter, they have been used successfully to protect them. For instance, regarding the protection of the constitutional right to privacy, and particularly to the individual right of a person to his own image[65]; and regarding the protection to constitutional rights against public official actions, like the constitutional right to free enterprise [66]. The référé has also been used in France for the protection of property rights, for instance, regarding industrial factories against illegal occupation of its premises by the workers[67].

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

65 It as was a case in 1980, of a judicial decision ordering the *Reader's Digest* magazine that published in the front cover of one of its issues, the photo of a doctor showing him practicing medicine, -ordering- to publish in the following issue, a notice indicating that the affected doctor never gave his consent for the publication of his photograph in the previous issue. See the references in Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile l990, pp 22-23

66 In a case decided in 1983, such right was protected against the limits imposed by the *de facto* actions (*voi de fait*) adopted by a city Mayor without any previous formal administrative procedure, ordering the Mayor to restore the situation of the affected party had before the arbitrary municipal action was taken. See Enrique Paillas, *El recurso de protección ante el derecho comparado,* Santiago de Chile, l990, p. 26

67 In such cases, the Courts, even though recognizing the workers constitutional right to strike, in protection of the property rights of the owners of the factory and their rights to have access to their property, considered illegal the *de facto* occupation of the premises by the workers (*voi de fait illegal*), contrary to the owners rights, that prevented the continuation of work and impede the free entrance to the buildings. In similar situations, injunction has been issued in the

In Italy, the judicial mean equivalent to the French référé is the proceeding in case of urgency set forth in the Civil Procedural Code within the precautionary measures, that can be seek by a party which fears that during the term taken by an ordinary process to enforce his rights, they can be threatened by an imminent and irreparable prejudice or losts. In such cases, the person may go before the court asking for the necessary urgent decisions that, according to the circumstances, could be suitable in order to provisionally assure the effects of the decision on the merits. This procedure has also been used for the protection of constitutional rights such as the right to protection of health, environmental rights, rights to have a name and right to one owns' image[68]

These so called innominated precautionary judicial powers have also been regulated in the Latin American civil procedure codes, and have been successfully applied in many countries. But, previous to their development, whether because they were not generally attributed to ordinary judges, or because the inefficiency of the Judiciary to effective protect constitutional rights, the general trend in almost all of Latin America since the XIX Century has been the progressive regula-

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United States, even brought before the courts by the Attorney General asking for the protection of property rights of the United States regarding mail, and the protection of freedom of interstate commerce and of transportation of the mail, against striking workers members of the American Railway Union who in 1894 had sit in the railroad premises paralyzing the traffic in Chicago. Without challenging the workers right to quit work and without interfering with the organization of labour, the court considered that the strike interfered with the operation of trains carrying mail and with interstate commerce, and ordered the end of the sit in. In the well known *In Re Debs* case 158 U.S. 564, 15 S.ct. 900,39 L. Ed. 1092 (1895), the Supreme Court set forth the basic principles of injunctions, particularly regarding the power the courts have to punish the disobedience of its injunctive rulings by imposing fines and ordering imprisonment for contempt. See Owen M. Fiss and Doug Rendelman, *Injunctions,* The Foundation Press, Mineola new York 1984, pp. 13

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

tion of the amparo action as a special judicial means exclusively set forth for the protection of constitutional rights.

C. The European "amparo" actions

As aforementioned, in Europe, in addition to the general ordinary or extraordinary judicial procedures, some countries have developed a specific recourse or action for the protection of fundamental rights. Is the case in Austria, Germany, Switzerland and Spain, where a specific judicial means for the protection of some constitutional rights has been regulated, particularly as a consequence of the adoption, in the 20's and under Hans Kelen influence[69], of the concentrated method of judicial review, resulting in the creation of Constitutional Courts or Constitutional Tribunals. These Courts were empowered not only to act as a constitutional judge controlling the constitutionality of statutes, executive regulations and Treaties, but also to grant constitutional protection to individuals against the violation of fundamental rights.

The first protective action was established in 1920, in Austria, where any individual has the right to bring before the Constitutional Tribunal, recourses or complaints against administrative acts when the claimant alleges that they infringe rights guaranteed in the Constitution (art. 144).

This was the origin of the development of a special judicial means for the protection of fundamental rights in Europe, although with a concentrated character (because the actions are filed before one Constitutional Court), which establishes the difference with Latin American "amparo" recourses that in general terms are filed before all the first instance courts.

The Austrian model influenced the establishment of the other concentrated system of judicial review in Europe. It happened in the same

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

year in Czechoslovakia, and in 1931 in the Second Spanish Republic, where the Constitution of that year (December 9 1931) created a Tribunal of Constitutional Guarantees(70), with the exclusive powers to judge upon the constitutionality of statutes, and additionally, to protect fundamental rights by means of a recourse of constitutional protection called "*recurso de amparo*". Some authors have also found some influence of the Mexican "amparo"[71] on the Spanish one, which disappeared after the Spanish Civil War.

After the Second World War, also following the Austrian model, the 1949 Constitution of Germany created a Federal Constitutional Tribunal as the "supreme guardian of the Constitution"(72), empowered to decide in a concentrated way, not only regarding the abstract and concrete control of constitutionality of statutes, but also to decide constitutional complaints for the protection of a fundamental right. This complaint or recourse can be brought before the Federal Constitutional Tribunal against judicial decisions considered to have violated the rights and freedoms of a person because applying a statute which is alleged to be unconstitutional (Art. 93, 1, 4,a) FCT Law).

In Switzerland, a recourse for the protection of fundamental rights was also established to be filed before the Federal Court, and more recently, in the Spanish 1978 Constitution. In the latter, a Constitutional Tribunal was created, establishing a concentrated method of judicial

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

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

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

review [73], and in addition empowering to decide the "recourse of unconstitutionality against laws and normative acts with force of law" (Article 161,1 a Constitution), it has also been empowered to decide the *recursos de amparo* for the protection of constitutional rights. These recourses that can be directly brought by individuals before the Constitutional Tribunal, when they deem their constitutional rights and liberties have been violated by administrative acts, juridical decisions or by simple factual actions from public entities or officials (Article 161, 1, b, Constitution; Article 41, 2 Organic Law 2/1979[74], and only when the ordinary judicial means for the protection of fundamental rights have been exhausted (Article 43, 1 Organic Law 2/1979). Consequently, the recourse for *amparo* in general results in a direct action against judicial acts [75] and can only indirectly lead to judicial review of legislation when the particular state act challenged by it is based on a statute considered unconstitutional (Art. 55,2 Organic Law 2/1979).

A general trend that can be identify in all these European "amparo" recourses, in contrast with the Latin American institution, is that it is conceived as a concentrated judicial mean for the protection of fundamental rights against State actions, by assigning the power to decide them to a single Constitutional Tribunal; and only to protect certain constitutional rights listed in the Constitutions as "fundamental" rights, more or less equivalent to civil or individual rights; and only against authorities administrative or judicial acts. This framework contrast with the Latin American amparo proceeding, which I am going to study in the Third Lesson of this Course.

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

74 This recourse for the protection of fundamental rights can only be exercised against administrative or judicial acts as well as against other acts without force of law produced by the legislative authorities. Art. 42 Organic Law 2/1979.

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

III. CONSTITUTIONAL RIGHTS AND GUARANTIES OF ALIENS IN THE VENEZUELAN LEGISLATION

Latin American Constitutions, as all contemporary ones, establish a basic distinction regarding the status of persons, between national or citizens and aliens. As persons or human beings, they all have the same rights without discrimination of any kind, except for political rights that are reserved to nationals or to citizens.

In this context and in order to analyze the general constitutional and legal regime applicable to aliens and particularly to migrants, I will refer, as an example in latin America, to the Venezuelan constitutional and legal system.

1. Constitutional and Legal Status of Persons regarding Nationality or Citizenship

The Venezuelan Constitution, as mentioned, establishes a basic distinction regarding persons between citizens (national) and aliens.

A. Venezuelan citizenship

Citizens are the venezuelan nationals; citizenship being the political bond existing between a person and the State that allows a person to participate in the political system. That is why article 39 of the Constitution, declares that only Venezuelan "exercise the citizenship and, therefore, are entitled to political rights and duties as per this Constitution."

This provision has been repeated in Article 50 of the 2004 Nationality and Citizenship Statute[76] specifying that "citizens are those Venezuelans not subject to political impedment or to civil interdiction

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[76] See *Official Gazette*, No. 37971 of July 1st , 2004. See the text in Allan R. Brewer-Carías, *Régimen Legal De La Nacionalidad, Ciudadanía Y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Colección Texto Legislativos Nº 31, 1ª edición, Editorial Jurídica Venezolana, Caracas 2005, pp. 87 ff.

and fulfill the age requirements foreseen in the Constitution and in the statutes." These age conditions difer regarding the corresponding political right to be exercised. For example, to vote, it is enough to be older than 18 years old (Art. 64), but to be elected Governor of a State of the federation it is necesary to be older than 25 years old (Art. 160); to be Congressmen to the National Assembly and to a State Legislative Council, it is necesary to be older than 21 years old (Arts. 188 and 162); to be Mayor of any Municipality, 25 years old (Art. 174); to be President and Vice President of the Republic, older than 30 (Arts. 227 and 238); as well as to be People's Defender (Art. 280) and General Controller of the Republic (Art. 288); and to be Minister, older than 25 (Art. 244).

Furthermore, as regards the Justices to the Supreme Tribunal of Justice (Art. 263), the Attorney General (Art. 249) and the General Prosecutor of the Republic (Art. 284), the Constitution requires to be at least 35 years old, which is set forth in the conditions to exercise such positions.

B. Migrants and non migrants aliens

All other persons in Venezuela not being Venezuelans are considered aliens. In this sense, article 3 of the 2004 Aliens and Migration Statute,[77] provides that all those who are not considered to be Venezuelans are legally considered to be foreigners or aliens.

Aliens, according to the same Statute, and regarding their access and permanency in the territory of the Republic, can be admitted in two categories: as non migrants or as migrants.

As to the non migrant aliens, these are the people who enter the territory of the Republic to remain in it for a limited time of 90 days, without having the intention to establish his or his family's permanent

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[77] See in *Official Gazette* No. 37.944 of May 24, 2004. See the text in Allan R. Brewer-Carías, *Régimen Legal De La Nacionalidad, Ciudadanía Y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Colección Texto Legislativos Nº 31, 1ª edición, Editorial Jurídica Venezolana, Caracas 2005, pp. 101 ff.

residence in it. These non migrant aliens can not perform activities that involve remuneration or profit.

As to the migrants, they are those aliens who enter the territory of the Republic to reside in it temporal or permanently,[78] being then classified in two categories: temporary migrants and permanent migrants (Art. 6). The temporary migrants, are those entering the territory of the Republic with the intention of residing in it temporarily while the activities that origin their admission last; and the permanent migrants, those who have authorization to remain indefinitely in the territory of the Republic.

These migrants are basically the "migrant workers", defined in the International Conventions on Migrant Workers as the "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."[79]

C. Aliens with status of refuge and asylum

But in addition to the status of migrants and non migrants aliens, article 69 of the Constitution set forth in the section related to political rights, "that the Bolivarian Republic of Venezuela acknowledges and guarantees the right of asylum and refuge." Therefore, in addition to

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[78] As established in article 3 of the Statute governing aliens and migration of 2004 (*Official Gazette* Nº 37.944 of 05-24-2004). This Statute derogated the Aliens Statute of 1937 (*Official Gazette* Nº 19.329 dated August 3, 1937), the Statute about Alien activities in the Venezuelan territory of 1942 (*Official Gazette* Nº 20.835 dated June 29, 1942) and the Immigration and Colonization Statute of 1966 (Extraordinary *Official Gazette* Nº 1.032 dated July 18, 1966), as well as all other dispositions that violate it.

[79] See for instance article 2,1 of the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, Adopted by the General Assembly at its 45th session on 18 December 1990 (A/RES/45/158).The same definition is contained in the IOL *Covenant on Migrant Workers* (1949), in effect in Venezuela since 1983, in which in addition is clarified that the Covenant is not applicable to "border workers", the entry for a short period of time of artists or persons exercising liberal professional activities, and people of see (Article 11,2).

the non migrants and migrants aliens, two other categories of aliens can be identified in Venezuela internal law, the refugees and asyled aliens, following the provisions of the 2001 Organic Statute on Refugees and Asyled[80].

a. Asylum

Pursuant to article 38 of this Statute, the asylum statut is granted to aliens the State considers to be persecuted due to their beleives, opinions, or political affinities, or due to acts that might be considered as political crimes, or to common crimes committed with political purposes.

The Venezuelan State, exercising its sovereignity and as per the international treaties, conventions and agreements ratified by the Republic, shall grant asylum within its territory to a person persecuted for political reasons or crimes (art. 38), once the nature of such is qualified (art.39) (territorial asylum).

The State, shall also grant asylum to a person seeking it before diplomatic missions, Venezuelan war ships, or military aircrafts, as per international treaties and conventions on the matter of which Venezuela is part (article 40 of the Organic Law) (Diplomatic asylum).

On the other hand, asylum cannot be granted, to a person accussed, processed or convicted before ordinary competent Courts due to common crimes, or having committed crimes against peace, war crimes, or crimes against mankind, as defined in international treaties (article 41 of the Organic Law).

All these provisions related to the asylum, according to article 24of the Organic Law, shall be construed pursuant the 1948 Universal Declaration of Human Rights, and the 1954 Caracas Convention on

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80 See in *Official Gazette* No. 37.296 of October 3, 2001. See the text in Allan R. Brewer-Carías, *Régimen Legal de la Nacionalidad, Ciudadanía y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Colección Texto Legislativos Nº 31, Editorial Jurídica Venezolana, Caracas 2005, pp. 117 ff

Territorial Asylum and other provisions of international treaties on human rights, duly executed and ratified by the Government of Venezuela.

b. Refugees

The same Organic Statute on Refugees and Asyled also establishes, regarding the regugee status, that the Venezuelan State shall grant refugee status "to every person recognized as such by the competent authority, in virtue of having entered in the national territory due to persecution because of his or her race, gender, religion, nationality, membership in a social group or political opinion, and is outside his or her home country and shall not or does not want to be protected by that country, or that, having no nationality, shall not or does not want to return the country where he or she has his residence." (article 5).

The main legal trend regarding the refugee status is that according to the Law, no person asking refugee protection shall be punished due to illegal entrance or stay in the national territory, provided that he or she appears without delay before the national authorities, and plea just cause (Art. 6). Additionally, a person making a refugee protection claim shall not be denied admission or subject to a measure forcing him or her to return to the country where his or her life, physical integrity or personal freedom is jeopardize (due to the reasons set forth in article 5 of the Law). However, these benefits shall not be granted to an alien considered, due to well-founded reasons, a danger for the Republic's security or that having been convicted for a serious crime, he or she represents a community threaten (Art. 7).

Moreover, according to the Statute, every alien claiming Venezuelan State protection as refugee, shall be admitted in the national territory and shall be authorized to stay in it until his or her claim be decided, including a reconsideration period. However, an alien considered, due to well-founded reasons, a danger for the Republic's safety or that having been convicted for a serious crime, is a threaten to the community, cannot claim these benefits (art. 2).

On the other hand, the refugee protection, as per article 9 of OLRA, shall not be granted to aliens in the following cases: 1. When the alien comitted a crime against peace, war crimes or crimes against mankind, as defined in international treaties; 2. When the alien committed common crimes outside the country granting refugee protection that are not compatible with the refugee status; and 3. When the alien commited acts against the principles of the United Nations Organization.

All these internal provisions related to the refugee status, according to article 4 of the Organic Law, shall be construed pursuant the 1948 Universal Declaration of Human Rights, 1967 Protocol on the Status of Refugees, the 1969 American Convention on Human Rights, and other provisions of international treaties on human rights, duly executed and ratified by the Government of Venezuela.

c. Common regime

Pursuant article 2 of the Organic Law, Venezuela acknowledges and guarantees the right of asylum and refugee, according to the following principles:

1. Every person is able to file a refugee protection claim in the Bolivarian Republic of Venezuela, due to well-founded fear to be persecuted by the reasons and the conditions set forth in the 1967 Protocol on the Refugee Statuts.

2. Every person is able to make a refugee protection claim in the Bolivarian Republic of Venezuela as well as in its diplomatic missions, war ships and military aircrafts abroad, when persecuted for political reasons or crimes in the conditions set forth in that Law.

3. No person claiming asylum or refugee protection shall be neglected or subjected to any measure that force him or her to be repatriated to the territory where his or her life, phisycal integrity or freedom is jeopardize due to the reasons set forth in that Law.

4. Authorities shall impose no punishment due to the irregular entrance or stay in the territory of the Republic on persons that claim

refugee protection or asylum, pursuant the terms set forth in the Constitution.

5. Discriminations based on race, gender, religion, political opinions, social condition, country of origin or those that in general lessen or annulled the acknowledge, enjoy or excercise in equal situation of the refugee or assylee condition of every person shall not be permitted.

6. The unity of a refugee's or assylee family shall be guaranteed, and speccially, the protection of children refugees and teenagers without company or separated from the family, in the terms set forth in the Law.

All the procedures set forth in the Law to grant refugee and asylum protection are subject to the principles of accesibility, orality, swiftness and freeness (art. 3).

Regarding refugees, according to article 22 of the Organic Law, they hold in the territory of the Republic the same rights foreigners have with the limitations set forth in the Constitution and laws. A refugee, moreover, is entitled to request assistance before the Office of the High Commissioner of the United Nations for Refugees or before any other entity, public or private, national or international. (art. 23).

On the other hand, refugees shall receive all sort of help to process his or her Venezuelan citizenship (art. 26). The Executive Regulation to the Organic Law turns this provision into a right when pointing out that "Every alien staying in the country with a refugee status is entitled to petition for the Venezuelan nationality by naturalization in the terms set forth in the Constitution of the Bolivarian Republic of Venezuela and the laws ruling the matter" (Art. 18)[81].

On the other hand, regarding duties, the asylee admitted in the national territory shall comply the Republic's Constitution and laws, and cannot participate in political matters or in any other matter compromising national security or the Venezuelan State interests

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[81] Decrree No. 2491, *Official Gazette* No. 37.740 of July, 28, 2003

(Art.44). Regarding refugees, article 24 of the Organic Law set forth also that those with refugee status in the Republic shall obey the Constitution and laws and not intervene in political or any other matters compromising the national security and internal or external Venezuelan interests. Addittionally, refugees are forced to notify the National Commission for Refugees of every change of residence within the national territory (Art. 25). Moreover, as per article 17 of the By Law, a refugee cannot leave the country without written authorization issued by the National Commission for Refugees, which shall have an up dated file with every authorization granted.

2. General Legal Regime regarding Migrant Aliens

Venezuela, particularly during the twentieth Century, has been a country of immigrants. First after World War II when a huge flow of peoples arriving from Italy, Spain and Portugal was incorporated in the activities of the country, contributing in a very important way to its social and economic development, producing a completely integrated and mixed population. Second, since the seventies', with the arrival in the country of an important flow of citizens from other Latin American countries, like Colombia, seeking employment and other economic better conditions. An important contingent of these latter migrants has been illegal immigrants.

1. General Legal regime

Notwisthanding the special provisions referred to refugees and asyled aliens, the general rgime regarding all aliens is established in the 2004 Aliens and Migration Statute[82], which applies to all foreigners located within the territory of the Republic nothwisthanding their migratory condition (Art. 2).

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[82] See Allan R. Brewer-Carías, "*Legal Situation of Migrants in Venezuela* (*La situación jurídica de los migrantes*), National Report for the XVII International Congress of Comparative Law, International Academy of Comparative Law, Utrecht, 16-22 de julio de 2006. See in www.allanbrewercarías.com (Section I,1, 2006).

The only exception to this general rule are "diplomatic and consular representatives, members of diplomatic missions and consular offices, representatives, delegates and other members of international bodies and specialized organizations of which the Republic and their families are part of, accredited before the National Government" (Art. 4); to which such regime does not apply.

This general regime established in the Law provides for everything related to the admission, entry, stay, registry, control and information, departure and reentry of foreigners in the Republic's territory, as well as their rights and duties. Consequently, the 2004 Law repealed the 1937 Aliens Law, the 1942 Law on Aliens' Activity in Venezuelan Territory and the 1966 Immigration and Colonization Law, as well as every other provision contravening it.

On the other hand, regarding Indigenoues people sharing the boundaries with Colombia and with Brazil, article 60 of the Statute, aiming at facilitating their cultural integration as well as their rigth to practice their values, uses and customs, impose the country with the need to enter into agreements with those countries in order to promote the cultural unity and the preservation of their life style.

B. Admission system for migrant aliens

a. Necessary documents for admission

The basic condition for a migrant alien to be admitted, to entry, reentry and to remain in the territory of the Republic, is to have a valid passport, with the respective visa or other document authorizing the entry or permanence in the territory of the Republic, according to the applicable statutes and international treaties signed and ratified by the Republic of Venezuela (Art. 7).

For such purpose, aliens must present themselves at the entry Terminal "with their passport with a valid visa or a document authorizing their entry or permanence in the territory to the Republic" (article 10 of the Statute).

In the case of an alien representative of any religion or cult who enters the territory of the Republic to perform religious activities or any other activity related to it, he must obtain the respective authorization, accrediting his condition, from the National Executive through the competent authority (Art. 11).

b. Entry control of aliens

It is up to the competent authorities in matters of aliens and migration located in ports, airports and border zones, to impede the entrance to the territory of the Republic, of those aliens who do not comply with the requirements established by the Statute for their legal entry into the country (Art. 12). Exception is made in cases set forth in international agreements signed by the Republic exonerating aliens from complying with any of the requirements for their entry, established by the Statute. This is the case of persons seeking refuge that could not be rejected or be subjected to any measure implying his return to the territory where his life, physical integrity and personal freedom be at risk due to the factors enunciated in article 5 of the Refugee and Asylum Statute (article 7 of the same Statute).

c. Entry and departure places for aliens

The entry and departure of aliens from the territory of the Republic can only be made through Terminals legally authorized for said effects.

In case of emergency or proved need, said legally authorized places can be temporarily closed for traffic of people and, in this case, in accordance to article 9 of the Statute, the act containing this measure must be issued following the provisions regarding estates of exception situations. This act must be dully motivated in the facts as well as in the law on which it is based. In consequence, in order to have the "closing of borders", the respective Act must occur in the frame of the state

of exception regulated by articles 337 of the Constitution and the State of Exception Organic Statute[83].

d. The negative towards the admission of aliens

Aliens, who are compromised in the following cases listed in article 8 of the Statute, can not be admitted into the territory of the Republic:

1. When his presence can cause alteration of the domestic public order or compromises the international relations of the Republic, because being requested by foreign police or judicial authorities, for common criminal causes or for being connected to national or international criminal organizations.

2. When they have been deported from the territory of the Republic and the prohibition of entrance into the country is still in effect.

3. When they have committed a felony qualified and punished by Venezuelan laws, in cases when they have not served their sentence, or the action or penalty has not prescribed.

4. When they had committed violations of Human Rights, Humanitarian International Law or of the dispositions content in international instruments of which the Republic is part of.

5. When they are involved in the traffic of drugs or psychotropic substances or performing similar activities.

6. When they suffer from infect-contagious diseases or others that might risk public health.

C. The Labor Authorization System

a. Prohibition for Non Migrant Aliens to perform a Remunerated Activity.

As previously said, the non migrant alien category correspond to those who enter the country with the purpose of staying for a 90 day limited time, without having the intention of setting permanent resi-

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[83] Organic Statute of Exception Status (Statute N 32), O.G. Nº 37.261 de 08-15-2001.

dence for him or his family in it. The Statute establishes, in general, that they can not perform activities that involve remuneration or profit.

However, the Statute establishes exceptions by regulating labor authorizations, and establishing in its article 17, that non migrant aliens in the following cases do not require labor authorizations for the exercise and activities that motivate their granting:

1. Scientifics, professionals, technicians, experts and specialized personnel who come to counsel, provide training or perform temporal labor, for a period of no more than ninety (90) days.

2. Technicians and professional invited by public or private entities to perform academic, scientific or research activities, as long as these activities do not exceed the ninety (90) day period.

3. Those that enter the territory of the Republic to develop activities protected by cooperation and technical assistance agreements.

4. Workers of foreign media dully accredited for the exercise of informative activities.

5. Members of international scientific missions performing research works in the territory of the Republic authorized by the Venezuelan government.

b. Labor Authorization in cases of Migrant Workers

Article 16 of the Statute set forth that every person who enter the territory of the Republic under a work contract, must obtain the labor authorization from the Ministry of Labor. The procedure to obtain the corresponding authorization must be performed by the alien, through his contracting party, in the territory of the Republic.

In case of working aliens who want to be contracted by a public enterprise (that belong to the Republic, the States and Municipalities), they must also obtain the corresponding labor authorization (Art. 19).

The visa authorizing the permanence of the aliens in the territory of the Republic must have the same length of duration as the labor authorization and must be renovated when the circumstances that determined its issuance, persists (Art. 20).

