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The Amparo Proceeding in Venezuela: Constitutional Litigation and Procedural Protection of Constitutional Rights and Guarantees

Allan R. Brewer-Carías

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THE AMPARO PROCEEDING IN VENEZUELA: CONSTITUTIONAL LITIGATION AND PROCEDURAL PROTECTION OF CONSTITUTIONAL RIGHTS AND GUARANTEES*

*Allan R. Brewer-Carías***

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** Professor at the Central University of Venezuela; former Simón Bolívar Professor at University of Cambridge Law School; and former Adjunct Professor of Laws at the Université de Paris II, and at Columbia Law School, New York.

I. INTRODUCTION

The amparo proceeding is an extraordinary judicial remedy specifically conceived for the protection of constitutional rights against harms or threats inflicted by authorities or individuals. It is a Latin American procedural means for constitutional litigation that normally concludes with a judicial order or writ of protection (*amparo, protección* or *tutela*), that has been indistinctly called an action, recourse or suit of amparo.[1]

This constitutional litigation means was introduced in the American continent during the nineteenth century, and although similar remedies were established in the twentieth century in some European countries, like Austria, Germany, Spain and Switzerland, and also in Canada, it has been adopted by all Latin American countries, except in Cuba, being considered as one of the most distinguishable features of Latin American constitutional law.[2] As such, it has influenced the introduction of a similar remedy in the Philippines, the writ of amparo, which was created by the Supreme Court in 2007.[3]

This specific remedy, providing for the protection of fundamental rights, contrasts with the constitutional system of the United States, where the effective protection of human rights is effectively assured, following the British procedural law tradition, through the general judicial actions and equitable remedies, particularly the injunctions, which are also used to protect any other kind of personal or property rights or interests.

The amparo proceeding was first introduced in Mexico in 1857 as the *juicio de amparo*, evolving in that country into a unique and

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1. *See* HÉCTOR FIX-ZAMUDIO AND EDUARDO FERRER MAC-GREGOR (COORD.), EL DERECHO DE AMPARO EN EL MUNDO, Edit. Porrúa, México, 2006; ALLAN R. BREWER-CARÍAS, EL AMPARO A LOS DERECHOS Y LIBERTADES CONSTITUCIONALES. UNA APROXIMACIÓN COMPARATIVA, Cuadernos de la Cátedra de Derecho Público, n° 1, Universidad Católica del Táchira, San Cristóbal, 1993; also published 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; and 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.

2. *See generally* ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA, A COMPARATIVE STUDY OF THE AMPARO PROCEEDINGS (Cambridge University Press 2009)., pp. 77ff.

3. *See generally* Allan R. Brewer-Carías, *The Latin American Amparo Proceeding and the Writ of Amparo in The Philippines*, 1.1 CITY UNIV. HONG KONG L. REV. 73-90 (Oct. 2009).

very complex institution exclusively found in Mexico. Not only was it designed to guarantee judicial protection of constitutional guarantees against the State acts or actions, but to perform multipurpose judicial roles, including actions and procedures that in all other countries are separate processes, like judicial review, cassation review and judicial review of administrative actions.

In the rest of Latin America the amparo gave rise to a very different specific judicial remedy established with the *exclusive* purpose of protecting human rights and freedoms, becoming in many cases, more protective than the original Mexican institution. The institution has been described in various ways, always meaning the same, such as: *Amparo* (Guatemala); *Acción de amparo* (Argentina, Ecuador, Honduras, Paraguay, Uruguay, Dominican Republic, Venezuela); *Acción de tutela* (Colombia); *Proceso de amparo* (El Salvador, Peru); *Recurso de amparo* (Bolivia, Costa Rica, Nicaragua, Panama); *Recurso de protección* (Chile) or *Mandado de segurança* and *mandado de injunçao* (Brazil).[4] In all of the Latin American countries, the provisions for the action are embodied in the constitutions; and in all of them, except Chile, the actions of amparo have been expressly regulated by statutes, particularly in special statutes related to constitutional litigations, with the exception of Panama and Paraguay where the amparo action is regulated in the general procedural codes (*Código Judicial, Código Procesal Civil*).

II. THE RIGHT TO AMPARO IN VENEZUELA

Within a mixed system of judicial review, since 1961, the Venezuelan Constitution establishes a "constitutional right for amparo" or to be protected by the courts,[5] that according to article 27 of the

4. *See generally* Allan R. Brewer-Carías, *Ensayo de síntesis comparativa sobre el régimen del amparo en la legislación latinoamericana*, in REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL, No. 9 enero-junio 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 311-321; Eduardo Ferrer Mac-Gregor, *Breves notas sobre el amparo latinoamericano (desde el derecho procesal constitucional comparado)*, in HÉCTOR FIX-ZAMUDIO AND EDUARDO FERRER MAC-GREGOR, EL DERECHO DE AMPARO EN EL MUNDO, Edit. Porrúa, México, 2006, 3–39.

5. VENEZ. CONST. ART. 27 (1999); VENEZ. CONST. ART. 49 (1961). *See generally*, on the action of amparo in Venezuela, Allan R. Brewer-Carías, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, Editorial Jurídica Venezolana, Caracas, 1998; GUSTAVO BRICEÑO V., COMENTARIOS A LA LEY DE AMPARO, Edit. Kinesis, Caracas, (1991); RAFAEL J. CHAVERO 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

1999 Constitution everybody has for the protection of all the rights, freedoms and guarantees enshrined in the constitution and in international treaties, or which, even if not listed in the text, are inherent to the human person. The constitution does not set forth a separate action of habeas corpus for the protection of personal freedom and liberty; which are also protected by the action for amparo. In this latter case of amparo for the protection of personal freedom or safety, it can be exercised by any person in which cases "the detainee shall be immediately transferred to the court, without delay" [6]

Additionally, the Venezuelan Constitution has also set forth the habeas data recourse, in order to guarantee the right to have access to the information and data concerning the claimant, contained in official or private registries. The habeas data recourse also provides the right to know about the use that has been made of such information concerning its purpose, and to petition the competent court for the updating, rectification or destruction of erroneous records that unlawfully affect the petitioner's rights.

The amparo proceeding has been regulated in the Organic Law on Amparo for the protection of constitutional rights and guarantees that was sanctioned in 1988 (*Ley Orgánica de Amparo sobre derechos y garantías constitucionales*).[7] According to its provisions, the right to amparo can be exercised through an "autonomous action for amparo"[8] that is generally filed before the first instance courts,[9] with a reestablishing nature, in general regarding fla-

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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, 649–92.

6. VENEZ. CONST. ART. 27 (1999).

7. *See Gaceta Oficial* n. ° 33.891 of January 22, 1988. On this Law, *see* Allan R. Brewer-Carías, Carlos M. Ayala Corao & Rafael Chavero G., LEY ORGÁNICA DE AMPARO SOBRE DERECHOS Y GARANTÍAS CONSTITUCIONALES, Editorial Jurídica Venezolana, Caracas, 2007.

8. *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, 51 ff.

9. According to Article 7 of the Organic Law on Amparo, the competent courts to decide amparo actions are the courts of First Instance with competence on matters related to the constitutional rights or guarantees violated, in the place where the facts, acts or omission occurred. Venez. Amparo Law, Art. 7. Regarding amparo of personal freedom and security, the competent courts should be the criminal first instance courts. Venez. Amparo Law, Art. 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 any judge of the site, which must decide according to the law. Such judge must also, in a twenty-four hour delay, send the files for consultation to the competent First Instance court. Venez. Amparo Law, Art. 9. Only in cases in which facts, acts or omissions of the President of the Republic, his cabinet members, the National Electoral Council, the Prosecutor General, the Attorney General and the

grant, vulgar, direct and immediate constitutional harm to the plaintiff's rights. The constitutional protection can also be claimed by means of other preexisting ordinary or extraordinary legal actions or recourses already established in the legal system to which an amparo petition is joined. This can be the popular action of unconstitutionality of statutes, the judicial review of administrative actions' recourses, and any other "ordinary judicial procedures" or "preexisting judicial means," through which the "violation or threat of violation of a constitutional right or guaranty may be alleged."[10] In these cases, in which a competent judge is empowered to immediately reestablish the infringed legal situation, it is not that the ordinary means substitute the constitutional right of protection (or diminish it), but instead that they can serve as the judicial means for constitutional litigation because the judge is empowered to protect fundamental rights and immediately reestablish the infringed legal situation.[11]

These regulations result in the Venezuelan right for amparo, which has certain peculiarities that distinguish it from the other similar institutions for the protection of the constitutional rights and guarantees established in Latin America.[12] Besides the adjective consequences of the amparo being a constitutional right in Venezuela, it can be characterized by the following trends:

First, the right of amparo can be exercised 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 provision 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 guarantees against any disturbance in their enjoyment and exercise, whether originated by public authorities or by private individuals, without distinction. In addition, in the case of disturbance by public authorities, the amparo is admissible

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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. Venez. Amparo Law, Art. 8.

10. Venez. Amparo Law, Arts. 3, 4, 5

11. *See* Allan R. Brewer-Carías, *La reciente evolución jurisprudencial en relación a la admisibilidad del recurso de amparo*, in REVISTA DE DERECHO PÚBLICO, n.° 19, Caracas, 1984, pp. 207–218.

12. *See generally* H. FIX-ZAMUDIO, LA PROTECCIÓN PROCESAL DE LOS DERECHOS HUMANOS ANTE LAS JURISDICCIONES NACIONALES, Madrid, 1982, 366.

against statutes; against legislative, administrative and judicial acts and against material or factual courses of action of Public Administration or public officials.

Third, the decision of the judge, as a consequence of the exercise of this right to amparo, whether through the preexisting actions or recourses or by means of the autonomous action for amparo, is not limited to being 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, because the Venezuelan system of judicial review is a mixed one, judicial review of legislation can also be exercised by the courts when deciding an 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.

Finally, in the Venezuelan systems of judicial review and of amparo, according to article 336.10 of 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 proceedings, and also by any court when applying the diffuse method of judicial review resolving the inapplicability of statutes because they are considered unconstitutional.

Following these main general trends, I will analyze the amparo proceeding in Venezuela, studying the rules regarding the injured party; the justiciable rights; the conditions of the injury; the reparable character of harms and the restorative character of amparo; the imminent character of threats and preventive character of the amparo; the injuring party; the conditions of the injuring public actions and omissions; the admissibility condition and the extraordinary condition of the action; the rules of procedure; the preliminary protective measures; and the final decision. In each case where it proceeds I have made the corresponding comparisons with civil rights injunctions in the United States.

III. THE INJURED PARTY IN THE AMPARO PROCEEDNG

One of the most distinguishable principles regarding the amparo proceeding as an extraordinary judicial means for the protection of constitutional rights is the principle of bilateralism, which implies the need for the existence of a controversy between two or more parties. The main consequence of this principle is that the amparo proceeding can only be initiated at a party's request, which excludes any case of *ex officio* amparo proceeding. [13]

Consequently, in order to initiate this proceeding, an action must be brought before a court by a plaintiff as the injured party, against the injuring party or parties, who, as defendants, must be called to the procedure as having caused the harm or the violation to the constitutional rights of the former. [14]

The injured party, in principle, is the person having the constitutional right that has been violated, a situation that gives him a particular interest in bringing the case before a court. That is why the amparo action has been considered as an action *in personam* (*personalisima*) through which the plaintiff, seeking the protection of constitutional rights, must be the actual injured or aggrieved person.

Because the action has a personal character (*acción personalísima*), the plaintiff, as the person whose constitutional rights have been injured or threatened of being harmed,[15] is the titleholder of the harmed or violated right[16] and is the injured party

13. *See* ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA,. A COMPARATIVE STUDY OF THE AMPARO PROCEEDINGS, *supra* note 2, at 179.

14. *Id.*

15. *See* Decision of the former Venezuelan Supreme Court of Justice, Politico Administrative Chamber n.° 571 of Aug. 13, 1992, in REVISTA DE DERECHO PÚBLICO, n.° 51, Editorial Jurídica Venezolana, Caracas, 1992, pp. 160-61.

16. Regarding injunctions in the United States the court in *Parkview Hospital v. Commw. Dep't of Pub. Welfare*, held that bringing an action "requires an aggrieved party showing a substantial, direct and immediate interest in the subject matter of the litigation." 424 A.2d 599, 600 (Pa. Commw. Ct. 1981). See also 43A C.J.S. *Injunctions* § 299. See also *Warth v. Seldin*, 422 U.S. 490, 498-500 (1975) (the plaintiff must "'allege such a personal stake in the outcome of the controversy'" as to justify the exercise of the court's remedial powers on his behalf, because he himself has suffered "'some threatened or actual injury resulting from the putatively illegal action.'"). *See* M. GLENN ABERNATHY AND BARBARA A. PERRY, CIVIL LIBERTIES UNDER THE CONSTITUTION 4 (6th ed. 1993). That is why standing to seek injunctive relief in the United States is only attributed to the person affected. *See* Ala. Power Co. v. Ala. Elec. Co-op., 394 F.2d 672 (5th Cir. 1968); 43A C.J.S. *Injunctions* § 200 (2004).

with justiciable interest in the subject matter of the litigation, which can be a natural person (citizens or foreigner), or an artificial person (associations, foundations, corporations or companies). For this purpose the plaintiff can act directly, *in personam,* or through his representative.[17] Thus, nobody can file an action for amparo alleging in his own name a right belonging to another,[18] the general exception being the action of habeas corpus, in which case, because 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.[19]

On the other hand, as not all constitutional rights are individual, and to the contrary, some are collective by nature, in the sense that they correspond to a more or less defined group of persons, their violations affect not only the personal rights of each of the individuals who enjoy them, but also, the whole group of persons or collectivity to which the individuals belong. In these cases the amparo action can also be filed by the group or the association of persons representing their associates, even if they do not have the formal character of an artificial person. For such purpose, the Venezuelan constitution expressly sets forth the constitutional right of everybody to have access to justice, to seek for the enforcement not only of personal rights, but also of "collective" and "diffuse" rights.[20] This has been the case, for instance, of amparo

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17. As it was ruled by the former Supreme Court of Justice of Venezuela regarding the personal character of the amparo suit, imposing for its admissibility:

> A qualified interest of who is asking for the restitution or reestablishment of the harmed right or guaranty, that is, that the harm be directed to him and that, eventually, its effects affect directly and indisputably upon him, harming his scope of subjective rights guaranteed in the Constitution. It is only the person that is specially and directly injured in his subjective fundamental rights by a specific act, fact or omission the one that can bring an action before the competent courts by mean of a brief and speedy proceeding, in order that the judge decides immediately the reestablishment of the infringed subjective legal situation.

See decision n.° 460 of Aug. 27, 1993, *Kenet E. Leal* case, in REVISTA DE DERECHO PÚBLICO, n.° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 322; and decision of the Venezuelan First Court on Judicial Review of Administrative Actions, Nov. 18, 1993 (*Gobernación del Estado Miranda* case), in REVISTA DE DERECHO PÚBLICO, n.° 55–56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 325–327.

18. *See* decision of the former Venezuelan Supreme Court of Justice, Politico Administrative Chamber, n.° 72 of Feb. 14, 1990, *Carlos Coll* case, in REVISTA DE DERECHO PÚBLICO, n.° 41, Editorial Jurídica Venezolana, Caracas, 1990, p. 101.

19. Venez. Amparo Law, Art. 41 (anybody acting on his behalf).

20. VENEZ. CONST. ART. 26. The Constitutional Chamber has referred to the diffuse and collective interests or rights as concepts established for the protection of a number of individuals that can be considered as representing the entire, or at least an important part of a society, which are affected on their constitutional rights and guarantees destined to

actions filed for the protection of electoral rights, in which case, any citizen, invoking the general voters' rights, can file the action.[21] In other words, the Constitutional Chamber has admitted that: "Any capable person that tends to impede harm to the population or sectors of it to which he appertains, can file actions in defense of diffuse or collective interest," extending the "standing to the associations, societies, foundations, chambers, trade unions and other collective entities devoted to defend society, provided that they act within the limits of their societal goals referring to the protection of the interests of their members."[22]

In these cases, the Constitutional Chamber has determined that the action filed must be based "not only on the personal right or interest of the claimant, but also on a common or collective right or interest."[23] Consequently, in these cases, a bond or relation must exist, "even if it is not a legal one, between whoever demands

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protect the public welfare by an attack to their quality of life. *See* decision of the Constitutional Chamber n° 656 of June 30, 2000, *Defensor del Pueblo vs. Comisión Legislativa Nacional* case, available at http://www.tsj.gov.ve/decisiones/scon/Junio/656-300600-00-1728%20.htm. *See* also decision of the same Constitucional Chamber n° 379 of Feb. 26, 2003, *Mireya Ripanti et vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)* case, in REVISTA DE DERECHO PÚBLICO, n° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ff.

21. In these cases, the Chamber has even granted precautionary measures with *erga omnes* effects "to both individuals and corporations who have brought to suit the constitutional protection, and to all voters as a group." *See* Decision of the Constitutional Chamber n° 483 of May 29, 2000, *"Queremos Elegir" y otros* case, in REVISTA DE DERECHO PÚBLICO, n° 82, 2000, Editorial Jurídica Venezolana, pp. 489–491. In the same sense, see the decision of the same Chamber n° 714 of July 13, 2000, *APRUM* case, in REVISTA DE DERECHO PÚBLICO, n° 83, Editorial Jurídica Venezolana, Caracas, 2000, pp. 319 ff.

22. The Chamber added that:

> Those who file actions regarding the defense of diffuse interest do not need to have any previously established relation with the offender, but has to act as a member of society, or of its general categories (consumers, users, etc.) and has to invoke his right or interest shared with the population's, because he participates with all regarding the harmed factual situation due to the noncompliance of the diminution of fundamental rights of everybody, which gives birth to a communal subjective right, that although indivisible, is actionable by any one place within the infringed situation.

See decision of June 30, 2000, *Defensoría del Pueblo* case, available at http://www.tsj.gov.ve/decisiones/scon/Junio/656-300600-00-1728%20.htm. See the comments in RAFAEL CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, pp. 110–114.

23. That is, the reason of the claim or the action for amparo must be "the general damage to the quality of life of all the inhabitants of the country or parts of it, since the legal situation of all the members of the society or its groups have been damaged when their common quality of life was worsened." Thus, the damage "concerns an indivisible right or interest that involves the entire population of the country or a group of it." Decision n° 1048 of Aug. 17, 2000, *William O. Ojeda O. vs. Consejo Nacional Electoral* case, available at http://www.tsj.gov.ve/decisiones/scon/agosto/1053-310800-00-2397%20.htm.

in the general interest of the society or a part of it (social common interest), and the damage or danger caused to the collectivity."[24]

These collective actions have some similarities with the civil rights class actions developed in the United States,[25] which have been very effective for the protection of civil rights in cases of discrimination.[26]

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24. *See* Decision n° 1048 of Aug. 17, 2000, *William O. Ojeda O. vs. Consejo Nacional Electoral* case, http://www.tsj.gov.ve/decisiones/scon/agosto/1053-310800-00-2397%20.htm. In spite of all the aforementioned progressive decisions regarding the protection of collective and diffuse rights, like the political ones, in a decision dated Nov. 24, 2005, the Venezuelan Constitutional Chamber has reverted its ruling, and in a case originated by a claim filed by the director of a political association named "Un Solo Pueblo" against the threat of violations of the political rights of the aforesaid political party and of all the other supporters of the calling of a recall referendum regarding the President of the Republic, the Chamber ruled that:

> The action of amparo was filed for the protection of constitutional rights of an undetermined number of persons, whose identity was not indicated in the filing document, in which they are not included as claimants. It is the criteria of this Chamber, those that could result directly affected in their constitutional rights and guaranties by the alleged threat attributed to the Ministry of Defense and the General Commanders of the Army and the National Guard are, precisely, the persons that are members or supporters of "*Un Solo Pueblo*," or those who prove they are part of one of the groups that promoted the recall referendum; in which case they would have standing to bring before the constitutional judge, by themselves or through representatives, seeking the reestablishment of the infringed juridical situation or impeding the realization of the threat, because the *legitimatio ad causam* exists in each one of them, not precisely as constitutionally harmed or aggrieved. Due to the foregoing, the Chamber considers that Mr. William Ojeda, who said he acted as Director of the political association called "*Un Sólo Pueblo*," a quality that he furthermore has not demonstrated, lacks the necessary standing to seek for constitutional amparo of the constitutional rights set forth in Articles 19, 21 and 68 of the constitution regarding the members, supporters and participants of the mentioned political association as well as the political coalition that proposed the recall referendum of the President of the Republic, and consequently, this Chamber declares the inadmissibility of the amparo action filed.

See Decision n° 3550 of Nov. 24, 2005, *Willian Ojeda vs. Ministro de la Defensa y los Comandantes Generales del Ejercito y de la Guardia Nacional* case, in REVISTA DE DERECHO PÚBLICO, n° 104, Editorial Jurídica Venezolana, Caracas, 2005, pp. 231 ff.

25. Regulated in Rule 23 of the Federal Rules of Civil Procedure filed for the protection of civil rights, according to which, in cases of a class of persons whom have "questions of law or fact common to the class," but have so many members that joining all of them would be an impracticable task, then the action can be filed by one or more of its members as representative plaintiff parties on behalf of all, provided that the claims of the representative parties are "typical of the claims . . . of the class" and that such "representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

26. It was the case decided by the Supreme Court in *Zablocki v. Redhail*, as a result of a class action brought before a federal court under 42 U.S.C. § 1983, by Wisconsin residents holding that the marriage prohibition set forth in Wisconsin Statute § 245.10 violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. 434 U.S. 374, 375-77 (1978). According to that statute, Wisconsin residents were prevented from marrying if they were behind in their child support obligations or if the children to whom they were obligated were likely to become public charges. *Zablocki*, 434 U.S. 377. The Court found that the statute violated equal protection in that it "directly and substantially" interfered with the fundamental right to marry, without being closely tailored to

Although being of a personal character, even in cases of actions for the protection of collective and diffuse rights, the People's Defendant was created in Venezuela as an independent and autonomous separate branch of government for the protection of human rights,[27] having enough standing to file amparo actions on behalf of the community or groups of persons.[28] For example, standing is extended to cases of the protection of indigenous peoples' rights, the right to the environment and the citizens' right to political participation.[29]

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effectuate the state's interests. *Id.* at 382, 387. Another Supreme Court decision, *Lau v. Nichols*, also decided in favor of a class on discrimination violations. 414 U.S. 563 (1974). In the case, non-English-speaking students of Chinese ancestry brought a class suit in a federal court of California against officials of the San Francisco Unified School District, seeking relief against alleged unequal educational opportunities resulting from the officials' failure to establish a program to rectify the students' language problem. *Lau*, 414 U.S. at 564-65. The Supreme Court eventually held that the school district, which received federal financial assistance, violated statutes that ban discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance, and furthermore violated the implementing regulations of the Department of Health, Education, and Welfare by failing to establish a program to deal with the complaining students' language problem. *Id.* at 568-69.

27. The 1999 Venezuelan Constitution, in this regard, establishes a separation of powers, distinguishing five branches of government, separating the Legislative, Executive, Judicial, Electoral and Citizens branches; creating the People's Defendant within the Citizens Power, in addition to the Public Prosecutor Office and the General Comptroller Office. VENEZ. CONST. ART. 134 (1999). The People's Defendant was created for the promotion, defense and supervision of the rights and guarantees set forth in the constitution and in the international treaties on human rights, as well as for the citizens' legitimate, collective and diffuse interests. VENEZ. CONST. ART. 281 (1999). In particular, according to Article 281 of the constitution, it also has among its functions to watch for the functioning of public services power and to promote and protect the peoples' legitimate, collective and diffuse rights and interests against arbitrariness or deviation of power in the rendering of such services, being authorized to file the necessary actions to ask for the compensation of the damages caused from the malfunctioning of public services. VENEZ. CONST. ART. 281 (1999). It also has among its functions, the possibility of filing actions of amparo and habeas corpus.

28. The courts have declared that the Defender has standing to bring to suit actions aimed at enforcing the diffuse and collective rights or interests; not being necessary the requirement of the acquiescence of the society it acts on behalf of for the exercise of the action. See Decision n° 1051 of Aug. 2, 2000 of the Venezuelan First Court on Judicial Review of Administrative Actions, *Henry Lima et al. case*, in REVISTA DE DERECHO PÚBLICO, n° 83, Editorial Jurídica Venezolana, Caracas, 2000, pp. 326-27.