In the cases of the employment of aliens workers for agriculture, fishery and cattle rising, in specific areas and for a specific period of time, corresponds to the Ministries of Lands, of Labor and Production and Commerce, to issue the respective procedures, trough joint resolution (Art. 18).

D. Control of Migrant Aliens

a. Competent administrative entity

The Government authority with attributions in the area of governing aliens and migration, according to Decree N° 5.246 dated March 20, 2007 about Organization and Functioning of the Central Public Administration[84], is the Ministry of the Interior and Justice. This Ministry is therefore, the national migratory authority in charge of the admission, entrance, permanence, registry, departure and reentry of aliens. However, the Ministries with competence in the areas of Foreign Affairs, and Defense and Labor, must help in the execution of the objectives of the Statute.

Another regulated body in the Statute is the National Migration Commission which, according to article 28, has the object of advising the National Executive to comply with the functions established in the Statute.

This National Migration Commission is integrated by the Minister of the Interior and Justice, who presides it and by a representative of the Ministries with competence in Foreign Affairs, Defense, Education, Fishery, Agriculture, Cattle rising, Production, Commerce and Labor.

b. The National Registry of Aliens

Article 21 of the Statute created the "National Registry of Aliens" (both male and female) in the Ministry of the Interior and Justice.

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84 *Official Gazette* Nº 38.654, March 28, 2008.

The Ministry of the Interior and Justice, in exercise of its control functions, must continuously update the statistics about both female and male aliens in the territory of the Republic, independently of their migratory category (Art. 27).

c. The Obligations to Inform

- *The duty of hotel, boarding houses and lodging places .*

Owners or administrators of hotels, boarding houses or lodging places must keep a registry of their alien users, specifically about their nationality; and this information must be sent every 8 days to the National Registry of Aliens (art. 25).

- *The duty of the owners or administrators of transport businesses*

Owners or administrators of the passenger transportation and national and international tourism companies must keep a registry of their alien users; this information must also be sent every 8 days to the National Registry of Aliens (art. 26).

- *The duties of the employers of alien people*

Every employer of an alien person must demand from him/her to furnish identification documents and must inform the National Registry of Aliens, in writing, the terms and conditions of the labor relation, as well as its termination within a 30 day period following the respective event (article 24).

Additionally, every employer or contractor of aliens workers must agree before the competent authority in the matter of aliens and migration, to pay for the return ticket of the alien and his/her family, if that was the case, back to his/her country of origin or of last residence, within the following month of the termination of his contract.

- *The duty of the civil registry authorities*

The civil authority before which a change of the civil status of an alien is performed, must inform the National Registry of Aliens of it, within an 8 day period after the event (art. 22).

- *The duty of prisons institutions*

The directors of the prisons must send every 3 months an updated list of the alien persons imprisoned for having been found guilty by final judgment (art. 23).

E. Expedite procedure for the Legalization of Ilegal inmigrants (2004)

In 2004, months before a recall referendum regarding the Presiden of the Republic took place, and before the new laws on Nationality and Citizenship and Foreigners and Migration enter into force, an Executive Regulation was issued by means of Decrtee No 2823 of February 3, 2004[85] in order "to legalize the admission and permanence of illegal inmigrants in the territory of the Republic, and also to grant the opportunity to apply for the Venesuelan citizenchip for those foreigners fulfilling the requirements set forth" (art. 1). Although such Decree was reapeal by the new Laws on Nationality and Citizenship and Foreigners and Migration Laws, it has been subsequently been applied.

The basic motivation of the Decree was "the duty of the State to defend and guarantee human rights, dignity, fair and equal treatment, freeness, oportune and appropriate answer, honesty, transparency, impartiality and good faith, in order to introduce an effective procedure to attend requests made by aliens located in the territory of the Bolivarian Republic of Venezuela" (article 3).

For such purpose, the Executive asssiged the Ministry of Interior and Justice jurisdiction to apply the Regulation through the National Office of Identification and Immigration (arts. 3 and 4), granting to such office the attribution to ease or supress administrative paperwork in the process of legalizing the admission and permanence of illegal foreigners (or in irregular condition) and in the citizinship process, pursuant to the principles and rules set forth in the Law ruling this

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[85] See in *Official Gazette* No. 37.871 of February 3, 2004. Reformed by Decree No. 3042 of August 3, 2004, *Official Gazette* No. 38002 of August 17, 2004.

matter (art.5), which at the time was the now reapeled Law on Aliens of 1937 and the Naturalization Law of 1955.

For such purpose, the Decree established for illegal inmigrants in order for them to regularize their legal situation, to regitrer themselves in the Foreigners Registry (article 7), and to file before the National Office of Identification and Aliens the following documents for their legalization: Passport or any other identification document; evidence of the activity or occupation in the country; residence letter issued by a competent authority, and three pictures carnet size (article 8).

Pursuant to article 9 of the Decree, the situation of those foreigners that fulfilled those requirements shall be legalized by granting them "condition of resident" of the territory of the Republic. Consequently, the National Office of Identification and Aliens must issue a triple legalization certificate, one of which shall be given to the foreigner, another shall be filed in the Office of Foreigners Control, and the third one shall be filed in the office issuing the certificate. Said legalization certificate, which shall have foreigner's identification data, is valid for 30 days counted from the date it was issued (article 10).

3. *General Regime regarding Civil Rights and Duties of Migrant Aliens*

A. The civil and political rights' system

According to Article 13 of the Statute, aliens who are living in the territory of the Republic, have the same rights as nationals (Venezuelan citizens), with no more limitations than those stated in the Constitution and the laws, which in the 1961 Constitution was expressly set forth in article 45, as follows: "Aliens have the same rights and duties as Venezuelans, with the limitations or exceptions established by this Constitution and the laws".[86]

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[86] À complete and important Declaration of Rights of Migrants has been incorporated in the International Convention on the Protection of the Rights of all Mi-

Even though this rule disappeared from the constitutional text of 1999, the same principle applies derived from the fundamental right to equal protection (art. 21). That mean that aliens in Venezuela have the same rights to Venezuelan, except political rights which are reserved to Venezuelan citizens (article 40).

Nonetheless, this principle has an express exception regarding the political right to vote in regional or local (municipal, parish and states) elections, which article 64 of the Constitution also recognize to aliens having reached the age of 18, when not subjected to civil disability or political impediment and having more that 10 years of residence in the country. In this same sense, article 51 of the Law repeats that "except for the cases provided for in the Constitution, and the laws, the excercise of political rights is solely for Venezuelans."

These other political rights enumerated in the Constitution reserved only to nationals, are the folling: right to political participation (articles 62 and 70); right to vote, except for parish, county and states elections (article 63); right to participate in referenums (aprobatory, abrogatory or recal referendums) (article 71 and ss.); right to hold public posts (article 65); right to request redering accounts to those elected (article 66); right to be associate for political purposes (article 67) and right to public demonstration (article 68).

B Particular reference to the right to the effective protection by court

On the other hand, and in an express way, article 15 of the Aliens and Migrants Statute guarantees aliens the right to be judicially and effectively protected regarding all the acts related to them or in which they are involved, in regards to their alien condition.

The rule adds that in all administrative procedures established in matters regarding aliens, the guarantees foreseen in the Constitution

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grant Workers and Members Of Their Families, Adopted by the General Assembly at its 45th session on 18 December 1990 (A/RES/45/158).

and the Statutes on administrative procedure must be observed in any case, especially regarding the publicity of the acts, the contradictory principle, the hearing of the interested party and the motivation of the resolutions. The application of the administrative acts related to alien condition or situation must be performed as established by the Organic Statute of Administrative Procedures when applicable.

Additionally, acts and administrative resolutions adopted in relation to aliens are, as in general administrative acts, essentially reviewable, in conformity to the Statute regulating administrative procedures when applicable.

C The duties system

According to article 14 of the Statute, aliens who remain in the territory of the Republic, without prejudice of the duties and obligations imposed by the Constitution and the Statutes, must comply with the following duties:

1. To comply with the requirements and conditions of identification, permanence and address in Venezuela, as established in the legal system.

2. To show, before the authorities, the documents that identify them, any time they are asked to do so. Said documents may not be retained by the authorities.

3. To register in the National Registry of Aliens in the ministry with competence in the matter, within the following 30 days of their arrival, when entering the territory of the Republic as temporary migrant or acquiring the category of permanent migrant.

4. To file, before the civil authority corresponding to his/her place of domicile, the certifications relative to the marital status duly legalized or with the respective apostille, his/hers as well as the family information, and particularly of any change of domicile or residence when the matter is about aliens located in the categories of temporal and permanent migrants.

5. To keep the visas or any other document, authorizing his permanence in the territory of the Republic, in force.

6. To appear before the competent authority in the time lapse fixed for the citation.

4. The Disciplinary Administrative Regime

A. Administrative Sanctions

Any failure by aliens to comply with the obligations foreseen in the Foreigners and Migrants Statute, as stated in article 35, can be sanctioned by the Ministry of the Interior, applying the following sanctions: admonishment, fines or the deportation from the territory of the Republic. For such purpose, a 72 hour long pleading hearing must be opened in every case, in order to determine the type of sanction applicable according to the seriousness or recurrence of the infringement.

The person sanctioned by any of these measures has a period of 5 working days to file recourses, exceptions and defenses according to the Organic Statute of Administrative Procedures.

a. The fines

The fines that can be imposed upon aliens, as listed in article 36, are the following:

1. To aliens who fails to fulfill the duty of registering in the National Registry of Aliens and of making the respective participations to authorities in the terms contained in article 14 of the Statute, a fine of ten tributary units (10 U.T.).

2. To natural persons or corporations referred to in articles 24, 25 and 26 of the Statute, who infringe the obligations to inform about aliens there foreseen, a fine of fifty tributary units (50 U.T.).

3. To any employer who hires illegal aliens for the rendering of a determined service, a fine of two hundred tributary units (200 U.T.).

Once the respective fines are imposed, the offender must make its payment within the 8 following days of the notification of the decision. After said period has expired, in case of it's failing to comply, the procedure foreseen in the Organic Tax Code must be applied (art. 37).

b. Deportation and expulsion of aliens

Among the sanctions that can be imposed upon aliens, the Statute distinguishes between the deportation and the expulsion of aliens.

The deportation from the territory of the Republic can be imposed according to article 38 of the stature, to aliens who incur in any of the following offenses:

1. Those who enter and remain in the territory of the Republic without the correspondent visa.

2. Those who have entered the territory of the Republic to perform activities submitted to the labor authorization and fail to comply with said requirement.

3. Those who fail to comply with the obligation of renovating the visa within the lapse established by the Regulations of this Statute.

4. Alien workers (female and male) who perform activities different from those they were hired for and in a different jurisdiction from the one they were authorized for.

5. Those who have been fined twice or more times by the competent authority in matters of aliens and migration, and refuse to pay for it.

Regarding expulsion from the territory of the Republic, according to article 39 of the Statute, this sanction can be imposed upon aliens in following cases:

1. Those who have obtained or renovated the visa authorizing their entrance or permanence in the territory of the Republic in defraudation to the law.

2. Those dedicated to the production, distribution or possession of drugs and psychotropic substances or other related activities.

3. Those who, while legally in the territory of the Republic, propitiate the legal or illegal entrance of another aliens under false promises of work contracts, visas or work authorizations.

4. Those who compromises the security and defense of the Nation, alters the public order or is incurred in crimes against Human rights, Humanitarian International Law or against the dispositions content in international instruments of which the Republic is part of.

According to article 40 of the Statute any authority that has knowledge of an alien incurring in any of the deportation or expulsion situations, have the duty of notifying the Ministry of the Interior and Justice, without delays, in order to begin the corresponding administrative procedure.

B. The procedure

a. The opening of the administrative procedure

For the imposition of the sanctions of deportation or expulsion, the Ministry of the Interior and Justice can proceed *ex officio* or at the denunciation of anybody (article 41).

Once the competent authority within the Ministry of the Interior and Justice has the knowledge of an alien incurring in any of the situations for deportation or expulsion, it must formally order the opening of the corresponding administrative procedure, which must be informed to the interested alien within 48 hours following the opening of the said procedure, following the notification rules established in the Organic Statute of Administrative Procedures.

According to article 42, said notifications must clearly indicate the facts motivating these proceedings, as well as the alien's right to have access to the administrative file and of having the time he considers necessary to examine it, for what he can be assisted by a lawyer of his trust.

b. The precautionary measures

The competent authority of the Ministry, in the order to guaranty the eventual execution of the measure of deportation or expulsion, when opening the respective administrative procedure, can impose the alien subjected to the procedure of deportation or expulsion, the following precautionary measures established in article 46 of the Statute:

1. Periodical presentations before the competent authority in matters of aliens and migration.

2. Prohibition of leaving the location in which he resides without the corresponding authorization.

3. Presentation of an adequate monetary bail; for this, the economical status of the alien must be taken into consideration.

4. Move to a determined location while the administrative procedure lasts.

5. Any other measure that seems pertinent in order to guarantee the fulfillment of the decision of the competent authority, as long as said measure does not involve depravation or restriction of the right for personal freedom.

The imposition of these precautionary measures can not exceed 30 days, starting from the date of the decision.

c. The oral hearing before the competent authority

In the same opening order of the aforementioned administrative procedure, the competent authority must order the notification of the interested alien, who must appear before it on the third working day following his notification, in order to participate in the oral hearing and file his plea for his defense, for which he would dispose of all the evidence means he considers necessary (article 43). This oral hearing can be postponed for up to three working days when requested by the interested alien in duly motivated petition.

In the oral hearing, the interested alien may be assisted by a lawyer of his trust; and an interpreter will be assigned to him/her in case he/she does not speak Spanish or can not communicate verbally.

If in the public hearing the interested alien request to be recognized in a refugee condition, the matter must handled according to the procedure established by the Organic Statute of Refugees.

d. The Administrative Decision

After the aforementioned oral hearing has been terminated and within the following 72 hours of its celebration, the competent authority must decide on the matter, in writing and through a duly motivated administrative act, issued according to the provisions of the Organic

Statute of Administrative Procedures (article 44), in which the term for its compliance must be indicated (article 50).

The decision for deportation or expulsion ought to be notified to the interested alien within the following 24 hours; it must contain the complete text of the administrative act indicating the recourses that can be filed against it, the lapse to file it and the entities or courts before which they must be introduced.

The interested alien can file a hierarchic recourse before the Ministry of the Interior and Justice within the following 5 working days of the decision; the Ministry must decide through motivated administrative action during the following 2 working days of its mediation (article 45 of the Statute).

The administrative decision ordering the deportation or expulsion of aliens, must determine a term for its fulfillment or execution, which can only begin once all the administrative or judicial recourses have been exhausted. After such exhaustion, the deportation or expulsion measure can be considered final (article 44).

In case of failure in the fulfillment of the term fixed in the deportation or expulsion administrative measure (art. 50) to abandon the territory of the Republic, the alien must be taken to the departure Terminal enabled for this purpose where the competent authority must make the expulsion effective (art. 50).

C. The administrative consequence of the deportation or expulsion measure

The main legal effect of the order of deportation and expulsion of aliens issued by the Ministry of the Interior and Justice is that through motivated Resolution, it must revoke their visa or document of entry or permanence in the territory of the Republic (article 48).

D. *Rights of aliens in deportation or expulsion cases*

a. The right to move acquired possessions

Aliens subjected to deportation or expulsion measures who possess legally acquired goods, have a one year time period –starting from the date the measure is final- to move and place them safe. Said transportation can be made by themselves or through a representative or attorney duly authorized by authenticated document (article 47).

b. The right to receive labor benefits

According to article 49 of the Statute, alien workers subjected to deportation or expulsion measures have the right to perceive the salaries, social services and all the benefits established in the Statute regulating the Labor Relations, collective trade unions instruments and other social laws applicable about the labor relation.

5. The Criminal Offences and Responsibility Systems

A. The offences

The following offences have been regulated in the Statute governing aliens and migration:

First, the offence of facilitating the illegal entry, established in article 52, according to which every person who facilitates or allows the illegal entry of aliens (female and male) into the territory of the Republic can be punished with a prison sentence of 4 to 8 years.

Second, the offence of facilitating the illegal entry in the case of public officials, in which case, article 59 of the Statute states that the public official or police or military authority who, for any reason, favors or induces, by action or omission, the entrance or departure of people from the territory of the Republic either clandestine or by fraud of the migratory control established in our legal system, will be penal-

ized with a prison sentence of 4 to 8 years, and will not be able to perform any function in the Public Administration for 10 years.

Third, the offence of alien labor exploitation, established in article 53 of the Statute, according to which a prison sentence of 4 to 8 years can be given to "those who hire aliens (female and male) whose permanence in the territory of the Republic is illegal, in order to exploit them as workforce in conditions that might harm, suppress or limit the labor rights recognized by legal dispositions, collective agreements or individual contracts". The same punishment must be given to the individual who by simulating a contract or collocation, or by a similar deception, determines or favors the migration of a person to another country.

Forth, the offence of illicit immigration, established in article 55 of the Statute, which states that everyone who promotes or favors by any mean the illicit immigration of aliens into the territory of the Republic will be punished with a prison sentence of 4 to 8 years.

Fifth, the offence of illegal traffic of people, established in article 56 of the Statute, according to which a punishment of a 4 to 8 year long prison sentence will be given to the natural person and the representatives of the corporation who, by action or omission, promote or mediate in the illegal traffic of people in transit or with destination in the territory of the Republic. Article 57 of the Statute establishes, as aggravating circumstance, when those who perform these conducts obtain profit from it or using violence, intimidation, deceit or by taking advantage of the need situation of the victim, his/her gender or vulnerable groups, will be punished with a prison sentence of 8 to 10 years.

Likewise, for all the offences aforementioned (articles 52, 53, 54, 55, 56), article 58 of the Statute states that the corresponding sentences will be augmented in their halves superior, when in the perpetration of the events, the life, health or integrity of the persons or victim is placed in jeopardy.

B. Criminal responsibility of corporations

According to article 54 of the Statute, when the events foreseen in articles 52 (offence of facilitating of illegal entry) and 53 (offence of alien labor exploitation) of the Statute were imputed to corporations, the sentence must be imposed to the administrators or people in charge of the service who had been responsible of them and who in knowledge and been able to solve it, did nothing to do so.

Third Lesson

A GENERAL OVERVIEW OF THE LATIN AMERICAN "AMPARO" FOR THE PROTECTION OF HUMAN RIGHTS

As aforementioned, all fundamental rights of any person, whether national of aliens, are to be protected by the courts without any kind of discrimination.

This protection can be achieved through the general ordinary or extraordinary judicial means, or by means of specific judicial actions or recourses set forth for the protection of constitutional rights, as is the case in all Latin American countries, with the *amparo, tutela* and *protección* proceeding.

In effect, 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, in the majority of countries, 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*) and in Brazil, is equivalent to the *mandado de segurança*

or the *mandado de injunçao*).[87] That is 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 a 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 de-

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87 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, C*onstitutional Protection of Human Rights in Latin America. A Constitutional Comparative Law Study on the Amparo Proceeding,* Cambridge University Press, (September) 2008.

claratory 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 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.

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, as aforementioned, 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 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.

In the following pages, I will refer, first to the general trends of the amparo proceeding in Latin America, particularly according to the provisions of the American Convention on Human Rights, and second, to the specific constitutional and statutory regulations of the amparo proceeding in each country.

I. GENERAL APPROACH TO THE AMPARO PROCEEDING IN LATIN AMERICA

1. The origin and development of the Latin American Amparo Proceeding

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 that 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).[88]

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 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

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88 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.

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*).[89] 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.

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.[90]

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).

It was also included in the 1994 Argentinean Constitution, but in this country since 1957 (*Siri* case) 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.

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

90 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.

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[91]; and in all of them, exception made of Chile, the proceeding has been the object of statutory regulation.[92] These statutes are, in general,

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91 ARGENTINA. Constitución Nacional de la República Argentina, 1994; BOLIVIA. Constitución Política de la República de Bolivia, 1967 (Last reform, 2005); BRAZIL. Constituçao 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

92 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 Constitu-

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.

In some Constitutions, like the Guatemalan, Mexican and Venezuelan ones, the amparo action is conceived to protect all constitutional rights and freedoms, including also 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, Panama, 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

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cional, 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.

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.

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.

2. The Amparo Proceeding and the American Convention on Human Rights

I have mentioned the importance of the American Convention on Human Rights (1969) regarding the consolidation of human rights protection in Latin America, including the amparo proceeding, which in fact, nowadays 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 pro-

vided 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"[93]. 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 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'"[94]. 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"[95]

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93 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.

94 *Idem*, Paragraph 34.

95 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

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"[96].

Bearing this in mind, I want to try to give a general overview of the Latin American amparo proceeding according to the general principles deriving from the provisions of the American Convention on Human Rights comparing them with the national regulations[97], in order also to determine how the member States have conducted themselves "so as to effectively ensure the free and full exercise of human rights"[98].

In this regard, of course, it is always important to recall, 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"[99] In this regard, of course, the existence of an autonomous and independent Judiciary is essential.

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

97 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

98 Idem, Paragraph 167

99 *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.

3. *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:

A. The protection of all constitutional rights

First, that according to the American Convention, the amparo action is conceived for the protection of all constitutional rights (Civil, political, social, economic, cultural, environmental)which in general are always "fundamental rights", not only 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 protected 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 freedoms. 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, expressly include within the rights protected those declared in the international system of protection of human rights.

B. The special and extraordinary judicial character of the proceeding

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

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.

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"[100]; 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"[101].

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.

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 (availability principle); 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

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

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

been filed seeking the protection of the constitutional right, then the extraordinary mean cannot be filed.

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.

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"[102].

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

C. The simple, prompt and effective character of the procedure

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[103], that is, from the adjective point of view, an expedite procedure and remedy to effectively protect the violated or harmed rights. This is the general trend of all Statutes.

The simplicity implies that the procedure must lack the dilatory procedural formalities of ordinary judicial means, imposing the need to grant immediate constitutional 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"[104]. 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[105]; 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".[106]

For these purposes, many Latin American Amparo Laws or Statutes 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, effective-

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103 Suárez Romero Case, Paragraph 66.

104 Ivcher Bronstein Case, paragraph 140.

105 Velásquez Rodríguez Case, paragraph 66.

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

ness, and due process" (Article 45); and in Peru, the Code refers to "the principles of judicial direction of the process: cost-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, cost-free and not subject to formality.

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[107], 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.

D. The universal scope regarding the injured persons

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 hu-

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107 See Honduras, Article 70; Uruguay, Article 12; Panama, Article 2610; Para guay, Article 586; Uruguay, Article 12.

man 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.

E. The universal scope regarding public acts or omissions

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.

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.

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 (*Kot* case), 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).

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.

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[108]. 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[109]. In similar sense, in Peru, the amparo action against judicial decisions is admitted when they are issued outside a regular procedure.

F. The personal filing of the action and its exceptions

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 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

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108 See Decision C-543, September 24, 1992

109 Decision T-231, May 13, 1994

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 and 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 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).

4. The Amparo Proceeding and the Judiciary

Finally, as can be appreciate from the general trends of the amparo proceeding in Latin America, which derived from the provisions of the Constitutions of the Latin American countries, their Statutes on amparo and from the provisions of the American Convention, a unique and impressive set of norms have been established for the protection of constitutional rights.

But of course, I insist, 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 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, 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 (as is the case of Venezuela),[110] threatening the

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[110] See Allan R. Brewer-Carías, "Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", en *Lateinamerika Analysen*, 19, 1/2008, GIGA, Germa Institute of Global and Area Studies, Institute of Latin American Studies, Hamburg 2008, pp. 119-142; "El autoritarismo establecido en fraude a la Constitución y a la democracia y su formalización en "Venezuela mediante la reforma constitucional. (De cómo en un país democrático se ha utilizado el sistema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional)" in *Temas constitucionales. Planteamientos ante una*

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. Unfortunately, this latter is the situation, I must say it with regret, in my country (Venezuela).

II. THE AMPARO PROCEEDING IN THE CONSTITUTIONAL SYSTEMS OF THE LATIN AMERICAN COUNTRIES

As aforementioned, the amparo proceeding has been established in all Latin American Constitutions, except in Cuba. In order to analyze the constitutional and legal provisions sanctioned regarding this proceeding, I will successively refer to the countries in the following order according to the judicial review method they apply (which will be studied in the Fourth Lesson): The case of Argentina (1) where the diffuse method of judicial review is only applied; followed by the countries having only a concentrated system of judicial review: Costa Rica (2), El Salvador (3), Honduras (4), Panama (5), Bolivia (6), Chile (7), Paraguay (8) and Uruguay (9); and finally, countries where a mixed system (at the same time diffuse and concentrated) of judicial review exists: México (10), Dominican Republic (11), Guatemala (12), Nicaragua (13), Brazil (14), Colombia (15), Ecuador (16), Peru (18) and Venezuela (19).

1. The amparo, habeas corpus and habeas data actions in Argentina

The Constitution of Argentina in an article that was included in the 1994 constitutional reform establishes three specific actions for the

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Reforma, Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74.

protection of human rights protection: the "amparo", the habeas data and the habeas corpus actions (Article 43). [111]

Regarding the "amparo" action, the Constitution provides that any person may file a prompt and summary proceeding against any act or omission attributed to of public authorities or to individuals, for the protection of the rights and guaranties recognized by the Constitution, the treaties or the statutes, which can only be brought before a court if there is no other more suitable judicial mean.

The same article 43 of the Constitution also provides for a collective action of "amparo" that can be filed by the affected party, the people's defendant and non-profit associations, in order to protect collective rights, like the rights to a proper environment and to free competition, and the user and consumer rights, as well as the rights that have general collective impact.

In the case of Argentina, these three specific remedies for the protection of all human rights are regulated in three separate statutes: the "amparo" Action Law (*Ley de acción de amparo, Ley 16986/1966*), the Habeas Corpus Law (*Ley 23098/1984*) and the Personal Data Protection Law (*Ley 25366/2000*).[112]

But, as aforementioned, even though the "amparo" action was regulated for the first time in the 1994 Constitution, in practice it was created four decades before by the Supreme Court in the *Angel Siri*

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[111] See Juan F. Armagnague et al., *Derecho a la información, hábeas data e Internet*, Ediciones La Roca, Buenos Aires 2002; Miguel Ángel Ekmekdjian et al., *Hábeas Data. El derecho a la intimidad frente a la revolución informática*, Edic. Depalma, Buenos Aires 1998; Osvaldo Alfredo Gozaíni, *Derecho Procesal Constitucional, Hábeas Data. Protección de datos personales. Ley 25.326 y reglamentación (decreto 1558/2001),* Rubinzal-Culzoni Editores, Santa Fe, Argentina 2002.

[112] See in general, José Luis Lazzarini, *El Juicio de Amparo*, La Ley, Buenos Aires, 1987; Néstor Pedro Sagües, *Derecho Procesal Constitucional. Acción de Amparo*, Vol 3., Editorial Astrea, Buenos Aires 1988, and "El derecho de amparo en Argentina", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *El derecho de amparo en el mundo*, Edit. Porrúa, México 2006, pp. 41-80.

Case of 27 December 1957[113] in which the power of ordinary courts to protect fundamental rights of citizens against violation from public authorities actions was definitively admitted. At that time, the Constitution only provided for the habeas corpus action (Article 18) which was regulated in the provisions of the Criminal Procedural Code (Title IV, Section II, Book IV) and established for the protection of physical and personal freedom against illegal or arbitrary detentions.[114] Regarding other constitutional rights, they were only protected through the ordinary judicial means, so the courts considered that the habeas corpus could not be used for such purpose.

That is why, for instance, in 1950 the Supreme Court of the Nation in the *Bartolo* Case, rejected the application of the *habeas corpus* proceeding to obtain judicial protection of constitutional rights other than personal freedom, ruling that "nor in the text, or in its spirit, or in the constitutional tradition of the habeas corpus institution, can be found any basis for its application for the protection of the rights of property or of freedom of commerce and industry", concluding that against the infringements of such rights, the statutes set forth administrative and judicial remedies."[115]

This situation radically changed in 1957 as a result of the decision of the *Angel Siri* case, who was the director of a newspaper (Mercedes) in the Province of Buenos Aires, which was shut down by the Government. He filed a petition requesting "amparo" for the protection of his freedom of press and his right to work, which was rejected by the corresponding criminal court, arguing that the petition was filed as a

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[113] See G. R. Carrio, *Algunos aspectos del recurso de amparo*, Buenos Aires 1959, p. 9; J. R. Vanossi, *Teoría constitucional,* Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 277.

[114] See Néstor Pedro Sagües, *Derecho Procesal Constitucional. Hábeas Corpus*, Volume 4, 2nd Edition, Editorial Astrea, Buenos Aires 1988, p. 116.

[115] See the references to the *Barolo* Case in Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, p. 66.

habeas corpus action which was only established for the protection of physical and personal freedom and not of other constitutional rights. By means of an extraordinary recourse, the case arrived before the Supreme Court, which in a decision of December 27, 1957 repeal the lower court decision, and admitted the action of "amparo", following these arguments: First, that in the case, the violation of the constitutional guaranty of freedom of press and the right to work was duly argued; second, that the arbitrary governmental violation affecting those rights was proved; and third, that those rights needed to be protected by the courts, concluding that for such purpose the absence of a statutory regulation on "amparo" could not be a valid argument to reject the judicial protection. In brief, the Supreme Court considered in its decision that the constitutional rights and guaranties of the peoples, once declared in the Constitution, needed always to be judicially protected, regardless of the existence of a regulatory statute on the matter.[116]

The second important decision of the Argentinean Supreme Court on "amparo" matters was issued a year later, in the *Samuel Kot* Case, of October 5th, 1958. In this case the plaintiff was the owner of an industry, which had been occupied by workers on strike. After an "amparo" petition that was filed before a lower court was rejected, once the procedure reached the Supreme Court, the "amparo" was admitted, and the Court ordered the restitution of the occupied premises to its owner. The Court decided that in any case when in a manifest way the illegitimacy of a restriction to any of the essential constitutional rights clearly appears, and when the resolution of the case through the judicial ordinary means could cause grave and irreparable damages, then the courts must immediately re-establish the harmed right by means of the "amparo" action, even applying the habeas corpus procedure.

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[116] See the reference to the *Siri* Case in José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 26 ff y 373 ff.; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad,* Ed. Astrea, Buenos Aires 1987, pp. 5; Néstor Pedro Sagües, *Derecho Procesal Constitucional. Acción de Amparo*, Volume 3, 2nd Edition, Editorial Astrea, Buenos Aires 1988, pp. 9 ff.

But beside admitting the "amparo" action without constitutional or legal provision, the other very important issue decided by the Supreme Court in this *Kot Case* was that the "amparo" was not only intended to protect rights against acts of authorities, but also against private individuals' illegitimate actions when if seeking protection by means of the ordinary judicial procedure, serious and irreparable harm could affect the claimant.[117]

After these decisions, the "amparo" action developed through judicial interpretation up to the enactment of the 1966 Amparo Law 16.986,[118] which in spite of the doctrine set forth in the *Kot case*, only referred to the action of "amparo" against acts of the State, leaving aside the "amparo" against individuals that nonetheless, was is filed in accordance to the Civil and Commercial Procedure Code of the Nation (Article 32,1, Sub-sections 2 and 498).[119]

According to this 1966 Law, the "amparo" action can be brought before the competent judge of first instance (Article 4) for the protection of all constitutional rights and freedoms against acts or omissions

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[117] See the references to the *Samuel Samuel Kot Ltd*. Case of 5 September, 1958, in S.V. Linares Quintana, *Acción de amparo*, Buenos Aires 1960, p. 25; José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 243 ff; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires 1987, pp. 6.; Susana Albanese, *Garantías Judiciales. Algunos requisitos del debido proceso legal en el derecho internacional de los derechos humanos*, Ediar S.A. Editora, Comercial, Industrial y Financiera, Buenos Aires 2000; Augusto M. Morillo et al., *El amparo. Régimen procesal,* 3rd Edition, Librería Editora Platense SRL, La Plata 1998, 430 pp.; Néstor Pedro Sagües, *Derecho Procesal Constitucional,* Vol. 3, *Acción de Amparo,* 2nd Edition, Editorial Astrea, Buenos Aires 1988.

[118] See José Luis Lazzarini, *El juicio de amparo*, Buenos Aires, l987; Néstor Pedro Sagüés, *Derecho Procesal Constitucional. Acción de Amparo*, Buenos Aires, 1988; Néstor Pedro Sagüés, "El derecho de amparo en Argentina", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 41-80.

[119] J. L. Lazzarini, *Idem,* p. 229.

of public authorities, but not against judicial decisions or against statutes, which are excluded from the "amparo" action.

This action is thus basically directed, in Argentina, to be filed against administrative actions or omission, and can only be filed when no other judicial or administrative recourses or remedies exist to assure the claimed protection. So that if they exist, they must be previously exhausted, unless it is proved that they are incapable of redressing the damage and their processing can lead to serious and irreparable harm. This can also be considered as a common trend of the amparo action in Latin America, as an extraordinary remedy, similar to what happens with the injunction procedure in the United States.

As mentioned, the amparo action is filed before the first instance courts and also in this case, the cases can only reach the Supreme Court by means of an extraordinary recourse which can only be filed when in the judicial decision a matter of judicial review of constitutionality is resolved,[120] in a similar way as constitutional questions can reach the Supreme Court in the United States.

2. The amparo and habeas corpus recourses in Costa Rica

The Constitution of Costa Rica has also expressly regulated the right of persons to file recourses of habeas corpus and "amparo" in order to seek for the protection of their constitutional rights, attributing to the same Constitutional Chamber the exclusive competency to decide on the matter. [121]

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[120] See Elias Guastavino, *Recurso extraordinario de inconstitucionalidad*, Ed. La Roca, Buenos Aires, Argentina, 1992; Lino Enrique Palacio, *El recurso extraordinario federal. Teoría y Técnica*, Abeledo-Perrot, Buenos Aires, 1992.

[121] See, in general, Rubén Hernández Valle, *La tutela de los derechos fundamentales*, Editorial Juricentro, San José 1990; Rubén Hernández Valle, "El recurso de amparo en Costa Rica", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 257-304.

In this regard, Article 48 of the Constitution provides that "every person has the right to the habeas corpus recourse in order to guarantee his personal freedom and integrity, and to the "amparo" recourse in order to be reestablished in the enjoyment of the rights declared in the Constitution, as well as those fundamental rights set forth in international instruments on human rights applicable in the Republic."

In Costa Rica, both the habeas corpus and the "amparo" recourses are also regulated in a single statute, the Constitutional Jurisdiction Law (*Ley de la Jurisdicción Constitucional, Ley nº 7135*) of October 11, 1989.[122] According to article 29 of this Law, the recourse of "amparo" can be filed against any provision, decision or resolution and, in general, against any public administration action, omission or material activity which is not founded in an effective administrative act and has violated or threatened to violate the constitutional rights.

As in Argentina, the law excludes the "amparo" action against statutes or other regulatory provisions. Nonetheless, they can be challenged together with the individual acts applying them, or when containing self executing or automatically applicable provisions, in the sense that their provisions become immediately obligatory simply upon their sanctioning. But in such cases, the Chamber must decide the matter of the unconstitutionality of the statute, not in the "amparo" proceeding, but in a general way following the procedure of the action of unconstitutionality.

The Law also excludes the "amparo" action against judicial resolutions or other authorities' acts when executing judicial decisions, and against the acts or provisions in electoral matters issued by the Supreme Tribunal of Elections (Article 30).

Regarding individuals, Costa Rica's Law as in Argentina, admits the possibility of the "amparo" actions to be filed against any harming actions or omissions from individuals, but in this case, in a limited way

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[122] See in general, Rubén Hernández Valle, "El recurso de amparo en Costa Rica", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 257-304

only referred to persons or corporations exercising public functions or powers that by law or by fact place them in a position of power against which ordinary judicial remedies are clearly insufficient to guaranty the protection of fundamental rights and freedoms (Article 57).

3. The amparo and habeas corpus actions in El Salvador

In El Salvador, Article 247 of the Constitution also sets forth the two common specific judicial means for the protection of all constitutional right: the "amparo" and the habeas corpus actions, the latter also for the protection of personal freedom. As in Costa Rica, the only competent court to hear and decide on this matter is the Constitutional Chamber of the Supreme Court of Justice, also establishing a concentrated judicial system of "amparo" (Article 247)[123]. The only exception to this rule exists in matters of habeas corpus when the aggrieving action takes place outside the capital, San Salvador, cases in which the habeas corpus recourse can be filed before the Chambers of Second Instance (article 42). In such cases, and only if they deny the liberty of the aggrieved party, can the case be reviewed by the Constitutional Chamber.

The regulation of the "amparo" and habeas corpus action in El Salvador is also set forth, along with the other constitutional processes, in one single statute: the 1960 Statute on Constitutional Proceedings (*Ley de Procedimientos Constitucionales*) of 1960, as amended in 1997.[124]

According to this Law, the action of "amparo" can be filed against any actions or omissions of any authority, public official or decentralized bodies. Regarding judicial decisions, contrary to Argentina and

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[123] See Manuel Arturo Montecino Giralt, "El amparo en El Salvador", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 333-380.

[124] See in general, Manuel A. Montecino Giralt, "El amparo en El Salvador", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *El derecho de amparo en el mundo*, Edit. Porrúa, México 2006, pp. 333-380.

Costa Rica, the action can also be filed but just against judicial definitive decisions issued by the Judicial Review of Administrative Action courts when violating the rights guaranteed in the Constitution or which impeding its exercise (Article 12).

The Law expressly refers to the extraordinary character of the action of "amparo", also providing, as in Argentina, that it can only be filed when the act against which it is formulated cannot be reparable by means of other remedies.

4. The amparo and habeas corpus recourses in Bolivia

The Constitution of Bolivia regulates the "amparo" and the habeas corpus recourses, the latter also for the protection of personal freedom when somebody claims they are being unduly or illegally persecuted, detained, prosecuted or held (Article 18). Both the "amparo" and the habeas corpus actions are regulated in one single statute along with other constitutional procedures, the Constitutional Tribunal Law (*Ley nº 1836 del Tribunal Constitucional*) enacted in 1998.[125]

Regarding the "amparo", Article 19 of the Constitution conceived it as an action for the protection of all constitutional rights declared in the Constitution and in statutes, which can also be filed against any illegal acts or omissions from public officials or private individuals that restrict, suppress or threaten to restrict or withhold personal rights and guaranties recognized by the Constitution and the statutes (Article 19)[126]. In this cases the action can only be filed when there is no other

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[125] See in general, José A. Rivera Santivañez, *Jurisdicción constitucional. Procesos constitucionales en Bolivia*, Ed. Kipus, Cochabamba 2004, and "El amparo constitucional en Bolivia", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 81-122.

[126] See José Antonio Rivera Santibáñez, "El amparo constitucional en Bolivia", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 81-122.

mean or legal recourse available for the immediate protection of the restricted, suspended or threatened right or guaranty.

Law 1.836 of 1998 of the Constitutional Tribunal, provides that the constitutional "amparo" can be brought before the highest Courts in the Department capitals or before the District Judges in the Provinces (Article 95) and shall be admitted "against any unlawful resolution, act or omission of an authority or official, provided there is no other procedure or recourse available to immediately protect the rights and guaranties", which, as established in Argentina and El Salvador, confirms its extraordinary character. Judicial decisions are excluded from the "amparo" action when they can be modified or suppressed by means of other recourses (Article 96,3).

The Law also admits, like in Argentina, the filing of the "amparo" action "against any unlawful act or omission of a person or group of private individuals that restricts, suppresses or threatens the rights or guaranties recognized by the Constitution and the Laws" (Article 94).

In Bolivia, according to the Constitution (Article 120,7), and the Law of the Constitutional Tribunal (Article 7,8), all the judicial decisions issued on "amparo" or habeas corpus must be sent to the Constitutional Tribunal in order to be reviewed. But in this case of Bolivia, similar to the situation in Colombia, but different to the provisions in Argentina, Brazil, and Venezuelan where an extraordinary recourse for revision is provided, the power of the Constitutional Tribunal to review the "amparo" and habeas corpus decisions is exercised, not because of an extraordinary recourse, but because of an obligatory review duty, for which purpose the decisions must automatically be sent by the courts to the Constitutional Tribunal. Through this power, the Tribunal can guaranty the uniformity of the constitutional interpretation.

5. *The* protección *and amparo recourses in Chile*

In Chile, Articles 20 and 21 of the Constitution, in addition to the habeas corpus recourse and with antecedents in the Constitutional Act Nº 3 (Decree-Law 1.552) of 1976, also establishes the "amparo" recourse called recourse for protection (*recurso de protección*) conceived,

as in Colombia, to protect only certain constitutional rights and freedoms, which are enumerated in some paragraph of article 19 of the Constitution, basically referred to civil and individual rights, freedom of economic rights and the right to live in an environment free of contamination. In this regard, the Chilean provisions, follow the same pattern of the German and Spanish constitutional regulations regarding the "amparo" recourse, established only the protection of "fundamental rights". The consequence of these rules is that all the other constitutional rights not enumerated or listed as protected by the recourse for protection, must be enforced by means of the ordinary judicial procedures

The Chilean "*recurso de protección*" is the only action for amparo constitutionally established in Latin America which has not yet been statutorily regulated, which of course has not prevented it exercise,[127] particularly in cases where there is an urgent need for the protection. The recourse is only regulated by a Supreme Court regulation: *Auto acordado de la Corte Suprema de Justicia sobre tramitación del Recurso de Protección de Garantías Constitucionales, 1992.*[128]

The recourse for protection must be brought before the Courts of Appeals, which can immediately adopt the rulings they consider appropriate for re-establishing the rule of law and assuring the due protection of the affected party's rights (Article 20).[129]

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[127] See in Enrique Paillas, *El recurso de protección ante el derecho comparado*, Santiago de Chile, l990, pp. 80 ff.

[128] See in general, Eduardo Soto Kloss, *El recurso de protección. Orígenes, docgtrina, jurisprudencia,* Editorial Jurídica de Chile, Santiago 1982; Humberto Nogueira Alcalá, "El derecho y acción constitucional de protección (amparo) de los derechos fundamentales en Chile a inicios del Siglo XXI", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 159-211.

[129] See in general Pedro Aberastury et al., *Acciones constitucionales de amparo y protección: realidad y prospectiva en Chile y América Latina,* Editorial Universidad de Talca, Talca 2000, Chile; Juan Manuel Errazuriz Gatica et al., *Aspectos procesales del recurso de protección,* Editorial Jurídica de Chile, Santiago de Chile 1989; Sergio Lira Herrera, *El recurso de protección. Naturaleza Jurídica, Doctrina, Jurispru-*

The Chilean Constitution (Article 21) also provide for the habeas corpus recourse for the protection of personal freedom and safety, naming it in this case, as the "amparo" recourse.

One aspect that must be highlighted regarding the Chilean recourse for protection is that when deciding the case, the courts cannot adopt any decision on judicial review of legislation which is reserved to the Constitutional Tribunal. Consequently, when deciding a recourse of protection, if the court considers that the applicable statute is unconstitutional, it cannot decide on the matter, but has to refer the case to the Constitutional Tribunal for its decision.

6. The amparo and habeas corpus actions in Honduras

The Constitution of Honduras also provides for two separate actions for the protection of human rights: "amparo" and habeas corpus, that must be filed according to what is provide in the already mentioned general statute on constitutional proceedings, the Constitutional Judicial Review statute (*Ley sobre la Justicia Constitucional*) of 2004.[130]

Regarding the recourse of "amparo", Article 183 of the Constitution declares the right of any person to file the recourse, in order to be restored in the enjoyment of all rights declared or recognized in the Constitution, and in addition, in treaties, covenants and other interna-

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dencia, Derecho Comparado, Editorial Jurídica de Chile, Santiago de Chile 1990; Enrique Paillas, *El recurso de protección ante el derecho comparado*, Editorial Jurídica de Chile, Santiago de Chile 1990; Humberto Nogueira Alcalá, "El derecho y acción constitucional de protección (amparo) de los derechos fundamentales en Chile a inicios del Siglo XXI", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 159-211.

130 See in general, Francisco D. Gómez Bueso, "El derecho de amparo en Honduras", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 409-460; and Allan R. Brewer-Carías, "El sistema de justicia constitucional en Honduras", in *El sistema de justicia constitucional en Honduras (Comentarios a la ley sobre Justicia Constitucional)*, Instituto Interamericano de Derechos Humanos, San José 2004, pp, 107-140.

tional instruments of human rights (Article 183 Constitution, Article 41,1 Law), against public authority actions or facts, comprising statutes, judicial decisions or administrative acts and also omissions or threats of violation (Articles 13 and 41, Law). In this cases, and depending on the rank of the injurer's public authority, the action of "amparo" that can be filed before a variety of courts,.

Regarding individuals, as in Colombia, Costa Rica and Ecuador, the action can be filed against their actions only when issued exercising delegated public powers, that is, against institutions maintained by public funds and those acting by delegation of a State entity by virtue of a concession, contract or other valid resolution (Article 42)[131]..

The Constitution of Honduras, like the solution in Guatemala, also expressly admits the "amparo" against statutes, establishing the right of any party to file the action for amparo, in order to have a judicial declaration ruling that its provisions do not oblige the plaintiff and are not applicable when they contravene, diminish or distort any of the rights recognized in this Constitution"

In the case of Honduras, the "amparo" decisions are subject to an obligatory review by the corresponding superior court, and those issued by the Appellate Courts also subject to review by the Constitutional Chamber of the Supreme Court, but in this case on a discretionary basis, by means of the parties' request (articles 68, 69, Law). Thus, the Constitutional Chamber can always be the last resort to decide upon the matters of "amparo".

On the other hand, by means of the "amparo" action is possible to consider that in Honduras the diffuse method of judicial review can be applied, in the sense that in a contrary sense to the other Latin American regulations in concentrated systems, the Constitution allows the courts to decide that a statute is not to be enforced against the claimant

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[131] See Francisco Daniel Gómez Bueso, "El derecho de amparo en Honduras", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 409-460.

nor is it applicable in a specific case when such statute contravenes, diminishes or distorts a right recognized by this Constitution," (183,2 Constitution)

7. The amparo and habeas corpus actions in Panamá

Following the general trend of Latin America, Constitution of Panama also distinguishes two specific judicial means for the protection of constitutional rights: the habeas corpus and the "amparo" recourses.

Regarding the recourse of "amparo", the Constitution of Panama set forth the right of any person to have revoked any order to do or to refrain from doing issued by any public servant violating the rights and guaranties set forth in the Constitution (Article 50).

Thus, the "amparo" is also conceived in Panamá for the protection of constitutional rights only against authority actions and is not admitted against individual unconstitutional actions. The action can be filed before the ordinary first instance courts, except in cases of high rank officials, in which cases the Supreme Court is the competent one.[132]

Panama together with Paraguay, are the only two countries where the statutory regulation regarding habeas corpus and "amparo" are set forth in the general procedural code, the Judicial Code (*Código Judicial, Libro IV Instituciones de garantía*), Articles 2574-2614 (habeas corpus) and 2615-2632 (*amparo de garantía constitucionales*) of 1987.[133]

According to the Code, the "amparo of constitutional guaranties" can be brought before the courts against any acts that harm or injure the fundamental rights and guaranties set forth in the Constitution (Ar-

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[132] See Lao Santizo P., *Acotaciones al amparo de garantías constitucionales panameño*, Editorial Jurídica Sanvas, San José, Costa Rica 1987; Arturo Hoyos, "El proceso de amparo de derechos fundamentales en Panamá", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *Idem,* pp. 565-580.

[133] See in general, Arturo Hoyos, "El proceso de amparo de derechos fundamentales en Panamá", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 565-580.

ticle 2615) and also against judicial decisions when all the existing judicial means to challenge them have been exhausted; but it cannot refer to judicial decisions adopted by the Electoral Tribunal or by the Supreme Court of Justice or any of its Chambers.

8. The amparo, habeas corpus and habeas data recourses in Paraguay

The Constitution of Paraguay also regulates in a very detailed way three judicial means for the protection of constitutional rights: the "amparo", the habeas *corpus* (Article 133)[134] and the habeas data recourses (Article 135).

Regarding the petition for "amparo", according to Article 134 of the Constitution, it can be filed by anyone who considers himself seriously affected in his rights or guaranties by a clearly illegitimate act or omission, either by governmental authorities or individuals, or who may be in imminent danger that his constitutional rights and guaranties may be curtailed, and whom, in light of the urgency of the matter cannot obtain adequate remedy through regular legal means. In all such cases, the affected person may file a petition for "amparo" before a competent judge[135].

The "amparo" petition, originally regulated in the 1971 Law nº 341 of Amparo (*Ley 341/71 reglamentaria del "amparo"*), since 1988 has been regulated in a section of the Civil Procedure Code (articles 565-588)[136], which, as in Argentina and Costa Rica, provides that it is not admissible against judicial decisions and resolutions, nor in the procedure of

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[134] See Evelio Fernández Arévalos, *Habeas Corpus Régimen Constitucional y legal en el Paraguay*, Intercontinental Editora, Asunción, Paraguay 2000.

[135] See Jorge Seall-Sasiain, "El amparo en Paraguay", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 58-591.

[136] See in general, Jorge Seall-Sasian, "El amparo en Paraguay", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 581-591

formation, sanction and promulgation of statutes, or when the matter refers to the individual freedom protected by the recourse of habeas corpus (Article 565,a,b).

According to Article 566 of the Code, the petition for "amparo" can be filed before any first instance court with jurisdiction in the place where the act or omission could have effect. Nonetheless, regarding electoral questions and matters related to political organization, the competent court will be those of the electoral jurisdiction (Article 134 Constitution).

9. The amparo and habeas corpus actions in Uruguay

Regarding the amparo action, the Constitution of Uruguay, if it is true that it does not expressly and specifically provide for it, nonetheless it has been deducted from Articles 7,72 and 332 of the 1966 Constitution, that declare the general right of all inhabitants of the Republic "to be protected in the enjoyment of their life, honor, freedom, safety, work and property". In contrast, the Constitution expressly provide for the action of habeas corpus (Article 17) to protect any undue imprisonment.