29. The Constitutional Chamber of the Supreme Tribunal of Venezuela admitted the standing of the Defender of the People to file actions for amparo on behalf of the citizens as a whole, as was the case of the action filed against the legislative body pretension to appoint the Electoral National Council members without fulfilling the constitutional requirements. In the case, decided on June 30, 2000, the Constitutional Chamber, when analyzing Article 280 of the constitution, in its decision n° 656 pointed out that "the protection of diffuse and collective rights and interests may be raised by the Defender of the People, through the action of amparo," adding the following:

> As for the general provision of Article 280 *eiusdem*, regarding the general defense and protection of diffuse and collective interests, this Chamber considers that the Defender of the People is entitled to act to protect those rights and interests, when they

IV. THE JUSTICIABLE CONSTITUTIONAL RIGHTS AND GUARANTEES THROUGH THE AMPARO PROCEEDING

As a matter of principle in Venezuela, all rights and guarantees enshrined in the constitution or those that have acquired constitutional rank and value are justiciable[30] rights by means of the amparo action. That is, they have to be, in spite of being regulated in statutes, out of the reach of the legislator in the sense that they cannot be eliminated, or diminished through statutes.

The consequence of this principle is that the purpose of the amparo actions is to protect individuals against violations of the "constitutional" provision regarding their right; not being able to file an action for amparo simply based on the violation of the "statutory" provisions that regulate the constitutional right. For instance, as it happens with the right to property, regarding which an amparo action for its protection can be admitted when, for example, arbitrary administrative acts prevent or impede in absolute terms the use of property. On the contrary, it is not admitted

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correspond in general to the consumers and users (6, Article 281), or to protect the rights of Indian peoples (paragraph 8 of the same Article), since the defense and protection of such categories is one of the faculties granted to said entity by Article 281 of the Constitution in force. It is about a general protection and not a protection of individualities. Within this frame of action, and since the political rights are included in the human rights and guaranties of Title III of the Constitution in force, which have a general projection, among which the ones provided in Article 62 of the Constitution can be found, it must be concluded that the Defender of the People on behalf of the society, legitimated by law, is entitled to bring to suit an action of amparo tending to control the Electoral Power, to the citizen's benefit, in order to enforce Articles 62 and 70 of the Constitution, which were denounced to be breached by the National Legislative Assembly...(right to citizen participation). Due to the difference between diffuse and collective interests, both the Defender of the People, within its attributions, and every individual residing in the country, except for the legal exceptions, are entitled to bring to suit the action (be it of amparo or an specific one) for the protection of the former ones; while the action of the collective interests is given to the Defender of the People and to any member of the group or sector identified as a component of that specific collectivity, and acting defending the collectivity. Both individuals and corporations whose object be the protection of such interests may raise the action, and the standing in all these actions varies according to the nature of the same, that is why law can limit the action in specific individuals or entities. However, in our Constitution, in the provisions of Article 281 the Defender of the People is objectively granted the procedural interest and the capacity to sue.

See Decision of the Constitutional Chamber n° 656 of June 30, 2000, *Defensor del Pueblo vs. Comisión Legislativa Nacional* case, available at http://www.tsj.gov.ve/decisiones/scon/Junio/656-300600-00-1728%20.htm. *See also* Decision n° 379 of February 26, 2003, *Mireya Ripanti et vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)* case, in REVISTA DE DERECHO PÚBLICO, n° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ff.

30. "Justiciability" being defined as "The quality or state of being appropriate or suitable for review by courts;" and "Justiciable," as "capable of being disposed of judicially." BLACK'S LAW DICTIONARY 882 (8th ed. 2004).

for the protection of property, for instance, against trespassing. In these cases, the ordinary civil judicial expedite actions (*interdictos*) are the ones that should be filed.[31]

In general terms, this implies the extraordinary character of the amparo action, in the sense that it can only be filed when no other appropriate and effective ordinary judicial means for protection are legally provided or when if such protections are provided, they are ineffective.

This condition of admissibility of the amparo actions is very similar to the so-called "inadequacy" condition established in the United States regarding the equitable injunction remedies, in the sense that they are only admissible when there are no adequate remedies in law to assure the protection; or when the law cannot provide an adequate remedy because of the nature of the right involved, as was the case regarding school segregation.[32]

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31. Property rights are not only established in the constitutions but are also extensively regulated in the Civil Code. The latter not only contains substantive regulations regarding the exercise of such rights, but it also provides for adjective ordinary remedies in case those rights are affected. In particular, the Civil Code and the Civil Procedure Codes establishes some sort of civil injunctions to guarantee immediate protection in cases of trespasses (*interdictos*) for instance of possession rights, which are effective judicial remedies for the protection of land owners or occupant rights. Thus, in cases of property trespass, the *interdicto de amparo* or of new construction are effective judicial means for protection of property rights, not being possible to file an amparo action in such cases. In this regard, the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela, in a case decided in 2000, argued as follows:

> The amparo action protects one aspect of the legal situations of persons referred to their fundamental rights, corresponding the defense of subjective rights – different to fundamental rights and public liberties – to the ordinary administrative and judicial recourses and actions. For instance, it is not the same to deny a citizen the condition to have property rights, than to discuss property rights between parties, the protection of which corresponds to a specific ordinary judicial action of recovery (reivindicación). This means that in the amparo proceedings the court judges the actions of public entities or individuals that can harm fundamental rights; but in no case can it review, for instance, the applicability or interpretation or statutes by Public Administration or the courts, unless from them a direct violation of the Constitution can be deduced. The amparo is not a new judicial instance, nor the substitution of ordinary judicial means for the protection of rights and interest; it is an instrument to reaffirm constitutional values, by mean of which the court, hearing an amparo, can decide regarding the contents or the application of constitutional provisions regulating fundamental rights; can review the interpretation made by Public Administration or judicial bodies, or determine if the facts from which constitutional violations are deduced constitute a direct violation of the Constitution.

See Decision n° 828 of July 27, 2000, *Seguros Corporativos (SEGUCORP), C.A. et al. vs. Superintedencia de Seguros* case, in REVISTA DE DERECHO PÚBLICO, n° 83, Editorial Juridica Venezolana, Caracas, 2000, pp. 290 ff.

32. *See* OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS, 59 (2nd ed. 1984). This inadequacy condition, of course, normally results from the factual situations regarding the case or from the nature of the right, which in some cases impedes or allows the granting of the protection. In this sense, for instance, it was resolved since the well-known case of *Wheelock v. Nooman*, 15 N.E. 67 (N.Y. 1888), in which case the defendant, having left on

The rights protected by the amparo action are the "constitutional rights," that comprise of first, rights expressly declared in the constitution. Second, are those rights that are not enumerated in the constitution and are inherent to human beings. Third, are the rights enumerated in international instruments on human rights ratified by the state, that in Venezuela have constitutional rank being applied with preference in all cases in which they provide more favorable conditions for the enjoyment of the right.[33] Consequently, all the rights listed in Title III of the constitution, which refer to human rights, guarantees and duties, are protected by the amparo action. Those rights include citizenship rights, civil (individual) rights, political rights, social and familial rights, cultural and educational rights, economic rights, environmental rights and the rights of indigenous peoples enumerated in Articles 19 to 129. Additionally, all other constitutional rights and guarantees derived from other constitutional provisions can also be protected even if not included in Title III, such as the constitutional guarantee of the independence of the judiciary, or the constitutional guarantee of the legality of taxation (that taxes can only by set forth by statute).[34] Also, regarding the protected rights, through the open clause of constitutional rights, the constitution admits the amparo action for the protection of those other constitutional rights and guaranties not expressly listed in the constitution, but that can be considered inherent to human beings.[35]

The most important question regarding the justiciability of constitutional rights refers to the scope of the protection of social rights, and in particular the right of the people to have their health protected by the state,[36] and the obligation of the state to provide public health services. In this regard, the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela in a

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the plaintiff's property great boulders beyond the authorization he had, the injunction was granted in order to require such defendant to remove them. Wheelock, 15 N.E. at 67-70. The plaintiff in the case could not easily remove the boulders and sued the cost of removal of the trespassing rocks because of their size and weight. *Id.* at 69. On the contrary, in another case, the remedy at law was considered adequate because the litter the defendant left on the property could be removed by the plaintiff paying for someone to remove the trash, in which case he could simply sue the defendant for the cost incurred. *Connor v. Grosso*, 529 P.2d 435 (Cal. 1953).

33. VENEZ. CONST. ART. 23.

34. *See* BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 209. *See* Decision of the First Court on Judicial Review of Administrative Action, *Fecadove* case, in Rafael Chavero G., EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at p. 157.

35. VENEZ. CONST. ART. 22.

36. VENEZ. CONST. ART. 83.

decision (*Glenda López y otros vs. Instituto Venezolano de los Seguros Sociales*) pointed out that the right to health or to the protection of health is:

> an integral part of the right to life, set forth in the Constitution as a fundamental social right (and not simply as an assignment of State purposes) whose satisfaction mainly belongs to the State and its institutions, through activities intended to progressively raise the quality of life of citizens and the collective welfare.[37]

This, according to the Court's decision, implies that "the right to health is not to be exhausted with the simple physical care of a person, but must be extended to the appropriate treatment in order to safeguard the mental, social, environmental integrity of persons, including the community."[38]

V. THE INJURY IN THE AMPARO PROCEEDING

The injuries violating constitutional rights, against which the amparo action is established, can consist of harms or threats affecting those rights. Harms are always damages affecting or destroying the object of the right; and threats are injuries that, without destroying such object, put the enjoyment of the right in a situation of danger or of suffering a detriment.

In order to be protected by means of the amparo proceeding, these injuries–harms or threats–caused to constitutional rights, must be evident, actual and real, that is, they must affect personally and directly the rights of the plaintiff, in a manifestly arbitrary, illegal and illegitimate way, which the plaintiff must not have consented to.

In addition to these general conditions, specifically regarding harms, they must have a reparable character. Regarding threats, they must affect the rights in an imminent way. That is why the type of injuries inflicted on constitutional rights furthers the purpose for the amparo proceeding: if harms, being reparable, the amparo has a restorative effect; and if threats, being imminent, the amparo has a preventive effect.

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37. Decision of the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela n° 487 of Apr. 6, 2001, *Glenda López y otros vs. Instituto Venezolano de los Seguros Sociales* case, in REVISTA DE DERECHO PÚBLICO, n° 85-88, Editorial Juridica Venezulana, Caracas, 2001, pp. 139 ff.

38. *Id.*

Regarding the general conditions with which the injuries to constitutional rights must comply in order for an amparo actions to be admitted, the following are established in the Amparo Law. First, it must have a personal and direct character, in the sense that it must personally affect the plaintiff. Second, it must be actual and real. Third, it must be manifestly or ostensibly arbitrary, illegal and illegitimate. Fourth, it must be evidenced in the case. Finally, it must not be consented to by the plaintiff.

The first condition of the injury inflicted upon the plaintiff's constitutional rights, in order for an amparo action to be admitted, is that the plaintiff must have suffered a "direct, personal and present harm or threat in his constitutional rights."[39] That is, the plaintiff must be personally affected. Consequently, the amparo action cannot be filed when the affected rights belong to another person, separate from the claimant or only affects the plaintiff in an indirect way.

If the harm does not affect the constitutional rights of the plaintiff in a personal and direct way, the action must be considered inadmissible. The action is also inadmissible when the harm or threat is not attributed to the person identified as the injuring party, that is, when the injury is not personally caused by the defendant.[40]

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39. For example, it has been ruled by the courts in Venezuela that: "[i]t is necessary, though, that the denounced actions directly affect the subjective sphere of the claimant, consequently excluding the generic conducts, even if they can affect in a tangential way on the matter." *See* Decision of the First Court on Juricial Review of Administrative Actions of Dec. 2, 1993, in REVISTA DE DERECHO PÚBLICO, n° 55–56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 302–303.

40. In this sense, for instance, it was decided by the former Supreme Court of Justice in 1999, in an amparo filed against the President of the Republic, denouncing as the injuring acts, possible measures to be adopted by the National Constituent Assembly that the President had convened, once installed. The Court rejected the action considering that "the reasons alleged by the plaintiff were of eventual and hypothetical nature, which contradicts the need of an objective and real harm or threat to constitutional rights or guaranties" in order for the amparo to be admissible. Regarding the alleged defendant in the case, the Court ruled as follows:

> This court must say that the action for constitutional amparo serves to give protection against situations that in a direct way could produce harm regarding the plaintiff's constitutional rights or guaranties, seeking the restoration of its infringed juridical situation. In this case, the person identified as plaintiff (President of the Republic) could not be by himself the one to produce the eventual harm which would condition the voting rights of the plaintiff, and the fear that the organization of the constituted branches of government could be modified, would be attributed to the members of those that could be elected to the National Constituent Assembly not yet elected. Thus in the case there does not exist the immediate relation between the plaintiff and the defendants needed in the amparo suit.

See the reference to the Decision of Apr. 23, 1999 (*A. Albornoz* case), in RAFAEL CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at p. 240.

However, in addition to directly affecting the constitutional rights of the plaintiff, the injury must be "actual," in the sense that at the moment of the filing of the action, the harm or threat must be presently occurring and must not have ceased or concluded.

This same rule is also applied in the United States regarding injunctions, in the sense that for a person to be entitled to injunctive relief, he or she must establish an actual, substantial and serious injury, or an affirmative prospect of such an injury. Consequently, a petitioner is not entitled to an injunction where no injury to the petitioner is shown from the action sought to be prevented.[41]

In other words, the injury must be real, in the sense that it must have effectively occurred; a fact that must be clearly demonstrated by the plaintiff in his petition. That is why the Venezuelan courts have ruled that:

> The amparo action can only be directed against a perfectly and determined act or omission, and not against a generic conduct; against an objective and real activity and not against a supposition regarding the intention of the presumed injurer, and against the direct and immediate consequences of the activities of the public body or officer.[42]

This actual and real character of the injury necessary to sustain an amparo suit implies that it cannot be a past injury, or one likely to occur in the future. In this sense the Venezuelan courts have argued that the injury "must be alive, must be present in all its intensity," in the sense that "referring to the present, not to the past; it does not refer to facts that already had happened, which

41. *See* Boyle v. Landry, 401 U.S. 77 (1971).

42. Decision of the former Supreme Court of Justice, Politico Administrative Chamber, of Dec. 2, 1993, in which the Court added, "that is why the amparo action is not a popular action for denouncing the illegitimacy of the public entities of control over convenience or opportunity, but a protector remedy of the claimant sphere when it is demonstrated that it has been directly affected," in REVISTA DE DERECHO PÚBLICO, n° 55–56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 302–303. In another decision, the same former Supreme Court of Justice ruled about the need that: "The violation of the constitutional rights and guaranties be a direct and immediate consequence of the act, fact or omission, not being possible to attribute or assign to the injurer agent different results to those produced or to be produced. The right's violation must be the product of the harming act." Decision n° 398 of Aug. 14, 1992, in REVISTA DE DERECHO PÚBLICO, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 145.

appertain to the past, but to present situations, which can be prolonged during an indefinite length of time."[43]

Based precisely on this condition, the former Supreme Court of Justice of Venezuela rejected the possibility of filing amparo actions against statutes, in cases in which they are not directly applicable, needing additional acts for their execution.[44]

On the other hand, this same condition that the harm or threat be actual implies that it must not have ceased or concluded, as could happen, for instance, when, in the course of the procedure, the challenged act is repealed.[45] Consequently, in order to grant the amparo protection, the Venezuelan courts have ruled that the harm must not have ceased before the judge's decision is adopted. On the contrary, if the harm has ceased, the judge *in limine litis* must declare the inadmissibility of the action.[46] For instance, in the case of amparo actions against judicial omissions, if before the filing of the action or during the proceeding, the court has issued its decision, the harm can be considered as having ceased[47] and the amparo action must be declared inadmissible. The same prin-

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43. *See* Decision of the First Court on Judicial Review of Administrative Actions, May, 7 1987, *Desarrollo 77 C.A.* case, in FUNEDA 15 AÑOS DE JURISPRUDENCIA DE LA CORTE PRIMERA DE LO CONTENCIOSO ADMINSITRATIVO 1977–1992, Caracas, 1994, p. 78. In this sense, Article 6,1 of the Amparo Law establishes for the admissibility of the amparo action, that the violation "must be actual, recent, alive." Venez. Amparo Law, Art. 6.1.

44. The Court ruled:

> When an amparo action is filed against a norm, that is, when the object of the action is the norm in itself, the concretion of the possible alleged harm would not be "immediate," due to the fact that it would always be necessary for the competent authority to proceed to the execution or application of the norm, in order to harm the plaintiff. One must conclude that the probable harm caused by a norm will always be mediate and indirect, needing to be applied to the concrete case. Thus, the injury will be caused through and by means of an act applying the disposition that is contrary to the rule of law.

Decision n° 315 of the former Supreme Court of Justice, Politico Administrative Chamber, May 24, 1993, in REVISTA DE DERECHO PÚBLICO, n° 55–56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 289–90.

45. In this regard, the First Court on Judicial Review of Administrative Actions of Venezuela resolved the inadmissibility of an action for amparo because, during the proceedings, the challenged act was repealed. Decision of Aug. 14, 1992, *José V. Colmenares* case, in REVISTA DE DERECHO PÚBLICO, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 154.

46. Decision n° 651 of Dec. 15, 1992, in REVISTA DE DERECHO PÚBLICO n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 164; *See* First Court on Judicial Review of Administrative Action, Decision of Dec. 12, 1992; *Allan R. Brewer-Carías* case, in REVISTA DE DERECHO PÚBLICO, n° 49, Editorial Jurídica Venezolana, Caracas, 1992, pp. 131–132; Decision n° 210 of the Former Supreme Court, Politico Administrative Chamber of May 27, 1993, in REVISTA DE DERECHO PÚBLICO, n° 53–54, Editorial Jurídica Venezolana, Caracas, 1993, p. 264.

47. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 237–38.

ciple applies in the United States regarding the actual character of the harm for granting the injunctive protection because the rule in federal cases is that an actual controversy must exist, not only at the time of the filing of the action, but at all stages of the proceeding, even at appellate or certiorari review stages.[48]

Nonetheless, this principle of the actual character of the injury has some exceptions. For instance, in Venezuela, the exception involves the effects already produced by a challenged act. Because additional suits are necessary in order to establish civil liabilities and compensation, even if the effects of the challenged act have ceased, the amparo protection can be granted in order for the responsible person to be judicially determined, allowing the subsequent filing of an action seeking compensation.

In order for an amparo action to be admitted, in addition to the injury being a direct, real and actual one, the harm or threat to the constitutional right must be manifestly arbitrary, illegal or illegitimate. Regarding public authorities' acts, this general condition of admissibility of the amparo action derives from the general public law principle of the presumption of validity that benefit the state's acts, which implies that in order to overcome such a presumption, the plaintiff must demonstrate that the injury caused is manifestly illegal and arbitrary. The same principle applies in the United States, imposing on the plaintiff in civil right injunctions against administrative officials, the burden to prove

48. Nonetheless, in the important case *Roe v. Wade*, the Supreme Court expanded women's right to privacy, striking down states' laws banning abortion. 410 U.S. 113 (1973). The Court recognized that even if this right of privacy was not explicitly mentioned in the constitution, it was guaranteed as a constitutional right for protecting "a woman's decision whether or not to terminate her pregnancy," even though admitting that the states' legislation could regulate the factors governing the abortion decision at some point in pregnancy based on "safeguarding health, maintaining medical standards and in protecting potential life." *Roe*, 410 U.S. at 153. The point in the case was that, pending the procedure, the pregnancy period of the claimant came to term, so the injury claimed lost its present character. *See id.* Nonetheless, the Supreme Court ruled in the case that:

> [when], as here, pregnancy is a significant fact in the litigation, the normal 266-day human generation period is so short that pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review.

Id. at 125. *See* ABERNATHY & PERRY, *supra* note 16, at 4-5.

the alleged violations in order to destroy the presumption of validity of official acts.[49]

The consequence of this condition is that the challenged act or omission must be manifestly contrary to the legal order, that is, contrary to the rules of law contained in the constitution, the statutes and the executive regulations. It must be manifestly illegitimate and lacking any legal support, or manifestly arbitrary by resulting from an unreasonable or unjust decision, which is contrary to justice or to reason.

The condition of the injury–harm or threats–to be manifestly arbitrary, illegal and illegitimate and to affect in a direct and immediate way the plaintiff rights, implies that for the filing of the amparo action, it must be evident, thus, directly imposing on the plaintiff the burden to prove his assertions. That is, the plaintiff has the burden to overcome the presumption of validity and must base his arguments on a reasonable basis by proving the unreasonable character of the public officer's challenged act or omission, and that it has personally and directly harmed his rights. Also in this matter, the rule in the amparo proceeding is similar to the rules on matters of injunctions, as they have been resolved by the United States' courts, according to which, "the party seeking an injunction, whether permanent or temporary, must establish some demonstrable injury."[50]

Consequently, in the amparo proceeding, it is for the plaintiff to prove the harm or the threats caused to his rights as being caused precisely by the defendant. This implies that when the proof of the harms or threats can be established by means of written evidence (documents, for instance), they must always be filed with the complaint in order to illustrate this to the court.[51]

Finally, the injury to constitutional rights which allows the filing of an amparo action must not only be actual, possible, real and

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49. ABERNATHY & PERRY, *supra* note 16, at 5. As M. Glenn Abernathy and Perry have commented:

> The courts do not automatically presume that all restraints on free choice are improper. The burden is thrown on the person attacking such acts to prove that they are improper. This is most readily seen in cases involving the claim that an act of the legislature is unconstitutional . . . . Judges also argue that acts of administrative officials should be accorded some presumption of validity. Thus a health officer who destroys food alleged by him to be unfit for consumption is presumed to have good reason for his action. The person whose property is so destroyed must bear the burden of proving bad faith on part of the official, if an action is brought as a consequence.

See ABERNATHY & PERRY, *supra* note 16, at 5.

50. *See* 43A C.J.S. INJUNCTIONS § 36 (2010) (citing Mt. Emmons Min. Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984).

51. Venez. Amparo Law, Art. 18.6.

imminent, but must also be an injury that has not been consented to by the plaintiff, who, in addition, must not have provoked it. That is, the plaintiff must not have expressly or tacitly consented to the challenged act or the harm caused to his rights. On the contrary, the amparo action would be considered inadmissible. The Amparo Law in this matter distinguishes two sorts of possible ways of consenting conducts: the express consent and the tacit consent, each with some exceptions.

Express consent, as established in article 6.4 of the Venezuelan Amparo Law, exists when there are "unequivocal signs of acceptance" by the plaintiff, of the acts, facts or omissions causing the injury, in which case the amparo action is inadmissible.[52] In certain aspects, this inadmissibility clause for the amparo proceeding when an express consent of the plaintiff exists also has some equivalence to the United States injunctions procedure with the equitable defense called "estoppel." Estoppel refers to actions of the plaintiff prior to the filing of the suit, when being inconsistent with the rights he is asserting in his claim.[53]

Apart from the cases of express consent, the other clause of inadmissibility in the amparo proceeding occurs in cases of tacit consent by the plaintiff regarding the act, fact or omission causing the injury to his rights. Tacit consent occurs when the precise term, legally established to file the complaint, has elapsed without the action being brought before the courts. This clause for the inadmissibility of the amparo suit is equivalent to the United States procedure for injunction called "laches," which seeks to prevent a plaintiff from obtaining equitable relief when he has not acted promptly in bringing the action, which is summarized in the phrase, that "equity aids the vigilant, not those who slumber in their rights."[54] The difference between the doctrine of "laches" and

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52. Venez. Amparo Law, Art. 6.4 (six months).

53. *See* WILLIAM M. TABB & ELAINE W. SHOBEN, REMEDIES, 50-51 (3d ed. 2005). The classic example of estoppel, as referred to by Tabb and Shoben:

> is that a plaintiff cannot ask equity for an order to remove a neighbor's fence built over the lot line if the plaintiff stood by and watched the fence construction in full knowledge of the location of the lot line. The plaintiff's silence with knowledge of the facts is an action inconsistent with the right asserted in court.

Id.