Nonetheless, the "amparo" recourse has been regulated in the 1988 *Amparo* Law nº 16011 (*Ley de amparo*),[137], which establishes that any person, human or artificial, public or private, except in those cases where an action of *habeas corpus* is admitted, may bring an action of "amparo" against any act, omission or fact of the public sector authorities, as well as of private individuals that in a illegitimate and evident unlawful way, currently or imminently, impair, restrict, alter or threaten any of the rights and freedoms expressly or implicitly recognized by the Constitution (Article 72).

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[137] See in general, José R. Saravia Antúnez, Recurso de Amparo. Práctica Constitucional, Fundación Cultura Universitaria, Montevideo 1993; Héctor Gros Espiell, "El derecho de amparo en Uruguay", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 633-648.

This action of "amparo" for the protection of all constitutional rights and freedoms may be brought before the judges of first instance in the place where the act, fact or omission under dispute have produced effect (Article 3).[138]

However, Law nº 16.011, like in Argentina, Costa Rica and in Paraguay, excludes all judicial acts issued in judicial controversies from the action of "amparo". The acts of the Electoral Court, and the statutes and decrees of departmental governments that have force of statute in their jurisdiction (Article 1) are also excluded, as in Costa Rica and Panama,

This action of "amparo" in the Uruguayan system, as in Argentina, is only admitted when there are no other judicial or administrative means available for obtaining the same result of protection or "amparo", or when, if they exist, they are clearly ineffective for protecting the right (Article 2).

In the proceeding of the "amparo" action, constitutional questions regarding the unconstitutionality of statutes may also arise, but as in Paraguay, the ordinary court cannot resolve them and must refer the matter to the Supreme Court of Justice, as a consequence of the concentrated method of judicial review of legislation that exists.[139]

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[138] See in general Luis Alberto Viera et al., *Ley de Amparo. Comentarios, Texto Legal y Antecedentes legislativos a su sanción. Jurisprudencia sobre el amparo*, 2nd Edition, Ediciones IDEA, Montevideo 1993; Miguel Ángel Semino, "Comentarios sobre la acción de amparo en el Derecha uruguayo", in *Boletín de la Comisión Andina de Jurista*, nº 27, Lima, 1986; Héctor Gross Espiel, "El derecho de amparo en el Uruguay", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 633-648.

[139] See in general José Korseniak, "La Justicia constitucional en Uruguay", in *La Revista de Derecho,* año III, enero-junio 1989, Facultad de Derecho, Universidad Central, 1989; Héctor Gross Espiell, "La jurisdicción constitucional en el Uruguay", in *La Jurisdicción Constitucional en Iberoamérica*, Ed. Universidad Externado de Colombia, Bogotá Colombia, 1984; Eduardo Esteva G. "La jurisdicción constitucional en Uruguay", in Domingo García Belaunde and Francisco Fer-

10. The mandado de segurança, mandado de injunção, habeas corpus and habeas data in Brazil

In Brazil, Article 5 of the Constitution establishes four actions for the protection of constitutional rights and guaranties: in addition to the habeas corpus,[140] and habeas data recourses, it provides for the *mandado de segurança* and the *mandado de injunção*, both which are the most similar to the amparo decisions. The procedural rules regarding the *mandado de segurança* are set forth in *Lei* nº 1.533, of December 31, 1951; and *Lei* nº 4.348, of June 26, 1964.[141]

The *mandado de segurança* and the recourse for *habeas corpus* were set forth in the 1934 Constitution;[142] and the *mandado de injunçao* and

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nández Segado (Coord.), *La Jurisdicción Constitucional en Iberoamérica,*. Ed. Dykinson, Madrid 1997; Norbert Lösing, "La justicia constitucional en Paraguay y Uruguay", in *Anuario de Derecho Constitucional Latinoamericano 2002,* Ed. Kas, Montevideo 2002.

[140] The habeas corpus can be brought before the courts whenever anyone suffers or feels threatened with suffering violence or duress in his or her freedom of movement because of illegal acts or abuses of power (Article 5, LXVIII of the Constitution). The right of movement (*ius ambuland*) is defined as the right of every person to enter, stay and leave national territory with his belongings (Article 5, XV). In principle, the action is brought before the Tribunals of First Criminal Instance, but actions may be heard by the Appeals Tribunals and even by the Supreme Federal Tribunal if action is brought against the Tribunal of First Instance or against the Appeals Tribunal.

[141] See in general, J. Cretella Junior, *Comentários à la Lei do mandado de segurança*, Forense, Rio de Janeiro, 1992; José Afonso de Silva, "El mandamiento de seguridad en Brasil", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem*, pp. 123-157.

[142] Article 113,33 Constitution 1934. See A. Ríos Espinoza, Presupuestos constitucionales del mandato de seguridad", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, nº 46, México 1963, p. 71. Also published in H. Fix-Zamudio, A. Ríos Espinosa and N. Alcalá Zamora, *Tres estudios sobre el mandato de seguridad brasileño,* México 1963, pp. 71-96.

the recourse of *habeas data* established in the 1988 Constitution,[143] being Brazil the first Latin American country to have constitutionalized this latter to guaranty the right to have access to official records and the rights to rectify or correct the information they contain (Article 5, LXXII).

The *mandado de segurança* was expressly provided for the protection of fundamental rights, except for personal freedom and the right to free movement which are protected by the recourse for *habeas corpus* (Article 153, 21). According to the Law No 1533 of December 31 1951, it is only admitted against illegal or abuse of power actions adopted by public authority or corporations when exercising public attributions (Article 5, LXIX). The *mandado de segurança*, as is the case of the "amparo" action in Argentina, cannot be filed against statutes, even being of auto-applicative or self-executing nature.[144]

The 1988 Constitution also provided for a *mandado de segurança* of a collective nature, conceived as a mean for protecting collective interests that can be brought before the courts by political parties represented in the National Congress, and by trade union and other legally organized entities or associations for the defense of the interests of their members or associates (Article 5, LXX).

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[143] See in general. José Alfonso Da Silva, *Mandado de injunçao e habeas data*, Sao Paulo, 1989; Dimar Ackel Filho, *Writs Constitutionais*, Sao Paulo, 1988; Nagib Slaibi Filho, *Anotaçoes a Constituiçao de 1988*, Río de Janeiro, 1989; Celso Agrícola Barbi, Do *Mandado de Segurança*, 7th Edition de acordo com o Código de Processo Civil de 1973 e legislação posterior, Editora Forense, Río de Janeiro 1993; J. Cretella Júnior, *Comentários à ley do mandado de segurança (de acordo com a constituição de 5 de outubro de 1988*, 5th Edition, Editora Forense, Río de Janeiro 1992; José Alfonso Da Silva, "El mandamiento de seguridad en Brasil", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 123-157.

[144] See H. Fix-Zamudio, "Mandato de seguridad y juicio de amparo", in *Boletín del Instituto de Derecho Comparado de México*, Universidad Nacional Autónoma de México, N° 46, México 1963, pp. 11, 17.

This *mandado de segurança* can be brought before a variety of courts, and only if there are no other administrative recourses that can be filed against the challenged act, or if against judicial decisions, when no other recourses are provided in procedural law to obtain for their modification.

The *mandado de injunçao* was established to protect constitutional rights against the omissions of State authorities to regulate their exercise, particularly referring to constitutional rights related to nationality and citizenship when the lack of legislative or regulatory provisions make them unenforceable (Article 5, LXXI). So the action is filed in order to obtain a court order directed to the legislative or regulatory bodies to produce determined regulatory acts, the absence of which affects or harms the specific right.[145] In these cases, the courts cannot surrogate themselves in the powers of the legislative body, in the sense that they cannot "legislate" by means of this writ of *injunçao*, and are restricted to order or instruct for the protection of the constitutional right when unenforceable because of the lack of regulation.

11. The "tutela" and habeas corpus actions in Colombia

For the immediate protection of constitutional rights, the 1991 Colombian Constitution created the "action for tutela," using a word that in Spanish has the same general meaning as "amparo" and as "protección".

This action for "*tutela*", is referred in Article 86 of the Constitution as a preferred and summary proceeding that can be used for the immediate protection of certain constitutional rights (like in Chiile) that are those listed in the Constitution as "fundamental rights" or that are considered as such because of their connection with them. The Constitution refers to the action for *tutela* providing that it can be filed against

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[145] If the regulatory omission is attributable to the highest authorities of the Republic, the competent court to decide the mandado de injunçao is the Supreme Federal Tribunal. In other cases, the High Courts of Justice are the ones competent to do so.

public officials' violations and also against individual or corporations whose activities may particularly affect collective interest.

The action can only be filed when the injured party has no other judicial mean for the protection of his rights, unless when the tutela action is used as a transitory mean to prevent irreparable damages.

The *tutela* action, created by the 1991 Constitution was immediately regulated in the decree-law nº 2591 of November 19, 1991, and subsequently developed by decree nº 306 of February 19, 1992 and decree nº 382 of July 12, 2000.[146]

In addition to the habeas corpus recourse, which is regulated in the Criminal Code, the Constitution also provide for a "popular action" established for the protection of collective rights and interests when related to the protection of public property, public space use, public safety and public health, administrative behavior, the environment, free economic competition and others of the same nature defined by statute.

In particular, regarding the "action of *tutela*", its statutory regulation issued by Decree nº 2.591 of 1991, [147] and its very important appli-

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[146] See in general, Manuel José Cepeda, *La Tutela. Materiales y reflexiones sobre su signifycado*, Imprenta nacional, Bogotá1992; Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá 2004; Julio César Ortiz Gutierrez, "La acción de tutela en la Carta Politica de 1991. El derecho de amparo y su influencia en el ordenamiento constitucional de Colombia", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 213-256.

[147] See, in general, in regard to the tutela in Colombia, Jorge Arenas Salazar, *La Tutela Una acción humanitaria,* 1st Edition 1992, Ediciones Librería Doctrina y Ley, Santa Fe de Bogotá D.C., Colombia 1992; Manuel José Cepeda, *La Tutela Materiales y Reflexiones sobre su significado*, Imprenta Nacional, Bogotá 1992; Oscar José Dueñas Ruiz*, Acción de Tutela, Su esencia en la práctica, 50 respuestas básicas, Corte Suprema, Consejo de Estado, Legislación*, Ediciones Librería del Profesional, Santa Fe de Bogotá D.C., Colombia 1992; Federico González Campos, La Tutela: *Interpretación doctrinaria y jurisprudencial*, 2nd Edition, Ediciones Jurídicas Gustavo Ibáñez, Santa Fe de Bogotá 1994; Manuel José Cepeda, *Las Carta de Derechos. Su interpretación y sus implicaciones,* Temis, Bogotá 1993; Juan Manuel

cation by the courts, have molded an effective judicial mean for the protection of fundamental constitutional rights, which can be filed before the courts[148] at all times and in any place for the immediate protection of fundamental constitutional rights, whenever they are harmed by the action or the omission of any public authority or by certain individuals. In the latter case, they must be those rendering a public service, whose conduct can seriously and directly affects collective interests, and regarding which the aggrieved party finds himself in a position of subordination or defenselessness.

The Constitution does not exclude any State act from the tutela action, so Article 40 of the Decree 2591 expressly provided for the action for tutela against judicial decisions. Notwithstanding, the following year this article was annulled by the Constitutional Court by a decision

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Charry U., *La acción de tutela*, Editorial Temis, Bogotá 1992; Julio César Ortiz Gutierrez, "La acción de tutela en la Carta política de 1991. El derecho de amparo y su influencia en el ordenamiento constituicional de Colombia", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 213-256.

[148] The Constitution sets forth that the action of tutela for the protection of fundamental constitutional rights can be brought "before the judges"; which according to Decree 2.591 of 1991 are those with jurisdiction in the place where the violation or threat of violation have taken place (Article 37). In another Decree nº 1380 of 2000, regarding the courts with jurisdiction to decide the tutela actions, it was established that they must be file: before the Districts' Superior Courts when against any national public authority; before the Circuit courts when against any national or departmental decentralized entity for public services; before the municipal courts when against district or municipal authorities and against individuals; before the Cundinamarca Judicial review of administrative actions when against any general administrative act issued by a national authorities; before the respective superior court when against any judicial decision; and before a Corporation in its corresponding Chamber when against the Supreme Court of Justice, the Consejo de Estado or the Superior Council of the Judiciary, or its Disciplinary Chamber.

issued on October 1, 1992, considering it unconstitutional[149] because it was contrary to the general principle of *res judicata* effects of the judicial rulings, as an expression of the due process rights. With this Constitutional Court ruling, all arbitrary judicial decisions were left out of specific control. But in spite of the annulment of the article, this situation was amended by the same Constitutional Court through the development of the so called doctrine of arbitrariness, precisely conceived to allow the admission of the tutela actions against judicial decisions when issued as a result of courts arbitrary ruling or *voie de fait.* [150]

According to Article 86 of the Constitution, the action for tutela can only be admitted when the affected party does not have any other preferred and brief mean for judicial defense (Article 6,2 of the Decree Nº 2591), and in such cases, when filed "to obtain temporary judicial relief to avoid irreparable harm", being understood as irreparable damage those " that can only be wholly repaired by means of compensation" (Article 6,1). The Tutela Law also provides, similar to the Venezuelan "amparo" regulations, that in these cases "when used as a preliminary protective relief to avoid irreparable harm, the action of *tutela* may be brought conjunctly with the actions for annulment filed against administrative acts before the judicial review of administrative action jurisdiction (*contencioso administrativo*).

In all these cases, the judge may determine that the challenged administrative act "would not be applied to the specific protected situation pending the final decision on the nullity of the challenged act." (Decree nº 2.591, Article 8).

12. The amparo and habeas corpus actions in the Dominican Republic

The Constitution of the Dominican Republic only sets forth the judicial guaranties for the protection of personal safety, by means of the

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[149] See the decision nº C-543 of September 24, 1992 in *Derecho Colombiano*, Bogotá 1992, pp. 471 to 499; and in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá 2001, pp. 1009 ff.

[150] See the decision nº. T-231 of May 13, 1994, in *Idem,* pp. 1022 ff.

action of habeas corpus (Article 8) for the protection of personal freedom, which was initially regulated by the 1978 Habeas Corpus Law (*Ley de habeas corpus*). Since 2002 has been regulated in the Procedural Criminal Code (Ley 76-02) (articles 381-392).[151] Based on such regulations, the Supreme Court traditionally limited the procedure of habeas corpus for the protection of physical freedom and safety, excluding any possibility of using it in order to protect other constitutional rights. Apart from the Cuban Constitution, the Dominican Constitution is the only Latin American one which does not expressly regulate the "amparo" action as a specific judicial mean for the protection of the other constitutional rights. As aforementioned, the other Constitution that does not expressly provide for the amparo action is the Uruguayan one, but the action has been deducted from other guaranties established in it.

Nonetheless, the omission on the Dominican Republic Constitution did not impede the Supreme Court of Justice from admitting the "amparo" action, applying for that purpose the American Convention on Human Rights. It occur in a decision of February 24, 1999 in the *Productos Avon S.A.* Case, when the Supreme Court, based on the American Convention on Human Rights, admitted the "amparo" recourse for the protection of constitutional rights, in a case involving a judicial decision, assigning the power to decide on amparo matter, to the courts of first instance[152]; and establishing the general procedural rules for the proceeding.

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[151] See in general, Juan de la Rosa, *El recurso de amparo*, Edit. Serrales, Santo Domingo, 2001.

[152] Since then, the amparo action was successfully used for the protection of constitutional rights. Among the multiple cases is a very interesting 2002 case in which the Court of First Instance of the National District ordered the National Citizenship Registry to issue the Identification Card to two boys born in the Republic from illegally settled Haitian parents, arguing that the rejection of such documents constituted a violation of the boys' identity and citizenship rights. The matter finally reached the Inter American Court on Human Rights. See Samuel Arias Arzeno, "El Amparo en la República Dominicana: su Evolu-

This judicial doctrine regarding the admissibility of the "amparo" recourse leads to the sanctioning, in 2006, of the Law 437-06 establishing the recourse for amparo (*Ley nº 437-06 que establece el Recurso de Amparo)*, "against any act or omission from public authorities of from any individual, which in an actual and imminent way and with manifest arbitrariness and illegality, harms, restrict, alter of threat the rights and guaranties recognized explicit or implicit in the Constitution" (article 1). Nonetheless, and even though the amparo recourse was admitted by the Supreme Court in 1999 as a public law institution in a case brought before the Court against a judicial decision, the 2006 Law expressly has excluded the amparo recourse against "jurisdictional acts issued by any court within the Judicial Power" (Judiciary) (article 3,a); also providing that no judicial process before any court can be suspended by the exercise of the action for amparo (article 5).

The courts of first instance are the competent on matters of amparo (article 6), being the recourse an "autonomous action" which imply that in the Dominican Republic, the amparo action is not subjected to the previous exhaustion of other recourses or judicial means establish to challenge the act or omission (article 4).

13. The amparo, habeas corpus and habeas data actions in Ecuador

The Constitution of Ecuador also provides for the three fundamental means designed for the protection of human rights: the habeas corpus, habeas data and "amparo"; but contrary to the general trend of Latin America, not all are set forth as judicial remedies.

This is the case of the habeas corpus recourse, provided in article 95 of the Constitution as a right of "any person who thinks that he has been illegally deprived of his freedom" to file for its protection by an administrative request before the corresponding local government authority or mayor (*alcalde*).

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ción Jurisprudencial", in *Revista Estudios Juridicos*, Vol. XI, nº 3, Ediciones Capeldom, Septiembre-Diciembre 2002.

In contrast, regarding the "amparo" action it is conceived as a judicial remedy, for which, the same Article 95, also sets forth a very extensive regulation providing for a preferred and summary remedy for the protection of any right declared in the Constitution or in an international treaty or convention in force, against any illegitimate act or omission from a public authority. In Ecuador, as in Colombia and Costa Rica, the "amparo" action can also be filed if the act or the omission is executed by individuals or corporations rendering public services or that are acting by delegation or concession from a public authority.

In Ecuador, the three remedies, habeas corpus, habeas data and the "amparo" are also regulated in one single statute along with other constitutional proceedings: the Constitutional Judicial Review Law (*Ley de Control Constitucional*, Ley nº 000 RO/99) of July 2, 1997.[153]

The purpose of the "amparo" action, according to Article 95 of the Constitution and article 46 of the Law, is to effectively protect the rights enshrined in the Constitution or in international declarations, covenants and instrument, against any threat originated in any public authority illegitimate act or omission that causes imminent, grave and irreparable harm to the plaintiff[154]. The amparo action is also admitted against individuals when their conduct affects in a grave and direct way communal, collective or diffuse rights. It also be filed against acts or omissions of individuals and corporations, but in this case, as in Co-

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153 See in general, Rafael Oyarte martínez, *Manual de Amparo Constitucional. Guía de litigio constitucional*, CLD-Konrad Adenauer, Quito 2003; Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, and "La garantía de amparo en Ecuador", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 305-331.

154 See Hernán Salgado Pesantes, "La garantía de amparo en Ecuador", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 305-331.

lombia, only when they render a public service or act by delegation or concession from a public authority

The amparo action is not admissible against judicial decisions, and the competent courts to hear the "amparo" action are the first instance courts (Article 47, Law).

14. The amparo action in Guatemala

In Guatemala, Article 265 of the Constitution sets forth the "amparo", as a specific judicial mean with the purpose of protecting the people's constitutional rights against the violations or the threats to their rights in order to restore their effectiveness. The Constitution emphatically states that "there is no scope that could escape from the "amparo" as constitutional protection, since it is possible to file the action against acts, resolutions, provisions or statutes which explicitly or implicitly threatens, restricts or violates the rights guarantied by the Constitution and the statutes" (Article 265).[155]

For such protection, the constitutional provision only refers to actions from public authorities, but this has not prevented the admission of the "amparo" for the protection of all rights declared in the Constitution and also in statutes, as well as against individual actions.

The regulation of the action of "amparo" in Guatemala is also set forth in a general statute, the 1986 Amparo, Personal Exhibition and Constitutionality Statute (Decree nº 1-86, *Ley de amparo, exhibición personal y de constitucionalidad*).[156]

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[155] See Jorge Mario García Laguardia, "Las garantías jurisdiccionales para la tutela de los derechos humanos en Guatemala: Hábeas corpus y amparo", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 381-408.

[156] See in general, Jorge Mario García Laguardia, "Las garantías jurisdiccionales para la tutela de los derechos humanos en Guatemala. Habeas courpus y amparo", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 381-408.

According to Article 10 of this Law, the "amparo" is established to protect all rights against any situation provoking any risk, threat, restriction or violation, whether from authorities or private entities. Notwithstanding, regarding the latter, Article 9 of the Amparo Law restrict the "amparo" action only against private entities that are supported with public funds or that have been created by statute or by virtue of a concession, or those that act by delegation of the State, by virtue of a contract or a concession. Amparo can also be filed against entities to which certain individuals are legally compelled to be part of them (professional corporations) and other that are recognized by statute, like political parties, associations, societies, trade unions, cooperatives and similar.

Article 10 of the Amparo Law enumerates a few examples according to which everybody has the right to ask for "amparo",[157] including,

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[157] Article 10: a) To ask to be maintained or to be restituted in the enjoyment of the rights and guaranties set forth in the Constitution or any other statute; b) In order to seek a declaration in a particular case, that a statute, regulation, resolution or authority act does not oblige the plaintiff because it contradicts or restricts any of the rights guarantied in the Constitution or recognized by any other statute; c) In order to seek a declaration in a particular case that a non legislative disposition or resolution of Congress is not applicable to the plaintiff because it violates a constitutional right; d) When an authority of any jurisdiction issues a regulation, accord or resolution of any kind that abuses power or exceeds its legal attributions, or when it has no attributions or they are exercised in a way that the harm caused or that can be caused would be irreparable through any other mean of defense. e) When in administrative activities the affected party is compelled to accomplish unreasonable or illegal formalities, task or activities, or when no suppressive mean or recourse exists; f) When the petitions or formalities before administrative authorities are not resolved in the delay fixed by statutes, or in case that no delay exists, in a delay of 30 days once exhausted the procedure, or when the petitions are not admitted; g) In political matters when the rights recognized in the Constitution or statutes are injured by political organizations; h) In judicial and administrative matters, regarding which the statutes set forth procedures and recourses according to due process rules that can serve to adequately resolve them, if after the exhaustion of threat by the interested party, the threat, restriction or violation to the rights recognized in the Constitution and guarantied by the statute persist.

like in Honduras, the "amparo" against statutes which is conceived as a mean to obtain in a judicial decision in a particular case, a declaration that a statute, regulation, resolution or act of any authority does not oblige the plaintiff or injured party because it contradicts or restricts any of the rights guarantied in the Constitution or recognized by any statute. (Article 10,b).

Article 263 of the Constitution and Article 82 of the Amparo Law also regulate the right to *habeas corpus* in favor of anyone who is illegally arrested, detained or in any other way prevented from enjoying personal freedom, threatened with losing such freedom, or suffering humiliation, even when their imprisonment or detention is legally founded. In such cases, the affected party has the right to request his immediate personal appearance (*habeas corpus*) before the court, either for his constitutional guarantee of freedom to be reinstated, for the humiliations to cease, or to terminate the duress to which he was being subjected.

15. The "juicio de amparo"in México

The most important feature of the Mexican system of judicial review, related to the diffused method of judicial review, is the amparo suit (*juicio de amparo*) that can also be initiated be means of an action brought before the courts of the Federation for the protection of all individual guaranties declared in the Constitution, but only against actions accomplished by authorities, such as statutes, judicial decisions or administrative acts, and not against private individual actions. Since its introduction in the 1847 Acts of Constitutional Reform (article 25) as the duty of federal courts to provide protection to citizens against State actions, the *juicio de amparo* has developed allowing the courts to decide, always in particular cases or controversies, without making general declarations concerning the challenged act.

This "amparo" suit is also set forth to resolve any controversy arising from statutes' and authorities' acts which violate individual guaranties; and to resolve any controversy produced by federal statutes' or authorities' acts harming or restricting the States' sovereignty, or by

States' statutes of authorities' acts invading the sphere or federal authority (Article 1,1 of the Amparo Law).

In all these cases of "amparo", the judicial protection is granted by means of a quick and efficient procedure witch in the various expressions of the "amparo" suit, follows the same general procedural trends: the absence of formalisms; the role of the judges as intermediaries between the parties; the inquisitorial character of the procedure which grants the judge a wide range of powers to conduct and direct it, that can also to be exercised *ex officio*; and the concentration of the procedure steps in only one hearing.[158]

Article 107 of the Constitution regulates in a very extensive and detailed way the procedural rules for the exercise of the "amparo" action, and the competent courts to hear the cases. In this basic regulation, the traditional Mexican rule established is that in deciding the cases, the courts can not make any general declaration as to the statute or act on which the complaint is based.The "amparo" suit has also been regulated in Mexico in a specific "amparo" statute which develops Articles 103 and 107 of the Constitution *(Ley de amparo reglamentaria de los artículos 103 y 107 de la Constitución Política)* of 1936, which has been amended many times.[159]

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[158] See Héctor Fix-Zamudio, *Ensayos sobre el derecho de amparo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2003; Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, "El derecho de amparo en México", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 461- 521.