54. *Id.* at 48. As the court stated in Lake Dev. Enter. Inc. v. Kojetinsky, 410 S.W.2d 361, 367–68 (Mo. App. 1966):

> 'Laches' is the neglect, for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done. There is no fixed period within which a person must assert his claim or be barred by laches. The length of time depends upon the circumstances of the particular case. Mere delay in asserting a right does not of itself constitute laches; the delay involved must work

the Venezuelan Law concept of tacit consent, basically lies in the fact that the term to file the amparo action is expressly established in the Amparo Law[55] so the exhaustion of the term without the filing of the action results in tacit consent regarding the act, the fact or the omission causing the injury.

The sense of this clause of inadmissibility of the amparo action was summarized by the former Supreme Court of Justice of Venezuela when ruling as follows:

> Since the amparo action is a special, brief, summary and effective judicial remedy for the protection of constitutional rights . . . it is logical for the Legislator to prescribe a precise length of time between the moment in which the harm is produced and the moment the aggrieved party has to file the action. To let more than 6 months pass from the moment in which the injuring act is issued for the exercise of the action is the demonstration of the acceptance of the harm from the side of the injured party. His indolence must be sanctioned, impeding the use of the judicial remedy that has its justification in the urgent need to reestablish a legal situation.[56]

However, regarding the effect of tacit consent, an exception has been established in the Venezuelan Amparo Law in cases of violations affecting "public order" provisions,[57] which refer to situations where the application of a statute may concern the general and indispensable legal order for the existence of the community. The

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to the disadvantage and prejudice of the defendant. Laches is a question of fact to be determined from all the evidence and circumstances adduced at trial.

Id.

55. Venez. Amparo Law, Art. 6.4 (six months).

56. Decision n° 555 of Oct. 24, 1990, in REVISTA DE DERECHO PÚBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 144.

57. Venez. Amparo Law, Art. 6.4. *See* Decision n° 177 of the former Supreme Court of Justice, Politico Administrative Chamber, of June 30, 1992, in REVISTA DE DERECHO PÚBLICO, n° 50, Editorial Jurídica Venezolana, Caracas, 1992, p. 157. Public order has been defined by the Constitutional Chamber of the Supreme Tribunal of Justice as "a value destined to maintain the necessary harmony basic for the development and integration of society." See Decision n° 1104 of May 25, 2006 of the (quoting Decision No. 144 of March 20, 2000), in REVISTA DE DERECHO PÚBLICO, n° 106, Editorial Jurídica Venezolana, Caracas 2006, p. 146. Consequently the concept of public order allows the general interest of the Society and of the State to prevail over the individual particular interest, in order to assure the enforcement and purpose of some institutions. For such purpose in many cases, it is the legislator itself that has expressly declared in a particular statute that its provisions are of "public order" character, in the sense that its norms cannot be modified through private agreements between parties See Decision n° 105 of former Supreme Court of Justice, Politico Administrative Chamber, Mar. 22, 1988, IN REVISTA DE DERECHO PÚBLICO, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 114.

exception, of course, cannot be applied in cases only concerning the parties in a contractual or private controversy.

This notion of "public order" is important because even when the term to sue has elapsed without the action being filed, the courts can admit the action because of reasons of "public order," not considered applicable in the case of tacit consent. As was decided by the Venezuelan First Court of Administrative Judicial Review:

> The extinction of the amparo action due to the elapse of the term to sue... is produced in all cases, except when the way through which the harm has been produced is of such gravity that it constitutes an injury to the juridical conscience. It would be the case, for instance, of flagrant violations to individual rights that cannot be denounced by the affected party; deprivation of freedom; submission to physical or psychological torture; maltreatment; harms to human dignity and other extreme cases.[58]

Consequently, in such cases where no tacit consent can be considered as having been produced, the amparo is admitted even though the term to file the action would have been exhausted.

Another general exception to the rule of tacit consent refers to situations where the harms inflicted on the rights are of a continuous nature, that is, when they are continuously occurring. In the same sense, in the United States, it is considered that "laches" cannot be alleged as a defense to challenge a suit for an injunction "to enjoin a wrong which is continuing in its nature."[59]

For instance, the Venezuelan courts have ruled regarding a defense argument on the inadmissibility of an amparo action because the term of six months to file the action had elapsed, that in the particular case:

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58. *See* the decision of First Court on Judicial Review of Administrative Action of Oct. 13, 1988, in REVISTA DE DERECHO PÚBLICO, n° 36, Editorial Jurídica Venezolana, Caracas, 1988, p. 95; decision n° 293 of the former Supreme Court of Justice, Politico Administrative Chamber, of Nov. 1, 1989, in REVISTA DE DERECHO PÚBLICO, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 111. *See also* the Cassation Chamber of the same Supreme Court of Justice, of June 28, 1995, (Exp. n° 94–172), in RAFAEL CHAVERO G., EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at p. 188, note 178, 214 & 246.

59. 43A C.J.S. INJUNCTIONS § 297 (2004) (citing Pacific Greyhound Lines v. Sun Valley Bus Lines, 216 P.2d 404, (Ariz. 1950); Goldstein v. Beal, 59 N.E.2d 712 (Mass. 1945).

> In spite that the facts show that the challenged actions occurred more that six months ago, they have been described revealing a supposed chain of events that, due to their constancy and re-incidence, allows to presume that the plaintiff is presently threatened by those repeated facts. This character of the threat is what the amparo intends to stop. According to what the plaintiff points out, no tacit consent can be produced from his part ... Consequently, there are no grounds for the application to any of the inadmissibility clauses set forth in the Amparo Law.[60]

In Venezuela, the Amparo Law also provides a few exceptions regarding the tacit consent rule. When the amparo action is filed conjointly with another nullity action, the general six-month term established for the filing of the action does not apply. This is the rule in cases of harms or threats that have originated in statutes or regulations, and in administrative acts or public administration omissions, when the amparo action is filed jointly with the popular action for judicial review of unconstitutionality of statutes,[61] or with the judicial review action against administrative actions or omissions.[62]

VI. THE REPARABLE CHARACTER OF THE HARMS AND THE RESTORATIVE CHARACTER OF THE AMPARO PROCEEDING

As previously mentioned, the injury inflicted upon constitutional rights, necessary to file an amparo action can be the result of harms or threats, which must fulfill the general conditions previously mentioned. In addition, two other conditions must be fulfilled by the injury, depending on whether a harm or threat is at issue. The harm inflicted on a person's rights must be a reparable

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60. *See* Decision of First Court on Judicial Review of Administrative Action of Oct. 22, 1990, *María Cambra de Pulgar* case, in REVISTA DE DERECHO PÚBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 143–44.

61. Regarding the judicial review popular action against statutes, it is conceived in the Organic Law of the Supreme Tribunal as an action that can be filed at any time. If a petition for amparo is filed together with the popular action, no delay is applicable. Venez. Amparo Law, Art. 21. *See* ALLAN R. BREWER-CARÍAS, LEY ORGÁNICA DEL TRIBUNAL SUPREMO DE JUSTICIA, Editorial Jurídica Venezolana, Caracas, 2006, p. 255. This is why no tacit consent can be understood when the harm is provoked by a statute.

62. Similarly, the tacit consent rule does not apply either in cases of administrative acts or omissions, when the amparo action is filed together with the judicial review action against administrative acts or omissions, in which case, due to the constitutional complaint, the latter can be filed at any moment, as is expressly provided in the Amparo Law. Venez. Amparo Law, Art. 5.

one and the amparo proceeding seeks to restore the enjoyment of that right, thus having a restorative character. If the injury to a person's rights is caused by a threat, the threat must be imminent. The amparo tends to prevent or impede the violation from occurring in the case of threats, and has a preventive character.

In cases involving harms, the amparo proceeding seeks to restore the enjoyment of the plaintiff's injured right and reestablish the situation that existed when the right was harmed. This is accomplished by eliminating or suspending if necessary, the detrimental act or fact. In this regard, the amparo action also has similarities with the reparative injunctions in the United States, which seek to eliminate the effects of a past wrong or to compel the defendant to engage in a course of action that seeks to correct those effects.[63]

However, in some cases, due to the factual nature of the harm that has been inflicted, the restorative effect cannot be obtained, in which case, the amparo decision must place the plaintiff's right "in the situation closest or more similar to the one that existed before the injury was caused."[64]

Due to the restorative character of the amparo, the specific conditions of the harms must be fulfilled for an amparo petition to be granted and they must have a reparable character. Consequently, as is established in the Venezuelan Amparo Law, that amparo

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63. As has been explained by Owen M. Fiss:

> To see how it works, let us assume that a wrong has occurred (such as an act of discrimination). Then the mission of an injunction –classically conceived as a preventive instrument– would be to prevent the recurrence of the wrongful conduct in the future (stop discriminating and do not discriminate again). But in *United States v. Louisiana*, a voting discrimination case, Justice Black identified still another mission for the injunction—the elimination of the *effects* of the past wrong (the past discrimination). The reparative injunction –long thought by the nineteenth-century textbook writers, such as High to be an analytical impossibility– was thereby legitimated. And in the same vein, election officials have been ordered not only to stop discriminating in the future elections, but also to set aside a past election and to run a new election as a means of removing the taint of discrimination that infected the first one. Similarly, public housing officials have been ordered to both cease discriminating on the basis of race in their future choices of sites and to build units in the white areas as a means of eliminating the effects of the past segregative policy (placing public housing projects only in the black areas of the city).

Owen M. Fiss, THE CIVIL RIGHTS INJUNCTION, 10 (1978) (citing United States v. Louisiana, 380 U.S. 145 (1965); 29 U.S.C. §§ 101-115) (internal citations omitted).

64. In this sense, it has been decided by the former Venezuelan Supreme Court of Justice ruling that "one of the principal characteristics of the amparo action is to be a restorative (*restablecedor*) judicial means, the mission of which is to restore the infringed situation or, what is the same, to put the claimant again in the enjoyment of his infringed constitutional rights." *See* Decision of Feb. 6, 1996, *Asamblea Legislativa del Estado Bolívar* case; in CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at, 185, 242–43.

actions are inadmissible, "when the violation of the constitutional rights and guaranties turns out to be an evident irreparable situation, and is impossible to restore."[65] In these cases, the Amparo Law defines the irreparable harms as those that, by means of the amparo action, cannot revert to the status existing before the violation had occurred.[66]

The main consequence of this reparable character of the harm is the restorative effect of the amparo proceeding, through the amparo action, and it is not possible to create new juridical situation for the plaintiff, nor is it possible to modify the existing legal situations.[67]

In this sense, the Venezuelan Constitutional Chamber of the Supreme Tribunal of Justice denied a request formulated by means of an amparo action for the plaintiff to obtain asylum because it was seeking to obtain Venezuelan citizenship without accomplishing the established administrative conditions and procedures. The Court ruled "this amparo action has been filed in order to seek a decision from this court, consisting in the legalization of the situation of the claimant, which would consist in the creation of a civil and juridical status that the petitioner did not have before filing the complaint for amparo." Thus the petition was considered "contrary to the restorative nature of the amparo."[68]

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65. Venez. Amparo Law, Art. 6.3.

66. Venez. Amparo Law, Art. 6.3.

67. *See* Decisions of the Politico Administrative Chamber of the former Supreme Court of Justice, nº 462 of Oct. 27, 1993, *Ana Drossos* case, and of nº 582 of Nov. 4, 1993, *Partido Convergencia* case, in REVISTA DE DERECHO PÚBLICO, nº 55–56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 340-42.

68. *See* Decision dated January 20, 2000, *Domingo Ramírez Monja* case, in RAFAEL CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at p. 244. In another decision issued on Apr. 21, 1999, *J. C. Marín* case, the former Supreme Court in a similar sense, declared inadmissible an amparo action in a case in which the claimant was asking to be appointed as judge in a specific court or to be put in a juridical situation that he did not have before the challenged act was issued. The Court decided that in the case, it was impossible for such purpose to file an amparo action, declaring it inadmissible, thus ruling as follows:

> This Court must highlight that one of the essential characteristics of the amparo action is its reestablishing effects, that is, literally, to put one thing in the situation it had beforehand, which for the claimant means to be put in the situation he had before the production of the claimed violation. The foregoing means that the plaintiff's claim must be directed to seek 'the reestablishment of the infringed juridical situation'; since the amparo actions are inadmissible when the reestablishment of the infringed situation is not possible; when through them the claimant seeks a compensation of damages, because the latter cannot be a substitution of the harmed right; nor when the plaintiff pretends to the court to create a right or a situation that did not exist before the challenged act, fact or omission. All this is the exclusion for the possibility for the amparo to have constitutive effects.

Id. at 244-45.

Consequently, the restorative effect of the amparo proceeding imposes the need for the harm to be of a reparable character in order for the courts to restore things to the status or situation they had been in at the moment of the injury, enjoining the infringing fact or act. On the contrary, when the violation of a constitutional right turns out to be of an irreparable character, the amparo action is inadmissible.

This is congruent with the main objective of the amparo proceeding, which is found in Article 27 of the Venezuelan Constitution and Article 1 of Amparo Law, in that it seeks to "immediately restore the infringed situation or to place the claimant in the situation more similar to it."[69] This is also a general condition for the admissibility of injunctions in the United States where the courts have established that because "the purpose of an injunction is to restrain actions that have not yet been taken", an injunction cannot be filed to restrain an already completed action at the time the action is brought.[70]

In this same sense, for instance, the former Venezuelan Supreme Court declared inadmissible an amparo action against an illegitimate tax-collecting act after the tax was paid because it was not possible to restore the infringed situation.[71] Regarding women's pregnancy rights, the Venezuelan courts have declared an amparo action inadmissible that seeks to protect maternity leave rights when filed after childbirth, ruling that:

> It is impossible for the plaintiff to be restored in her presumed violated rights to enjoy a maternity leave during six month before and after the childbirth, because we are now facing an

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69. *See* First Court on Judicial Review of Administrative Action, Decision of Jan. 14, 1992, in *Revista de Derecho Público*, n° 49, Editorial Jurídica Venezolana, Caracas, 1992, p. 130; Decision n° 162 of the former Supreme Court of Justice, Politico Administrative Chamber, of Mar. 4, 1993, in REVISTA DE DERECHO PÚBLICO, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1993, p. 260.

70. As quoted in the *C.J.S.*:

> There is no cause for the issuance of an injunction unless the alleged wrong is actually occurring or is actually threatened or apprehended with reasonable probability and a court cannot enjoin an act after it has been completed. An act that has been completed, such that it no longer presents a justiciable controversy, does not give grounds for the issuance of an injunction.

43A C.J.S. INJUNCTIONS § 55 (2004) (citing Ex parte Connors, 855 So. 2d 486 (Ala. 2003); Patterson v. Council on Probate Judicial Conduct, 577 A. 2d 701 (Conn. 1990); Kay v. David Douglas School Dist., 738 P. 2d 1389, (Or. 1987); County of Chesterfield v. Windy Hill, Ltd., 559 S.E.2d 627 (Va. 2002).

71. *See* Decision of the former Supreme Court of Justice, of Mar. 21, 1988, in REVISTA DE DERECHO PÚBLICO, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 114.

> irremediable situation that cannot be restored, due to the fact that it is impossible to date back the elapsed time.[72]

In other cases, the same former Venezuelan Supreme Court of Justice considered amparo actions inadmissible when the only way to restore the infringed juridical situation was by declaring the nullity of an administrative act, which the amparo judge cannot do in his decision.[73]

From these regulations it can be determined that the amparo proceeding regarding violations is restorative in nature and imposes the need for the illegitimate harm to be possibly stopped or amended in order for the plaintiff's situation to be restored by a judicial order; or if having continuous effects, for its suspension when not being initiated. Regarding effects that have already been accomplished, an amparo action implies the possibility to set things back to the stage they had been before the harm was initiated. Consequently, the amparo judge cannot create situations that were nonexistent at the moment of the action's filing; or correct the harms that have infringed upon rights after it is too late.[74]

In this regard, with respect to the right to the protection of health, the former Venezuelan Supreme Court of Justice ruled that:

> The Court considers that the infringed situation is reparable by means of amparo, due to the fact that the plaintiff can be satisfied in his claims through such judicial mean. From the

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72. *See* Decision of the First Court on Judicial Review of Administrative Actions of Sept. 7, 1989, in REVISTA DE DERECHO PÚBLICO, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, pp. 110-11.

73. *See* Decision n° 573 of the former Supreme Court of Justice, Politico Administrative Chamber of Nov. 1, 1990, in REVISTA DE DERECHO PUBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 152–153; *Cfr.* First Court on Judicial Review of Administrative Action, decision of Sept. 10, 1992, *Consejo Nacional de Universidades* case, in REVISTA DE DERECHO PÚBLICO, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 155.

74. As decided by the First Court on Judicial Review of Administrative Action of Venezuela, regarding a municipal order for the demolition of a building, in the sense that if the demolition was already executed, the amparo judge cannot decide the matter because of the irreparable character of the harm. *See* the decision of January 1, 1999, *B. Gómez* case, in RAFAEL CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, p. 242. The First Court also ruled in a case decided in February 4, 1999, *C. Negrín* case, regarding a public university position contest that:

> [t]he pretended aggrieved party is seeking to be allowed to be registered himself in the public contest for the Chair of Pharmacology in the School of Medicine José María Vargas, but at the present time, the registration was impossible due to the fact that the delay had elapsed the previous year, and consequently the harm produced must be considered as irreparable, declaring inadmissible the action for amparo.

Id. at 243.

judicial procedure point of view, for the protection of health it is possible for the judge to order the competent authority to assume precise conduct for the medical treatment of the claimant's conduct. The petitioner's claim is to have a particular and adequate health care, which can be obtained via the amparo action, seeking the reestablishment of a harmed right. In this case, the claimant is not seeking her health to be restored to the stage it had before, but to have a particular health care, which is perfectly valid.[75]

VII. THE IMMINENT CHARACTER OF THE THREATS AND THE PREVENTIVE CHARACTER OF THE AMPARO AGAINST THREATS

However, the amparo proceeding is not only a judicial device that seeks to restore harmed constitutional rights, it is also a judicial means established for the protection of constitutional rights against illegitimate threats that violate those rights. It is in these cases that the amparo proceeding has a preventive character by avoiding harm, similar to the United States' preventive civil rights injunctions that seek "to prohibit some act or series of acts from occurring in the future,"[76] and designed "to avoid future harm to a party by prohibiting or mandating certain behavior by another party."[77]

It would be absurd for the affected party to have complete knowledge of the near occurrence of the harm, or to patiently wait for the harming act to occur in order to file the amparo action. On the contrary, one has the right to file the action to obtain a judicial order prohibiting the action from being accomplished, thus avoiding the harm altogether.

The main condition for filing the type of amparo action against threats (*amenaza*) to constitutional rights is expressly provided in the Amparo Law.[78] The threat must be real, certain, immediate, imminent, possible and realizable.

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75. *See* Decision n° 109 of Mar. 8, 1990, *Luz M. Serna* case, in REVISTA DE DERECHO PÚBLICO, n° 42, Editorial Jurídica Venezolana, Caracas, 1990, p. 107.

76. See FISS & RENDLEMAN, *supra* note 32, at 7.

77. See TABB & SHOBEN, *supra* note 53, at 22. In Spanish the word "preventive" is used in procedural law (*medidas preventivas o cautelares*) to refer to the "temporary" or "preliminary" orders or restraints that in the United States the judge can issue during the proceeding. So the preventive character of the amparo and of the injunctions cannot be confused with the "*medidas preventivas*" or temporary or preliminary measures that the courts can issue during the trial for the immediate protection of rights, facing the prospect of an irremediable harm that can be caused.

78. Venez. Amparo Law, Art. 2 & 6.2.

On the other hand, there are some constitutional rights that specifically need to be protected against threats, such as the right to life in cases of imminent death threats, because on the contrary, they could lose all sense. In this case, the only way to guarantee the right to life is to avoid materialization of the threats, for instance, by providing the person with effective police protection.

If the main condition for the admissibility of the amparo action against harms to constitutional rights is their reparable character; regarding threats, the specific characteristic of the threat at issue must have an imminent character.

This condition is also expressly established in the Amparo Law,[79] which provides that in order to file an amparo action against threats, the threats must not only be real, certain, possible and realizable, but additionally, they must have an immediate and imminent character, provoking fear in persons or making persons feel in danger for their rights. On the contrary, "harm" refers to situations in which a fact has already been accomplished, so no threat is possible.

Consequently, in order to file an amparo action against a threat, it must consist of a potential harm or violation that is imminent in the sense that it may occur soon. This same rule requiring the imminent character of the threat is applied in the United States, as an essential condition for granting preventive injunctions. This means that the courts will order injunctions only when the threat is imminent and prohibits future conduct, but not when the threat is considered remote, potential or speculative.[80]

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79. *Id.*

80. In *Reserve Mining Co. v. Environmental Protection Agency*, the Circuit Court did not grant the requested injunction ordering Reserve Mining Company to cease discharging wastes from its iron ore processing plant in Silver Bay, Minnesota into the ambient air of Silver Bay and the waters of Lake Superior because even though the plaintiff has established that the discharges give "rise to a potential threat to the public health . . . no harm to the public health has been shown to have occurred, that the danger to health is not imminent but that it did call for preventive and precautionary steps; that no reason existed which required that the company terminate its operations at once . . ." 514 F.2d 492 (8th Cir. 1975); *see* FISS & RENDLEMAN, *supra* note 32, at 116. In another classically cited case, Fletcher v. Bealey, 28 Ch. 688 (1885), which referred to waste deposits in the plaintiff's land by the defendant, the judge ruled that since the action is brought to prevent continuing damages, for a quia-timet action, two ingredients are necessary:

> There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it

In the same sense as the amparo, injunctions in the United States cannot be granted "merely to allay the fears and apprehensions or to soothe the anxieties of individuals, since such fears and apprehensions may exist without substantial reasons and be absolutely groundless or speculative."[81] Injunctions, similar to the amparo, are extraordinary remedies "designed to prevent serious harm, and are not to be used to protect a person from mere inconvenience or speculative and insubstantial injury."[82]

This condition is also generally established in Venezuela, in the sense that threats that can be protected by the amparo suits must be imminent,[83] so the action for amparo is inadmissible when the threat or violation of a constitutional right has ceased or ended[84] or when the threat against a constitutional right or guarantee is not "immediate, possible and feasible.[85]

In the same sense, the former Supreme Court of Justice of Venezuela in 1989 ruled that:

> The opening of a disciplinary administrative inquiry is not enough to justify the protection of a party by means of the judicial remedy of amparo, moreover when the said proceeding, in which all needed defenses can be exercised, may conclude in a decision discarding the incriminations against the party

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will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action.

Fletcher, 28 Ch. 688 (1885); *see* FISS & RENDLEMAN, *supra* note 32, at 110-11.

81. 43A C.J.S. INJUNCTIONS § 40 (2004) (citing Ormco Corp. v. Johns, 869 So.2d 1109 (Ala. 2003); Callis, Papa, Jackstadt & Halloran, P.C. v. Norkolk & W. Ry. Co., 748 N. E.2d 153 (Ill. 2001); Frey v. DeCordova Bend Estates Owners Ass'n, 647 S.W.2d 246 (Tex. 1983).

82. 43A C.J.S. INJUNCTIONS § 40 (2004) (citing Kucera v. State Dep't of Transp., 995 P.2d 63 (Wash. 2002)).

83. Venez. Amparo Law, Art. 2

84. Venez. Amparo Law, Art. 8.1.

85. Venez. Amparo Law, Art. 6.2. *See* Decision n° 203 of the former Supreme Court of Justice, Politico Administrative Chamber of June 9, 1988, in REVISTA DE DERECHO PÚBLICO, n° 35, Editorial Jurídica Venezolana, Caracas, 1988, p. 119, and decision of the same Chamber n° 398 of Aug. 14, 1992, in REVISTA DE DERECHO PÚBLICO, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, pp. 158–159. *See also* Decision of the First Court on Judicial Review of Administrative Action, decision of June 30, 1988, *Joao Gomez E.* case in REVISTA DE DERECHO PÚBLICO, n° 35, Editorial Jurídica Venezolana, Caracas, 1988, p. 120. These general conditions have been considered as concurrent ones when referring to the constitutional protection against harms that someone will soon be inflicting on the rights of other. *See* Decision n° 315 of the former Supreme Court of Justice, Politico Administrative Chamber, of May 24, 1993, in REVISTA DE DERECHO PÚBLICO, n° 55–56, Editorial Jurídica Venezolana, Caracas, 1993, p. 289; and decision of Mar. 22, 1995, *La Reintegradora* case, in RAFAEL CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, p. 239.

with the definitive closing of the disciplinary process, without any sanction to the party.[86]

The criteria of the imminent character of the threat to constitutional rights for the admission of the amparo action has also led the former Supreme Court of Justice of Venezuela to reject the amparo proceeding against statutes, arguing that a statute or a legal norm, in itself, cannot cause a possible, imminent and feasible threat.[87] Nonetheless, the Court has considered that the plaintiff can always file the amparo action against the public officer that applies the statute, and seek a court prohibition directed to said public officer, compelling him not to apply the challenged norm.[88]

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86. *See* Decision of the Politico Administrative Chamber of Oct. 26, 1989, *Gisela Parra Mejía* case, in RAFAEL CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, pp. 191, 241.