[159] See in general, Hector Fix-Zamudio, *Ensayos sobre el derecho de amparo*, Universidad nacional Autónoma de México, Editorial Porrúa, México 2003; Ignacio Burgoa, *El Juicio de Amparo*, Ediorial Porrúa, México1991; Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002; Héctor Fix-Zamudio and Eduardo Ferrer Mac-Grego, "El derecho de amparo en México", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 461-521.

But this trial of amparo, if it is true that is the only judicial mean that can be used for the judicial protection of constitutional rights and guaranties as well as for judicial review of the constitutionality of legislation, in its substance is a collection of various proceedings assembled in a very complex procedural institution, comprising at least five different judicial processes that in all other countries with a civil law tradition are different ones. These five different aspects, contents or expressions of the trial for *amparo*, as systematized by Professor Héctor Fix-Zamudio,[160] are the following:

The first aspect of the *juicio de amparo* is the so called "amparo" for the protection of freedom (*amparo de la libertad*), which is a judicial mean for the protection of fundamental rights established in the Constitution. This trial for "amparo" is equivalent to the *habeas corpus* proceeding for the protection of personal liberty, but in Mexico can also serve for the protection of all other fundamental rights or guaranties established in Articles 1 to 29 when violated by an act of an authority.[161]

The second aspect of the trial for amparo is the amparo against judicial decisions (Article 107, III, V Constitution) called "*amparo judicial*" or "*amparo casación*", filed by a party in a particular case alleging that the judge, when deciding, has incorrectly applied the pertinent legal provision. In this case, the amparo is a recourse to challenge judicial decisions very similar to the recourse of cassation that exists in proce-

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[160] See H. Fix-Zamudio, *El juicio de amparo*, México 1964, p. 243, 377; H. Fix-Zamudio, "Reflexiones sobre la naturaleza procesal del amparo", in *Revista de la Facultad de Derecho de México*, 56, 1964, p. 980; H. Fix-Zamudio, "Lineamientos fundamentales del proceso social agrario en el derecho mexicano", in *Atti della Seconda Assemblea. Istituto di Dirito Agrario Internazionale a Comparato,* Vol. I, Milán 1964, p. 402; Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España, Estudio de Derecho Comparado*, 2nd Edition, Edit. Porrúa, México 2000; Ignacio Burgoa O., *El juicio de amparo*, Twenty-eighth Edition, Editorial Porrúa S.A., México 1991.

[161] See Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, p. 92.

dural law in all civil law countries which are filed before the Supreme Courts of Justice to control the legality or constitutionality of judicial decisions. The institution is elsewhere called *recurso de casación*, according to the French tradition, and is filed before the Court on cassation or before the Cassation Chambers of the Supreme Court as an extraordinary judicial mean to challenge definitive and final judicial decisions founded on violations of the Constitution, or of statutes or of the judicial procedural formalities. By this judicial mean, the Supreme Courts assures the uniformity of judicial interpretation and application of the law. In Mexico this well known extraordinary judicial recourse is regulated as one of the modalities or expressions of the *juicio de amparo*.

The third aspect of the trial for amparo is the so-called administrative amparo (*amparo administrativo*) through which it is possible to challenge administrative acts that violate the Constitution or the statutes (Article 107, IV Constitution), resulting in this case, in a judicial mean for judicial review of administrative action. This means is equivalent to the *contencioso-administrativo* recourses (Judicial review of administrative actions) that, also following the French influence, exists in many of the civil law countries.These recourses are commonly filed before special courts (*contencioso administrativo)* specifically established for the purpose to control the legality and constitutionality of Public Administration's actions and, in particular, of administrative acts, seeking their annulment.[162] In Mexico, on the contrary, the administrative amparo is the judicial mean established to control the legality of administrative action and for the protection of individual constitutional rights

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[162] Even in some Latin American countries, like Colombia, a Consejo de Estado has been created following the Conseil d'État French model, as the head of a Judicial Review of Administrative Action separate Jurisdiction. In the other countries, the head of the Jurisdiction has been located in the Supreme Court, and the main purpose of it, as mentioned, is to challenge administrative acts seeking their annulment when considered unconstitutional or illegal. The important trend of such Jurisdiction is that it is not only devoted to protect human or constitutional rights, but in general, the legality of the administrative actions.

and guaranties against administrative acts, substituting what in other countries is the *jurisdicción contencioso administrativa.*[163]

The fourth aspect of the trial for amparo is the so called agrarian amparo (*amparo agrario*) which is set up for the protection of peasants' rights against acts of public authorities, particularly referring to collective rural property rights (Article 107, II.).

And finally, the fifth aspect of the trial for amparo, is the so called amparo against laws *(amparo contra leyes),* as a judicial mean directed to challenge statutes that violate the Constitution, resulting in this case, in a judicial review mean of the constitutionality of legislation. It is exercised in a direct way against statutes without the need for any additional administrative or judicial act of enforcement or of application of the statute considered unconstitutional; which implies that the challenged statute must have a self executing character.

All of these five "amparo" proceedings are developed before a variety of courts, so for instance, when the petition of "amparo" is filed against federal or local statutes, international treaties, national executive regulations or State's Governors' regulations or any other administrative regulations, it must be filed before the District Courts (article 114 Amparo Law).[164]

From all these five aspects or expressions of the "amparo" suit, the conclusion is that in Mexico, the "amparo" is not really one single adjective guaranty (action or recourse) for the protection of constitutional rights, but is rather a varied range of judicial processes and procedures all used for the protection of constitutional guaranties. It is a unique judicial proceeding which, with all its procedural peculiarities, cannot be reproduced in any other legal system. It was initially established fol-

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[163] An exception has always been the Tribunal Fiscal de la Federación.

[164] See H. Fix-Zamudio, "Algunos problemas que plantea el amparo contra leyes", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, México 1960, pp. 15, 20.

lowing the United States judicial review model,[165] also as a mean for judicial review of the constitutionality of statutes following the features of the diffuse method of judicial review of legislation[166], but it eveolved in a quite different way

Regarding the amparo against statutes, always filed against "public authorities"[167], is a mean for judicial review of the constitutionality of legislation, sought through an "action of unconstitutionality" that is filed before a federal District Court (Article 107, XII). The defendants in the case are the organs of the State that have intervened in the process of formation of the statute, namely, the Congress of the Union or the state Legislatures which have sanctioned it; the President of the Republic or the Governors of the states which have enacted it, and the Secretaries of state which have countersigned it and ordered its publication.[168] In these cases, it is provided that the federal district courts decisions are reviewable by the Supreme Court of Justice (Article 107, VIII,a).

The *amparo* against statutes, therefore, is a direct action filed against a statute when it directly affects the plaintiff's guaranties, without the need of any other intermediate or subsequent administra-

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165 See J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la ciencia política", in *Revista de la Facultad de Derecho de México*, n° 45, México 1962, p. 657.

166 See H. Fix-Zamudio, "Algunos problemas que plantea el amparo contra leyes", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, México 1960,p. 22, 23.

167 This aspect, particularly regarding judicial review of statutes, reveals another substantial difference between the Mexican system and the general diffuse system of judicial review, in which the parties in the particular process where a constitutional question is raised, continue to be the same..

168 See H. Fix-Zamudio, "Algunos problemas que plantea el amparo contra leyes", in *Boletín del Instituto de Derecho Comparado de México,* Universidad Nacional Autónoma de México, México 1960, p. 21.

tive or judicial act, that is, a statute that with its sole enactment causes personal and direct prejudice to the plaintiff. [169]

Regarding the effects of the judicial decision on any of the aspects of the trial for *amparo*, including the cases of judicial review of constitutionality of legislation, since the initial 19th Century provision for the trial for *amparo*, the Constitution has expressly emphasized that the courts cannot "make any general declaration as to the law or act on which the complaint is based". Consequently, the judgment can "only affect private individuals" and is limited to protect them in the particular case to which the complaint refers (Article 107,II).[170] Therefore, the decision in a *juicio de amparo* in which judicial review of legislation is accomplished, as it happens with the decisions of the Supreme Courts in Paraguay and Uruguay, only has *inter partes* effects, and can never consist in general declarations with *erga omnes* effects.

Therefore, the courts, in their amparo decisions regarding the unconstitutionality of statutes, can not annul or repeal them; and similarly to all legal systems with the diffuse method of judicial review, the statute remains in the books and can be applied by the courts, the only effect of the declaration of its unconstitutionality being directed to the parties in the particular process.

As a consequence, the decisions of the trials for *amparo* do not have general binding effects, being only obligatory to other courts when a precedent is established by means of *jurisprudencia* (Article 107, XIII, 1 Constitution), which according to that Amparo Law is attained when five consecutive decisions to the same effect, uninterrupted by any in-

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[169] That is why, in principle, the action seeking the amparo against laws must be brought before the court within 30 days after their enactment, or within 15 days after the first act of execution of the said statute so as to protect the plaintiff's rights to sue. Article 21 Amparo Law. See H. Fix-Zamudio, *Idem*, pp. 24, 32; Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, pp. 164, 171, 176.

[170] The principle is named the "*Otero formula*" due to its inclusion in the 1857 constitution under the influence of Mariano Otero. See H, Fix-Zamudio, *Idem*, p. 33, 37.

compatible ruling, are rendered by the Supreme Court of Justice or by the Collegiate Circuit Courts.[171] Nonetheless, the *jurisprudencia* can be modified when the respective Court pronounces a contradictory judgment with a qualified majority of votes of its members (Article 139).[172]

16. The amparo and habeas corpus recourses in Nicaragua

The Constitution of Nicaragua provides for a recourse for "amparo", as well as the habeas corpus recourse established for the protection of people's freedom, physical integrity and safety (Articles 188 and 189 of the Constitution), both regulated in one general "amparo" statute (*Ley de amparo*) of 1988.[173]

Regarding the "amparo" action, the Constitution only provides that "the persons whose constitutional rights have been violated or are in peril of being violated, can file the recourse of personal exhibition or the recourse of "amparo". No constitutional provision exists regarding

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[171] Article 192, 193. See in Robert D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, pp. 256, 257.

[172] Nevertheless, as *jurisprudencia* can be established by the federal Collegiate Circuit Courts and by the Supreme Court, contradictory interpretations of the constitution can exist, having binding effects upon the lower courts. In order to resolve these conflicts, the constitution establishes the power of the Supreme Court or of the Collegiate Circuit Court to resolve the conflict, when the contradiction is denounced by the Chambers of the Supreme Court or another Collegiate Circuit Court; by the Attorney General or by any of the parties to the cases in which the *jurisprudencia* was established (Article 107, XIII). Anyway the resolution of the contradiction between judicial doctrines, has the sole purpose of determining one single *jurisprudencia* on the matter, and does not affect particular juridical situations, derived from the contradictory judicial decisions adopted in the respective trials (Article 107, XIII). See the comments in J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las leyes: una contribución de las Américas a la ciencia política", in *Revista de la Facultad de Derecho de México*, 45, México 1962, p. 662.

[173] See in general, Iván Escobar Fornos, "El amparo en Nicaragua", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 523-563

the origin of the violation, so that if it is true that the recourse could then be brought against violations provoked by public officials and individuals, the latter case has not been regulated. Like in Costa Rica and El Salvador, Nicaragua has also established a concentrated judicial system of "amparo" by granting the Supreme Court of Justice the exclusive power to decide the "amparo" actions (Article 164,3), but with the difference that in those countries, the judicial review system is an exclusively concentrated one, exercised by the Constitutional Chamber of the Supreme Courts. In Nicaragua, the judicial review system is a mixed one.

According to the Law, the recourse of amparo in Nicaragua is set forth against any provision, act or resolution, and in general against any action or omission from any official, authority or agent that violates or an attempt to violate the rights declared in the Constitution (Article 45), and is not admitted against violations or threats committed by individuals.

Regarding the procedure of the Nicaraguan concentrated "amparo", it is also different from the one in Costa Rica and El Salvador, particularly because the recourse for "amparo", although being decided by the Supreme Court, is not directly filed before it, but before the Courts of Appeals. So in Nicaragua, the procedure on the "amparo" suit has two steps: one that must be accomplished, including the possible suspension of the effects of the challenged act, before the Courts of Appeals; and the second that must be accomplished before the Supreme Court where the files must be sent for the final decision. The Courts of Appeals are also empowered to reject the recourses, in which cases the plaintiff can bring the case before the Supreme Court also by means of an action of "amparo" (Article 25 Law)[174].

[174] Idem.

17. The amparo, habeas corpus and habeas data recourses in Peru

The Constitution of Peru in its enumeration of the constitutional guaranties also provides for the three actions for constitutional protection: the habeas corpus, the "amparo" and the habeas data actions (Article 200). [175]

The action of *habeas corpus* that can be filed against any action or omission by any authority, official or person that impairs or threatens individual freedom, and the action of *habeas data* can be filed against any act or omission by any authority, official or person that impairs or threatens the rights to request and receive information from any public office, except when they affect personal privacy or were excluded for national security. The action of habeas data can also de filed to assure that public or private information services will not release information that affects personal and familiar privacy. (Article 2, 5 and 6).

All these actions (habeas corpus, "amparo" and habeas data) have been regulated in the Constitutional Procedural Code sanctioned in 2004 (Ley Nº 28237, *Código Procesal Constitucional*)[176], which in addition to regulate all the juducial review procedures, provide that in matters of "amparo", the competent courts to hear the proceeding are the Civil Courts with jurisdiction on the place where the right is affected, or where the plaintiff or defendant have their residence. (Article 51) When the harm is caused by a judicial decision, the competent court is always the Civil Chamber of the respective superior court of justice.

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[175] See in general, Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004; Domingo García Belaúnde and Gerardo Eto Cruz, "El proceso de amparo en el Perú", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 593-632

[176] The Code repealed the previous statutes regulating the amparo and the habeas corpus recourses (Law 23.506 of 1982, and Law 25.398 of 1991). See Samuel B. Abad Yupanqui et al., *Código Procesal Constitucional*, Ed. Palestra, Lima 2004; Alberto Borea Odria, *Las garantías constitucionales: Habeas Corpus y Amparo,* Libros Perúanos S.A., Lima 1992; Alberto Borea Odría, *El amparo y el Hábeas Corpus en el Perú de Hoy*, Lima, 1985.

Article 200 of the Constitution also establishes the action of "amparo" to protect all other rights recognized by the Constitution which are impaired or threatened by any authority, official or private individuals in order to restore things to the situation they had previous to the violation (Article 1). As in Paraguay, according to the Constitution, the action of "amparo" is not admissible against statutes or against judicial decisions, but with the difference that in Peru, the exclusion refers only to judicial decisions issued in a regular proceeding.

According to the same Code, the "amparo" action shall only be admitted when previous procedures have been exhausted (Articles 5,4; 45); and in any case, when doubts exists over the exhaustion of prior procedures. (Article 45)

18. The amparo proceeding in Venezuela

The 1999 Venezuelan Constitution establishes a constitutional right for amparo[177]or for protection by the courts that everybody have for the protection of all the rights and freedoms enshrined in the Constitution and in international treaties, or which, even if not listed in the text, are inherent to the human person.[178]

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[177] Regarding this constitutional provision, Héctor Fix Zamudio pointed out in 1970 that Article 49 of the 1961 Constitution, "definitively enshrined the right to amparo as a procedural instrument to protect all the constitutionally enshrined fundamental rights of the human person", in what he described as "one of the most outstanding achievements of the very advanced Magna Carta of 1961. See Héctor Fix Zamudio, "Algunos aspectos comparativos del derecho de amparo en México y Venezuela", *Libro Homenaje a la Memoria de Lorenzo Herrera Mendoza*, UCV, Caracas 1970, Volumen II, pp. 333-390. This trend has been followed in Article 27 of the 1999 Constitution. See Héctor Fix-Zamudio, "La teoría de Allan R. Brewer-Carías sobre el derecho de amparo latinoamericano y el juicio de amparo mexicano", in *El Derecho Público a comienzos del Siglo XXI. Libro Homenaje al profesor Allan R. Brewer-Carías*, Volumen I, Instituto de Derecho Público, Editorial Civitas, Madrid 2003, pp. 1125 ff.

[178] On the action of amparo in Venezuela, in general, see Gustavo Briceño V., *Comentarios a la Ley de Amparo*, Editorial Kinesis, Caracas 1991; Rafael J. Chavero

As in Guatemala and Mexico, the Constitution does not set forth a separate action of habeas corpus for the protection of personal freedom and liberty, instead it establishes that the action for "amparo" regarding freedom or safety, may be exercised by any person in which cases "the detainee shall be immediately transferred to the court, without delay".

The Constitution has also set forth the habeas data recourse, guaranteeing the right to have access to the information and data concerning the claimant contained in official or private registries, as well as to know about the use that has been made of the information and about its purpose, and to petition the competent court for the updating, rectification or destruction of erroneous records and those that unlawfully affect the petitioner's right (Article 28).

The "amparo" action is regulated in a Statute on Amparo for the protection of constitutional rights and guaranties sanctioned in 1988 (*Ley Orgánica de Amparo sobre derechos y garantías constitucionales*).[179]

Gazdik, *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001; Gustavo José Linares Benzo, *El Proceso de Amparo*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Caracas 1999; Hildegard Rondón De Sansó, *Amparo Constitucional*, Caracas 1988; Hildegard Rondón De Sansó, *La acción de amparo contra los poderes públicos*, Editorial Arte, Caracas 1994; Carlos M. Ayala Corao and Rafael J. Chavero Gazidk, "El amparo constitucional en Venezuela", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 649-692.

[179] See in general, Allan R. Brewer-Carías, *Instituciones políticas y constitucionales, Vol. V, El derecho y la acción de amparo*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas-San Cristóbal 1998; Hildegard Rondón de Sansó, *Amparo constitucional*, Caracas 1988; Gustavo J. Linares Benzo, *El proceso de amparo*, Universidad Central de Venezuela, Caracas 1999; Rafael J. Chavero Gazdik, *El Nuevo regimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001; Allan R. Brewer-Carías, Carlos Ayala Corao and Rafael J. Chavero G., *Ley Orgánica de Amparo sobre derechos y garantías constitucionales*, Editorial Jurídica Venezolana, Caracas 2007; Carlos Ayala Corao and Rafael

This right to amparo can be exercised through an "autonomous action for amparo"[180] that in general is filed before the first instance court (Article 7 Amparo Law);[181] or by means of pre existing ordinary or extraordinary legal actions or recourses to which an "amparo" petition can be joined, and the judge is empowered to immediately re-establish the infringed legal situation. In all such cases, it is not that the ordinary means substitute the constitutional right of protection (or diminish it), but that they can serve as the judicial mean for protection since the

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Chavero G., "El amparo constitucional en Venezuela", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México 2006, pp. 649-692.

[180] See Allan R. Brewer-Carías, "El derecho de amparo y la acción de amparo", in Revista *de Derecho Público*, n° 22, Editorial Jurídica Venezolana, Caracas 1985, pp. 51 ff.

[181] According to the Constitution, the right to protection may be exercised, according to the law, before "the Courts", and thus, as it has been said, the organization of the legal and procedural system does not provide for one single judicial action to guaranty the enjoyment and exercise of constitutional rights to be brought before one single Court. In Venezuela, according to Article 7 of the Organic Law on Amparo, the competent courts to decide amparo actions are the First Instance Courts with jurisdiction on matters related to the constitutional rights or guaranties violated, in the place where the facts, acts of omission have occurred. Regarding amparo of personal freedom and security, the competent courts should be the Criminal First Instance courts (Article 40). Nonetheless, when the facts, acts or omissions harming or threatening to harm the constitutional right or guaranty occurs in a place where no First Instance court exists, the amparo action may be brought before and any judge of the site, which must decide according to the law, and in a 24 hour delay it must send the files for consultation to the competent First Instance court (Article 9). Only in cases in which facts, actions or omissions of the President of the Republic, his Cabinet members, the National Electoral Council, the Prosecutor General, the Attorney general and the General Comptroller of the Republic are involved does the power to decide the amparo actions correspond to the Constitutional Chamber of the Supreme Tribunal of Justice (Article 8).

judge is empowered to protect fundamental rights and immediately re-establish the infringed legal situation.[182]

This last possibility does not presuppose in Venezuela that for the filing of an autonomous "amparo" action, all other pre-existing legal judicial or administrative means have to be exhausted, as is the case for instance, of the recourse for amparo or the "constitutional complaint" developed in Europe, particularly in Germany and in Spain.[183]

This right for "amparo" has been regulated in the 1988 Organic Law of Amparo,[184] expressly providing for its exercise, not only by

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[182] See Allan R. Brewer-Carías, "La reciente evolución jurisprudencial en relación a la admisibilidad del recurso de amparo", in *Revista de derecho público*, nº 19, Caracas 1984, pp. 207-218.

[183] In these countries, the protective remedy is really an authentic "recourse" that is brought, in principle, against judicial decisions. In Germany, for example, to bring a constitutional complaint for the protection of constitutional rights before the Federal Constitutional Tribunal, the available ordinary judicial means need to be previously exhausted, which definitively entails a recourse against a final judicial decision, even though, in exceptional cases, a direct complaint for protection may be allowed in certain specific cases and with respect to a very limited number of constitutional rights. See K. Schlaich, "Procedures et techniques de protection des droits fondamentaux. Tribunal Constitutionnel Fédéral allemand", in L. Favoreu (ed.), *Cours constitutionnelles européenes et droits fondamentaux,* Paris 1982, pp. 105-164. In Spain, all legal recourses need to be exhausted in order to bring a "recurso de amparo" of constitutional rights before the Constitutional Tribunal, and, particularly when dealing with protection against administrative activities, the ordinary means for judicial review of administrative decisions must be definitively exhausted. For this reason, the recourse for protection in Spain is eventually a means for judicial review of decisions taken by the Administrative Judicial review courts. See J.L. García Ruíz, *Recurso de amparo en el derecho español,* Madrid 1980. F. Castedo Álvarez, "El recurso de amparo constitucional", in Instituto de Estudios Fiscales, *El Tribunal Constitucional*, Madrid 1981, Vol. I, pp. 179-208.

[184] See Gaceta Oficial n° 33.891 of January 22, 1988. See Allan R. Brewer-Carías, Carlos M. Ayala Corao and Rafael Chavero G., *Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales*, Caracas 2007. See also Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Tomo V, *El derecho y la acción de amparo*, Editorial Jurídica Venezolana, Caracas 1998, pp. 163 et seq.

means of an autonomous action for "amparo", or by the filing of the amparo petition jointly with the popular action of unconstitutionality against statutes and State acts of the same rank and value (Article 3); with the judicial review of administrative actions recourses against administrative acts or against omissions from Public Administration (article 5); or with another ordinary judicial actions (article 6,5).[185]

The same Supreme Court has also ruled that in these latter cases, the action for "amparo" is not an autonomous action, "but an extraordinary one, ancillary to the action or recourse to which it has been joined, thus subject to its final decision. Being joint actions, the case must be heard by the competent court regarding the principal one"[186].

Regarding the first mean for protection, that is, the autonomous action for "amparo", in principle it can be brought before the first instance courts[187], having a re-establishing nature and "is a sufficient ju-

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[185] See the Supreme Court decision of July 7, 1991 (Case*: Tarjetas Banvenez*), in *Revista de Derecho Público*, nº 47, Editorial Jurídica Venezolana, Caracas 1991, pp. 169-174.

[186] See in *Revista de Derecho Público,* nº 50, Editorial Jurídica Venezolana, Caracas 1992, pp. 183-184. See Allan R. Brewer-Carías, "Observaciones críticas al Proyecto de Ley de la Acción de Amparo de los Derechos Fundamentales (1985)"; "Proyecto de Ley Orgánica sobre el Derecho de Amparo (1987)"; and "Propuestas de reforma al Proyecto de Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales (1987)", in *Estudios de Derecho Público, Tomo III, (Labor en el Senado 1985-1987)*, Ediciones del Congreso de la República, Caracas 1989, pp. 71-186; 187-204; 205-229

[187] Regarding amparo of personal freedom and security the competent courts should be the Criminal First Instance courts (Article 40). Nonetheless, when the facts, acts or omissions harming or threatening to harm the constitutional right or guarantee occurs in a place where no First Instance court exists, the amparo action may be brought before and judge of the place, which must decide according to the law, and in a 24 hour delay it must send the files for consultation to the competent First Instance court (Article 9). Only in cases in which facts, actions or omissions of the President of the Republic, his Cabinet members, the National Electoral Council, the Prosecutor General, the Attorney general and the General Comptroller of the Republic are involved, the power to decide the

dicial mean in itself in order to return the things to the situation they were when the right was violated and to definitively make the offender act or fact disappear. In such cases, the plaintiff must invoke and demonstrate that it is a matter of flagrant, vulgar, direct and immediate constitutional harm, and the courts must decide based on the violation of the Constitution and not only on the violation of statutes.[188]

In all these other cases of "amparo" petitions filed jointly with other judicial means, contrary to the Mexican system, they do not substitute the ordinary or extraordinary judicial means by naming them all as "amparo"; only providing that the "amparo" claim can be filed jointly with those other judicial means"[189].

From all these regulations it results that the Venezuelan right for "amparo", as it happened with the Mexican system, also has certain peculiarities that distinguish it from the other similar institutions for the protection of the constitutional rights and guaranties established in Latin America.[190] Beside the adjective consequences of the "amparo"

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amparo actions correspond in only instance to the Constitutional Chamber of the Supreme Tribunal of Justice (Article 8).

188 Decision of July 7, 1991. See the text in *Revista de Derecho Público*, nº 47, Editorial Jurídica Venezolana, Caracas 1991, pp. 169-174.

189 In this regard, the Supreme Court of Justice has clearly set forth the proceeding rules as follows: "The amparo claims filed jointly with another action or recourse have all the inherent adjective character of the actions' joint proceedings, that is: it must be decided by only one court (the one competent regarding the principal action), and both claims (amparo and nullity or other) must be heard in only one proceeding that has two stages: the preliminary one regarding the amparo, and the contradictory one, which must include in its final decision, the preliminary one which ends in such time, as well as the decision on the requested nullity. In other words, if because of the above analyzed characteristics the amparo order [for instance when the amparo is filed conjunctly with other action] is reduced only and exclusively to the preliminary suspension of a challenged act, the decision which resolves the requested nullity leaves without effects the preventive preliminary measure, whether the challenged act is declared null or not." *Idem*, p. 171.

190 See in general, H. Fix Zamudio, *La protección procesal de los derechos humanos ante*

being a constitutional right, it can be characterized by the following trends:

First, the right of "amparo" can be exercised in Venezuela for the protection of all constitutional rights, not only of civil individual rights. Consequently, the social, economic, cultural, environmental and political rights declared in the Constitution and in international treaties are also protected by means of "amparo". The habeas corpus *is* an aspect of the right to constitutional protection, or one of the expressions of the *amparo*.

Second, the right to "amparo" seeks to assure protection of constitutional rights and guaranties against any disturbance in their enjoyment and exercise, whether originated by public authorities or by private individuals without distinction[191].

And in the case of disturbance by public authorities, the "amparo" is admissible against statutes, against legislative, administrative and judicial acts, and against material or factual courses of action of Public Administration or public officials.

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las jurisdicciones nacionales, Madrid, 1982, pp. 366.

[191] The Constitution makes no distinction in this respect, and thus the action for amparo is perfectly admissible against actions by individuals, the action for amparo has doubtlessly been conceived as a traditional means of protection against actions by the state and its authorities. However, despite this tradition of conceiving the action for protection as a means of protecting rights and guarantees against public actions, in Venezuela, the scope with which this is regulated by Article 27 of the Constitution allows the action for amparo to be brought against individual actions, that is to say, when the disruption of the enjoyment and exercise of rights originates from private individuals or organizations. This also differentiates the Venezuelan system from that which exists in other systems such as México or Spain, in which the "action for amparo" is solely conceived against public actions. For this reason, in Spain the recourse of amparo is expressed as a review of decisions by the administrative judicial court when reviewing administrative acts. See J. González Pérez, *Derecho procesal constitucional*, Madrid, 1980, p. 278.

Third, the decision of the judge, as a consequence of the exercise of this right to "amparo", whether through the pre-existing actions or recourses or by means of the autonomous action for "amparo", is not limited to be of a precautionary or preliminary nature, but to reestablish the infringed legal situation by deciding on the merits, that is, the constitutionality of the alleged disturbance of the constitutional right.

Fourth, since the Venezuelan system of judicial review is a mixed one, judicial review of legislation can also be exercised by the courts when deciding action for "amparo" when, for instance, the alleged violation of the right is based on a statute deemed unconstitutional. In such cases, if the protection requested is granted by the courts, it must previously declare the statute inapplicable on the grounds of it being unconstitutional. Therefore, in such cases, judicial review of the constitutionality of legislation can also be exercised when an action for "amparo" of fundamental rights is filed.

Fourth Lesson

A GENERAL OVERVIEW OF THE LATIN AMERICAN SYSTEMS OF JUDICIAL REVIEW

Judicial review of the constitutionality of legislation an judicial protection of constitutional rights have been developing in Latin America since the 19th century, where the two main judicial review systems known in comparative law[192] have been applied, that is, the diffuse (decentralized) and the concentrated (centralized) methods of judicial review. In some cases, one or the other of these methods have been established in the Latin American countries, as the only one existing in it; and in other cases, they have been adopted in a mixed or parallel way, coexisting for the purpose of guarantying the supremacy of the Constitutions. This last solution has been followed in many Latin

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[192] See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

American countries, being possible then to identify a mixed system of judicial review, in which the diffuse and concentrated methods of judicial review are combined.[193]

The main criteria for classifying these systems of judicial review of the constitutionality of State acts, particularly of statutes, is referred to the number of courts that must carry out that task of exercising constitutional justice, in the sense that it can be attributed to all the courts of a given country (diffuse method), or only to one single court (concentrated system), whether the Supreme Court or a special Constitutional Court created for such purpose.

In the first case, that is, in the diffuse method, when all the courts of a given country are empowered to act as constitutional judges and control the constitutionality of statutes, the system has been identified as the "American system", because it was first adopted in the United States particularly after the well known *Marbury* v. *Madison* case U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803). Notwithstanding, the system is not only specific to countries with common law systems, since it has also been developed in countries with Roman or civil law traditions, precisely like those in Latin America. This method of judicial review has also been called diffuse or decentralized,[194] because in it, the judicial control belongs to all the courts, from the lowest level up to the Supreme Court of the country, allowing them not to apply a statute in the particular case they have to decide, when they consider it unconstitutional and void, thereby giving prevalence to the Constitution.[195]

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[193] See in general M. Cappelletti, *Judicial Review in the Contemporary World*, Indianapolis 1971, p. 45 and M. Cappelleti and J.C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations", in *Harvard Law Review*, 79, 6, April 1966, p. 1207.

[194] See M. Cappelletti, "El control judicial de la constitucionalidad de las leyes en el derecho comparado", in *Revista de la Facultad de Derecho de México,* nº 61, 1966, p. 28.

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

Since the 19th Century this diffuse method has been applied in almost all Latin American countries, as is the case of Argentina (1860), Brazil (1890), Colombia (1850), Dominican Republic (1844), Mexico (1857), Venezuela (1897), and also since the 20th Century in Ecuador, Guatemala, Nicaragua, and Peru.[196] Only in Argentina, the method strictly follows the American model. In the other countries it exists, but applied in combination with the concentrated method of judicial review.

Following the American model, when applying the diffuse method of judicial review of legislation, the decisions of the courts only have *inter partes* effect, that is, related to a particular case where the decision has been issued and to the parties in the process. So the courts do not annul the statutes considered unconstitutional, but only declare them void and unconstitutional, and not applicable to the case.

In the second method of judicial review, that is the concentrated one, when the power to control the constitutionality of legislation is given to a single judicial organ of the State, whether it is the Supreme Court or a special Constitutional Court created for such particular purpose, it has been identified as the "Austrian" system, because in Europe, it was first established in Austria and Czechoslovakia in 1920, due to the influence of Hans Kelsen,[197] who proposed the creation of the Constitutional Court. It has also been called the "European system" because after World War II it was followed in other European countries, as is the case of Germany, Italy, France, Portugal and Spain, countries where Constitutional Tribunal or Courts were created. It is a con-

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[196] See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina", in Domingo García Belaúnde and Francisco Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117-161.

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

centrated system of judicial review, as opposed to the diffuse system, because the power to control the constitutionality of statutes is given only to one single Constitutional Court of Tribunal, that must decide on the matter in an objective way without any reference to a particular case or controversy, with powers, in general, to declare the nullity of the challenge statutes with general, *erga omnes* effects.

But before Kelsen's proposals and before the European experiences, and even though without the creation of special Constitutional Courts or Tribunals, the concentrated method of judicial review also was established since the middle of the 19th Century in Latin America by assigning the existing Supreme Court of the countries the power to nullify statutes on grounds of unconstitutionality. This was the case in Colombia and Venezuela where an authentic concentrated system of judicial review exercised by means of a popular action has existed since 1858, initially in the hands of the Supreme Courts and more recently, through Constitutional Courts, having the monopoly of annulling statutes on the grounds of their unconstitutionality.

This concentrated system has been adopted in all Latin American counties, except Argentina, and in Bolivia, Costa Rica, Chile, El Salvador, Honduras, Panama, Paraguay and Uruguay, the system remains exclusively concentrated, although only in Bolivia and Chile, a Constitutional Tribunals have been created. In the other countries, the system has moved to a mixed one, combining the diffuse and the concentrated methods of judicial review, as is the case of Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru and Venezuela. In this latter group, only in Colombia, Ecuador, Guatemala and Peru, a Constitutional Court or Tribunal has been crated; and in Nicaragua and Venezuela what has been created is a Constitutional Chamber within the Supreme Court.

In the concentrated system of judicial review, the petition for judicial review of legislation can be brought before the Court, whether by means of a direct action filed against the statute, in which case its constitutionality is the only matter in discussion in the proceeding, without any reference or relation to a particular case or controversy; or

whether by means of an incidental constitutional question or request that must be raised in a particular case or controversy, where, on the contrary, the main issue of litigation is not the constitutional question, but what constitutes the merits of the case.

Other distinction can be made in the concentrated system regarding the direct actions of unconstitutionality, referred, first, to the standing to sue, which can be a limited one as occur in many countries (reserved to High Officials) or can be open to the citizenship, through a popular action s is the case in Colombia, El Salvador, Nicaragua, Panama and Venezuela; and second, to the moment of the filling of the action, which can be prior to the enactment of the particular challenged statute (*a priori* control) like in France; or after the statute has come into effect (*a posteriori* control), like in Germany and Italy. In Latin America, in all the counties the control is always *a posteriori* one, although in some countries both possibilities have been established, as is the case of Colombia and Venezuela, in similar way as in Spain and Portugal.

Judicial review proceedings in order to control the constitutionality of legislation consequently, as the amparo proceeding, are also essential parts of the Latin American constitutional system, which I want to analyzed following the same classification used above, grouping the countries in three main categories:

First, countries having only a diffuse system of judicial review, which is only the case of Argentina;

Second, countries having only a concentrated system of judicial review, which is the case of Costa Rica, El Salvador, Honduras and Panama in Central America; and of Bolivia, Chile, Paraguay and Uruguay in South America;

And ***Third***, countries having a mixed system of judicial review, that is, at the same time the diffuse and the concentrated ones, which is the case of México in North America; of Dominican Republic in the Caraibes; of Guatemala and Nicaragua in Central America; and of Brazil, Colombia, Ecuador, Peru and Venezuela in South America.

I. THE DIFFUSE METHOD OF JUDICIAL REVIEW IN ARGENTINA, AS THE ONLY APPLIED IN THE COUNTRY

In Latin America, Argentina is the only country where the diffuse method of judicial review remains as being the only applied in order to control the constitutionality of legislation.

The Argentinean system of judicial review system,[198] is perhaps the one that more closely follows the United States model, derived also from the supremacy clause established in the 1860 Constitution which as in the United States, does not expressly confer any judicial review power upon the Supreme Court or the other courts. So in the case of Argentina, judicial review was also a creation of the Supreme Court, based on the same principles of supremacy of the Constitution and judicial duty when applying the law.

The first case in which judicial review power was exercised was the *Sojo* case (1887) concerning the unconstitutionality of a federal statute that tried to extend the original jurisdiction of the Supreme Court[199]

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[198] See in general Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Ed. Asrea, Buenos Aires 2002; Ricardo Haro, *El control de constitucionalidad*, Editorial Zavalia, Buenos Aires, Argentina, 2003; Juan Carlos Hitters, "La jurisdicción constitucional en Argentina", in Domingo García Belaunde and Francisco Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Ed. Dykinson, Madrid, España, 1997; Maximiliano Toricelli, *El sistema de control constitucional argentino*, Editorial Lexis Nexis Depalma, Buenos Aires, Argentina, 2002.

[199] See A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952., p. 5; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, p. 41, 43, 179 who speaks about a "pretorian creation" of judicial review by the Supreme Court, p. 179. See Jorge Reinaldo Vanossi and P.F. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996 (also printed as *Institutuciones de defense de la Constitución en la Argentina*, Universidad Nacional Autónoma de México, Congreso Internacional sobre la Constitución y su defense, México 1982); H. Quiroga Lavie, *Derecho constitucional*, Buenos Aires 1978, p. 481. Previously in 1863 the first Supreme Court decisions were adopted in constitutional matters but referred to provincial and executive acts. See. A.E. Ghigliani, *Idem,* p. 58.

as also happened in the *Marbury* v. *Madison* case U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803), in which the Constitution was considered as the supreme law of the land and the courts were empowered to maintain its supremacy over the statutes which infringed it.[200]

Therefore, through the work of the courts, in the Argentinean system of judicial review, all the courts have the power to declare the unconstitutionality of treaties[201] and legislative acts[202] whether at national or provincial levels.

So in a similar way as the United States system of judicial review, the Argentinean system has also an incidental character, in the sense that the question of constitutionality is not the principal matter of a process. The question has to be raised by a party in a particular judicial controversy, case or process, normally through an exception, at any moment before the decision in the case is adopted by the court.

Thus, in the particular case[203] a party can raise the question of unconstitutionality of the statute to be applied, alleging that the statute which is considered invalid injures his own rights. Consequently, in Argentina, as in the United States, the question of unconstitutionality

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[200] See. A.E. Ghigliani, *Idem,* p. 58.

[201] In particular, regarding the unconstitutionality of Treaties and the posibility of the Courts to control them, A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, p. 62; Jorge Reinaldo Vanossi, *Aspectos del recurso extraordinario de inconstitucionalidad,* Buenos Aires 1966, p. 91, and *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 277.

[202] See Néstor.Pedro Sagües, *Recurso Extraordinario*, Buenos Aires 1984, Vol. I, p. 91; Jorge Reinaldo Vanossi and P.F. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; J.R. Vanossi, *Teoría constitucional,* Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 155.

[203] Article 100 of the Constitution; R. Bielsa, *Idem*., p. 213, 214; A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952., pp. 75, 80; J.R. Vanossi and P.F. Ubertone, *Idem*., p. 23; .M. Lozada, *Derecho Constitucional Argentino,* Buenos Aires 1972, Vol. I, p. 342.

cannot be raised *ex officio,*[204] except in cases where "public order" is involved.[205]

In addition, it has been considered that the constitutional question raised in the case, particularly due to the presumption of constitutionality of all statutes, must be of an unavoidable character, in the sense that its decision must be alleged to be essential to the resolution of the case which depends on it. For that purpose the constitutional question must be clear and undoubted.[206]

Finally, it must be said that in the Argentinean system, the Supreme Court of the Nation has developed the same exception to judicial review established in the United States system, concerning the political questions. Even though the Constitution does not expressly establish anything on the matter, these political questions are related to the "acts of government" or "political acts" exercised by State political bodies in accordance with powers exclusively and directly attributed to them in the Constitution.[207]

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[204] See R. Bielsa, *Idem*., p. 198, 214; H. Quiroga Lavie, *Derecho constitucional*, Buenos Aires 1978, p. 479.

[205] See G. Bidart Campos, *El derecho constitucional del poder*, Vol. II, Chap. XXIX; J.R. Vanossi, *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 318, 319; J.R. Vanossi and P.E. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; .R. Bielsa, *Idem*, 255; H. Quiroga Lavie, *Idem,* p. 479.

[206] See A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, p. 89; S.M. Losada *Derecho Constitucional Argentino,* Buenos Aires 1972, Vol. I, p. 341; H. Quiroga Lavie, *Derecho constitucional,* Buenos Aires 1978, p. 480. Thus when an interpretation of the statute avoiding the consideration of the constitutional question is possible, the court must follow this path. See A.E. Ghigliani, *Idem*, p. 91.

[207] See A.E. Ghigliani, *Idem*., p. 85; H. Quiroga Lavie, *Idem*, p. 482; S.M. Losada, *Derecho Constitucional Argentino,* Buenos Aires 1972, Vol. I, p. 343; J.R. Vanossi and P.E. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996.

The courts in Argentina, as in the United States, when deciding constitutional questions regarding statutes, do not have the power to annul or repeal a law. This power is reserved to the legislative body, so the only thing the courts can do is to refuse or reject its application in the particular case when they consider it unconstitutional. The statute, therefore, when considered unconstitutional and non-applicable by the judge, is considered void, with no effect whatsoever,[208] but only in the particular case, remaining valid and generally applicable, so in principle, even the same court, can change its criteria about the unconstitutionality of the statute and apply it in the future.[209]

Being a federal state, the Argentinean Judiciary is regulated through national and provincial statutes, and the Supreme Court of Justice, which is the only judicial body created in the Constitution, is the "final interpreter" or "the defendant of the Constitution", having also two sorts of jurisdiction: original and appellate ones.[210] It has been through the appellate jurisdiction and by means of the "extraordinary recourse" in cases decided by the National Chambers of Appeals and by the Superior Courts of the Provinces that the constitutional cases can reach the Supreme Court, with similar results to the request for *writ of certiorari* before the United States Supreme Court can be achieved.

Nonetheless, the main difference between both extraordinary means is that contrary to the United States system, the Supreme Court of Argentina does not have discretionary powers in accepting extraor-

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[208] See A.E. Ghigliani, *Idem,* p. 95; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, pp. 197, 198, 345; N.P. Sagües, *Derecho procesal Constitucional*, Tomo I, Cuarta edición, 2002, p. 156.

[209] See A.E. Ghigliani, *Idem,* p. 92, 97; R. Bielsa, *Idem,* p. 196; N. P. Sagües, *Idem,* p. 177.

[210] See R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema,* Buenos Aires 1958, pp. 60-61, 270; J.R. Vanossi and P.F. Ubertone, "Control jurisdiccional de constitucionalidad", in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996.

dinary recourses, which in the case is a mandatory jurisdiction, exercised as a consequence of a right the parties have to file them.

When deciding these extraordinary recourses, the Supreme Court does not act as a third instance court, its power of review only concentrated on matters regarding constitutional questions.[211]

That is why, in a different way to the appeal, the extraordinary recourse must be motivated and founded on constitutional reasons, and one of the important conditions for its admissibility is that the constitutional question raised, must have been discussed in the proceeding before the lower courts. Therefore, the Supreme Court has rejected the recourse when the constitutional issue has not been discussed and decided in the lower courts.[212]

Another aspect that must be highlighted is that in the Argentinean system, the Supreme Court decisions on judicial review on constitutional issues are not obligatory for the other courts or for the inferior courts;[213] that is, they do not have *stare decisis* effects. In the 1949 constitutional reform, an attempt was made to give binding effects on the national and provincial courts to the interpretation adopted by the Supreme Court of Justice regarding articles of the Constitution,[214] but this provision was later repealed and the situation today is the absolute power of all courts to render their judgment autonomously with their own constitutional interpretation. Nevertheless, the decisions of the Supreme Court of Justice, as the highest court in the country, have a definitive important influence upon all the inferior courts particularly when a doctrine has been clearly and frequently established by the Court.

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[211] See R. Bielsa, *Idem,* p. 222; N. P. Sagües, *Idem*, p. 270; pp. 185, 221, 228, 275.

[212] See R. Bielsa, *Idem*, p. 190, 202-205, 209, 245, 252.

[213] See R. Bielsa, *Idem*, pp. 49, 198, 267; A.E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, pp. 97, 98.

[214] Article 95 of the 1949 Constitution. See C.A. Ayanagaray, *Efectos de la declaración de inconstitucionalidad,* Buenos Aires 1955, p. 11; R. Bielsa, *Idem,* p. 268.

Finally, it must be said that in the Argentinean system of judicial review, even though the amparo action is also an important tool to raise constitutional questions, discussions have raised regarding the applicability of the diffuse method of judicial review by the courts, precisely when deciding actions for amparo.

In the initial development of the amparo, and in spite of the diffuse system of judicial review followed in Argentina, the Supreme Court, in a contradictory way, established the criteria that the courts, when deciding amparo cases, have no power to decide on the constitutionality of legislation, reducing their powers to decide only on acts or facts that could violate fundamental rights. Thus, the amparo could not be granted when the complaint contained the allegation of unconstitutionality of a statute on which the relevant acts or facts were based.[215] This doctrine was incorporated in the Law 16.986 of 18 October 1966 on the recourse for amparo, in which it was expressly established that the "action for amparo will not be admissible when the decision upon the invalidity of the act will require.... the declaration of the unconstitutionality of statues, decrees or ordinances." (Article 2,d).

But one year later, in 1967, the Supreme Court, without expressly declaring the unconstitutionality of this provision, in the *Outon* case,[216] decided its inapplicability and accepted the criteria that when considering amparo cases, the courts have the power to review the unconstitutionality of legislation.[217]

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[215] See the *Aserradero Clipper SRL case* (1961), J. R. Vanossi, *Teoría constitucional*, Vol. II, Supremacía y control de constitucionalidad, Buenos Aires 1976, p. 286.

[216] *Outon* Case of 29 March 1967. J. R. Vanossi, *Idem,* p. 288.

[217] See G. J. Bidart Campos, *Régimen legal del amparo*, 1969; G. J. Bidart Campos, "E1 control de constitucionalidad en el juicio de amparo y la arbitrariedad o ilegalidad del acto lesivo", *Jurisprudencia argentina*, 23-4-1969; N. P. Sagües, "El juicio de amparo y el planteo de inconstitucionalidad", *Jurisprudencia argentina*, 20-7-1973; J. R. J. R. Vanossi, *Idem*, pp. 288-292; José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 80, 86; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Ed. Astrea, Buenos Aires 1987, p. 58; Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general,*

But in spite of Argentina being the only Latin American country that has kept the diffuse method of judicial review as the only one applicable in order to control the constitutionality of legislation, the diffuse method of judicial review is also applied in Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru and Venezuela but with the main difference that it is applied within a mixed system of judicial review (diffuse and concentrated).

II. JUDICIAL REVIEW IN COUNTRIES APPLYING ONLY THE CONCENTRATED METHOD OF JUDICIAL REVIEW OF LEGISLATION

Other Latin American countries, do not apply at all the diffuse method of judicial review, having adopted only the concentrated one, as is the case of Bolivia, Chile, Costa Rica, El Salvador, Honduras, Panama, Paraguay and Uruguay, attributing the power to decide on the unconstitutionality of statutes to the existing Supreme Court, as is the case in Costa Rica, El Salvador, Honduras, Panama, Paraguay, Uruguay, or as in Europe, to a special Constitutional Tribunal created for such purpose,[218] as is the case in Bolivia and Chile. In the former group, in some countries a special Constitutional Chamber of the Supreme Court has been created for the purpose of being the Constitutional Jurisdiction (Costa Rica, El Salvador, Honduras and Paraguay).

The Supreme Court of Constitutional Tribunal can be reach on matters of judicial review trough a direct action or in an incidental way by means of a referral of the constitutional question made by a lower

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Argentina, México, Corte Interamericana de Derechos Humanos), Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, pp. 71, 117.

[218] See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina", in Domingo García Belaúnde and Francisco Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Dykinson S.L. (Madrid), Editorial Jurídica Venezolana (Caracas), Ediciones Jurídicas (Lima), Editorial Jurídica E. Esteva (Uruguay), Madrid 1997, pp. 117-161.

court ex officio or at a party request. In general the action of unconstitutionality of statutes is subjected to standing rules limiting it to some High Officials of the State (Bolivia, Chile and Costa Rica). In some countries a popular action is provided (Panama and, El Salvador) and in Uruguay the action is given to the interested party. Only in Uruguay, no direct action exists, and the Supreme Court can only be reach in the incidental way.

In all the countries with only an exclusive concentrated system of judicial review, except in Paraguay and Uruguay where it has inter partes effects, the effects of the Supreme Court of Constitutional Tribunal decision on the unconstitutionality of statutes, have annullatory, erga onmes effects.

Finally, being a concentrated system of judicial review, in these countries some mechanism have been established in order to assure that the decisions on other constitutional matters different to judicial review, like those adopted in amparo proceedings for the protection of constitutional rights, can reach the higher constitutional court. For such purpose, in Bolivia, an automatic review power of the Constitutional Court has been set forth and in Honduras, a recourse for revision is provided.

In these countries with only a concentrated system of judicial review, another distinction can be made specifically regarding the judicial competencies on matter of amparo, in the sense that in some of these countries, the concentrated method on matters of constitutionality is an absolute one, also including the amparo proceeding, as is the case in Costa Rica and El Salvador, where the power to decide the "amparo" action has also been concentrated in a "Constitutional Jurisdiction", as it also happens with the "amparo" actions in Europe. In Latin America, this is an exceptional trend, not being in general terms the Supreme Courts or the Constitutional Tribunals the only ones empowered to decide on matters of amparo. On the contrary, in the majority of the Latin American countries with or without concentrated system of judicial review, the "amparo" jurisdiction corresponds to a variety of courts and judges.

That is why, for the purpose of studying the concentrated method of judicial review as the only one applied in some countries, a distinction must be made between countries where the "amparo" proceedings are also attributed to the single court exercising the concentrated power of judicial review, and countries where there are attributed to the whole Judiciary, independently of the concentrated method of judicial review.