87. In a Decision n° 315 of May 24, 1993, the Politico Administrative Chamber of the former Supreme Court ruled:

> The same occurs with the third condition set forth in the Law; the threat, that is, the probable and imminent harm, will never be feasible –that is, concreted– by the defendant. If it could be sustained that the amparo could be filed against a disposition the constitutionality of which is challenged, then it would be necessary to accept as defendant the legislative body or the public officer that had sanctioned it, being the latter the one that would act in court defending the act. It can be observed that in case the possible harm would effectively arrive to be materialized, it would not be the legislative body or the state organ which issued it, the one that will execute it, but the public official for whom the application of the norm will be imposing in all the cases in which an individual would be in the factual situation established in the norm. If it is understood that the norm can be the object or an amparo action, the conclusion would be that the defendant (the public entity sanctioning the norm the unconstitutionality of which is alleged) could not be the one entity conducting the threat; but that the harm would be in the end concretized or provoked by a different entity (the one applying to the specific and particular case the unconstitutional provision).

In REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 289–290.

88. In the same decision n° 315 of May 24, 1993, the Politico Administrative Chamber of the former Supreme Court ruled as referenced *supra* in footnote 87, the Court ruled as follows:

> Nonetheless, this High Court considers necessary to point out that the previous conclusion does not signify the impossibility to prevent the concretion of the harm – objection that could be drawn from the thesis that the amparo can only proceed if the unconstitutional norm is applied–, due to the fact that the imminently aggrieved person must not necessarily wait for the effective execution of the illegal norm, because since he faces the threat having the conditions established in the Law, he could seek for amparo for his constitutional rights. In such case, though, the amparo would not be directed against the norm, but against the public officer that has to apply it. In effect, being imminent the application to an individual of a normative disposition contrary to any of the constitutional rights or guaranties, the potentially affected person could seek from the court a prohibition directed to the said public officer plaintiff, compelling not to apply the challenged norm, once evaluated by the court as being unconstitutional.

VIII. THE INJURING PARTY IN THE AMPARO PROCEEDING

Because the amparo procedure is governed by the principle of bilateralism, the party that initiates it, that is the plaintiff, whose constitutional rights and guarantees have been injured or threatened, must always file the action against an injuring party whose actions or omissions are those that have caused the harm or threats. This means that the action must always be filed against a person or a public entity that must also be an individual.[89] That is why the amparo proceeding, as well as injunctions in the United States, have the result of a judicial order "addressed to some clearly identified individual, not just the general citizenry."[90]

Thus, since the beginning of the proceeding when the amparo action is filed, or during the procedure, the bilateral character of the amparo suit implies the need to have a procedural relation that must be established between the injured party and the injuring one who must also participate in the process.[91]

This need for the individualization of the defendant also derives from the subjective or personal character of the amparo in the sense that the plaintiff's complaint, as provided in article 18,3 of the Amparo Law, must clearly identify the authority, public officer, person or entity against whom the action is filed. In the case of amparo actions filed against artificial persons, public entities or corporations, the petition must also identify them with precision and if possible, also identify their representatives.

Id. at 290.

89. The only exception to the principle of bilateralism is the case of Chile, where the offender is not considered a defendant party, but is instead considered only a person whose activity is limited to inform the court and give it the documents it has. That is why in the regulation set forth by the Supreme Court (*Auto Acordado*) it is said that the affected state organ, person or public officer "can" just appear as party in the process. *See* JUAN MANUEL ERRAZURIZ G. AND JORGE MIGUEL OTERO A., ASPECTOS PROCESALES DEL RECURSO DE PROTECCIÓN, Editorial Jurídica de Chile 1989, p. 27.

90. *See* FISS, *supra* note 63, at 12.

91. In this regard, the former Supreme Court of Justice of Venezuela in a decision n° 649 of Dec.15, 1992, pointed out that:

> The amparo action set forth in the Constitution, and regulated in the Organic Amparo law, has among its fundamental characteristic its basic personal or subjective character, which implies that a direct, specific and undutiful relation must exist between the person claiming for the protection of his rights, and the person purported to have originated the disturbance, who is to be the one with standing to act as defendant or the person against whom the action is filed. In other words, it is necessary, for granting an amparo, that the person signaled as the injurer be in the end, the one originating the harm.

Supreme Court of Justice, Politico Administrative Chamber, decision dated Dec. 16, 1992, *Haydée Casanova* Caso, in REVISTA DE DERECHO PÚBLICO, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 139.

In these cases of harms caused by entities or corporations, the action can be filed directly against the natural person acting on its behalf as representative of the entity or corporation, for instance, the public official or directly against the entity in itself.[92] In this latter case, according to the expression used in civil right injunctions in the United States, the action is filed against "the office rather than the person."[93]

Consequently, in cases of amparo actions filed against entities or corporations, the natural person representing them can be changed, as it commonly happens with public entities, [94] a circumstance that does not affect the bilateral relation between aggrieved and aggrieving parties.

As aforementioned, the action can also be personally filed against the representative of the entity or corporation itself, for instance the public officer or the director or manager of the entity, particularly when the harm or threat has been personally provoked by him, independent of the artificial person or entity for which he is acting.[95]

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92. This implies that in the filing of the action of amparo in cases of Public Administration activities, "the person acting on behalf of (or representing) the entity who caused the harm or threat to the rights or guaranties must be identified, which is, the signaled person who has the exact and direct knowledge of the facts." Decision of the First Court on Judicial Review of Administrative Actions, dated July 14, 1988, *Aurora Figueredo* case, in REVISTA DE DERECHO PÚBLICO, n° 35, Editorial Jurídica Venezolana, Caracas, 1988, pp. 138-39.

93. See FISS, *supra* note 63, at 15.

94. As decided by the Venezuelan First Court on Judicial Review of Administrative Action in a decision of Sept. 28, 1993, *Universidad de Los Andes* case, regarding an amparo action filed against the dean of a law faculty, in which case the person in charge as dean was changed:

> The heading of the position does not change its organic unity. If the dean of the Faculty changes, it will always be a subjective figure that substitutes the previous one. That is why in a decision of September 11, 1990, this Court ruled that the circumstance of the head of an organ mentioned as aggrieving being changed does not alter the procedural relation originated with the amparo action. In addition, it must be added that it would have no sense to rule for the procedural relation be continued with the person that doesn't occupy anymore the position, because in case the constitutional amparo is granted, then the ex public official would not be in a position to reestablish the factual infringed situation. As much, the former public officer could be liable for the damages caused, but as it is known, the amparo action has the only purpose of reestablishing the harmed legal situation, and that can only be assured by the current public official.

First Court on Judicial Review of Administrative Action in a decision of Sept., 28, 1993, See in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 330.

95. In such cases, when the action is filled against public officers, as it is established in Article 27 of the Venezuelan Amparo Law, the court deciding on the merits must notify its decision to the competent authority "in order for it to decide the disciplinary sanctions

In these cases, when, for instance, the public official responsible for the harm can be identified with precision as the injuring party, it is only him, personally, who must act as defendant in the procedure, in which case no notice is needed to be sent to his superior or to the Attorney General.[96] In such cases, it is the individual natural person or public officer that must personally act as the injuring party.[97]

On the contrary, if the action is filed, for instance, against a ministerial entity as a public administration organ, in this case the Attorney General, as representative of the state, is the entity that must act in the process as its judicial representative.[98] In other cases, when the amparo action is exercised against a perfectly identified and individuated organ of a public administration and not against the state, the Attorney General, as its judicial representative, does not necessarily have a procedural role to play,[99] and cannot act on its behalf.[100]

One of the most important aspects in the Venezuelan amparo proceeding regarding the injuring party is that the action for amparo can be filed not only against public authorities, but also against individuals. In other words, this specific judicial means is conceived for the protection of constitutional rights and guaran-

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against the public official responsible for the violation or the threat against a constitutional right or guaranty." Venez. Amparo Law, Art. 27.

96. *See* First Court on Judicial Review of Administrative Action, decision of May 12, 1988, in REVISTA DE DERECHO PÚBLICO, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 113; Venezuelan Supreme Court of Justice, Politico Administrative Chamber, decision n° 57 of Mar. 16, 1989, in REVISTA DE DERECHO PÚBLICO, n° 38, Editorial Jurídica Venezolana, Caracas, 1989, p. 110; Venezuelan First Court on Judicial Review of Administrative Action, decision of Sept. 7, 1989, in REVISTA DE DERECHO PÚBLICO, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 107.

97. *See* former Supreme Court of Justice, Politico Administrative Chamber, decision n° 109 of Mar. 8, 1990, in REVISTA DE DERECHO PÚBLICO, n° 42, Editorial Jurídica Venezolana, Caracas, 1990, p. 114; Venezuelan First Court on Judicial Review of Administrative Action, decision of Nov. 21, 1990, *Comisión Nacional de Valores* case, in REVISTA DE DERECHO PÚBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 148.

98. *See* First Court on Judicial Review of Administrative Action, decision of Sept. 7, 1989, in REVISTA DE DERECHO PÚBLICO, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 107.

99. See First Court on Judicial Review of Administrative Action, decision of Nov. 21, 1990, *Comisión Nacional de Valores* case, in REVISTA DE DERECHO PÚBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 148.

100. See former Supreme Court of Justice, Politico Administrative Chamber, decision n° 391 of Aug. 1, 1991, in REVISTA DE DERECHO PÚBLICO, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, p. 120; First Court on Judicial Review of Administrative Action, decision of July 30, 1992, in REVISTA DE DERECHO PÚBLICO, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 164; Former Venezuelan Supreme Court of Justice, Politico Administrative Chamber decision n° 649 of Dec. 15, 1992, *Haydée M. Casanova* case, in REVISTA DE DERECHO PÚBLICO, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 139.

tees against harms or threats regardless of the actor, which can be public entities, authorities, individuals or private corporations.

The amparo proceeding was originally created to protect individuals against the state and that is why some countries like Mexico remain with that traditional trend; but that initial trend has not prevented the possibility for the admission of the amparo proceeding for the protection of constitutional rights against other individual's actions. The current situation is similar in the majority of Latin American countries, the admission of the amparo action against individuals is accepted, as is the case in Argentina, Bolivia, Chile, the Dominican Republic, Paraguay, Peru, Venezuela and Uruguay, as well as, although in a more restrictive way, in Colombia, Costa Rica, Ecuador, Guatemala and Honduras. In this sense, the writ of amparo is also regulated in the Philippines, which can be filed against acts or omissions "of a public official or employee, or of a private individual or entity."[101] In only a minority of Latin American countries the amparo action remains exclusively as a protective means against authorities, as happens in Brazil, El Salvador, Panama, Mexico and Nicaragua. This is also the case in the United States where the civil rights injunctions, in matters of constitutional or civil rights or guaranties,[102] can only be admitted against public entities.[103]

In Venezuela, the amparo action is admitted against acts of individuals. The 1988 Organic Law of Amparo[104] provides that the

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101. Phil. Amparo Law, § 1.

102. In other matters, injunctions can be filed against any person such as "higher public officials or private persons." ABERNATHY & PERRY, *supra* note 16, at 8.

103. As explained by M. Glenn Abernathy and Barbara A. Perry:

> Limited remedies for private interference with free choice. Another problem in the citizen's search for freedom from restriction lies in the fact that many types of interference stemming from private persons do not constitute actionable wrongs under the law. Private prejudice and private discrimination do not, in the absence of specific statutory provisions, offer grounds for judicial intervention in [sic] behalf of the sufferer. If one is denied admission to membership in a social club, for example, solely on the basis of his race or religion or political affiliation, he may understandably smart under the rejection, but the courts cannot help him (again assuming no statutory provision barring such distinctions). There are, then, many types of restraints on individual freedom of choice which are beyond the authority of courts to remove or ameliorate.
>
> It should also be noted that the guarantees of rights in the United States Constitution only protect against *governmental* action and do not apply to purely private encroachments, except for the Thirteenth Amendment's prohibition of slavery. Remedies for private invasion must be found in statutes, the common law, or administrative agency regulations and adjudications.

ABERNATHY & PERRY, *supra* note 16, at 6.

104. *See* the reference in RAFAEL CHAVERO G., EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, p. 188, note 178, 214 & 246.

amparo action "shall be admitted against any fact, act or omission from citizens, legal entities, private groups or organizations that have violated, violates or threaten to violate any of the constitutional guaranties or rights."[105]

IX. THE INJURING PUBLIC ACTIONS AND OMISSIONS

Being that the amparo action was originally established to defend constitutional rights from state and authority violations, the most common and important injuring parties in the amparo proceeding are, of course, the public authorities or public officials when their acts or omissions, whether of legislative, executive or judicial nature, cause the harm or threats.

The general principle in this matter in Venezuela, with some exceptions, is that any authority can be questioned through amparo actions, and that any act, fact or omission of any public authority or entity or public official causing an injury to constitutional rights can be challenged by means of such actions. This is the wording used in the Amparo Law of Venezuela, providing that the action can be filed against "any fact, act or omission of any of the National, State, or Municipal branches of government" (*Poderes Públicos*);[106] which means that the constitutional protection can be filed against any public action, that is, any formal state act, any substantive or any factual activity (*vía de hecho*);[107] as well as against any omission from public entities. That is also why the courts in Venezuela have decided that "there is no State act that can be excluded from revision by means of amparo, the purpose of which is not to annul State acts but to protect public freedoms and restore its enjoyment when violated or harmed," thereby admitting that the constitutional amparo action can be filed even against legislative acts excluded from judicial review, when a harm or violation of constitutional rights or guarantees has been alleged.[108]

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105. Venez. Amparo Law, Art. 2.

106. *Id.*

107. Venez. Amparo Law, Art. 5.

108. *See* the former Supreme Court of Justice decision n° 22 dated Jan. 31, 1991, *Anselmo Natale* case, in REVISTA DE DERECHO PÚBLICO, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 118. *See also* Decision of the First Court on Judicial Review of Administrative Action of June 18, 1992, in REVISTA DE DERECHO PÚBLICO, n° 46, Editorial Jurídica Venezolana, Caracas, 1991, p. 125. The universal character of the amparo regarding public authorities, acts or omissions, according to the Venezuelan courts, implies that:

> From what Article 2 of the Amparo law sets forth, it results that no type of conduct, regardless of its nature or character or their authors, can per se be excluded from the

In particular, regarding the possibility to file amparo actions against legislative actions or omissions when they cause harms on constitutional rights of individuals, a distinction can be made between when the harm or threats are caused by statutes or by other decisions adopted, for instance, by parliamentary commissions.

Regarding congressional and parliamentary commissions' acts, including regional or municipal legislative councils,[109] when they harm constitutional rights and guarantees, in principle, it is pos-

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amparo judge revision in order to determine if it harms or doesn't harm constitutional rights or guaranties.

Decision of the First Court on Judicial Review of Administrative Action of Nov. 11, 1993, *Aura Loreto Rangel* case, in REVISTA DE DERECHO PÚBLICO, n° 55–56, Editorial Jurídica Venezolana, Caracas, 1993, p. 284. The same criterion was adopted by the Political Administrative Chamber of the former Supreme Court of Justice in a Decision n° 315 of May 24, 1993, as follows:

> The terms on which the amparo action is regulated in Article 49 of the Constitution (now Article 27) are very extensive. If the extended scope of the rights and guaranties that can be protected and restored through this judicial mean is undoubted; the harm cannot be limited to those produced only by some acts. So, in equal terms it must be permitted that any harming act—whether an act, a fact or an omission—with respect to any constitutional right and guaranty, can be challenged by means of this action, due to the fact that the amparo action is the protection of any norm regulating the so-called subjective rights of constitutional rank, it cannot be sustained that such protection is only available in cases in which the injuring act has some precise characteristics, whether from a material or organic point of view. The jurisprudencia of this Court has been constant regarding both principles. In a decision n° 22, dated January 31, 1991, *Anselmo Natale* case, it was decided that "there is no State act that could not be reviewed by amparo, the latter understood not as a mean for judicial review of constitutionality of State acts in order to annul them, but as a protective remedy regarding public freedoms whose purpose is to reestablish its enjoyment and exercise, when a natural or artificial person, or group or private organization, threatens to harm them or effectively harm them.

(*See* regarding the extended scope of the protected rights, Decision of Dec. 4, 1990, *Mariela Morales de Jimenez* case, n° 661); See in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 284–85. See on the *Mariela Morales de Jiménez* case in REVISTA DE DERECHO PÚBLICO, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 115 In another decision dated February 13, 1992, the First Court ruled:

> This Court observes that the essential characteristic of the amparo regime, in its constitutional regulation as well as in its statutory development, is its universality.., [if this is a proper omission, the ellipses should be . . . BB rule 5.3, page 78] so the protection it assures is extended to all subjects (physical or artificial persons), as well as regarding all constitutionally guaranteed rights, including those that without being expressly regulated in the Constitution are inherent to human beings. This is the departing point in order to understand the scope of the constitutional amparo. Regarding Public Administration, the amparo against it is so extended that it can be filed against all acts, omissions and factual actions, without any kind of exclusion regarding some matters that are always related to the public order and social interest. [BB rule 5.1, page 76]

See in REVISTA DE DERECHO PÚBLICO, n° 49, Editorial Jurídica Venezolana, Caracas, 1992, pp. 120–21.

109. In the United States, municipal council acts can be challenged through injunctions. Staub v. City of Baxley, 355 U.S. 313, 317 n.3 (1958). *See* ABERNATHY & PERRY, *supra* note 16, at 12–13.

sible to challenge them through amparo actions before the competent courts.[110] In contrast, in the United States, the general rule is that injunctions may not be directed against Congress so injunctions have been rejected, for instance, when seeking to suspend a congressional subpoena, regarding which the plaintiff had an adequate remedy to protect his rights.[111]

Regarding statutes, although in the majority of Latin American countries the amparo action against them is rejected, in Venezuela, it is expressly accepted, but only regarding self-executing statutes that can harm the constitutional rights without the need for any other state act executing or applying them, or only regarding the acts applying the particular statute. In effect, in Venezuela, due to the universal character of the system for constitutional protection, which eventually was consolidated in the 1999 Constitution, one of the most distinguishable innovations of the 1988 Amparo Law was to establish the amparo action against statutes and other normative acts, complementing the general mixed system of judicial review.[112] When filed directly against statutes, the purpose of the Amparo Law's provision was to secure the inapplicabil-

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110. In Venezuela, the Supreme Court, even recognizing the existence of exclusive attributions of legislative bodies, which according to the 1961 Constitution (Article 159) were not subjected to judicial review, admitted the amparo protection against them for the immediate restoration of the plaintiff's harmed constitutional rights. It admitted the amparo action against legislative acts, in a decision n° 22 dated January 31, 1991 in *Anselmo Natale*, ruling as follows:

> The exclusion of judicial review regarding certain parliamentary acts—except in cases of extra limitation of powers—set forth in Article 159 of the Constitution, as a way to prevent, due to the rules of separation of powers, that the executive and judicial branches could invade or interfere in the orbit of the legislative body which is the trustee of the popular sovereignty, is restricted to determine the intrinsic regularity of such acts regarding the Constitution, in order to annul them, but it does not apply when it is a matter of obtaining the immediate reestablishment of the enjoyment and exercise of harmed rights and guaranties set forth in the Constitution.

Anselmo Natale case. *See* in REVISTA DE DERECHO PÚBLICO, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 118.

111. 43A C.J.S. INJUNCTIONS § 202 (2004) (citing Mins v. McCarthy, 209 F.2d 307, 307 (D.C. Cir. 1953) (per curiam)).

112. According to Article 3 of the Amparo Law, two ways are established through which an amparo pretension can be filed before the competent court: (1) in an autonomous way, or (2) exercised together with the popular action of unconstitutionality of statutes. Venez. Amparo Law, Art. 3. In the latter case, the amparo pretension is subordinated to the principal action for judicial review, producing only the possibility for the court to suspend the application of the statute pending the unconstitutionality suit. *See* BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 227. In this case, the situation is similar to the one of the popular action of unconstitutionality in the Dominican Republic when the amparo pretension is filed together with it. *See* EDUARDO JORGE PRATS, DERECHO CONSTITUCIONAL, Vol. II, Gaceta Judicial, Santo Domingo, 2005, p. 399.

ity of the statute to the particular case, with *inter partes* effects.[113] Yet in spite of the Amparo Law provisions, the jurisprudence of the Supreme Tribunal rejected such actions, imposing the need to file them only against the state acts issued to apply the statutes and not directly against the statutes themselves.[114] The Court, in its decisions, even though admitting the distinction between the self-executing and not self-executing statutes,[115] concluded its ruling by declaring the impossibility for a real normative act to directly and by itself harm the constitutional rights of an individual. The Court also considered that a statute cannot be a threat to constitutional rights, because for an amparo to be filed, a threat must be "imminent, possible and realizable," considering that in the case of statutes such conditions are not fulfilled.[116]

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113. *See* BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 224; CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 553 ff.

114. The Politico Administrative Chamber of the former Supreme Court issued a decision n° 315 dated May 24, 1993, that has been the leading case on the matter, ruling that:

> [T]hus, it seem that there is no doubt that Article 3 of the Amparo law does not set forth the possibility of filing an amparo action directly against a normative act, but against the act, fact or omission that has its origin in a normative provision which is considered by the claimant as contrary to the Constitution and for which, due to the presumption of legitimacy and constitutionality of the former, the court must previously resolve its inapplicability to the concrete case argued. It is obvious, thus, that such article of the Amparo law does not allow the possibility of filing this action for constitutional protection against a statute or other normative act, but against the act which applies or executes it, which is definitively the one that in the concrete case can cause a particular harm to the constitutional rights and guaranties of a precise person.

REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 287–88.

115. Ruling that the self-executing statutes impose an immediate obligation for the person to whom it is issued, with its promulgation, and, on the contrary, those statutes not self-executing require an act for its execution, in which case its sole promulgation cannot produce a constitutional violation. *See* decision n° 315 of the Politico Administrative Chamber of the former Supreme Court of Justice, of May 24, 1993, in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 285-86.

116. The Court, in the same decision n° 315 dated May 24, 1993, rejected the possibility of a threat caused by a statute, with the following argument:

> In case of an amparo action against a norm, the concretion of the possible harm would not be 'immediate', because it will always be the need for a competent authority to execute or apply it in order for the statute to effectively harm the claimant. It must be concluded that the probable harm produced by the norm will always be a mediate and indirect one, due to the need for the statute to be applied to the particular case. So that the harm will be caused by mean of the act applying the illegal norm. The same occurs with the third condition, in the sense that the probable and imminent threat will never be made by the possible defendant. If it would be possible to sustain that the amparo could be admissible against a statute whose constitutionality is challenged, it would be necessary to accept as aggrieved party the legislative body issuing it, being the party to participate in the process as defendant. But it must be highlighted that in the case in which the possible harm could be realized, it would

Regarding executive authorities, the general principle is that the action is admitted against acts, facts or omissions from public entities or bodies conforming to the public administration at all its levels (national, state, municipal), including decentralized, autonomous, independent bodies and including acts issued by the Head of the Executive, that is, the President of the Republic. This last aspect, for instance, is contrary to the rule regarding injunctions in the United States where the principle is that such a coercive remedy "may not be directed against the President."[117]

Regarding administrative acts, as mentioned, the Amparo Law admits the filing of amparo actions against them, providing for possibility of exercising the amparo action in two ways: in an autonomous way or conjunctly with nullity recourse for judicial review of the administrative act.[118] The main distinction between both means[119] lies, first, in the character of the allegation. In the

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not be the legislative body the one called to execute it, but rather the public officer that must apply the norm in all the cases in which an individual is located in the situation it regulates. If it is understood that the object of the amparo action is the statute, then the conclusion would be that the possible defendant (the public entity enacting the norm whose unconstitutionality is alleged) could not be the one that could make the threat. The concrete harm would be definitively made by a different entity or person (the one applying the unconstitutional norm to a specific and particular case).