1. The Absolute Concentrated Systems of Judicial Review

The first group of countries refers to those where the competence on all constitutional matters, including amparo, is reserved to one single court. This is the system followed in Europe, in Germany[219], Austria[220] and Spain[221] where the "amparo" recourses can only be filed before the same Constitutional Courts or Tribunals that have the exclusive power to decide on matters of judicial review. In Latin America, this system is only followed in Costa Rica and El Salvador, where the Constitutional Chambers of the Supreme Courts, have the monopoly of the concentrated systems of judicial review in order to annul statutes on the grounds of unconstitutionality, and are also the sole and exclusive courts to hear and decide on matters of "amparo" and habeas corpus.

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[219] See I. V. Munch. "El recurso de amparo constitucional como instrumento jurídico y político en la República Federal de Alemania", in Revista *de Estudios Políticos*, nº 7, Madrid, 1979, pp. 269-289; Klaus Schlaich, "El Tribunal constitucional alemán", in L. Favoreu et al., *Tribunales Constitucionales Europeos Derechos Fundamentales*, Madrid, 1984, pp. 133-232.

[220] See F. Ermacora, "El Tribunal Constitucional Austríaco", in the *Tribunal Constitucional*, Dirección General de lo Contencioso del Estado, Instituto de Estudios Fiscales, Madrid, 1981, Volumen I, pp. 409-459.

[221] See Joan Oliver Araujo, *El recurso de amparo*, Palma de Mallorca, 1986; Antonio Moya Garrido, *El recurso de amparo según la doctrina del Tribunal Constitucional*, Barcelona, 1983; José L. Cascajo Castro and Vicente Gimeno Sendra, *El recurso de amparo*, Madrid, 1985; Antonio Cano Mata, *El recurso de amparo*, Madrid, 1983.

A. The Constitutional Chamber in Costa Rica with exclusive powers on matters of judicial review and amparo

The concentrated system of judicial review was established in Costa Rica in the 1989 Constitutional reform, when the Constitutional Chamber of the Supreme Court was created with the exclusive power to declare the unconstitutionality of statutes and other State acts, with nullifying effects (Article 10). For this purpose, the Chamber can be reached through the following means set forth in the Law on Constitutional Jurisdiction (article 73):

First, by means of a direct action of unconstitutionality that can be brought before the Chamber against any statute or executive regulation, or international treaty considered contrary to the Constitution, and even against constitutional amendments approved in violation of the constitutional procedure.

This principal unconstitutionality action can only be brought before the Constitutional Chamber by the General Comptroller, the Attorney General, the Public Prosecutor and the Peoples' Defendant (Article 75). Nonetheless, the action can also be brought before the Chamber in a similar way to a popular action in cases involving the defense of diffuse or collective interests filed against executive regulation or self executing statutes which do not require additional public actions for its enforcement.[222]

Second, the action can also be exercised in an incidental way before the Constitutional Chamber when a party raises the constitutional question in a particular judicial case, even in cases of habeas corpus and "amparo", as a mean for the protection of the rights and interest of the affected parties (Article 75).

In all these cases of actions, the decisions of the Chamber when declaring the unconstitutionality of the challenged statute have nullifying and general *erga omnes* effects.

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[222] See Rubén Hernández Valle, *El Control de la Constitucionalidad de las Leyes*, San José, 1990.

Third, in addition to the direct or incidental action of unconstitutionality, the other important mean for judicial review is the judicial referrals on constitutional matters that any courts can raise *ex officio* before the Constitutional Chamber when they have doubts regarding the constitutionality of the statutes they must apply for the resolution of the case (Article 120). In these cases, the lower court must prepare a resolution on the constitutional questions that must be sent to the Constitutional Chamber. The judicial procedure of the case must be suspended until the Constitutional Chamber decision is taken, having obligatory character and *res judicata* effects (articles 104 and 117).

B. The Constitutional Chamber of the Supreme Court in El Salvador with exclusive powers on judicial review and amparo

In El Salvador, the concentrated judicial review system established in the Constitution was the result of the creation of the Constitutional Chamber of the Supreme Court by the Constitutional reform of 1991-1992, with the exclusive power to declare the unconstitutionality of statutes, decrees and regulations challenged by means of a direct action, having the power to annull them with general *erga omnes* effects.

But in the case of El Salvador, contrary to the Costa Rican regulation, ann similar to Colombia, Nicaragua, Panama and Venezuela, the action in order to file petitions regarding the unconstitutionality of statutes, is not restricted in its standing, but is conceived as a popular action that can be brought before the Chamber by any citizen (Articles 2 and 10, Law).

2. The Concentrated Systems of Judicial Review combined with the Amparo Proceeding before a variety Of Courts

With the exception of the two abovementioned cases of Costa Rica and El Salvador where all constitutional judicial matters are concentrated in one single Constitutional Chamber of the Supreme Court, in all the other Latin American countries with concentrated systems of

judicial review, the actions or recourses of "amparo" and habeas corpus are regulated in a diffuse way in the sense that they can be filed before a wide range of courts, generally the first instance courts, as is the case of Bolivia, Brazil, Colombia, Chile, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

So, even in countries where a concentrated system of judicial review has also been established as the only method to control the constitutionality of legislation, as is the case of Bolivia, Chile, Honduras, Panama, Paraguay and Uruguay, the jurisdiction to decide "amparo" and habeas corpus actions is attributed to multiple courts.

A. The Constitutional Tribunal in Bolivia

In Bolivia, since the 1994 constitutional reform, the judicial review system has also been configured as an exclusively concentrated one,[223] corresponding to the Constitutional Tribunal the exclusive power to declare the nullity of statutes considered unconstitutional, also with general *erga omnes* effects (Article 58).[224] For such purpose, the petition of the unconstitutionality of a statute or general executive acts can be brought before the Tribunal by means of a direct action of abstract

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[223] See in general José Antonio Rivera Santibañez, "La jurisdicción constitucional en Bolivia. Cinco años en defensa del orden constitucional y democrático", in *Revista Iberoamericana de Derecho Procesal Constitucional,* nº 1, enero, junio 2004, Ed. Porrúa, 2004; José Antonio Rivera Santibañez, "El control constitucional en Bolivia", in *Anuario Iberoamericano de Justicia Constitucional*. Centro de Estudios Políticos y Constitucionales nº 3, 1999, pp. 205-237; José Antonio Rivera Santivañez, "Los valores supremos y principios fundamentales en la jurisprudencia constitucional", in *La Justicia Constitucional en Bolivia 1998-2003*, Ed. Tribunal Constitucional-AECI, Bolivia, 2003. pp. 347 ff.; Benjamín Miguel Harb, "La jurisdicción constitucional en Bolivia", in *La Jurisdicción Constitucional en Iberoamérica*, Ed. Dykinson, Madrid, España, 1997, pp. 337 ff.

[224] See Jorge Asbún Rojas, "Control constitucional en Bolivia, evolución y perspectivas", in *Jurisdicción Constitucional*, Academia Boliviana de Estudios Constitucionales. Editora El País, Santa Cruz, Bolivia, 2000, p. 86.

character, that can only by filed the President of the Republic, any senator or representative, the General Prosecutor and the Peoples' Defendant (Article 7,1). It is also possible for the parties in a particular case or *ex officio* by the judge to raise the question of unconstitutionality of statutes before the Constitutional Tribunal by means of an incidental recourse, when the decision of a particular case depends upon its constitutionality (Article 59).

So with the exception of the "amparo", habeas corpus and habeas data decisions, the ordinary courts cannot rule on constitutional matters, and must refer the control of constitutionality of statutes to the Constitutional Tribunal.

B. The Constitutional Tribunal in Chile

According to the concentrated judicial review system established in Chile[225] since 1990, and according to the provisions of the 2005 Constitutional Reform, the question of unconstitutionality of statutes can reach the Constitutional Tribunal (Article 82), by two means: a direct action that can be brought before the Tribunal by some public entities and high officials like the President of the Republic, the Senate, the Representative Chamber and the General Comptroller; or by means of a referral of a constitutional question made by any court at the request of any of the parties when the resolution of the case depends on the constitutionality of the provision, in which cases, the decision regarding the inapplicability of a statutory provision in a particular case has only *inter partes* effects. Only when the Constitutional Tribunal decides

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[225] See in general Raúl Bertelsen Repetto, *Control de constitucionalidad de la ley,* Editorial Jurídica de Chile, Santiago, Chile, 1969; Francisco Zúñiga Urbina, *Jurisdicción constitucional en Chile,* Tomo II, Ed. Universidad Central de Chile, Santiago, 2002; Humberto Nogueira Alcalá, "El Tribunal Constitucional chileno", in *Lecturas Constitucionales Andinas*, nº 1, Ed. Comisión Andina de Juristas, Lima, Perú, 1991; Lautaro Ríos Álvarez Álvarez, "La Justicia Constitucional en Chile", in *La Revista de Derecho*, nº 1, Ed. Facultad de Derecho, Universidad Central, Santiago, Chile, 1988; Teodoro Rivera, "El Tribunal Constitucional", in *Revista Chilena de Derecho*, Volumen 11 nº 23, Santiago, Chile, 1984.

an action of unconstitutionality of statutes, does the ruling annulling the statute have general *erga omnes* effects (article 82,7).

C. The Constitutional Chamber of the Supreme Court in Honduras

Article 320 of the Honduran Constitution sets forth the general rule on judicial review in the country declaring that "in cases of incompatibility between a constitutional norm and an ordinary statutory one, the courts must apply the former."

In the same sense as it is established in the Constitutions of Colombia, Guatemala and Venezuela, this constitutional provision of Honduras without doubts establishes the diffuse method of judicial review.[226] Nonetheless, the 2004 Law on Constitutional Justice (*Ley de Justicia Constitucional*),[227] failed to regulate such method in the country, and, instead, limited itself to established only an exclusive concentrated method of judicial review of legislation by attributing to the Constitutional Chamber of the Supreme Court the monopoly to annul statutes on the grounds of their unconstitutionality. According to this power, the Constitutional Chamber can declare the unconstitutionality of statutes "on grounds of form or in its contents" (Articles 184; 315,5).

For such purpose, the constitutional questions can reach the Constitutional Chamber also through two means: First, through an action

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[226] See Allan R. Brewer-Carías, "El sistema de justicia constitucional en Honduras", in *El sistema de Justicia Constitucional en Honduras (Comentarios a la Ley sobre Justicia Constitucional),* Instituto Interamericano de Derechos Humanos, Corte Suprema de Justicia. República de Honduras, San José, 2004, pp. 27 ff.

[227] See Allan R. Brewer-Carías, "La reforma del sistema de justicia constitucional en Honduras", in *Revista Iberoamericana de Derecho Procesal Constitucional. Proceso y Constitución* (Directores Eduardo Ferrer Mac-Gregor y Aníbal Quiroga León), nº 4, 2005, Editorial Porrúa, México, pp. 57-77; and "El sistema de justicia constitucional en Honduras", in *El sistema de Justicia Constitucional en Honduras (Comentarios a la Ley sobre Justicia Constitucional)*, Instituto Interamericano de Derechos Humanos, Corte Suprema de Justicia. República de Honduras, San José, 2004, pp. 1-148.

of unconstitutionality that can be brought before the Constitutional Chamber by persons with personal interest against statutes and constitutional amendments when approved contrary to the formalities set forth in the Constitution and against approbatory statutes of international treaties sanctioned without following the constitutional formalities (Article 17). It is also admissible against statutes that contravene the provisions of an international treaty or convention in force (article 76).

Second, the questions of constitutionality can also reach the Constitutional Chamber in an incidental way, as an exception raised by a party in any particular case (Article 82), or by the referral of the case that any court can make before the Chamber, before deciding the case (Article 87).

In both cases, whether through the action of unconstitutionality or by means of the incidental constitutional question, the decision of the Constitutional Chamber regarding the unconstitutionality of statutes also has general *erga omnes* effects (Article 94).

D. The Supreme Court of Panama

The judicial review system of Panama, is also conceived as a concentrated one, attributing to the Supreme Court of Justice the exclusive power (Article 203,1) to protect the integrity of the Constitution and to control the constitutionality of legislation also by means of two different methods: a direct popular action or by means of a question of constitutionality that can be raised by the parties to the case as an incident before a lower court, or *ex officio* by the respective court.

Regarding the action of unconstitutionality, in similar terms as in Colombia, El Salvador, Nicaragua and Venezuela, it is conceived as a popular action that can be brought before the Supreme Court by anybody in order to denounce the unconstitutionality of statutes, decrees, decisions or acts founded in substantive or formal questions (Article 2556).

In both cases, the Supreme Court's decision is final, definitive, obligatory and with general but non retroactive effects, and must be published in the *Official Gazette* (article 2573 Judicial Code).

E. The Constitutional Chamber of the Supreme Court in Paraguay

Since 1992, the Constitution of Paraguay establishes a concentrated system of judicial review attributing to the Constitutional Chamber of the Supreme Court of Justice, the exclusive power to decide on all matters dealing with judicial review of legislation.[228]

According to this method, the Supreme Court of Justice has the power to decide actions and exceptions seeking to declare the unconstitutionality and inapplicability of statutes contrary to the Constitution. For such purpose, when a judge hearing a particular case considers the applicable statute contrary to the Constitution, he must send the files, even *ex officio*, to the Constitutional Chamber of the Supreme Court of Justice, in order for the Court to decide the question of unconstitutionality when evident (Article 582 Code).

The main distinctive feature of the Paraguayan concentrated judicial review system is that contrary to all the other countries with the same concentrated system, there is not a direct action of unconstitutionality that can be filed before the Chamber, so that the constitutional questions regarding the unconstitutionality of statutes can only reach the Supreme Court in an incidental way. That is why the Supreme Court decisions only declare in the particular case the inapplicability of the statute provisions, having only *inter partes* effects regarding the

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[228] See in general, Norbert Lösing, "La justicia constitucional en Paraguay y Uruguay", in *Anuario de Derecho Constitucional Latinoamericano* 2002. Ed. KAS, Montevideo, Uruguay, 2002; Luis Lezcano Claude, *El control de constitucionalidad en el Paraguay*, Ed. La Ley Paraguaya S.A. Asunción, Paraguay, 2000.

particular case (Article 260, Constitution)[229], being this provision, together with the Uruguayan one, an exception regarding the general pattern in the other Latin American countries.

F. The Supreme Court in Uruguay

Since 1934, Article 256 of the Uruguayan Constitution,[230] has assigned the Supreme Court of Justice the exclusive and original power to declare the unconstitutionality of statutes and other State acts with force of statutes, whether founded on formal or substantive reasons as a consequence of an action of unconstitutionality that can be filed before the Court by all those who deem that their personal and legitimate interests have been harmed (Article 258)[231]. Thus, regarding the quality to sue (standing), the Uruguayan regulation has similarities with the Honduran one.

The constitutional question can also be submitted to the Supreme Court in an incidental way by a referral made *ex officio* or as a consequence of an exception of unconstitutionality raised by a party in a particular case by an inferior court (Article 258).

In all cases, similar to the Paraguayan solution where the question on the constitutionality of statutes referred only to particular cases, the decisions of the Supreme Court on matters of constitutionality only re-

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[229] See L.M. Argaña, "Control de la Constitucionalidad de las Leyes en Paraguay", in *Memoria de la Reunión de Presidentes de Cortes Supremas de Justicia en Iberoamérica, el Caribe, España y Portugal,* Caracas 1982, pp. 550, 551, 669, 671.

[230] Originally the system was established in 1934, and later in 1951. See H. Gross Espiell, *La Constitución y su Defensa*, Congreso, printed for the International Congress on La Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, pp. 7, 11. The system remained in the 1966 Constitution, in the "Acta Institucional nº 8 de 1977"and in the "Acta Institucional nº 12 de 1981". *Idem,* pp. 16, 20.

[231] Article 258. See H. Gross Espiell, "La Constitución y su Defensa", *Idem,*. 28, 29; J.P. Gatto de Souza, "Control de la Constitucionalidad de los Actos del Poder público en Uruguay", in *Memoria de la Reunión de Presidentes de Cortes Supremas de Justicia en Iberoamérica, el Caribe, España y Portugal,* Caracas 1982, pp. 661, 662.

fer to the particular case in which the question is raised (Article 259)[232] and also has *inter partes* effects.

III. THE MIXED SYSTEM OF JUDICIAL REVIEW OF LEGISLATION

Except in the case of Argentina which remains the most similar to the "American model",[233] the judicial review system in all the other Latin American countries applying the same diffuse method of judicial review has moved from the original exclusive diffuse one towards a mixed one, by also adopting the concentrated method. This is the case of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru and Venezuela. This transition towards the mixed system has happened even in Mexico, a country that with the peculiarities of its *juicio de amparo*, also moved in 1994 from the original diffuse system of judicial review initially and precisely established since 1857 with the amparo suit, to the current mixed system of judicial review by attributing to the Supreme Court the power to annul, with general effects, statutes directly challenged by some high officials

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[232] This principle is clear regarding the incidental mean of judicial review where the question of constitutionality is raised in a particular case, but originates doubts regarding the action of unconstitutionality. According to the Law nº 13747 of 1969 which regulates the procedures in matters of judicial review, the decision of the Supreme Court impedes the application of the challenged norms declared unconstitutional regarding the plaintiff, and authorizes its use as an exception in all other judicial proceedings, including the judicial review of Public administration activities. See H. Gross Espiell, "La Constitución y su Defensa", *Idem,* p. 29.

[233] See A. E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, who speaks about "Northamerican filiation" of the judicial control of constitutionality in Argentinian law, p. 6, 55, 115; R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, p. 116; J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las Leyes: una contribución de las Américas a la ciencia política", in *Revista de la Facultad de Derecho de México*, Universidad Nacional Autónoma de México, T. XII, n° 45, México 1962, p. 652; C.J. Friedrich, *The Impact of American Constitutionalism Abroad*, Boston 1967, p. 83.

This mixed system mean that in all these countries, for the resolution of particular cases or controversies, all the courts are empowered to decide upon the unconstitutionality of legislation, and to not apply for the resolution of the case the statutes they considered contrary to the Constitution, giving preference to the latter. At the same time, the Supreme Court (Brazil, Dominican Republic, Mexico), its Constitutional Chamber (Nicaragua, Venezuela) or the Constitutional Court or Tribunal (Colombia, Ecuador, Guatemala, Peru) are also empowered to decide upon the unconstitutionality of statutes, when requested through a direct action that can be filed by some high public officials (Brazil, Dominican Republic, Ecuador, Guatemala, Mexico, Peru), or by any citizen through a popular action (Colombia, Nicaragua, Venezuela). In all these cases, the Court or Tribunal has the power to annul, with general effects, the challenged statutes.

Finally, being a mixed system of judicial review where the concentrated method is applied by a Supreme Court of a Constitutional Tribunal, also in these countries (except in Dominican Republic) some mechanism have been established in order to assure that the decisions on constitutional matters whether by applying the diffuse method of judicial review by lower courts, or those adopted in amparo proceedings for the protection of constitutional rights, can reach the higher constitutional court. For such purpose, in Colombia and Ecuador, an automatic review power of the Constitutional Court or Tribunal has been set forth; in Brazil and Venezuela, an extraordinary recourse for revision before the Supreme Court has been establish; in Guatemala and Nicaragua, an appeal has been provided; and in a very exceptional way, a discretionary power of revision has been established in Mexico.

Additionally, as aforementioned, in all these countries, the amparo proceeding for the protection of constitutional rights has also been regulated, generally following the diffuse judicial pattern by attributing competence to decide the cases to a variety of courts, mainly the first instance courts, and not to a single one. The only exception is Nicaragua, where the Supreme Court is the only competent court to decide upon amparo matters.

1. *The Federal Tribunal in Brazil*

The mixed system of judicial review of the constitutionality of legislation , since the 19th Century has been developing in Brazil, combining the diffuse and the concentrated method of judicial review.

The diffuse method, clearly influenced by the United States constitutional system,[234] was introduced in the 1891 Federal Constitution by empowering the Supreme Federal Tribunal to review, through an extraordinary recourse, the decisions of the federal courts and of the courts of the States in which the constitutionality of treaties or federal statutes were questioned (article III, I, 1891 Constitution). As a consequence of this express constitutional attribution, the Federal Law No. 221 of November 20, 1984 (Article 13,10) expressly assigned to all federal courts the power to judge upon the validity of statutes and executive regulations when they considered them unconstitutional, and to decide upon their inapplicability when deciding a particular case.[235]

According to this diffuse system of judicial review in Brazil, all the courts of first instance have the power to decide not to apply laws (federal, state or municipal) that they deem unconstitutional when a party to the proceeding has raised the question of constitutionality,[236] or when the challenged particular authority act, in cases of *mandado de segurança* or the *habeas corpus* recourses, is alleged to be issued in execution of a statute deemed unconstitutional In these cases, the question

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234 See O.A. Bandeira de Mello, *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 157; J. Alfonso da Silva, *Sistema de defensa da Constituiçao brasileira,* Congreso sobre la Constitución y su Defensa, Universidad nacional Autónoma de México, México 1982, p. 29. (mimeo).

235 Thus, the diffuse system of judicial review of legislation was established in Brazil at the end of the 19th century, and was perfected through the subsequent constitutional reforms of 1926, 1934, 1937, 1946 and 1967. See O.A. Bandeira De Mello, *Idem,* pp. 158-237.

236 See J. Alfonso Da Silva, J. Alfonso Da Silva, *Curso de direito constitucional positivo*, Sao Paulo 1984, p. 18.

must be examined before the final decision of the case is adopted in a decision with *inter partes* effects on the case.[237]

The constitutional question can also be decided, in the appellate jurisdiction, in which case, if the court of second instance is a collegiate court, the decision upon matters of unconstitutionality of legislation must be adopted by a majority vote.[238]

But, the most distinctive feature of the Brazilian diffuse method of judicial review (Article 119, III,b,c), is that since its constitutional creation in 1894, the power of the Supreme Tribunal to intervene in all proceedings in which constitutional questions are resolved was also established when requested through an extraordinary recourse. In these cases, the Supreme Court's decisions have to be sent to the Federal Senate which has the power to "suspend the execution of all or part of a statute or decree when declared unconstitutional by the Supreme Federal Tribunal through a definitive decision" (Article 42, VII Federal Constitution) in which case the effects of the Senate's decisions has *erga omnes* and *ex nunc* effects. [239].

This diffuse system of judicial review, initially established in an exclusive way, in 1934 was transformed into a mixed system, when in addition, the Constitution established the concentrated method of judicial review by empowering the Federal Supreme Tribunal to declare

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[237] See J. Alfonso da Silva, *Sistema de defensa da Constituiçao brasileira,* Congreso sobre la Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, pp. 41,64.

[238] This qualified vote was first established in the 1934 Constitution (Article 179), and is always required. See O.A. Bandeira De Mello, *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 159.

[239] Article 119, III b,c, Constitution *Cf.* J. Alfonso Da Silva, *Sistema de defensa da Constituiçao brasileira,* Congreso sobre la Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, pp. 32, 34, 43, 73; J. Alfonso Da Silva, *Curso de direito constitucional positivo*, Sao Paulo 1984, pp. 17, 18; O.A. Bandeira De Mello, *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 215; H. Fix-Zamudio and J. Carpizo, "Amerique Latine", in L. Favoreu and J.A. Jolowicz (ed.), *Le contrôle juridictionnel des lois*, Paris 1986, p. 121.

the unconstitutionality of Member States' Constitutions or statutes when requested by means of a direct action of unconstitutionality that could be filed directly before the Tribunal by the Attorney General of the Republic (Article 12,2).

This direct action of unconstitutionality, originally established to defend federal constitutional principles against Member States acts, was extended through subsequent constitutional and statutory reforms (including the 1965 constitutional amendment and the Law nº 2271 of 22 July 1954), in order to allow the constitutional control over Federal and Member States statutes.[240] In these reforms the standing to sue was also extended, so that now, the action of unconstitutionality can be filed by the President of the Republic, by the boards of the Senate and of the Representative Chamber, as well as of the Legislative Assemblies of the States; by the States' governors and by the Attorney General of the Republic. In addition, it can be filed by the Federal Council of the Federal Bar (*Ordem dos advogados de Brasil*), the political parties represented in Congress, and the trade unions confederations and class entities (article 103, constitution). The decisions of the Supreme Tribunal resolving the actions when declaring the unconstitutionality of statutes have, *erga omnes* effects.[241]

Consequently, since 1934, the Brazilian system of judicial review can be considered as a mixed one in which the diffuse method of judicial review operates in combination with a concentrated one,[242] being

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[240] See J. Alfonso Da Silva, *Sistema de defensa da Constituiçao brasileira,* Congreso sobre la Constitución y su Defensa, Universidad Nacional Autónoma de México, México 1982, p. 31.

[241] See, José Carlos Barbosa M, "El control judicial de la constitucionalidad de las leyes en el derecho brasileño: Un bosquejo", in Eduardo Ferrer Mac-Gregor (Coord.), *Derecho Procesal Constitucional*, Tomo III, Editorial Porrúa, México 2003, Tomo III, p. 1999.

[242] See A. Buzaid, "La accion directa de inconstitucionalidad en el derecho brasileño", in *Revista de la Facultad de Derecho*, UCAB, nº 19-22, Caracas 1964, p. 55; O.A. Bandeira De Mello, , *A teoria das Constituiçoes rigidas*, Sao Paulo 1980, p. 157. See in general Mantel Goncalves Ferreira Filho, "O sistema constitucional

one of its particular trends, ever since its establishment in 1891, the power assigned to the Supreme Tribunal to review lower courts' decisions on matters of constitutionality through an extraordinary recourse that can be brought before the Tribunal against judicial decision issued on matters of constitutionality by the Superior Federal Court or by the Regional Federal Courts, when their decisions are considered to be inconsistent with the Constitution; and in cases in which the courts have denied the validity of treaties or federal statutes, or have declared their unconstitutionality; or when a local government law or act has been challenged as unconstitutional for being contrary to a valid federal law (Article 199. III, b,c. Constitution).

2. *The Constitutional Court in Colombia*

The system of judicial review also established since the 19th century in Colombia, has always been a mixed system of judicial review of legislation, which in a very similar way to the Venezuelan one, mixed the diffuse and concentrated methods of judicial review.[243]

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brasileiro e as recentes inovacoes no controle de constitucionalidade", in *Anuario Iberoamericano de Justicia Constitucional*, nº 5, 2001, Centro de Estudios Políticos y Constitucionales, Madrid, España, 2001; José Carlos Barbosa Moreira, "El control judicial de la constitucionalidad de las leyes en el Brasil: un bosquejo", in *Desafíos del control de constitucionalidad,* Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; Paulo Bonavides, "Jurisdicao constitucional e legitimidade (algumas observacoes sobre o Brasil)", in *Anuario IberoamerivanoIberoamericano de Justicia Constitucional* nº 7, Centro de Estudios Políticos y Constitucionales, Madrid, 2003; Enrique Ricardo Lewandowski, "Notas sobre o controle da constitucionalidade no Brasil", in Edgar Corzo Sosa et al., *Justicia Constitucional Comparada*, Ed. Universidad Nacional Autónoma de México, México D.F. 1993; Zeno Veloso, *Controle jurisdicional de constitucionalidade*, Ed. Cejup, Belém, Brasil, 1999.

243 See in general Eduardo Cifuentes Muñoz, "La Jurisdicción constitucional en Colombia", in F. fernández Segado and Domingo García Belaúnde, *La Jurisdicción constitucional en Iberoamérica*, Ed Dykinson, Madrid, España, 1997; Luis Carlos Sáchica, *La Corte Constitucional y su jurisdicción*, Ed. Temis. Bogotá Colombia, 1993. Concerning the mixed character of the system see: J. Vidal Perdomo, *Derecho constitucional general*, Bogotá 1985, p. 42; D.R. Salazar, *Constitu-*

Regarding the diffuse method of judicial review it was consolidated since the 1910 Constitution, which expressly attributed to all courts the power to declare the inapplicability of statutes deemed contrary to the Constitution. As in all cases where the diffuse method is applied, the courts cannot annul the statutes, the declaration of their unconstitutionality only being referred to the particular case, in the sense that the court must limit the ruling to not apply the unconstitutional statute to the case, with *inter partes* effects.

This method was developed in parallel with a concentrated method of judicial review by attributing the former Supreme Court of Justice and now the Constitutional Court, the power to annul statutes with general effects on the grounds of their unconstitutionality, when requested by means of a popular action. It was also in the 1910 Constitution that the role of the Supreme Court as "guardian of the integrity of the Constitution" was consolidated, a role that today is accomplished by the Constitutional Court.[244]

The creation of the Constitutional Court in 1991 as the ultimate guardian of the Constitution also originated the attribution to the Court of the power to review all the judicial decisions resolving actions for tutela. But, contrary to the Venezuelan or Argentinean regulations on this matter, the competence of the Constitutional Court in Colombia in the case is not the result of the filing of a specific recourse for review, but, as in Bolivia, is an attribution that must be automatically accomplished by the Court, although in a discretionary way (Article 33). For such purpose, in all cases where tutela decisions are not appealed, they must always be automatically sent for revision before the Constitutional Court (Article 31). But even in cases in which the tutela decisions are appealed, the matter must also reach the Constitutional Court be-

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ción Política de Colombia, Bogotá 1982, p. 305; E. Sarria, *Guarda de la Constitución*, Bogotá p. 78.

244 See Allan R. Brewer-Carías, *El Sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia (Temas de Derecho Público Nº 39) y Pontificia Universidad Javeriana (Quaestiones Juridicae Nº 5), Bogotá 1995.

cause the superior court's decision, whether confirming or revoking the appealed decision, must also be automatically sent for review before the Constitutional Court (Article 32). In all these cases, the Constitutional Chamber has discretionary powers to determine which decision of tutela will be examined (Article 33).

These Constitutional Court review decisions only produce effects regarding the particular case; thus the first instance court must be immediately notified, and in its turn, must notify the parties and adopt the necessary decisions in order to conform their own initial ruling to the Constitutional Court decision.

3. *The Supreme Court in the Dominican Republic*

The Dominican Republic also has a mixed system of judicial review which combines the diffuse method of judicial review with the concentrated one. Regarding the former, since 1844, the Constitution sets forth that "all statutes, decrees, resolutions, regulations or acts contrary to the Constitution are null and void" (Article 46, 2002 Constitution), so it was from this express supremacy clause that the courts developed their general power to declare statutes unconstitutional and not applicable when resolving particular cases.[245]

On the other hand, regarding the concentrated method of judicial review, the Supreme Court of Justice has the exclusive power to hear and decide action of unconstitutionality against statutes that can be filed by the President of the Republic, the Presidents of the National Congress Chambers and also by any interested party. (Article 67,1) In such cases, the Supreme Court decisions have *erga omnes* effects.

4. *The Constitutional Tribunal in Ecuador*

Ecuador also has a mixed system of judicial review of legislation which combines the diffuse and the concentrated methods, the former being expressly established in article 272 of the Constitution which prescribes not only that "The Constitution prevails over any other legal

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[245] See M. Berges Chupani, "Informe", in *Memoria de la Reunión de Cortes Superiores de Justicia de Ibero-America, El Caribe, España y Portugal*, Caracas 1983, p. 380.

norm" but that "All the statutes, decrees-law, ordinances, regulations or resolution, must conform to its provisions and in case they enter in contradiction with it or alters their provisions, they will have no value".

As a consequence of this supremacy principle, Article 274 of the Constitution reaffirms the diffuse method of judicial review allowing any court whether at the parties request or, as in Venezuela, raised *ex officio* by the courts, to declare the inapplicability of the provision contrary to the Constitution or to international treaties or covenants. According to the same article, this declaration has obligatory force only in the case in which it is issued, that is to say, only *inter partes* effects.

In all these cases of diffuse judicial review decisions, the court must produce a report on the issue of unconstitutionality of the statute that must be sent to the Constitutional Tribunal in order for it to resolve the matter in a general and obligatory way, that is to say, with *erga omnes* effects.

Regarding the concentrated method of judicial review, the 1998 Constitution assigns the Constitutional Tribunal, which was created in substitution of a former Constitutional Guarantees Tribunal,[246] the power to declare the nullity of any statute, decree, regulation or ordinance on the grounds of unconstitutionality with *erga omnes* effects (Article 22). These actions can be brought before the Tribunal by the

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[246] See in general Hernán Salgado Pesantes, "El control de constitucionalidad en la Carta Política del Ecuador", in *Una mirada a los Tribunales Constitucionales. Las experiencias recientes*. Lecturas Constitucionales Andinas nº 4, Ed. Comisión Andina de Juristas, Lima, Perú; Ernesto López Freire, "Evolución del control de constitucionalidad en el Ecuador", in *Derecho Constitucional para fortalecer la democracia ecuatoriana,* Ed. Tribunal Constitucional – Kas, Quito, Ecuador, 1999; Marco Morales Tobar, "Actualidad de la Justicia Constitucional en el Ecuador", in Luis López Guerra, (Coord.). *La Justicia Constitucional en la actualidad*, Corporación Editora Nacional, Quito, Ecuador, pp. 77–165; Oswaldo Cevallos Bueno, "El sistema de control concentrado y el constitucionalismo en el Ecuador", in *Anuario Iberoamericano de Justicia Constitucional*, nº 6, 2002, Madrid, España, 2002.

President of the Republic, the National Congress, the Supreme Court, one thousand citizens or by any person having a previous favorable report from the Peoples' Defendant (Article 18).

Finally, it must be mentioned that for the purpose of unifying the jurisprudence in constitutional matters, all the decisions granting "amparo" claims must obligatorily be sent to the Constitutional Tribunal in order to be confirmed or repeal. In cases of decisions denying the "amparo" action (as well as the habeas corpus or habeas data actions), they can be appealed before the same Constitutional Tribunal (Articles 12,3; 31; 52).

Also, in matters of "amparo" when the constitutional protection is granted by the competent courts applying the diffuse method of judicial review declaring the unconstitutionality of statutes,[247] they must send the report on the question of constitutionality to the Constitutional Tribunal for its confirmation (Article 12,6).

5. *The Constitutional Court in Guatemala*

The judicial review system of Guatemala is also a mixed system which combines the diffuse and concentrated methods. The former has been traditionally set forth in Guatemala, derived from the principle of the supremacy of the Constitution, expressly provided in Article 115 of the Amparo Law when it declares that all "statutes, governmental dispositions or any order regulating the exercise of rights guarantied in the Constitution shall be null and void if they violate, diminish, restrict or distort them. No statute can contravene the Constitution's disposition. Statutes that violate or distort the constitutional norms are null and void."

On the other hand, the consequence of this principle is the possibility of the parties to raise in any particular case (including cases of "amparo" and habeas corpus), before any court, at any instance or in cassation, but before the decision on the merits is issued, the question

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[247] See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, Ecuador, 2004, p. 85.

of the unconstitutionality of the statute in order to obtain a declaration of its inapplicability to the particular case. (Articles 116 and 120)

The question of unconstitutionality can be brought and raised as an action or as an exception or incident in the particular case, before the competent court by the Public prosecutor or by the parties. The decision which must be issued in three days, can be appealed before the Constitutional Courts (Article 121). If the question of unconstitutionality of a statute supporting the claim is raised has an exception or incident, the competent court must also resolve the matter (Article 123); and the decision can also be appealed before the Constitutional court. (Article 130)

The concentrated method of judicial review is exercised by the Constitutional Court which is empowered to hear actions of unconstitutionality filed against statutes, regulations or general dispositions. (Article 133) This action can be brought before the Court by the Public Prosecutor and the Human Rights Commissioner; and also by the board of directors of the Lawyer's (Bar) Association (*Colegio de Abogados*), and by any person with the help of three lawyers who are members of the Bar. (Article 134).

The statutes, regulations or general dispositions declared unconstitutional, will cease in their effects from the following day after the publication of the Constitutional Court decisions in the *Official Gazette* (Article 140), the decision of the Constitutional Court having general *erga omnes* effects.

The competent courts to hear and to decide on amparo matters vary regarding the challenged acts,[248] and in all the cases, the amparo decisions are subjected to appeal before the Constitutional Court (Art

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[248] For instance, according to Articles 11 et seq. of the 1986 Law of Amparo, the Constitutional Court, is competent in the cases of amparo brought against the Congress of the Republic, the Supreme Court of Justice, the President and the Vice President of the Republic, an the The Supreme Court of Justice must decide the cases of amparo brought against the Supreme Electoral Tribunal; Ministers or Vice Ministers of State when acting in the name of their Office.

60), which can be filed by the parties, the Public prosecutor and the Human Rights Commissioner (Article 63). The Constitutional Court in its decision can confirm, revoke or modify the lower court resolution (Article 67); and can also annul the whole proceeding when it is proved that the formalities had not been observed.

6. *The Supreme Court of the Nation in México*

Regarding judicial review of constitutionality of statutes, since the 1994 constitutional reform, the Mexican system has moved from an original exclusive diffuse system into a mixed system of judicial review by the incorporation of the concentrated method exercised by the Supreme Court by means of an abstract judicial review proceeding of statutes, with the power to decide in these cases with general binding effect.

According to article 105,II of the Constitution, in these cases, in order for the Supreme Court of the Nation to decide, a judicial action must be filed against federal statutes on the grounds of their unconstitutionality, the standing to sue being limited to members of Congress in number equivalent to the 33% of the members of the Chamber of Representatives or of the Senate; and to the Attorney General of the Republic. In the cases of actions against electoral statutes, the national representatives of the political parties also have standing to sue.

In all these cases, as mentioned, the Supreme Court can declare the invalidity of the statute with general *erga omnes* effects when approved by no less than 8 of the 11 votes.[249]

It must also be highlighted that according to a constitutional reform passed in 1983, the Supreme Court of Mexico was vested with a discretionary power to review the cases of "amparo" of constitutional importance (*facultad de atracción*), with some similarities to the writ of certiorari. Nevertheless, Collegiate Circuit Courts' decisions in direct

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[249] See José Brage Camazano, "El control abstracto de la constitucionalidad de las leyes en México", in Eduardo Ferrer Mac Gregor (Coordinador), *Derecho Procesal Constitucional,* Editorial Porrúa, México, Vol. I, 2003, pp. 919 ff.

amparo are not reviewable by the Supreme Court if they are based "on a precedent established by the Supreme Court of Justice as to the constitutionality of a statute or the direct interpretation of a provision of the Constitution".

Also, according to another constitutional reform sanctioned in 1988, the Supreme Court was also attributed the power to decide in last instance all cases of "amparo" where the decision involves the unconstitutionality of a federal statute or establishes a direct interpretation of a provision of the Constitution (article 107,IX).

Both attributions allow the Supreme Court to give final interpretation of the Constitution in a uniform way,[250] its decisions limited to resolve upon the actual constitutional questions.

7. *The Constitutional Chamber of the Supreme Court of Justice of Nicaragua*

The system of judicial review established in Nicaragua is also a mixed one, combining the diffuse and the concentrated methods. Regarding the diffuse method, the Constitution assigns to all courts (Article 182 of the Constitution) when resolving particular cases, the general power to decide upon the unconstitutionality of statutes, of course, with only *inter partes* effects.

On the other hand, the Constitution also assigns the Supreme Court of Justice the power to decide upon the unconstitutionality of statutes, decrees or regulations when challenged by means of an action of unconstitutionality which, as in Colombia, El Salvador, Panamá and Venezuela, is also conceived as a popular action that can be brought directly by any citizen (Article 2 of the Amparo Law). When deciding such popular action, the Supreme Court's decision declaring the un-

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[250] See Joaquin Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, p. 153-155.

constitutionality of the challenged statute, has general effects, preventing its application by the courts (Articles 18 and 19).

But in the Nicaraguan system, the question of the unconstitutionality of a statute, decree or regulation, can also be raised before the Constitutional Chamber of the Supreme Court by means of recourse of cassation and also, as mentioned, through a recourse of "amparo" filed by the corresponding party in the procedure of a case. In the former case, the Supreme Court, in addition to the cassation ruling regarding the challenged judicial decision, can also declare its nullity. And in the case of "amparo" recourses, as mentioned, they can serve as a judicial mean for judicial review of legislation, and the Supreme Court has the exclusive power to decide on the matter. So in these cases, in addition to the constitutional protection granted to the party in accordance to the "amparo" petition, the Supreme Court can also declare the unconstitutionality of the statute, decree or regulation, also with general effects (Article 18)[251]

The Amparo Law also provides that in any judicial decision other than "amparo", issued applying the diffuse method of judicial review with express declaration of the unconstitutionality of a statute, if such decision cannot be challenged by means of a cassation recourse, the respective court must send it to the Supreme Court in order for this Court to ratify the unconstitutionality of the statute, decree or regulation and declare its inapplicability.[252]

According to these means, in order to guarantee the uniformity of jurisprudence in constitutional matters, the Supreme Court in Nicaragua always has the power to review judicial decisions on constitutional matters.

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[251] Nonetheless, in these cases, the decision does not have retroactive effects in the sense that it cannot affect third party rights acquired from those statutes or regulations (Articles 20 and 22).

[252] In such cases the decisions also cannot affect third party rights acquired from those statutes or regulations (Articles 21 and 22).

8. *The Constitutional Tribunal in Peru*

The judicial review system of the constitutionality of legislation has also being conceived in Peru as a mixed one,[253] since it combines the diffuse system of judicial review with the concentrated one attributed to the Constitutional Tribunal[254]. The former is expressly set forth in Article 138 of the 1993 Constitution which provides that "in any process, if an incompatibility exists between a constitutional provision and a statute, the courts must prefer the former" (Article 138), having of course their decisions, in such cases, only *inter partes* effects.

But in the case of Peru, the diffuse method of judicial review has a peculiarity in the sense that all the courts' decisions regarding the inapplicability of statutes based on constitutional arguments must obligatorily be sent for revision to the Supreme Court of Justice and not to the Constitutional Tribunal. This provision, sanctioned before the Constitutional Procedures Code was enacted, has remained in force, em-

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[253] See Aníbal Quiroga León, "Control difuso y control concentrado en el derecho procesal Perúano", in *Revista Derecho* nº 50, diciembre de 1996, Facultad de Derecho de la Pontificia Universidad Católica del Perú, Lima, Perú, 1996, pp. 207 ff.

[254] See in general Domingo García Belaunde, "La jurisdicción constitucional en Perú", in D. García Belaúnde, y F. Fernández Segado (Coord.), *La jurisdicción constitucional en Iberoamérica*, Ed. Dykinson, Madrid, España, 1977; Domingo García Belaunde, "La jurisdicción constitucional y el modelo dual o paralelo", in *La Justicia Constitucional a fines del siglo XX, Revista del Instituto de Ciencias Políticas y Derecho Constitucional,* año VII, nº 6, Palestra editores, Huancayo, Perú; Domingo García Belaunde (Coordinador) *La Constitución y su defensa*, Ed Jurídica Grijley, Lima, 2003, p. 96. César Landa, *Teoría del Derecho procesal Constitucional*, Ed. Palestra, Lima, Perú, 2004; José Palomino Manchego, José, "Control y magistratura constitucional en el Perú", in Juan Vega Gómez, and Edgar Corzo Sosa (Coord.*), Instrumentos de tutela y justicia constitucional, Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México; Domingo García Belaúnde and Gerardo Eto Cruz, "El proceso de amparo en el Perú", in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 593-632.

powering the Supreme Court, through its Constitutional Law and Social Chamber, to determine if the decision of the ordinary court on constitutional matters was adequate or not (Article 14, Organic Law of the Judiciary)[255].

But in addition to the diffuse method of judicial review, a concentrated method is also set forth in the Constitution of Peru, by attributing the Constitutional Tribunal the power to hear in unique instance the actions of unconstitutionality (Article 202,1) that can be filed against statutes, legislative decrees, urgency decrees, treaties approved by Congress, Congressional internal regulations, regional norms and municipal ordinances (Article 77, Code).

This action can be brought before the Constitutional Tribunal by high public officials, as the President of the Republic, the Prosecutor General, the Peoples Defendant; by a number equivalent to 25% of representatives to the Congress; and also, by 5,000 citizen whose signatures must be validated by the National Jury of Elections. When the challenged act is a local government regulation, the action can be filed by 1% of the citizens of the corresponding entity. The Presidents of Regions with the vote of the Regional Councils, or the provincial mayors with the vote of the local Councils can also file actions of unconstitutionality in matter of their jurisdiction; and also the professional associations (*Colegios)* in matters of their specialty (Article 203; Article 99 Code).

The decision of the Constitutional Tribunal, in all these cases of the concentrated method of judicial review when declaring the unconstitutionality of a statute or normative provision, produces general *erga omnes* effects, from the day of its publication in the *Official Gazzette* (Article 204, Constitution; Articles 81,82 Code).

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[255] See Aníbal Quiroga León, "El derecho procesal constitucional Perúano", in Juan Vega Gómez and Edgar Corzo Sosa (Coord.) *Instrumentos de tutela y justicia constitucional, Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México, pp. 471 ff.

All judicial decisions denying the habeas corpus, "amparo" and habeas data can be review by the Constitutional Tribunal, which has the power to hear the cases in last and definitive instance (Article 202,2 Constitution). In addition, all the other decisions can also reach the Constitutional Tribunal of Peru by means of a recourse of constitutional damage (*agravio*) that can be filed against all second instance judicial decision denying the claim (Article 18, Code). If this constitutional damage recourse is denied, the interested party can also file before the Constitutional Tribunal a recourse of complaint (*queja*), in which case, if the Tribunal considered the complaint duly supported, it will proceed to decide the constitutional damage recourse, asking the superior court to send the corresponding files. (Article 19).

If the Constitutional Tribunal considers that the challenged judicial decision has been issued as a consequence of a procedural error or vice affecting its sense, it can annul it and order the reposition of the procedure to the situation previous to when the defect happened. In cases in which the vice only affects the challenged decision, the Tribunal must repeal it and issue a substantive ruling. (Article 20)

9. *The Constitucional Chamber of the Supreme Tribunal of Justice in-Venezuela*

The other country with a mixed system of judicial review established since the 19th Century[256] is Venezuela, where the diffuse method

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[256] With respect to this mixed character of the Venezuelan system, the former Supreme Court has analyzed the scope of judicial review of the constitutionality of statutes and has correctly pointed out that this is the responsibility: "not only of the Supreme Tribunal of the Republic, but also of all the judges, whatever their rank and standing may be. It is sufficient that an official is part of the Judiciary for him to be a custodian of the Constitution and, consequently, to apply its ruling preferentially over those of ordinary statutes. Nonetheless, the application of the Constitution by the judges, only has effects in the particular case at issue and, for that very reason, only affects the interested parties in the conflict. In contrast, when constitutional illegitimacy in a law is declared by the Supreme [Tribunal] when exercising its sovereign function, as the interpreter of the Constitution, and in response to the pertinent [popular] action, the effects of the decision extend erga omnes and have the force of law. In the first case,

is also expressly regulated in Article 334 of the 1999 Constitution, following a legal tradition that can be traced back to the 1897 Civil Procedure Code, by granting all courts, even *ex officio*, the power to declare statutes inapplicable for the resolution of a given case when they consider them unconstitutional and, hence, giving preference to constitutional rules.[257]

On the other hand, Article 336 of the same 1999 Constitution, also following a constitutional tradition that can be traced back to the 1858 Constitution,[258] establishes the concentrated method of judicial review by granting to the Constitutional Chamber of the Supreme Tribunal, as Constitutional Jurisdiction, the power to decide with nullifying effects upon the constitutionality of statutes and other national, state or municipal normative acts and acts of government adopted by the President of the Republic when requested, as is also established in Colombia, El Salvador, Nicaragua and Panama, by means of a popular action. This concentrated method of judicial review of the constitutionality of statutes and other similar State acts allows the Supreme Tribunal of Justice to declare them null and void with general *erga omnes* effects when they violate the Constitution.

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the review is incidental and special, and in the second, principal and general. When this happens -that is to say when the recourse is autonomous- the control is either formal or material, depending on whether the nullity has to do with an irregularity relating to the process of drafting the statute, or whether -despite the legislation having been correct from the formalist point of view- the intrinsic content of the statute suffers from substantial defects." See Federal Court (which in 1961 was substituted by the Supreme Court of Justice), decision June 19, 1953, *Gaceta Forense*, 1, 1953, pp. 77-78

257 See in general, Allan R. Brewer-Carías, *E1 control de la constitucionalidad de los actos estatales,* Caracas 1977; and also "Algunas consideraciones sobre el control jurisdiccional de la constitucionalidad de los actos estatales en el derecho venezolano", in *Revista de Administración Pública,* n° 76, Madrid 1975, pp. 419-446..

258 See J. G. Andueza, *La jurisdicción constitucional en el derecho venezolano*, Caracas 1955 p. 46.

Finally, it must be highlighted that in the Venezuelan systems of judicial review and of "amparo", according to the 1999 Constitution an extraordinary review recourse can be filed before the Constitutional Chamber of the Supreme Court against judicial final decisions issued in "amparo" suits and also, against any judicial decision issued when applying the diffuse method of judicial review resolving the inapplicability of statutes because they are considered unconstitutional (Article 336,10).

The essential trend of this attribution of the Constitutional Chamber is its discretionary character[259] that allows it to choose the cases to be reviewed. As the same Constitutional Chamber of the Supreme Tribunal pointed it out in its decision nº 727 of April 8th, 2003, "in the cases of the decisions subject to revision, the Constitution does not provide for the creation of a third instance. What has set forth the constitutional provision is an exceptional and discretional power of the Constitutional Chamber that as such, must be exercised with maxim prudence regarding the admission of recourses for review final judicial decisions"[260].

Montalbano Elicona/New York, July-August 2008

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[259] As mentioned, in a certain way similar to the *writ of certiorari* in the United States system. See Jesús María Casal, *Constitución y Justicia Constitucional,* Caracas 2002, p. 92.

[260] See *Revisión de la sentencia dictada por la Sala Electoral en fecha 21 de noviembre de 2002* Case, in *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas 2003. See decision of November 2, 2000, *Roderick A. Muñoz P.* Case, in *Revista de Derecho Público*, nº 84, (octubre-diciembre), Editorial Jurídica Venezolana, Caracas 2000, p. 367.