REVISTA DE DERECHO PÚBLICO, nº 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 288, 290. From the abovementioned, the Venezuelan Supreme Court's conclusion rejected the amparo action against statutes and normative acts, not only because it considered that the Amparo Laws do not set forth such possibilities –bypassing its text– but because even being possible to bring the extraordinary action against a normative act, it would not comply with the imminent, possible and realizable conditions of the threats set forth in Article 6.2 of the Amparo Law. See the comments in Allan R. Brewer-Carías, *La acción de amparo contra leyes y demás actos normativos en el derecho venezolano*, in LIBER AMICORUM. HÉCTOR FIX-ZAMUDIO, Vol. I, Secretaría de la Corte Interamericana de Derechos Humanos. San José, Costa Rica 1998, pp. 481-501.

117. 43A C.J.S. INJUNCTIONS § 201 (2004) (citing Sloan v. Nixon, 60 F.R.D. 228 (S.D.N.Y. 1973), *aff'd* 493 F.2d 1398 (2d Cir. 1974), *aff'd* 419 U.S. 958 (1974)).

118. Venez. Amparo Law, Art. 5. Regarding the latter, the former Supreme Court of Justice in the decision nº 343 of July 10, 1991, *Tarjetas Banvenez* case, clarified that in such case, the action is not a principal one, but subordinated and ancillary regarding the principal recourse to which it has been attached, and subjected to the final nullifying decision that has to be issued in it. *See* in REVISTA DE DERECHO PÚBLICO, nº 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 169–74. That is why, in such cases, the amparo pretension that must be founded in a grave presumption of the violation of the constitutional right has a preventive and temporal character, pending the final decision of the nullity suit, consisting of the suspension of the effects of the challenged administrative act. This provisional character of the amparo protection pending the suit is thus subjected to the final decision to be issued in the nullity judicial review procedure against the challenged administrative act. *See* the same decision nº 343 of July 10, 1991, in REVISTA DE DERECHO PÚBLICO, nº 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 170–71.

119. The main difference between both procedures according to the Supreme Court doctrine is that in the first case of the autonomous amparo action against administrative acts, the plaintiff must allege a direct, immediate and flagrant violation to the constitutional

first case, the alleged and proved constitutional right violation must be a direct, immediate and flagrant one. In the second case, what has to be proved is the existence of a grave presumption of the constitutional right violation. The distinction next lies in the general purpose of the proceeding. In the first case, the judicial decision issued is a definitive constitutional protection of restorative character. In the second case, it has only a preliminary character of suspension of the effects of the challenged act pending the decision of the principal judicial review process.[120]

Contrary to what happens in the majority of Latin American countries, in Venezuela, the amparo action is admitted against judicial acts, except decisions of the Supreme Tribunal of Justice.[121] Article 4 of the Amparo Law provides that in the cases of judicial decisions "the action for amparo shall also be admitted when a court, acting outside its competence, issues a resolution or decision, or orders an action that impairs a constitutional right."[122] Considering that no court has any power to unlawfully cause harm to constitutional rights or guarantees, the amparo against judicial decisions is extensively admitted when a court decision directly harms the constitutional rights of the plaintiff, normally related to the due process of law rights.[123] In a certain way re-

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right, which in its own demonstrates the need for the amparo order as a definitive means to restore the harmed juridical situation. In the second case, given the suspensive nature of the amparo order which only tends to provisionally stop the effects of the injuring act until the judicial review of administrative action confirming or nullifying it is decided, the alleged unconstitutional violations of constitutional provisions can be formulated together with violations of legal or statutory provisions developing the constitutional ones, because it is a judicial review action against administrative acts, seeking their nullity, they can also be founded on legal texts. What the court cannot do in cases of filing the actions together, in order to suspend the effects of the challenged administrative act, is to base its decision only in the legal violations alleged, because that would mean to anticipate the final decision on the principal nullity judicial review recourse. *See* the former Supreme Court of Justice in the decision n° 343 of July 10, 1991, *Tarjetas Banvenez* case, in REVISTA DE DERECHO PÚBLICO, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, pp.171–72.

120. *Id.* at 172. *See also*, regarding the nullity of Article 22 of the Organic Amparo Law, the former Supreme Court of Justice decision n° 644 dated May 21, 1996, in REVISTA DE DERECHO PÚBLICO, n° 65-66, Editorial Jurídica Venezolana, Caracas, 1996, pp.332 ff. See the comments in ALLAN R. BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 392 ff.

121. Venez. Amparo Law, Art. 6.6.

122. Venez.Amparo Law, Art. 4.

123. As was decided by the Cassation Chamber of the former Supreme Court of Justice in a decision from Dec. 5, 1990, the amparo against judicial decisions is admitted,

> when the decision in itself injures the juridical conscience, when harming in a flagrant way individual rights that cannot be renounced or when the decision violates the principle of juridical security (judicial stability), deciding against *res judicata*, or when issued in a process where the plaintiff's right to defense has not been guaranteed, or in any way the due process guaranty has been violated.

garding injunctions on judicial matters, it can also be said that in the United States, injunctions can also be granted when, for instance, it clearly appears that the prosecution of law actions are the result of fraud, gross wrong or oppression, in which cases justice clearly requires equitable interference.[124]

On the other hand, although in many countries the amparo proceedings cannot be the object of another amparo action, in a way similar to the rule established in the United States regarding an injunction against another injunction, sometimes referred to as a "counter injunction," which cannot be admitted,[125] in Venezuela the amparo actions are admitted even against previous amparo judicial decisions.[126] Considering that such decisions can also, by themselves, violate constitutional rights of the plaintiff or of the defendant, different to those claimed in the initial amparo action, such an admission of the amparo action is necessary.

Beside the legislative, executive and judicial branches of government, the amparo action can also be filed against the acts of other independent organs or branches of government like, for instance, the electoral bodies in charge of governing the electoral processes, the People's Defendant Office, the Public Prosecutor Office of the General Comptroller Office, including the judiciary organs in charge of the government and administration of courts and tribunals. Because those entities are state organs, in princi-

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Case *José Díaz Aquino*, also referred to in decision dated Dec.14, 1994, of the same Cassation Chamber. See the reference in BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 261; and CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 483 ff. *See also* Allan R. Brewer-Carías, *El problema del amparo contra sentencias o de cómo la Sala de Casación Civil remedia arbitrariedades judiciales*, in REVISTA DE DERECHO PÚBLICO, n° 34, Editorial Jurídica Venezolana, Caracas 1988, pp. 157-71.

124. As has been decided by the courts:

> The power of a court of equity to interfere with the general right of a person to sue and to restrain the person from prosecuting the action will be exercised only where it appears clearly that the prosecution of the law action will result in a fraud, gross wrong, or oppression, and that conscience and justice clearly require equitable interference. Accordingly, an action at law may be restrained under these restrictive rules where a person is attempting to, or would, through the instrumentality of an action at law, obtain an unconscionable advantage of another.

43A C.J.S. INJUNCTIONS § 96 (2004) (citing Miles v. Illinois Cent. R.R Co. 315 U.S. 698 (1942)); *see also* Kardy v. Shook, 207 A.2d 83 (Md. 1965); Langenau Mfg. Co. v. City of Cleveland, 112 N.E.2d 658 (Ohio 1953).

125. 43A C.J.S. INJUNCTIONS § 69 (2004) (citing Sellers v. Valenzuela, 32 So.2d 520 (Ala. 1947)).

126. *See* ALLAN R. BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 263; and *El recurso de amparo contra sentencias de amparo dictadas en segunda instancia*, in REVISTA DE DERECHO PÚBLICO, N° 36, Editorial Jurídica Venezolana, Caracas 1988, pp. 160-72.

ple their acts, facts and omissions can also be challenged by means of amparo actions when violating constitutional rights.

Apart from the positive acts or actions from public officers, authorities or from individuals, that amparo action can also be filed against the omissions of authorities when the corresponding entities or public officials fail to comply with their general obligations, thereby causing harm or threat to constitutional rights. In the cases of public officers' omissions, the amparo action is generally filed in order to obtain from the court an order directed against the public officer compelling him to act in a matter with respect to which he has the authority or jurisdiction. In these cases, the effect of the amparo decision regarding omissions is similar to the United States mandamus or mandatory injunction,[127] which consists in "a writ commanding a public officer to perform some duty which the laws require him to do but he refuses or neglects to perform."[128]

In any case, for an omission to be the object of an amparo action, it must also inflict a direct harm to the constitutional right of the plaintiff. If the violation is only referring to a right of legal rank, the amparo action is inadmissible and the affected party is obliged to use the ordinary judicial remedies, like the judicial review of administrative omission action to be filed before the special courts of the matter (*contencioso-administrativo*).[129] In order to deter-

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127. In the United States, "[w]hile as a general rule courts will not compel by injunction the performance by public officers of their official duties, a court may compel public officers or boards to act in a matter with respect to which they have jurisdiction or authority[.]" 43A C.J.S. INJUNCTIONS § 194 (2004) (citing Erie v. State Highway Comm'n, 461 P.2d 207 (Mont. 1969); Bellamy v. Gates, 200 S.E.2d 533, (Va. 1973)).

128. *See* ABERNATHY & PERRY, *supra* note 16, at 8. The consequence of this rule is that mandamus cannot be used if the public officer has any discretion in the matter; "but if the law is clear in requiring the performance of some ministerial (nondiscretionary) function, then mandamus may properly be sought to nudge the reluctant or negligent official along in the performance of his or her duties." As it was decided by the United States Supreme Court in Wilbur v. U. S. *ex. rel.* Kadrie:

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed, but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

281 U.S. 206, 218-19 (1930) (footnote omitted). *See* the references in ABERNATHY & PERRY, *supra* note 16, at 8.

129. According to the judicial doctrine established by the former Supreme Court of Justice of Venezuela, the amparo action against omissions by the Public Administration, must comply with the following two conditions:

> a) That the alleged omissive conduct be absolute, which means that Public Administration has not accomplished in any moment the due function; and b) that the omis-

mine when it is possible to file an amparo action against public officers' omissions, the key element established by the Venezuelan courts refers to the nature of the public officers' duties, because the amparo action is only admissible when the matters refer to a generic constitutional duty and not to specific legal ones.[130]

Because the judicial order of mandamus in the amparo decision regarding public authorities' omissions is a command directed to the public officer to perform the duty that the constitution requires him to do, which he has refused or neglected to perform,[131] the general rule is that the court order cannot substitute the public officer's power to decide. Only in cases when a specific statute provides what it is called a "positive silence" (the presumption that after the exhaustion of a particular term, it is considered that

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sion be regarding a generic duty, that is, the duty a public officer has to act in compliance with the powers attributed to him, which is different to the specific duty that is the condition for the judicial review of administrative omissive action. Thus, only when it is a matter of a generic duty, of procedure, of providing in a matter which is inherent to the public officer position, he incurs in the omissive conduct regarding which the amparo action is admissible.

See the Decision n° 541 of the former Supreme Court of Justice, Politico Administrative Chamber, dated Nov. 5, 1992, *Jorge E. Alvarado* case, in REVISTA DE DERECHO PÚBLICO, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 187; and decision n° 766 Nov.18, 1993, in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 295.

130. As defined by the same former Supreme Court of Justice, Politico Administrative Chamber, in a decision n° 69 dated February 11, 1992:

> In cases of Public Administration abstentions or omissions, a distinction can be observed regarding the constitutional provisions violated when they provide for generic or specific duties. In the first case, when a public entity does not comply with its generic obligation to answer [a petition] filed by an individual, it violates the constitutional right to obtain prompt answer [to his petition] as set forth in Article 67 of the Constitution; whereas when the inactivity is produced regarding a specific duty imposed by a statute in a concrete and ineludible way, no direct constitutional violation occurs, in which case the Court has imposed the filing of the judicial review of administrative omissions recourse . . . ..From the aforementioned reasons the Court deems conclusive that the inactivity of Public Administration to accomplish a specific legal duty precisely infringes in a direct and immediate way the legal (statutory) text regulating the matter, in which case the Constitution is only violated in a mediate and indirect way. For the amparo judge, in order to detect if an abstention of the aggrieved entity effectively harms a constitutional right or guaranty, it must first, rely himself on the supposedly unaccomplished statute in order to verify if the abstention is regarding a specific obligation; in which case it must deny the amparo action, having the plaintiff the possibility to file another remedy, like the judicial review action against Public Administration omissions.

REVISTA DE DERECHO PÚBLICO, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1993, pp. 272–73.

131. For instance, to promptly issue the corresponding decision accordingly to the formal petition filed before the authority. VENEZ. CONST. ART. 51 (1999). *See* the First Court on Judicial Review of Administrative Actions decision dated Aug. 26, 1993, *Klanki* case, in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 294.

public administration has tacitly decided accordingly to what has been asked in the particular petition) the judicial order is considered as implicitly giving positive effects to the official abstention or omission.[132]

X. THE ADMISSIBILITY CONDITIONS OF THE AMPARO ACTION BASED ON ITS EXTRAORDINARY CHARACTER

Since the amparo action is a judicial means specifically established for the protection of constitutional rights, it is conceived in Venezuela as an extraordinary judicial instrument that, consequently, does not substitute for all the other ordinary judicial remedies established for the protection of personal rights and interests. This implies that the amparo action, as a matter of principle, only can be filed when no other adequate judicial mean exists and is available in order to obtain the immediate protection of the violated constitutional rights. This implies the need for the courts to, determine the existence or nonexistence of other adequate judicial means for the immediate protection of the rights, which justifies or not the use of the extraordinary action.

This question of the adjective rules of the admissibility of the amparo action derives from the relation that exists between the amparo action as an extraordinary judicial means, and the other ordinary judicial means. In this context, the general rule of admissibility refers to two aspects: first, that the amparo action can only be admissible when there are no other judicial means for granting the constitutional protection; and second, that when the legal order provides for these other judicial means for protection of the right, they are inadequate in order to obtain the immediate protection of the harmed or threatened constitutional rights. In a contrary sense, the amparo action is inadmissible for the protection of a constitutional right if the legal order provides for other actions or proceedings that are adequate for such purpose, guaranteeing immediate protection to the right.

This rule of admissibility of the amparo action is similar to the general rule existing in the United States regarding injunctions and all other equitable remedies, "like mandamus and prohibitions, is reserved for extraordinary cases",[133] in the sense that they

132. *See* the First Court on Judicial Review of Administrative Actions decision dated Dec. 20, 1991, *BHO, C.A.* case, in REVISTA DE DERECHO PÚBLICO, n° 48, Editorial Jurídica Venezolana, Caracas, 1991, pp. 141–43.

133. 43A C.J.S. INJUNCTIONS § 2 (2004) (citing *Ex-parte* Collet, 337 U.S. 55, (1949)). This main characteristic of the injunction as an extraordinary remedy has been established

are "available only after the applicant shows that the legal remedies are inadequate."[134] It is a traditional and fundamental principle for granting an injunction that the "inadequacy of the existing legal remedies" must be established.[135] This condition of the "availability" or of the "sufficiency"[136] has also been referred to as the rule of "irreparable injury," meaning that the injunction is only admissible when the "harm cannot be repaired by the remedies available in the common law courts." That is, if the threatened rights are rectified by a legal remedy, then the judge will refuse to grant the injunction.[137]

This rule always imposes the need for the plaintiff and for the court to determine in each case, not only the existence and availability of ordinary judicial means for obtaining the constitutional protection, but also the adequacy of such existing and available

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since the nineteenth century in *In re Debs*, 158 U.S. 564 (1895), in which case, in the words of Justice Brewer, who delivered the opinion of the court, it was decided that: "As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter." *Debs*, 158 U.S. at 583. *See* FISS & RENDLEMAN, *supra* note 32.

134. FISS & RENDLEMAN, *supra* note 32, at 59.

135. 43A C.J.S. INJUNCTIONS § 71 (2004) (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1958)). The judicial doctrine on the matter has been summarized as follows:

> [A]n injunction, like any other equitable remedy, will only issue [sic] where there is no adequate remedy at law. Accordingly, except where the rule is changed by statute, an injunction ordinarily will not be granted where there is an adequate remedy at law for the injury complained of, which is full and complete. Conversely, a court of equitable jurisdiction may grant an injunction where an adequate and complete remedy cannot be had in the courts of law, despite the petitioner's best efforts. Moreover, a court will not deny access to injunctive relief when local procedures cannot effectively, conveniently and directly determine whether the petitioner is entitled to the relief claimed.

Id.

136. 43A C.J.S. INJUNCTIONS § 100 (2004).

137. *See* FISS & RENDLEMAN, *supra* note 32, at 59. This situation, as pointed out by Owen M. Fiss,

> [M]akes the issuance of an injunction conditional upon a showing that the plaintiff has no alternative remedy that will adequately repair his injury. Operationally this means that as general proposition the plaintiff is remitted to some remedy other than an injunction unless he can show that his noninjunctive remedies are inadequate.

FISS & RENDLEMAN, *supra* note 32. This term "inadequacy," according to Tabb and Shoben, "has a specific meaning in the law of equity because it is a shorthand expression for the policy that equitable remedies are subordinate to legal ones. They are subordinate in the sense that the damage remedy is preferred in any individual case if it is adequate." TABB & SHOBEN, *supra* note 47, at 15. In particular, regarding constitutional claims involving constitutional rights such as those for school desegregation, it has been considered that their protection precisely requires the extraordinary remedy that can be obtained by equitable intervention, as was decided by the Supreme Court regarding school desegregation in its second opinion in Brown v. Board of Education, 349 U.S. 753 (1955) and regarding the unconstitutional cruel and unusual punishment in the prison system in Hutto v. Finney, 437 U.S. 678 (1978). TABB & SHOBEN, *supra* note 53, at 25–26.

recourses for granting the immediate constitutional protection to the constitutional right. In this sense, in Venezuela, without an express provision in the Amparo Law, the Supreme Court has ruled that "the amparo is admissible even in cases where, although ordinary means exist for the protection of the infringed juridical situation, they would not be suitable, adequate or effective for the immediate restoration of the said situation."[138] Also, the question of the adjective consequences resulting from the plaintiff's previous election of other remedies for the claimed protection filed before the amparo action must also be analyzed.

Of course, this question of the availability and of the adequacy of the existing judicial means for the admissibility or inadmissibility of the amparo action eventually is a matter of judicial interpretation and adjudication, which must always be decided in the particular case decision, when evaluating the adequacy question.[139]

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138. Decision n° 109 of the former Supreme Court of Justice of Venezuela of Mar. 8, 1990, in REVISTA DE DERECHO PÚBLICO, n° 42, Editorial Jurídica Venezolana, Caracas, 1990, pp. 107–08. In a similar sense, the Supreme Court in a decision n° 705 dated Dec. 11, 1990, ruled that:

> The criteria of this High Court as well as the authors' opinions has been reiterative in the sense that the amparo action is an extraordinary or special judicial remedy that is only admissible when the other procedural means that could repair the harm are exhausted, do not exist or would be inoperative. Additionally, Article 5 of the Amparo Law provides that the amparo action is only admissible when no brief, summary and effective procedural means exist in accordance with the constitutional protection.
>
> This objective procedural condition for the admissibility of the action turns the amparo into a judicial mean that can only be admissible by the court once it has verified that the other ordinary means are not effective or adequate in order to restore the infringed juridical situation. If other means exist, the court must not admit the proposed amparo action.

REVISTA DE DERECHO PÚBLICO, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 112. The Supreme Court, in another decision n° 270 dated June 12, 1990, decided that the amparo action is admissible:

> when there are no other means for the adequate and effective reestablishment of the infringed juridical situation. Consequently, one of the conditions for the admissibility of the amparo action is the nonexistence of other more effective means for the reestablishment of the harmed rights. If such means are adequate to resolve the situation, there is no need to file the special amparo action. But even if such means exists, if they are inadequate for the immediate reestablishment of the constitutional guaranty, it is also justifiable to use the constitutional protection mean of amparo.

See decision n° 270 of the Politico Administrative Chamber of the Supreme Court of Justice of June 12, 1990, in REVISTA DE DERECHO PÚBLICO n° 43, Editorial Jurídica Venezolana, Caracas, 1990, p. 78. *See also* decision n° 656 of the Politico Administrative Chamber of the Supreme Court of Justice of Dec. 2, 1993, in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 311–13.

139. For instance, in a decision of the First Court on Judicial Review of Administrative Actions dated May 20, 1994 (*Federación Venezolana de Deportes Equestres* case), it was ruled that the judicial review of administrative acts were not adequate for the protection requested in the case, seeking the participation of the Venezuelan Federation of Equestrian Sports in an international competition, being the opinion of the courts:

In Venezuela, particularly regarding the amparo action against administrative acts, the prevalent doctrine on the matter for many years, established by the former Supreme Court of Justice, was to admit the amparo action in spite of the existence of the specific recourse before the Judicial Review of Administrative Action Jurisdiction. Yet this wide protective doctrine has been unfortunately abandoned in recent years by the Supreme Tribunal of Justice, applying a restrictive interpretation regarding the adequacy of the judicial review action for the annulment of administrative acts, and rejecting the amparo action when filed directly against them.[140]

> [T]hat when the action was brought before it, the only mean that the claimant had in order to obtain the reestablishment of the infringed juridical situation was the amparo action, due to the fact that by means of the judicial review of administrative acts recourse seeking its nullity, they could never be able to obtain the said reestablishment of the infringed juridical situation that was to assist to the 1990 international contest.

See in REVISTA DE DERECHO PÚBLICO, nº 57-58, Editorial Jurídica Venezolana, Caracas, 1994, pp. 284 ff..; and in CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra*, note 5, at 354.

140. This can be realized from the decision taken in a recent and polemic case referring to the expropriation of some premises of a corn agro-industry complex, which developed as follows: in Aug. 2005, officers from the Ministry of Agriculture and Land and military officers and soldiers from the Army and the National Guard surrounded the installation of the company *Refinadora de Maíz Venezolana, C.A. (Remavenca)*, and announcements were publicly made regarding the appointment of an Administrator Commission that would be taking over the industry. These actions were challenged by the company as a *de facto* action alleging the violation of the company's rights to equality, due process and defense, economic freedom, property rights and to the non-confiscation guarantee of property. A few days later, the Governor of the State of Barinas, where the industry was located, issued a decree ordering the expropriation of the premises, and consequently the Supreme Tribunal declared the inadmissibility of the amparo action that was filed, basing its ruling on the following arguments:

> The criteria established up to now by this Tribunal, by which it has concluded on the inadmissibility of the autonomous amparo action against administrative acts has been that the judicial review of administrative act actions –among which the recourse for nullity, the actions against the administrative abstentions and recourse filed by public servants– are the adequate means, that is, the brief, prompt and efficient means in order to obtain the reestablishment of the infringed juridical situation, in addition to the wide powers that are attributed to the administrative jurisdiction courts in Article 29 of the Constitution. Accordingly, the recourse for nullity or the expropriation suit are the adequate means to resolve the claims referring to supposed controversies in the expropriation procedure; those are the preexisting judicial means in order to judicially decide conflicts in which previous legality studies are required, and which the constitutional judge cannot consider. Thus, the Chamber considers that the claimants, if they think that the alleged claim persists, can obtain the reestablishment of their allegedly infringed juridical situation, by means of the ordinary actions and to obtain satisfaction to their claims. So because of the existing adequate means for the resolution of the controversy argued by the plaintiff, it is compulsory for the Chamber to declare the inadmissibility of the amparo action, according to what is set forth in Article 6,5 of the Organic Law.

The other question related to the admissibility of the amparo action is related to the question of the existence of a pending action or recourse already filed or brought before a court for the same purpose of protecting a constitutional right. This question regarding the admissibility of the amparo action also has some similarities with the United States' injunction procedure regarding defenses, called the "doctrine of the election of remedies," which is applied when an injured party having two available but inconsistent remedies to redress a harm, chooses one, which is considered a binding election that forecloses the other.[141] In a similar sense, this is the general rule in Venezuela, which is nonetheless only applied when the plaintiff has filed other judicial means for protection; not being applied if only administrative recourses have been filed before the public administration organs.[142]

This condition of inadmissibility of the amparo action when the plaintiff has chosen to file another action has also been regulated, in particular regarding the case of the previous filing of another amparo action that is pending to be decided.[143] In these cases, it is necessary that a previous amparo action had been filed regarding the same violation, the same action and the same persons.

XI. THE MAIN PRINCIPLES OF THE PROCEDURE IN THE AMPARO PROCEEDING

The extraordinary character of the amparo proceeding also conditions the general rules governing the procedure, which in gen-

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Decision of the Constitutional Chamber of the Supreme Tribunal of Justice n° 3375 of Nov. 4, 2005, *Refinadora de Maíz Venezolana, C.A. (Remavenca), y Procesadora Venezolana de Cereales, S.A. (Provencesa) vs. Ministro de Agricultura y Tierras y efectivos de los componentes Ejército y Guardia Nacional de la Fuerza Armada Nacional* See also in REVISTA DE DERECHO PÚBLICO, n° 104, Editorial Jurídica Venezolana, Caracas, 2005, pp. 239 ff.

141. *See* TABB & SHOBEN, *supra* note 53, at 56.

142. In this case, the inadmissible clause is not applied because the administrative recourses are not judicial ordinary means that can prevent the filing of the amparo action. *See* the Decision of the First Court on Judicial Review of Administrative Actions, which decided on a decision dated Mar. 8, 1993, *Federico Domingo* case, in REVISTA DE DERECHO PÚBLICO, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1994, p. 261. *See also* the Decision dated May 6, 1994, *Universidad Occidental Lisandro Alvarado* case, in REVISTA DE DERECHO PÚBLICO, n° 57-58, Editorial Jurídica Venezolana, Caracas, 1994. *See*, pp. 297 ff.; and in CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 250 ff.

143. Article 6.8 of the Amparo Law provides the inadmissibility of the action for amparo when a decision regarding another amparo suit has been brought before the courts regarding the same facts and is pending decision. Venez. Amparo Law, Art. 6.8. *See, e.g.*, Decision of the Politico Administrative Chamber of the Supreme Court of Justice of Oct. 13, 1993, *Escuela Básica Juan Lovera* case, in REVISTA DE DERECHO PÚBLICO, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 348–49.

eral terms are related to its bilateral character; to the brief and preferred character of the procedure; to the role of the courts directing the procedure and to the need for the substantial law to prevail regarding formalities.

In effect, as aforementioned, one of the fundamental principles regarding the amparo proceeding is that although being of an extraordinary nature, the bilateral character of the proceeding must always be guaranteed. This implies that the amparo proceeding must always be initiated by a party or parties (the injured or offended party), so that no *ex officio* amparo proceeding is admissible.[144] Consequently, the amparo proceeding must always be initiated by means of an action or a recourse brought before the competent court by a party against another party (the injurer or offender party) whose actions or omissions have violated or have caused harm to the complaining party's constitutional rights. This defendant must always be brought to the procedure in order to guarantee his rights of defense and due process.

From the amparo proceeding, its final outcome is always a judicial order, as also happens in the United States with the writs of injunction, mandamus or error, which are directed to the injuring party ordering him to do or to abstain from doing something, or to suspend the effects, or in some cases, to annul the damaging act.[145] In Venezuela, as already mentioned, the amparo statutes not only refer to the amparo as a remedy or as the final court written order (writ) commanding the defendant to do or refrain from doing some specific act, but in addition, it is regulated as a complete proceeding that is specifically designed to protect constitutional rights following an adversary procedure according to the "cases or controversy" requirement. All the phases or stages of the procedure are regulated. The procedure ends with a judicial deci-

144. Only in cases of habeas corpus actions do some amparo laws provide for the power of the courts to initiate the proceeding *ex officio*. GUATEMALA CONSTITUTION, art. 86; HONDURAS CONSTITUTION, art. 20.

145. The amparo suit has similarities with the civil suit for an injunction in the United States that an injured party can bring before a court to seek for the enforcement or restoration of his violated rights or for the prevention of their violation. It also can be identified with a "suit for mandamus," brought by an injured party before a court against a public officer whose omission has caused harm to the plaintiff, in order to seek for a writ ordering the former to perform a duty that the law requires him to do but he refuses or neglects to perform. Also, the suit for amparo has similarities with a "suit for writ of error" brought before the competent superior court by an injured party whose constitutional rights have been violated by a judicial decision, seeking the annulment or the correction of the judicial wrong or error.

sion or judicial order directed to protect the constitutional rights of the injured party.

Consequently, the general rule in the amparo proceeding is that although it is brief and speedy, the procedural adversary principle or the aforementioned principle of bilateralism must be preserved, assuring the presence of both parties and the respect of the due process constitutional guarantees, particularly the rights to defense.[146] That is why no definitive amparo adjudication can be issued without the participation of the defendant or at least without his knowledge about the filing of the action. The exception to this rule being very rare, as is the case of Colombia, where the *Tutela* Law admits the possibility for the court to grant the constitutional protection (tutela) *in limine litis*, that is, "without any formal consideration and without previous enquiry, if the decision is founded in an evidence that shows the grave and imminent violation of harm to the right."[147]

This Colombian provision undoubtedly was inspired by the 1988 Venezuelan Amparo Law that also provided for the possibility for the amparo judge "to immediately restore the infringed juridical situation, without considerations of mere form and without any kind of brief enquiry," requiring in such cases, that "the amparo protection be founded in evidence constituting a grave presumption of the violation of harm of violation."[148] Nonetheless, in Venezuela this article was annulled by the former Supreme Court, which refused to interpret it in harmony with the constitution, as only providing for preliminary decisions and as not intending to establish the possibility of a definitive amparo decision that could be issued *inaudita parte* because such action would be unconstitutional. In particular, a popular action was filed in 1988 before the former Supreme Court of Justice based on the alleged unconstitutionality of such provision. In it, it was requested from the Supreme Court to interpret it according to the constitution (*secundum constitucione*), in the sense that what was intended with the provision was to establish a legal authorization for the courts to simply adopt, in an immediate way, preliminary protective measures, pending the resolution of the case, but not definitive

146. Thus, a judicial guarantee of constitutional rights like the amparo suit can in no way transform itself into a proceeding violating the other constitutional guarantees, such as the right to defense. Except regarding preliminary judicial orders, the principle of *audi alteram partem* ("hear the other party" or "listen to both sides") must then always be respected.

147. Tutela Law of Columbia, Art. 18.

148. Venez. Amparo Law, Art. 22 (referring to the 1988 version).

amparo decisions. Nonetheless, the Supreme Court rejected this interpretation, and in a decision dated May 21, 1996, eventually annulled Article 22 of the Amparo Law considering that it violated in a flagrant way the constitutional right to defense.[149] The adjective consequence was that failing to interpret the norm according to the constitution, no legal support could be identified in the special Amparo Law empowering the courts to adopt provisional or preliminary relief,[150] which were then adopted applying the general provisions of the Procedural Civil Code.

Because the amparo suit is an extraordinary remedy for the immediate protection of constitutional rights, its main feature is the brief and prompt character of the procedure, which is justified because the purpose of the action is to immediately protect persons in cases of irreparable injuries or threats to constitutional rights. This irreparable character of the harm or threat and the immediate need for protection have been the key elements that have molded the procedural rules of the amparo proceeding. Such considerations have also dictated injunctions in the United States, where the judicial doctrine on the matter is also that "an injunction is granted only when required to avoid immediate and irreparable damage to legally recognized rights, such as property rights, constitutional rights or contractual rights."[151]

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149. This Article, as mentioned, allowed the courts to adopt final decisions on amparo matters in cases of grave violations of constitutional rights, reestablishing the harmed constitutional right without any formal or summary inquiry and without hearing the plaintiff or potential injurer. Even if the Article could have been constitutionally interpreted as only directed to allow the adoption of *inaudita partem* preliminary decisions or injunctions in the proceeding, the Supreme Court considered its contents as a vulgar and flagrant violation of the constitutional right to self-defense, and annulled it. *See* decision n° 644 of the Supreme Court of Justice of May 21, 1996, in GACETA OFICIAL EXTRA. n° 5071 of May 29, 1996, and in REVISTA DE DERECHO PÚBLICO, n° 65-66, Editorial Jurídica Venezolana, Caracas, 1996, pp.332 ff. See the comments in ALLAN R. BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 388-96; and in Chavero, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, AT 212, 266 FF., 410 FF.

150. *See* the comments in BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 398.

151. Consequently, "[t]here must be some vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy." Treadwell v. Inv. Franchises, Inc., 543 S.E.2d 729, 730 (Ga. 2001). In other words, to warrant an injunction it ordinarily must be clearly shown that some act has been done, or is threatened, which will produce irreparable injury to the party asking for the injunction, U.S. v. Am. Friends Serv. Comm., 419 U.S. 7, (1974). In the same sense it has been established that, "[t]he very function of an injunction is to furnish preventative relief against irreparable mischief or injury, and the remedy will not be awarded where it appears to the satisfaction of the court that the injury complained of is not of such character." State Comm'n on Human Rels. v. Talbot Cnty. Det. Ctr., 803 A.2d 527, 542 (Md. 2002). More specifically, a permanent, mandatory injunction, a preliminary, interlocutory or temporary injunction, a preliminary

The same principles also apply to the amparo proceeding, originating with the configuration of a brief and preferred procedure, precisely justified because of the protective purpose of the action and the immediate protection required because of the violations of constitutional rights. For these purposes, Article 27 of the Venezuelan Constitution expressly provides that the procedure of the constitutional amparo action must be oral, public, brief, free and not subject to formality.[152]

One of the consequences of the brief and prompt character of the procedure in the amparo proceeding is its preferred character that imposes, as it is provided in the Venezuelan Constitution, that "any time will be workable time, and the courts will give preference to the amparo regarding any other matter."[153] This preferred character of the procedure also implies that the procedure must be followed with preference, so when an amparo action is filed, the courts must postpone all other matters of different nature.[154]

In the amparo procedure, as a general rule, 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 is the responsibility of the courts.

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mandatory injunction, or a preliminary, interlocutory or temporary restraining order, will not, as a general rule, be granted where it is not shown that an irreparable injury is immediately impending and will be inflicted on the petitioner before the case can be brought to a final hearing, "no matter how likely it may be that the moving party will prevail on the merits." Packaging Indus. Group, Inc. v. Cheney, 405 N.E.2d. 106, 114 (Mass. 1980). *See also* 43A C.J.S. *Injunctions* § 192 (2004).

152. VENEZ. CONST. ART. 27. Regarding some of these principles, the Venezuelan First Court on Judicial Review of Administrative Actions, even before the sanctioning of the Amparo Law in 1988, ruled that because of the brief character of the procedure, it must be understood as having "the condition of being urgent, thus it must be followed promptly and decided in the shortest possible time." Additionally, the First Court determined that it must be summary, in the sense that "the procedure must be simple, uncomplicated, without incidences and complex formalities." In this sense, the procedure must not be converted in a complex and confused procedural situation." *See* Decision of Jan. 17, 1985, in REVISTA DE DERECHO PÚBLICO, n° 21, Editorial Jurídica Venezolana, Caracas, 1985, p. 140. According to these principles, the 1988 Venezuelan Amparo Law provided for the brief, prompt and summary procedure that governed the amparo proceeding up to the enactment of the 1999 Constitution, when the Constitutional Chamber of the Supreme Tribunal of Justice interpreted the provisions of the Law, according to the new constitution, in some way rewriting its regulations through constitutional interpretation. *See* the Decision of the Constitutional Chamber of the Supreme Tribunal of Justice n° 7 dated Feb. 1, 2000 (Case *José Amando Mejía*), in REVISTA DE DERECHO PÚBLICO, n° 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 245 ff. See the comments in ALLAN R. BREWER-CARÍAS, EL SISTEMA DE JUSTICIA CONSTITUCIONAL EN LA CONSTITUCIÓN DE 1999. COMENTARIOS SOBRE SU DESARROLLO JURISPRUDENCIAL Y SU EXPLICACIÓN, A VECES ERRADA, EN LA EXPOSICIÓN DE MOTIVOS, Editorial Jurídica Venezolana, Caracas, 2000; CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 203 ff.

153. VENEZ. CONST. ART. 27.

154. Venez. Amparo Law, Art. 13.

In addition, Article 11 of the Amparo Law restricts motions to recuse judges, establishing specific and prompt procedural rules regarding the cases of impeding situations of the competent judges to resolve the case.

Another principle governing the procedural rules in matters of amparo, in order to guarantee the brief and prompt character of the procedure, is the principle of the prevalence of substantive law over formal provisions, which, for instance, is referred to in the Venezuelan Constitution as a general principle applicable to all proceedings,[155] regarding the prevalence of "substantive justice" over "formal justice."

Another aspect to be analyzed regarding the procedure in the amparo proceeding refers to the specific configuration of the main phases or steps of the procedure, in particular, those related to the filing of the petition, the court decision on the admissibility of the action, the evidence activity, the defendant's pleading, and the hearing of the case.

The first specific trend to be highlighted regarding the judicial procedure of the amparo proceeding refers to the formalities of the petitions that are to be brought before the courts, being the general principle that the petition must be filed in writing, as is the case regarding injunctions in the United States.[156] Nonetheless, the Amparo Law allows the oral presentation of the amparo in cases of urgency,[157] in which the petitions must be subsequently ratified in writing.

In any case, in the written text of the action, the petitioner must always express in a clear and precise manner, all of the necessary elements regarding the alleged right to be protected and the arguments for the admissibility of the action. That is why the Amparo Law establishes, in general terms, the minimal content of the petition or complaint, which in particular must refer to the following aspects.[158] First, the complete identification and information regarding the plaintiff, and if someone is acting on behalf of the plaintiff, his identification is also required. If the plaintiff is an artificial person, the references regarding its registration as well as the representative's complete identification are also required. Second, the petition must establish the individuation of the injured party. Third, the detailed narration of the circumstances in

155. VENEZ. CONST. ART. 26.
156. *See* 43A C.J.S. INJUNCTIONS § 310 (2004).
157. Venez. Amparo Law, Arts. 16, 18.
158. Venez. Amparo Law, Art. 18.

which the harm or the threat has been caused, and the act, action, omission or fact causing the harm or threat must be identified. Fourth, the written text of the petition must indicate the constitutional right or guarantee that has been violated, harmed or threatened, with precise reference to the articles of the constitution or the international treaties containing the rights or guarantees claimed to be violated or harmed. Fifth, the plaintiff must specify the particular protective request asked from the court as well as the judicial order to be issued in protection of his rights that is requested from the court. Finally, the plaintiff must argue about the fulfillment of the conditions for the admissibility of the action, in particular, regarding the inadequacy of other possible judicial remedies and the irreparable injury the plaintiff will suffer without the amparo suit protection.[159]

In order to soften the consequences of not mentioning correctly all the above-mentioned requirements that have to be contained within the written text of the petition, the Amparo Law, in protection of the injured party's right to sue, provides that the courts are obliged to return to the plaintiff the petition that does not conform with those requirements in order for the plaintiff to make the necessary corrections. Consequently, in these cases, the petition will not be considered inadmissible because of formal inadequacies regarding the noncompliance with the petition's requirements set forth in the statutes, and in order to have them corrected or mended the court must return it to the petitioner for him to correct it in a brief amount of time. Only if the petitioner does not make the corrections will the complaint be rejected.[160]

The second important phase of the procedure in the amparo proceeding is the power of the competent courts at the beginning of the procedure to decide upon the admission of the petition when all the admissibility conditions set forth in the Amparo Law are satisfied. Consequently, the courts are empowered to decide *in limine litis* about the inadmissibility of the action when the petition does not accomplish in a manifest way the conditions determined in the statute; for instance, when the term to file the action is evidently exhausted; when the challenged act is one of those excluded from the amparo protection; when there are ordinary means for the protection of the rights that must be previously filed or that give adequate protection; or when ordinary judicial means

159. In a similar way as in the injunction petition in the United States. *See* 43A C.J.S. INJUNCTIONS § 314 (2004).

160. Venez. Amparo Law, Art. 19.

that can adequately guarantee the claimed rights have already been filed.

The main effect of the admission decision of the action is for the court to notify the interested parties of the initiation of the process, to request from the defendant a report on the violations, and to adopt, if necessary, preliminary amparo decisions for the immediate protection of the harmed or threatened constitutional rights, pending the development of the process.

The third phase in the amparo proceeding refers to the evidence activity and the burden of proof. As has been mentioned, the amparo suit is a specific judicial means regulated in order to obtain the immediate protection of constitutional rights and guarantees when the aggrieved or injured parties have no other adequate judicial means for such purpose. That is why this situation must be alleged and proven by the claimant. This implies that in order to file an amparo action and to obtain immediate judicial protection, the violation of the constitutional right must be a flagrant, vulgar, direct and immediate one, caused by a perfectly determined act or omission. Regarding the harm or injury caused to the constitutional rights, it must be manifestly arbitrary, illegal or illegitimate, a consequence of a violation of the constitution. All these aspects for obtaining the immediate judicial protection must be clear and ostensible, the plaintiff being obliged to argue them in his petition and support it with the needed evidence.

Consequently, as it is also established in the United States regarding injunctions,[161] in the amparo proceeding, the plaintiff has the burden to prove the existence of the right, the alleged violations of threat, and the illegitimate character of the action causing it with clear and convincing evidence. The consequence of the aforementioned is that in matters of amparo, due to the brief and prompt character of the procedure, the immediate protection of constitutional rights that can be granted needs to be based on existing sufficient evidence.

Accordingly, the courts have rejected amparo actions in complex cases where a major debate is needed, and in cases in which proof is difficult to provide, which is considered incompatible with the brief and prompt character of the amparo suit that requires that the alleged violation be "manifestly" illegitimate and harming.

161. *See* 43A C.J.S. INJUNCTIONS § 310 (2004).

Even without clear provisions on the matter, this principle has been applied by the courts in Venezuela.[162]

In this matter of constitutional protection, the courts have *ex officio* powers to obtain evidence, provided that it does not cause an irreparable prejudice to the parties.[163] On the other hand, the general principle in the amparo procedure is that all kinds of evidence is admitted, so the court can base its decision to grant the required protection on any type of evidence.

The fifth important phase of the amparo proceeding is the need for the court to notify the aggrieving party in order to request from it a formal written answer or report regarding the alleged violations of constitutional rights of the plaintiff, to which, in addition, the defendant can put forward his counter evidence, before the hearing on it.[164] Due to the bilateral and adversarial character of the procedure, as also happens in the injunctive relief procedure in the United States, an amparo ruling must not be issued until the defendant has been asked to file his plea.[165]

The defendant's answer or plea regarding the harm or threat alleged by the plaintiff, must be sent to the court within a very brief term of forty-eight hours.[166] The omission of the defendant to send his report or plea in answer to the court implies that the plaintiff's alleged facts must be considered as accepted by the defendant.[167]

Finally, one of the most important phases in the procedure is the hearing that the court must convene, also in a very prompt period of time, seeking the participation of the parties before adopting its decision on the case.[168] This hearing which must be

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162. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 340.

163. Venez. Amparo Law, Art. 17.

164. This is what was established in Article 24 of the Venezuelan Amparo Law, which nonetheless has been eliminated by the Constitutional Chamber in its decision n° 7 of February 1, 2000, *José A. Mejía et al.* (issue interpreting the Amparo Law according to the new 1999 Constitution, and reshaping the amparo suit procedure). *See* in REVISTA DE DERECHO PÚBLICO, n° 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 349 ff; CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 264 ff.; Allan R. Brewer-Carías, *El juez constitucional como legislador positivo y la inconstitucional reforma de la Ley Orgánica de Amparo mediante sentencias interpretativas*, in EDUARDO FERRER MAC-GREGOR Y ARTURO ZALDÍVAR LELO DE LARREA (COORDINATORS), LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México 2008, Tomo V, pp. 63-80.

165. *See* 43A C.J.S. INJUNCTIONS § 318 (2004).

166. Venez. Amparo Law, Art. 24.

167. *Id.*

168. Venez. Amparo Law, Art. 26.

oral, public and contradictory, in principle must always take place and must not be suspended.

The absence of the defendant's participation in the hearing, in general terms, does not produce its suspension, in which case, the evidence presented by the plaintiff will be accepted and the court must then proceed to decide. Regarding the plaintiff, his absence from the hearing is understood as his abandonment of the action.

The final decision of the amparo proceeding must be adopted after the hearing has taken place, although the Constitutional Chamber of the Supreme Tribunal has established that in matters of amparo the court must make its decision in the same hearing or trial.[169]

XII. THE PRELIMINARY PROTECTIVE MEASURES ON MATTERS OF AMPARO

The purpose of the amparo proceeding eventually is for the plaintiff to obtain a judicial adjudication from a competent court, providing for the immediate protection of his harmed or threatened constitutional rights. These judicial decisions, for instance, may restrain some actions, preserve the status quo, or command or prohibit actions.[170]

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169. In Venezuela, the Amparo Law established that the decision ought to be issued in the following days after the hearing. Venez. Amparo Law, Art. 24. Nonetheless, the Constitutional Chamber in decision n° 7 of February 1, 2000 (*José A. Mejía et al.* case), has modified this provision, providing that the decision must be issued at the end of the hearing. *See* in REVISTA DE DERECHO PÚBLICO, n° 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 349 ff.

170. In a very similar way, the injunctive decisions that the United States' courts can adopt injunctions for the immediate protection of rights, which can consist of restrain action or interference of some kind. Putnam v. Fortenberry, 589 N.W.2d 838 (Neb. 1999); Anderson v. Granite School Dist., 413 P.2d 597 (Utah 1996). Courts in the United States may also impose injunctions to furnish preventive relief against irreparable mischief or injury; or to preserve the *status quo*. Sndyer v. Sullivan, 705 P.2d 510 Colo 1985); Jenkins v. Pedersen, 212 N.W.2d 415 (Iowa 1973). An injunction is a remedy designed to prevent irreparable injury by prohibiting or commanding certain acts. Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte County, 38 P.3d 723 (Kan. 2002). The function of injunctive relief is to restrain motion and to enforce inaction. State ex rel. Great Lakes College, Inc. v Med. Bd., 280 N.E.2d 900 (Ohio 1972). An injunction is designed to prevent harm, not redress harm; it is not compensatory. Klinicki v. Lundgren, 695 P.2d 906 (Or. 1985); Simenstad v. Hagen, 126 N.W.2d 529 (Wis. 1964). The remedy grants prospective, as opposed to retrospective, relief, Jefferson v. Big Horn Cnty., 4 P.3d 26 (Mont. 2000), and it is preventive, protective or restorative. United States v. White Cnty. Bridge Comm'n, 275 F.2d 529 (7th Cir. 1960); Colendrea v. Wilde Lake Cmty. Ass'n, Inc., 761 A.2d 899 (Md. 2003); Stoetzel & Sons, Inc. v. City of Hatings, 658 N.W.2d 636 (Neb. 2003); Hunsaker v. Kersh, 991 P.2d 67 (Utah 1999). However, an injunction is not addressed to past wrongs. *Snyder v. Sullivan*, 705 P.2d 510 (Colo. 1985). *See generally* 43A CJS INJUNCTIONS § 2.

Amparo and injunctions are both extraordinary remedies having the same purpose, the main difference between them being the rights to be protected. In the United States, injunctions are equitable remedies that can be used for the protection of any kind of personal or property rights. On the other hand, in Latin America, the amparo proceeding is conceived only for the protection of constitutional rights, which explains its regulations in the constitutions, and not for the protection of rights established in statutes.[171]

In this matter of the amparo proceeding, as well as in matters of injunctions, two general sorts of judicial adjudications can be issued by the courts for the protection of constitutional rights: preliminary measures that can be ordered from the beginning of the procedure, with effects subject to the final court ruling; and definitive decisions preventing the violation or restoring the enjoyment of the threatened or harmed rights.

In Venezuela, as in all Latin American countries, according to the general regulations established in the Civil Procedure Codes, all courts are empowered to adopt, during the course of a proce-

171. In this sense, in Venezuela the courts have ruled that the harm caused must always be the result of a violation of a constitutional right that must be "flagrant, vulgar, direct and immediate, which does not mean that the right or guaranty is not due to be regulated in statutes, but it is not necessary for the court to base its decision in the latter to determine if the violation of the constitutional right has effectively occurred." Supreme Court of Justice, *Tarjetas Banvenez* case, decision n° 343 of July 10, 1991, in REVISTA DE DERECHO PÚBLICO, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 169–170. *See also* Decision of May 20, 1994, First Court on Judicial Review of Administrative Actions, *Federación Venezolana de Deportes Ecuestres* Case, in REVISTA DE DERECHO PÚBLICO, n° 57-58, Editorial Jurídica Venezolana, Caracas, 1994, pp. 284 ff.. In other words, only direct and evident constitutional violations can be protected by means of amparo; thus, for instance, as ruled in 1991 by the same First Court, the internal electoral regime of political parties or of professional associations could not be the object of an amparo action founded in the right to vote set forth in the constitution, "which only applies to the national electoral process [not being applied] to the internal electoral process of the political parties," concluding that the amparo "only protects constitutional rights and guaranties and not legal (statutory) ones, and much less the ones contained in association's by laws." Decision of Aug. 23, 1991, in REVISTA DE DERECHO PÚBLICO, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 129 ff. In other decisions, the courts declared inadmissible amparo actions for the protection of rights when the allegations were only founded "in legal (statutory) considerations," as the right to work commonly conditioned by statutes regarding dismissals. Thus, the amparo is not the judicial mean for the protection of such right if the violation is only referring to the labor law provisions. *See* Decision of the First Court of Oct. 8, 1990, *Rafael Rojas* case, in REVISTA DE DERECHO PÚBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 139–40. In a similar sense, the violation of the right to self-defense because a party's right to cross-examine a witness was denied according to Article 349 of the Civil Procedural Code cannot be founded in Article 68 of the Constitution because it implies the need to analyze norms of legal rank and not of constitutional rank. In this regard it was decided by the former Supreme Court of Justice, Politico Administrative Chamber, decision n° 614 of Nov. 8, 1990, in REVISTA DE DERECHO PÚBLICO, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 140–41.

dure, what are called "*medidas preventivas*" or "*medidas cautelares*," that is, interlocutory and temporal judicial measures that are also applied to the amparo proceeding. The expression refers to interlocutory or preliminary measures; so in this sense, a "*medida preventiva*" is not equivalent to the English expression "preventive measure," which is used in the sense of preventing or avoiding harm, and can be decided both in a definitive or a preliminary injunction.[172] That is, both the definitive and preliminary judicial amparo decisions can have "preventive" effects in the sense of preventing harms or preserving the status quo, the preliminary ones having only a temporary basis, pending the termination of the procedure.[173] Consequently, in order to avoid confusion, I use the expression "preliminary" measures to identify what in the Latin American procedural law are called "*medidas preventivas*" or "*medidas cautelares*," as interlocutory, preliminary and temporal judicial protective measures that can be issued pending the procedure, similar to the United States "preliminary injunctions" also issued as interlocutory and temporal relief pending the trial.[174]

Based on this distinction between preliminary measures ("*cautelares*") and definitive adjudications or decisions, the amparo proceeding in Venezuela is not just of a "*cautelar*" or preliminary nature, and on the contrary, it seeks to protect in a definitive way the constitutional right alleged as harmed or threatened. The precision is important because in some countries a distinction has

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172. In other words, as explained by Tabb and Shoben: "[t]he classic form of injunctions in private litigation is the preventive injunction. By definition, a preventive injunction is a court order designed to avoid future harm to a party by prohibiting or mandating certain behavior by another party. The injunction is 'preventive' in the sense of avoiding harm. The wording may be either prohibitory ("do not trespass") or mandatory ("remove the obstruction")." TABB & SHOBEN, *supra* note 53, at 22.

173. As the same authors Tabb & Shoben have said:

> [u]pon a compelling showing by the plaintiff, the court may issue a coercive order even before full trial on the merits. A preliminary injunction gives the plaintiff temporary relief pending trial on the merit. A temporary restraining order affords immediate relief pending the hearing on the preliminary injunction. Both of these types of interlocutory relief are designed to preserve the status quo to prevent irreparable harm before a court can decide the substantive merits of the dispute. Such orders are available only upon a strong showing of the necessity for such relief and may be conditioned upon the claimant posting a bond or sufficient security to protect the interests of the defendant in the event that the injunction is later determined to have been wrongfully issued.

TABB & SHOBEN, *supra* note 53, at 4.

174. In both cases, the preliminary measures are different from the final judicial protective (permanent injunction) decisions, which can have preventive or restorative effects. *See* 43A C.J.S. INJUNCTIONS § 6 (2004).

been made in procedural law between "*cautelar*" measures and "*cautelar*" actions, causing some terminological confusion when giving to the amparo the character of a "*cautelar*" action. In such cases, the expression is used, not in the sense of just having a "preliminary" nature, but in the sense of being confined to decide the immediate protection of a constitutional right without resolving any other matters or merits of the controversy.[175]

However, putting aside these terminological differences, in the amparo procedure, preliminary measures can be adopted by the courts pending the final adjudication and with effects during the development of the procedure, in order to preserve the status quo, avoiding harms or restoring the plaintiff's situation to the original one it had before the harm was inflicted. These preliminary measures are regulated in the Amparo Law and the Civil Procedure Code in two ways.

First, by establishing a precise and identified measure, called a *medidas cautelares nominada*, as is the case of the suspension of the effects of the challenged act of the amparo action. This is the most common preliminary judicial measure expressly established in the Amparo Law. When the action is filed against state acts, particularly administrative acts, the power is given to the courts to suspend their effects, at the request of the affected party, during the course of the procedure and pending the final decision of the proceeding.[176] Also, in addition to the provision establishing the court's possible decision to suspend the effects of the challenged acts, in the case of the filing of the amparo petition conjunctively

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175. In this sense, in Ecuador and Chile, the amparo proceeding has been considered to have "*cautelar*" nature, but in another sense, not equivalent to a "preliminary" nature. The Constitutional Court of Ecuador, for instance, has decided as follows:

> [t]hat the amparo action set forth in Article 95 of the Constitution is in essence *cautelar* regarding the constitutional rights, not allowing [the court] to decide on the merits or to substitute the proceedings set forth in the legal order for the resolution of a controversy, but only to suspend the effects of an authority act which harms those rights; and the decisions issued in the amparo suit do not produce *res judicata*, so the authority, once having corrected the incurred defects, may go back to the matter and issue a new act, providing it is adjusted to the constitutional and legal provisions.

HERNÁN SALGADO PESANTES, MANUAL DE JUSTICIA CONSTITUCIONAL ECUATORIANA, Corporación Editora Nacional, Quito, 2004, p. 78.

In a similar way, in Chile the action for protection has been considered to have a "*cautelar*" nature, not in the sense of "preliminary" measures, but as tending to obtain a definitive protective adjudication regarding constitutional rights. *See* EDUARDO SOTO KLOSS, EL RECURSO DE PROTECCIÓN. ORÍGENES, DOCTRINA Y JURISPRUDENCIA, Editorial Jurídica de Chile, Santiago, 1982, p. 248; *see also* JUAN MANUEL ERRAZURIZ AND JORGE MIGUEL OTERO A., ASPECTOS PROCESALES DEL RECURSO DE PROTECCIÓN, Editorial Jurídica de Chile, Santiago, 1989, pp. 34–38.

176. Venez. Amparo Law, Art. 5.

with other actions seeking judicial review of statutes or administrative acts, the amparo essentially has suspensive effects.[177]

Second, without any particular enumeration, other measures that can be adopted by the courts in order to protect the injured right are the *medidas cautelares innominadas* according to the provisions of the Civil Procedure Code.

In order to adopt all these preliminary measures, a few conditions must be met as has been established by the jurisprudence of the courts. The courts must consider, first, "the appearance of the existence of a good right" (*fumus boni juris*), that is, the need for the petitioner to prove the existence of his constitutional right or guarantee as being violated or threatened. Second, the "danger because of the delay" (*periculum in mora*), that is, the need to prove that the delay in granting the preliminary protection will make the harm irreparable. Third, the "danger of the harm" (*periculum in dammi*"), that is the need to prove the imminence of the harm that can be caused. Fourth, the balance between the collective and particular interest involved in the case.[178] As ruled by the Politico Administrative Chamber of the Supreme Tribunal of Justice of Venezuela, in a decision n° 488 dated March 16, 2000:

> In order for an anticipated protective measure to be granted, due to its preliminary content it is necessary to examine the existence of three essential elements, always balancing the collective or individual interest; such conditions are:
>
> 1. *Fumus Boni Iuris*, that is, the reasonable appearance of the existence of a "good right" in the hands of the petitioner

177. When the amparo action is filed jointly with the judicial review popular action for nullity against statutes, or with the judicial review of administrative actions recourse, the amparo petition has always had this preliminary (*cautelar*) character, in the sense that the decision granting the amparo pending the principal nullity suit is always of a preliminary character of suspension of the effects of the challenged act. Thus, in the case of statutes, the Constitutional Chamber, the competent court, decides to suspend its effects, in such cases, even with *erga omnes* effects. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 468 ff., 327 ff.; BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 277. Regarding administrative acts, the courts of the Administrative Jurisdiction are the ones that can decide the matter of the suspension of the effects of the administrative challenged act, pending the judicial review proceeding final decision. BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 281.

178. As for instance has been decided by the Venezuelan First Court on Judicial Review of Administrative Actions, *Video & Juegos Costa Verde, C.A. vs. Prefecto del Municipio Maracaibo del Estado Zulia* case, in REVISTA DE DERECHO PÚBLICO, n° 85-98, Editorial Jurídica Venezolana, Caracas, 2001, p. 291.

alleging its violation, an appearance that must derive from the written evidences (documents) attached to the petition.

2. *Periculum in mora*, that is, the danger that the definitive ruling could be illusory, due to the delay in resolving the incident of the suspension.

3. *Periculum in Damni*, that is, the imminence of the harm caused by the presumptive violation of the fundamental rights of the petitioner and its irreparability. These elements are those that basically allow one to seek the necessary anticipatory protection of the constitutional rights and guaranties.[179]

All these general conditions for the issuance of the preliminary protective measures are very similar to those prerequisites needed to be tested by the United States' courts when issuing preliminary injunctions, which are: (1) a probability of prevailing on the merits; (2) an irreparable injury if the relief is delayed; (3) a balance of hardship favoring the plaintiff; (4) and a showing that the injunction would not be adverse to the public interest; all of which must be proven by the plaintiff.[180]

Due to the extraordinary character of the amparo action, the preliminary protective measures requested by the plaintiff, if the above-mentioned conditions are fulfilled, can be decided and issued by the court in an immediate way, even without a previous hearing of the potential defendants. That is, *inadi alteram parte* or *inaudita pars*, as it is expressly provided in the Civil Procedure Code. In a similar sense, the courts in the United States, in cases of great urgency and when an immediate threat of irreparable injury exists, can issue preliminary injunctions or restraining orders without giving reasonable notice to the defendant, but always balancing the harm sought to be preserved with the rights of notice and hearing.[181]

Finally, the general rule is that in the amparo proceeding, as in the United States,[182] the effects of the preliminary measures are essentially modifiable or revocable by the court, particularly at the request of the defendant or of third parties.

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179. *See* the Politico Administrative Chamber decision n° 488 of March 16, 2000, *Constructora Pedeca, C.A. vs. Gobernación del Estado Anzoátegui* case, in REVISTA DE DERECHO PÚBLICO, n° 81, Editorial Jurídica Venezolana, Caracas, 2000, p. 459.

180. *See* TABB & SHOBEN, *supra* note 53 at 63.

181. *See* 43A C.J.S. INJUNCTIONS § 305 (2004).

182. *See, e.g.*, 43A C.J.S. INJUNCTIONS § 368 (2004).

On the other hand, the preliminary measures have effects during the course of the procedure, finishing with the definitive decision granting or rejecting the amparo. Nonetheless, if the final decision grants the amparo, the effects of the preliminary measures will be kept and will be converted if definitive.

XIII. THE DEFINITVE JUDICIAL ADJUDICATION ON MATTERS OF AMPARO

Regarding the definitive judicial decisions in the amparo proceedings, their purpose for the injured party (the plaintiff) is to obtain the requested judicial protection (*amparo*) of his constitutional rights when illegitimately harmed or threatened by an injuring party (the defendant).

Consequently, the final result of the amparo process, characterized by its bilateral nature that imposes the need for the defendants to have the right to participate and to be heard,[183] is a formal judicial decision or order issued by the court. Such order, as is also the case with the injunctions, is for the protection of the threatened rights or to restore the enjoyment of the harmed party, which can consist, for instance, of a decision commanding or preventing an action, or commanding someone to do, not to do or to undo some action.[184] This is to say, the amparo, as the injunction,[185] is a writ framed according to the circumstances of the case commanding an act that the court regards as essential to justice, or restraining an act that it deems contrary to equity and good conscience.

Consequently, the function of the amparo court's decision is, on the one hand, to prevent the defendant from inflicting further injury on the plaintiff that can be of a prohibitory or mandatory

183. Similarly, regarding definitive injunctions, they only can be granted if process issues and service is made on the defendant. *See, e.g.*, 43A C.J.S. INJUNCTIONS § 304 (2004).

184. In the United States' injunction, the order can be "commanding or preventing virtually any type of action". 43A C.J.S. INJUNCTIONS § 1 (citing Dawkins v. Walker, 794 So. 2d 333 (Ala. 2001); Levin v. Barish, 481 A.2d 1183 (Pa. 1984). The injunction may also be imposed to command an individual to redress some wrong or other injury." 43A C.J.S. INJUNCTIONS § 1 (citing . State Game & Fish Com'n v. Sledge, 42 S.W.3d 427 (Ark. 2001). "It is a judicial order requiring a person to do or refrain from doing certain acts" 43A C.J.S. INJUNCTIONS § 1 (citing. Skolnick v. Altheimer & Gray, 730 N.E.2d 4 (Ill. 2000). The order requires an individual to refrain "for any period of time, no matter its purpose." 43A C.J.S. INJUNCTIONS § 1 (citing Sheridan County Elec. Co-op v. Ferguson, 227 P.2d 597 (Mont. 1951)).

185. 43A C.J.S. INJUNCTIONS § 1 (2004).

character; or on the other hand, to correct the present by undoing the effects of a past wrong.[186]

That is why the amparo judicial order in Venezuela, as in all Latin American countries, even without the distinction between equitable remedies and extraordinary law remedies, is very similar in its purposes and effects not only to the United States' injunction, but also to the other equitable and non-equitable extraordinary remedies, like the mandamus, prohibition and declaratory legal remedies. Accordingly, for instance, the amparo order can be first, of a prohibitory character, similar to the prohibitory injunctions issued to restrain an action, to forbid certain acts or to command a person to refrain from doing specific acts. Second, it can also be of a mandatory character, that is, like the mandatory injunction requiring the undoing of an act, or the restoring of the status quo. The amparo may also act 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,[187] which normally happens in the cases of amparo actions filed against judicial decisions. Fourth, 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 courts have very extensive powers to provide for remedies in order to effectively protect constitutional rights, issuing final adjudication orders to do, to refrain from doing, to undo or to prohibit,[188] or as the Amparo Law establishes in Article 32,b the decision must "determine the conduct to be accomplished."[189]

The judicial amparo order can be of a restorative or of a preventive nature. In the first case, it may consist of an order seeking for the reestablishment of the juridical situation of the plaintiff to the stage it had before the violation or to the most similar one. In the second case, when of a preventive nature, it can consist in compel-

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186. This is similar to the "preventive injunction" and to the "restorative or reparative injunction," in the United States. *See* TABB & SHOBEN, *supra* note 53, at 86-89; 43A C.J.S. INJUNCTIONS § 8 (2004).

187. *See* TABB & SHOBEN, *supra* note 53, at 86, 246; 43A C.J.S. INJUNCTIONS § 5 (2004).

188. *See* BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 143.

189. CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 185 ff., 327 ff.; Brewer-Carías, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 399.

ling the defendant to do or to refrain from doing certain acts in order to maintain the enjoyment of the plaintiff's rights. Nonetheless, in the case of being of a restorative character, in general terms, when the amparo action is filed against acts, particularly authorities' acts causing the harms or threats to constitutional rights, the immediate effect of the decision is to suspend the effects of the challenged act regarding the plaintiff, the amparo proceeding not having the purposes of annulling those state acts. In principle, it is for the Constitutional Jurisdiction and for the Administrative Jurisdictions' courts and not for the amparo judges to adopt decisions annulling statutes or administrative acts.

In particular, regarding statutes and specifically self-executing ones, when an amparo action is filed directly against them,[190] the amparo judge when granting the amparo has no power to annul them, and in order to protect the harmed or threatened right he can declare their inapplicability to the plaintiff in the particular case. The competence to annul statutes is exclusively granted to the Constitutional Chamber of the Supreme Tribunal of Justice.[191]

Regarding administrative acts, the general rule is also that the amparo decision cannot annul the challenged administrative act, being that the amparo judge is only empowered to suspend its effects and application to the plaintiff. The power to annul administrative acts is also exclusively a power attributed to the Administrative Jurisdiction courts.[192]

Conversely, regarding the amparo actions filed against judicial decisions, the effects of the ruling granting the amparo protection consists in the annulment of the challenged judicial act or decision.[193]

Another aspect that must be mentioned regarding amparo decisions in Venezuela is that it has no compensatory character[194] be-

190. CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 468 ff.; BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 399.

191. VENEZ. CONST. ART. 336.

192. VENEZ. CONST. ART. 2591. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 358 ff.; Brewer-Carías, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 144 & 400.

193. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 511; BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5 at 297; BREWER-CARÍAS, *El problema del amparo contra sentencias o de cómo la Sala de Casación Civil remedia arbitrariedades judiciales, supra* note 123, at 157–71.

194. In a similar way to the United States injunctions. *See Simenstad v. Hagen*, 126 N.W.2d 529 (Wis. 1964).

cause it is the function of the courts in these proceedings only to protect the plaintiff's rights and not to condemn the defendant to pay the plaintiff any sort of compensation for damages caused by the injury.[195] That is, the amparo proceeding is, in general terms, a preventive and restorative process, but not a compensatory one,[196] the courts being empowered to prevent harms or to restore the enjoyment of a right, for instance by suspending the effects of the injuring act, but not to condemn the defendant to the payment of a compensation. The judicial actions tending to seek compensation from the defendant, because of its liability as a consequence of the injury inflicted to the constitutional right of the plaintiff, must be filed by means of a separate ordinary judicial remedy established for such purpose before the civil or administrative judicial jurisdiction.[197]

Finally, regarding the economic consequences of the amparo suit, in Venezuela the order to pay the costs is established in a very restrictive way, only in cases of amparo actions filed against individuals and not against public authorities.[198]

Another important aspect of the amparo definitive decisions is related to their effects. The general rule regarding the amparo judicial decisions is that they only have *inter partes* effects, that is, between the parties that have been involved in the suit (the plaintiff, the defendant and the third parties) and those that have participated in the process. So in a similar way to the injunctive decisions in the United States,[199] the amparo decisions only have binding effects regarding the parties to the suit, and only regarding the controversy; this being the most important consequence of the personal character of the amparo, as an action mainly devoted for the protection of personal constitutional rights or guarantees.[200]

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195. For instance in the case of an illegitimate administrative order issued by a municipal authority demolishing a building, if executed, even if it violates the constitutional right to property, the amparo action has not the purpose to compensate, being in this case inadmissible, particularly due to the irreparable character of the harm.

196. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 185, 242, 262, 326, 328; BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 143.

197. Article 27 of the Venezuelan Amparo Law also expressly provides that in cases of granting an amparo, the court must send copy of the decision to the competent authority where the public officer causing the harm works, in order to impose the corresponding disciplinary measures. Venez. Amparo Law, Art. 27.

198. Venez. Amparo Law, Art. 33.

199. *See,e.g.*, ESP Fidelity Corp. v. Dep't of Hous. & Urban Dev., 512 F.2d 887 (9th Cir. 1975).

200. The Venezuelan regulations can be highlighted in this regard. In principle, the court decisions have been constant in granting the action of amparo a personal character

The only exception to this principle in the United States refers to the effects of the ruling when constitutional questions are decided by the Supreme Court, in which cases, due to the doctrine of precedent (*stare decisis*), all courts are obliged to apply the same constitutional rule in cases with similar controversies.[201] The same rule exists in Venezuela regarding the Constitutional Chamber rulings[202] that can be issued with binding general character and effects.

Nonetheless, the general principle of the *inter partes* effects also has its exceptions due to the progressive development of the collective nature of some constitutional rights, as for instance, is the case of violation of environmental rights, indigenous people's rights and other diffuse rights,[203] in which cases,[204] the definitive ruling can benefit other persons different to those that have actively participated in the procedure as plaintiff. In these cases, due to the constitutional provision regarding the protection of diffuse or collective interests, the Constitutional Chamber of the Supreme Tribunal has admitted action for amparo seeking the protection and enforcement of those collective interests, including for instance, voting rights. In such cases, the Chamber has even granted *erga omnes* effects to the precautionary measures adopted "for both the individuals and entities that have filed the action for constitutional protection and to all the voters as a group."[205] In

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where the standing belongs firstly to "the individual directly affected by the infringement of constitutional rights and guaranties." *See, e.g.*, the decision n° 94 of the Constitutional Chamber of Mar. 15, 2000, *Corporación 18.625 C.A.* case, in REVISTA DE DERECHO PÚBLICO, n° 81, Editorial Jurídica Venezolana, 2000, pp. 322–23.

201. *See* ABERNATHY & PERRY, *supra* note 16, at 5.

202. VENEZ. CONST. ART. 336.

203. *See* CHAVERO, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA, *supra* note 5, at 333.

204. As also happens regarding the class actions in the United States. *See* ABERNATHY & PERRY, *supra* note 16, at 6.

205. *See* Decision of the Constitutional Chamber n° 483 of May 29, 2000, *"Queremos Elegir" y otros* case, *in* REVISTA DE DERECHO PÚBLICO, n° 82, Editorial Jurídica Venezolana, 2000, pp. 489–491. In the same sense, decision of the same Chamber n° 714 of July 13, 2000, *APRUM* Case, in REVISTA DE DERECHO PÚBLICO, n° 83, 2000, Editorial Jurídica Venezolana, pp. 319 ff. The Constitutional Chamber has decided that "any individual is entitled to bring suit based on diffuse or collective interests" and has extended "standing to companies, corporations, foundations, chambers, unions and other collective entities, whose object is the defense of society, as long as they act within the boundaries of their corporate objects, aimed at protecting the interests of their members regarding those objects." *See* Decision of the Constitutional Chamber n° 656 of May 6, 2001, *Defensor del Pueblo vs. Comisión Legislativa Nacional* Case, available at http://www.tsj.gov.ve/decisiones/scon/Junio/656-300600-00-1728%20.htm. See also decision n° 379 of Feb. 26, 2003, *Mireya Ripanti et vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)* case, in REVISTA DE DERECHO PÚBLICO, n° 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ff.

addition, the Office of the People's Defendant has the authority to promote, defend, and guard constitutional rights and guaranties "as well as the legitimate, collective or diffuse interests of the citizens,"[206] being consequently his standing admitted to file actions for amparo on behalf of the citizens as a whole.[207] In all these cases, the judicial ruling benefits all the persons enjoying the collective rights or interest involved.

On the other hand, as all definitive judicial decisions, the amparo decisions also have *res judicata* effects, providing stability to the ruling. That means that the courts' decisions are binding not only for the parties in the process or its beneficiaries, but also regarding the court itself, which cannot modify its ruling (immutability). *Res judicata* implies then, the impossibility for a new suit to take place regarding the same matter already adopted, or that a decision is issued in a different sense than the one already decided in a previous process.[208] Nonetheless, on this matter, of the *res judicata* effects, the scope of those effects is different when referring to the so-called "substantive" (*material*) or to the "formal" *res judicata* effects. In general terms, the concept of "formal *res judicata*" effects applies to judicial decisions that even when enforced do not impede the development of a new process between the same parties, provided that the matter has not been decided in the amparo proceeding on the merits of the case and its defense. On the other hand, the concept of "substantive *res judicata*" effects applies when the judicial decision has been decided on the merits, not allowing for other processes to develop regarding the same matter.

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206. VENEZ. CONST. ART. 280 & 281,2.

207. In one case the Defender of the People acted against a threat by the 2000 National Legislative Commission to appoint the Electoral National Council members without fulfilling constitutional requirements. In that case, the Constitutional Chamber decided that "the Defender has standing to bring actions aimed at enforcing diffuse and collective rights or interests" without requiring the acquiescence of the society on whose behalf he acts, but this provision does not exclude or prevent citizens' access to the judicial system in defense of diffuse and collective rights and interests. Decision of the Constitutional Chamber n° 656 of May 6, 2001, *Defensor del Pueblo vs. Comisión Legislativa Nacional* case, available at http://www.tsj.gov.ve/decisiones/scon/Junio/656-300600-00-1728%20.htm.

208. In contrast, these *res judicata* effects, as a general rule, are not applicable to the injunction orders in the United States, which can be modified by the court. As it has been summarized regarding the judicial doctrine on the matter: "Injunctions are different from other judgments in the context of *res judicata* because the parties are often subject to the court's continuing jurisdiction, and the court must strike a balance between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." Town of Durham v. Cutter, 428 A.2d 904 (N.H. 1981). *See also* FISS & RENDLEMAN, *supra* note 32, at 497–98, 526.

The matter decided in the amparo proceeding, that is the merits of the case, is related to the manifest illegitimate and arbitrary harm or threat caused by an identified injuring party to the constitutional right or guarantees of the plaintiff; a matter that is to be resolved in a brief and prompt procedure. Thus, the merits on the matters in the amparo proceeding are reduced to determining the existence of such illegitimate and manifest violation of the right, regardless of the other possible matters that can or may be resolved by the parties in other processes. In this regard, Article 36 of the Venezuelan Amparo Law, giving a different approach regarding the substantive or formal *res judicata* effects[209] provides that "[t]he definitive amparo decision will produce legal effects regarding the right or guaranty that has been the object of the process, without prejudice of the actions or recourses that legally correspond to the parties."[210]

According to this provision, *res judicata* in the amparo proceeding only refers to what has been argued and decided in the case regarding the violation or injury inflicted to a constitutional right or guarantee.[211] Thus, in general terms, the amparo decision does not resolve all the other possible matters that could be raised, but only the aspect of the violation or injury to the constitutional rights or guarantees; this being the only aspect regarding which the decision can produce *res judicata* effects. For example, if an amparo decision is issued regarding an administrative act because it causes harm to constitutional rights, it only has restorative or reestablishing effects, suspending the application of the challenged act, but it does not have annulling effects.[212] Consequently,

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209. In this regard, the First Court on Judicial Review of Administrative Actions, in a decision dated Oct. 16, 1986, the *Pedro J. Montilva* case, decided that if in a case:
the action of amparo is filed with the same object, denouncing the same violations, based on the same motives and with identical object as the previous one and directed against the same person, then it is evident that in such case, the res judicata force applies in order to avoid the rearguing of the case, due to the fact that the controversy to be resolved has the same subjective and objective identity than the one already decided.
See REVISTA DE DERECHO PÚBLICO, n° 28, Editorial Jurídica Venezolana, Caracas, 1986, p. 106. *See also* Chavero, EL NUEVO RÉGIMEN DEL AMPARO CONSTITUCIONAL EN VENEZUELA *supra* note 5, at 338 ff.; GUSTAVO LINARES BENZO, EL PROCESO DE AMPARO EN VENEZUELA, Caracas, 1999, p. 121.

210. Venez. Amparo Law, Art. 36.

211. *See* First Court on Judicial Review of Administrative Action, decision of Oct. 16, 1986, *Pedro Montilva* case, in REVISTA DE DERECHO PÚBLICO, n° 28, Editorial Jurídica Venezolana, Caracas, 1986, p. 106.

212. Due to this fact, by means of the amparo suit, as it has been ruled by the Supreme Court of Venezuela, "none of the three types of judicial declarative, constitutive or to condemn decision can be obtained, nor, of course, the interpretative decision." Decision n° 211 of the Politico Administrative Chamber of July 15, 1992, *Comité Campesino Provisional*

the amparo decision in such cases does not have *res judicata* effects regarding the judicial review action that can be filed against the administrative act before the Administrative Jurisdiction Courts in order to have its nullity declared.[213]

In these cases, after the amparo decision has been issued, other legal questions can remain pending to be resolved in other processes, and that is why the amparo decision in these cases is issued "without prejudice of the actions or recourses that could legally correspond to the parties."[214]

One last aspect that must be highlighted regarding the effects of the amparo decision refers to its obligatory character. As all judicial decisions, the amparo ruling is obligatory not only for the parties to the process but regarding all other persons or public officers that it applies to. The defendant, for instance, is compelled to immediately obey it, as it is expressly set forth in the Amparo Law.[215]

In order to execute the decision, the courts, *ex officio* or at the party's request, can adopt all the measures directed to its accomplishment. Yet the amparo judges in Venezuela do not have direct power to punish by imposing criminal sanctions for disobedience of their rulings. In other words, they do not have criminal contempt power, which in contrast is one of the most important features of the injunctive relief system in the United States.[216] These con-

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Corocito, in REVISTA DE DERECHO PÚBLICO, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, pp. 171 ff.

213. *See* BREWER-CARÍAS, INSTITUCIONES POLÍTICAS Y CONSTITUCIONALES, TOMO V, EL DERECHO Y LA ACCIÓN DE AMPARO, *supra* note 5, at 346.

214. Venez. Amparo Law, Art. 36.

215. Venez. Amparo Law, Art. 29-30.

216. This is particularly important regarding criminal contempt, which was established since the *In Re Debs* case, where according to Justice Brewer who delivered the Court's opinion, it was ruled:

> But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its order it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceedings of half its efficiency.

158 U.S. 564, 594-95 (1895).

In *Watson v. Williams*, it was said:

> The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as the necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.

tempt powers are precisely what gave the injunction in the United States its effectiveness regarding any disobedience, being the same court empowered to vindicate its own power by imposing criminal or economic sanctions by means of imprisonment and fines. In Venezuela, in contrast, the amparo courts do not have such powers, and regarding the application of criminal sanctions to the disobedient party, the amparo courts or the interested party must seek for the initiation of a judicial criminal procedure against the disobedient to be brought before the competent criminal courts.[217]

Due to the general by-instance procedural principle, the amparo decisions can be appealed before the superior courts according to the general rules established in the procedural codes. This general principle, of course, does not apply when the decision is adopted by the Supreme Tribunal. Consequently, the amparo decisions can only be adopted by the Supreme Tribunal, when having original jurisdiction, when deciding on appellate jurisdiction or when an extraordinary mean for revision is filed, similar to the writ for certiorari in the United States. In effect, particularly when constitutional issues are involved, the United States Supreme Court, when considering a petition for a writ of certiorari, is authorized to review all the decisions of the federal courts of appeals, and of the specialized federal courts, and all the decisions of the supreme courts of the states involving issues of federal law, but on a discretionary basis. In all such cases where there is no right of appeal and no mandatory appellate jurisdiction of the Supreme Court established, the cases can reach the Supreme Court as petitions for certiorari, when a litigant who has lost in a lower court and petitions a review in the Supreme Court, setting out the reasons why review should be granted.[218] This method of seeking review by the Supreme Court is expressly established in the cases set forth in the Title 28 of the United States Code, and according to Rule 10 of the Rules of the Supreme Court adopted in 2005, where it is established as not being "a matter of right, but of judicial discretion," granted only "for compelling reasons," that is, when there are special and important reasons.[219]

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36 Miss. 331, 341 (Hight Ct. of Errors & Appeals 1858). *See also* FISS & RENDLEMAN, *supra* note 32, at 13; TABB & SHOBEN, *supra* note 53, at 72.

217. Venez. Amparo Law, Art. 31.

218. *See* LAWRENCE BAUM, THE SUPREME COURT 81 (1st ed. 1981).

219. SUP. CT. R. 10.

According to this rule, to promote uniformity and consistency in federal law, the following factors might prompt the Supreme Court to grant certiorari: (1) Important questions of federal law on which the court has not previously ruled; (2) Conflicting interpretations of federal law by lower courts; (3) Lower courts' decisions that conflict with previous Supreme Court decisions; and (4) Lower courts' departures from the accepted and usual course of judicial proceedings.[220]

Of course, review may be granted on the basis of other factors, or denied even if one or more of the above-mentioned factors is present. The discretion of the Supreme Court is not limited, and it is the importance of the issue and the public interest considered by the Court in a particular case that leads the Court to grant certiorari and to review some cases.

In countries with a mixed system of judicial review, as is the case in Venezuela, the appellate jurisdiction of the Constitutional Chamber of the Supreme Court as Constitutional Jurisdictions, in order to review lower courts' decisions on constitutional matters, is also established in a discretionary basis,[221] and by means of an extraordinary recourse for review, regarding lower courts decisions applying the diffuse method and also the decisions issued on amparo proceedings (Article 336,10).[222]

In this matter, in Venezuela, the Constitutional Chamber of the Supreme Court, as Constitutional Jurisdiction, has developed *ex officio* powers for reviewing lower courts' decisions on constitutional matters, without any constitutional or statutory support. Based on the aforementioned power of the Constitutional Chamber to review in a discretionary way lower courts' decisions on constitutional matters of importance, the Constitutional Chamber distorting its constitutional review powers, has extended it to other decisions different from those issued on judicial review cases or on amparo proceedings, as established in the constitution.[223] Through obligatory judicial doctrine, the Chamber extended its review power regarding any other judicial decision issued in any matters when it considers it contrary to the constitution, a power that the Chamber considered authorized to exercise although

220. *Id. See also* RALPH. A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW. CASES AND INTERPRETATION, 28 (1st ed. 1983).

221. This occurs in a similar way to the operation of the writ of certiorari in the United States. *See* JESÚS MARÍA CASAL, CONSTITUCIÓN Y JUSTICIA CONSTITUCIONAL, 92 (1st ed. 2002).

222. VENEZ. CONST. ART. 336.10 (1999)..

223. VENEZ. CONST. ART. 336.10 (1999)..

without any constitutional provision, even *ex officio*. These review powers have also been developed in cases of particular judicial decisions when considered contrary to a Constitutional Chamber interpretation of the constitution, or when considered a grievous error regarding constitutional interpretation.[224]

On the other hand, since 2004, the Organic Law of the Supreme Tribunal, following such doctrine established by the same Tribunal, gave general powers to all the Chambers of the Tribunal to take away cases (*avocamiento*) from the jurisdiction of lower courts, also *ex officio* or through a party petition, when considered convenient, and to decide them.[225] This power, which has been highly criticized because it breaches due process rights, and particularly, the right to trial in a by-instance basis by the courts, has allowed the Constitutional Chamber to intervene in any kind of process, including cases being trialed by the other Chambers of the Supreme Tribunal, with very negative effects. For instance, the Constitutional Chamber power was used in order to annul a decision issued by the Electoral Chamber of the Supreme Tribunal[226] seeking to protect the citizens' right to political participation, in which the latter suspended the effects of a decision of the National Electoral Council (Resolution n° 040302-131 of Mar. 2, 2004), objecting to the presidential repeal referendum petition of 2004. The Constitutional Chamber, in this way, by means of a decision n° 566 of April 12, 2004, interrupted the process that was normally developing before the Electoral Chamber of the Supreme Tribunal, took away the case from such Chamber, and annulling its decision, decided in a contrary sense, according to what was the

224. *See* Decision n° 93 of Feb. 6, 2001, *Olimpia Tours and Travel vs. Corporación de Turismo de Venezuela* case, in REVISTA DE DERECHO PÚBLICO, N° 85-88, Editorial Jurídica Venezolana, Caracas, 2001, pp. 414–15. *See* also Allan R. Brewer-Carías, *Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación*, in VIII CONGRESO NACIONAL DE DERECHO CONSTITUCIONAL, PERÚ, SEPT. 2005, Fondo Editorial, Colegio de Abogados de Arequipa, Arequipa, 2005, pp. 463–89.

225. *See* Article 25.16 of the *Ley Orgánica del Tribunal Supremo de Justicia*, GACETA OFICIAL No. 5991 Extra. of July 29, 2010. *See* Allan R. Brewer-Carías, *Crónica de la* "IN"JUSTICIA CONSITUTICIONAL. LA SALA CONSTITUCIONAL Y EL AUTORITARISMO EN VENEZUELA, Editorial Jurídica Venezolana 91 (2007).

226. *See* Decisions n° 24 of Mar.15, 2004, (Exp. AA70-E 2004-000021; Exp. x-04-00006); and n° 27 of Mar. 29, (*Julio Borges, César Pérez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón José Medina y Gerardo Blyde vs. Consejo Nacional Electoral* case (Exp. AA70-E-2004-000021- AA70-V-2004-000006). *See* REVISTA DE DERECHO PÚBLICO, n° 97-98, Editorial Jurídica Venezolana, Caracas, 2004, pp. 373 ff.

will of the executive, restricting the people's right to participate through petitioning referendums.[227]

XIV. CONCLUSIONS

The two century tradition of Venezuelan constitutions of inserting very extensive declarations on human rights, has proven that in order for human rights to be effectively protected, independently of such formal declarations, the most important and necessary tool is to have not only effective judicial remedies for the immediate protections of rights, but an independent and autonomous judiciary.

Due to the traditional inefficacy of the ordinary and extraordinary judicial remedies that in other countries have proven to be effective for the protection of rights, in Venezuela, since 1961, the constitution has incorporated an express provision regarding the judicial guarantee of constitutional rights, establishing a specific judicial remedy for its protection, called the amparo action or proceeding, having different procedural rules when compared with the general judicial remedies that the legal system provides for the protection of personal or property rights. As it has been analyzed, this constitutional feature is one of the most important of Latin America constitutional law, particularly when contrasted with the constitutional system of the United States or of the United Kingdom, where the protection of human rights is effectively carried on through the general judicial actions and equitable remedies, that are also used to protect any kind of personal or property rights or interests.

This amparo remedy has been a very effective mean for the protection of constitutional rights, particularly in democratic regimes where the Judiciary has been preserved as an independent branch of government. Consequently, even providing in the constitution for this specific remedy of amparo to assure the immediate protection of constitutional rights, the very essence of its effectiveness is the existence of an independent and autonomous judiciary that could effectively protect human rights. Unfortunately, in the Latin American countries, the judiciary has not always accomplished its fundamental duty, so that in spite of the constitutional declara-

227. *See* in ALLAN R. BREWER-CARÍAS, LA SALA CONSTITUCIONAL VERSUS EL ESTADO DEMOCRÁTICO DE DERECHO. EL SECUESTRO DEL PODER ELECTORAL Y DE LA SALA ELECTORAL DEL TRIBUNAL SUPREMO Y LA CONFISCACIÓN DEL DERECHO A LA PARTICIPACIÓN POLÍTICA, Los Libros de El Nacional, Colección Ares, Caracas, 2004.

tions and provisions for amparo, many countries have faced, and others are still facing, a rather dismal situation regarding the effectiveness of the Judiciary as a whole, as an efficient and just protector of fundamental rights.

That is why, in spite of the extensive constitutional declarations of rights, in order to achieve the aims of the State of Justice, the most elemental institutional condition needed in any country, is the existence of a really autonomous and independent judiciary, out of the reach and control from the other branches of government, empowered to interpret and apply the law in an impartial way and protect citizens, particularly when referring to the enforcement of rights against the state. Such judiciary has to be built upon the principle of separation of powers. If this principle is not implemented and the government controls the courts and judges, no effective guarantee can exist regarding constitutional rights, particularly when the offending party is a governmental agency. In this case, and in spite of all constitutional declarations, it is impossible to speak of rule of law, as happens in many Latin American countries.

This is important, precisely on matters of amparo, particularly when the petition is filed against a government or authoritative act, in which case, no judicial protection can be given if the government controls the judiciary. Just one example can highlight this situation. In a case developed in Venezuela in 2003, where as a consequence of an amparo decision, the Judicial Review of Administrative Action Jurisdiction (*Jurisdicción contencioso-administrativa*) was intervened by the government, after being for three decades a very important autonomous and independent jurisdiction in order to control the legality of Public Administration activities.

In effect, in 2003 the Mayor of Caracas, the Ministry of Health and the Caracas Metropolitan Board of Doctors (*Colegio de Médicos*) decided to hire Cuban doctors for an important popular governmental health program in the Caracas slums, but without complying with the legal conditions established for foreign doctors to practice the medical profession in the country. Based on the democratic tradition the country had since 1958 in matters of control and review of Public Administration actions, on July 17, 2003, the Venezuelan National Federation of Doctors brought before the aforementioned Judicial Review of Administrative Actions highest Court in Caracas (First Court) a nullity claim against the aforementioned decision The National Federation of Doctors considered that the program was discriminatory and against the rights of

Venezuelan doctors to exercise their medical profession, allowing foreign doctors to exercise it without complying with the Medical Profession Statute regulations. The consequence was the filing of an amparo petition against both public authorities, seeking the collective protection of the Venezuelan doctors' constitutional rights.[228]

One month later, in August 21, 2003, the First Court issued a preliminary protective amparo measure, considering that there were sufficient elements to deem that the equality before the law constitutional guarantee was violated in the case. The Court ordered in a preliminary way the suspension of the Cuban doctors' hiring program and ordered the Metropolitan Board of doctors to substitute the Cuban doctors already hired, by Venezuelan ones or foreign doctors who had fulfilled the legal regulations in order to exercise the medical profession in the country.[229]

Nonetheless, in response to that preliminary judicial amparo decision, instead of enforcing it, the Minister of Health, the Mayor of Caracas, and even the President of the Republic made public statements to the effect that the decision was not going to be respected or enforced.[230] Following these statements, the government-controlled Constitutional Chamber of the Supreme Tribunal of Justice adopted a decision, without any appeal being filed, assuming jurisdiction over the case and annulling the preliminary amparo ordered by the First Court; a group of Secret Service police officials seized the First Court's premises; and the President of the Republic, among other expressions he used, publicly called the President of the First Court a "bandit."[231] A few weeks later, in response to the First Court's decision in an unrelated case challenging a local registrar's refusal to record a land sale, a Special Commission for the Intervention of the Judiciary, which in spite of being unconstitu-

228. *See* Claudia Nikken, *El caso "Barrio Adentro": La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos*, REVISTA DE DERECHO PÚBLICO, n° 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 5 ff.

229. *See* Decision of Aug. 21, 2003; *Id.* at 445.

230. The President of the Republic said: "*Váyanse con su decisión no sé para donde, la cumplirán ustedes en su casa si quieren . . .* " ("You can go with your decision, I don't know where; you will enforce it in your house if you want . . . "). *See* EL UNIVERSAL, Caracas Aug. 25, 2003 and EL UNIVERSAL, Caracas Aug. 28, 2003.

231. *See Apitz-Barbera et al. ("First Court on Judicial Review of Administrative Actions") v. Venezuela*, Inter-Am. Ct. H.R., ser. C No. 182, Aug. 5, 2008, available at http://www.corteidh.or.cr. Excepción Preliminar, Fondo, Reparaciones y Costas, Serie C, N° 182.

tional continued to exist, dismissed all five judges of the First Court.[232] In spite of the protests of all the bar associations of the country and also of the International Commission of Jurists;[233] the First Court remained suspended without judges, and its premises remained closed for about nine months,[234] a period during which simply no judicial review of administrative action could be sought in the country.[235]

The dismissed judges of the First Court brought a complaint to the Inter-American Commission of Human Rights for the government's unlawful removal of them and for violation of their constitutional rights. The Commission, in turn, brought the case, captioned *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo vs. Venezuela)* before the Inter-American Court of Human Rights. On August 5, 2008, the Inter-American Court ruled that the Republic of Venezuela had violated the rights of the dismissed judges established in the American Convention of Human Rights, and ordered the state to pay them due compensation, to reinstate them to a similar position in the Judiciary, and to publish part of the decision in Venezuelan newspapers.[236] Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal issued Decision No. 1.939, declaring that the August 5, 2008 decision of the Inter-American Court of Human Rights was unenforceable (*inejecutable*) in Venezuela. The Constitutional Chamber also accused the Inter-American Court of having

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232. *See* EL NACIONAL, Nov. 5, 2003, at A2. The dismissed President of the First Court said: "La justicia venezolana vive un momento tenebroso, pues el tribunal que constituye un último resquicio de esperanza ha sido clausurado." ("The Venezuelan judiciary lives a dark moment, because the court that was a last glimmer of hope has been shut down."). *Id.* The Commission for the Intervention of the Judiciary had also massively dismissed almost all judges of the country without due disciplinary process, and had replaced them with provisionally appointed judges beholden to the ruling power.

233. *See* in EL NACIONAL, Caracas Oct. 10, 2003, at A6; EL NACIONAL, Caracas Oct. 15, 2003, at A2; *El Nacional*, Caracas Sept. 24, 2003, at A4; EL NACIONAL, Caracas Feb. 14, 2004, at A7.

234. *See* EL NACIONAL, Caracas Oct. 24, 2003, A2; and EL NACIONAL, Caracas July 16, 2004, at A6.

235. *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, Madrid 2007, 25–57.

236. *Apitz-Barbera et al. ("First Court* on Judicial Review *of* Administrative Actions*") v. Venezuela,* Inter-Am. Ct. H.R., ser. C No. 182, Aug. 5, 2008, available at http://www.corteidh.or.cr. Excepción Preliminar, Fondo, Reparaciones y Costas, Serie C, N° 182..

usurped powers of the Supreme Tribunal of Justice, and asked the executive branch to denounce the American Convention of Human Rights.[237]

In general terms, this was the global governmental response to an amparo judicial preliminary decision that affected a very sensitive governmental social program; a response that was expressed and executed through the government-controlled judiciary.[238] The result was that the subsequent newly appointed judges replacing those dismissed, began to "understand" how they needed to behave in the future. That same Commission for the Intervention of the Judiciary, as mentioned, was the one that massively dismissed without due disciplinary process almost all judges of the country, substituting them with provisionally appointed judges, thus dependent on the ruling power, who in 2006 were granted permanent status without complying with the constitutional provisions.[239]

This emblematic case, contrasted with the very progressive text of the constitution in force in Venezuela (1999), which contains one of the most extensive declaration of constitutional rights in all Latin America, including the provision for the amparo action, even considering it as a constitutional right; shows that the judicial guarantee of constitutional rights always requires an independent and autonomous judiciary, conducted out of the reach of the government. On the contrary, with a judiciary controlled by the executive, as the aforementioned Venezuelan case illustrates, the

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237. Supreme Tribunal of Justice, Constitutional Chamber, Decision n° 1.939 of Dec. 18, 2008, *Abogados Gustavo Álvarez Arias et al.* case, (Exp. No. 08-1572), in REVISTA DE DERECHO PÚBLICO, n° 116, Editorial Jurídica Venezolana, Caracas 2008, pp. 89-96.

238. *See* Allan R. Brewer-Carías, *La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999–2004*, XXX JORNADAS J.M DOMÍNGUEZ ESCOVAR, ESTADO DE DERECHO, ADMINISTRACIÓN DE JUSTICIA Y DERECHOS HUMANOS, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174.

239. In this regard, the Venezuelan 1999 Constitution established, in general terms, the regime for entering the judicial career and promotion only "through public competition that assures suitability and excellence," guarantying "citizen's participation in the procedure of selection and appointment of the judges." The consequence is that they may not be removed or suspended from their positions except through a legal proceeding before a disciplinary jurisdiction. VENEZ. CONST. ART. 255. This, again, unfortunately is just a theoretical aim, because all contests for judge's appointment have been suspended since 2002. Almost all judges are being provisionally appointed without citizen participation, and there is no disciplinary jurisdiction for their dismissal. Furthermore, the suspension and dismissal of all judges corresponds to a commission for the intervention of the judiciary that is not regulated in the constitution. *See* Inter-American Commission on Human Rights, REPORT ON THE SITUATION OF HUMAN RIGHTS IN VENEZUELA, OEA/Ser.L/V/II.118, doc. 4 rev. 2, Dec. 29, 2003, para. 174. See http://www.cidh.oas.org/country-rep/Venezuela2003eng/toc.htm. See also the *2009 Annual Report*, para.479, available at http://www.cidh.oas.org/annualrep/2009eng/Chap.IV.f.eng.htm

declaration of constitutional rights is a death letter, and the provision of the action for amparo is no more than an illusion. This has been the tragic institutional result of the deliberated process of dismantling democracy to which Venezuela has been subjected during the past decade, through the imposition of an authoritarian government, defrauding the constitution and democracy itself.[240]

New York, August 2010

240. *See* ALLAN R. BREWER-CARÍAS, DISMANTLING DEMOCRACY. THE CHÁVEZ AUTHORITARIAN EXPERIMENT, (1st ed. 2010).