

THE CITIZEN'S ACCESS TO CONSTITUTIONAL JURISDICTION: SPECIAL REFERENCE TO THE VENEZUELAN SYSTEM OF JUDICIAL REVIEW*

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INTRODUCTION

The Citizen's access to Constitutional Jurisdiction, or the possibility for the Citizens to litigate constitutional issues in judicial proceedings, depends on the particular system of judicial review of constitutionality that exists in each country, and on the various judicial means established for such purposes.

Venezuela, as is the case of many Latin American countries, since the nineteenth century has developed a mixed or comprehensive system of judicial review, where the two classical methods of judicial review have been combined: the so called diffuse and concentrated ones. The first, also called decentralized, allows all judges to decide not to apply a statute when it is considered to be against the Constitution, giving prevalence to the latter; and the concentrated one, in which the power to control the constitutionality of legislation is given to one single judicial organ of the State, whether it's Supreme Court or a special Constitutional Court created for such particular purpose. In the Venezuelan case, the Constitutional Chamber of the Supreme Tribunal of Justice.

Nonetheless, judicial review cannot be reduced to these two classical methods, and other judicial means to guaranty the citizen's access to Constitutional Jurisdiction have been developed. Within them, in Latin

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America it must be first mentioned the specific judicial actions for the protection of human rights and constitutional guaranties that also since the XIX century have been adopted, called action for *amparo*, *tutela* or *protección*, *mandado de securanca*, and also the action for *habeas corpus*, and for *habeas data*.

In addition, another specific mean for judicial review, also with Latin American important developments, is the control of the unconstitutionality of Legislative omissions. And in Venezuela, finally, another mean for judicial review is the recourse for the abstract interpretation of the Constitution which also has opened the access of citizens to the Constitutional Jurisdiction.

Consequently, I will try to summarize the Venezuelan system of access of citizens to Constitutional Jurisdiction by referring to these five judicial means in a separate way: the diffuse method, the amparo proceeding, the concentrated method, the control of parliamentary omissions and the recourse for the abstract interpretation of the Constitution.

First, the question of Standing regarding in the diffuse method of judicial review of statutes, which was first established in Venezuela in the 1897 in the Civil Procedure Code, and is now expressly incorporated in the 1999 Constitution, establishing in article 334, that:

In case of incompatibility between this Constitution and a statute or other legal provision, when deciding a case, the courts, even at their own initiative, must give prevalence to the constitutional provisions.

Being an incidental mean for judicial review, in principle, only the parties to a proceeding can raise the constitutional question based on the concrete interest they hold in the trial; and that is why the decision of the judge has only *inter partes* effects in the specific case; that is, only has declarative effects.

This means that only citizens with procedural interest as set forth in the Civil Procedure Code have access to constitutional justice in these cases, that is, they have to be or a plaintiff pleading his own existing personal right or interest against a defendant, or conversely, a defending regarding the plaintiff, (art. 340 CPC). Therefore the plaintiff and the defendant are the parties entitled to raise constitutional issues in the proceeding. Third-parties are entitled to raise these issues as well, as long as they have an actual interest in supporting the reasons of one party, or, in other cases, are authorized by the Civil Procedure Code (art. 370).

Nonetheless, this principle has been modified in the Constitution of 1999 establishing the citizens' right to access to justice not only in order to enforce specific personal rights and interests, but also claiming the enforcement of "collective or diffuse interests" (art. 26), seeking the protection for instance of a number of individuals representing the entire or an important part of a society, like to protect the public welfare against attacks on the quality of life, the environment or to consumers. The same applies to the protection of *collective* interests, referred to a determined and identified sector of the population (even though not quantified), like professional groups, neighbors associations, to labor unions, to the inhabitants of a determined area.

In all these cases of petitions to decide matters of judicial review in a specific case, one of the parties can allege the protection of collective or diffuse interests, based on a common or collective right or interest, like the general damage to the quality of life of all the inhabitants of the country or parts of it.

On the other hand, representing the citizens, the Public Prosecutor, when authorized to intervene, in both civil (art.129 and ff. CCP) and criminal (art. 285, art. 105 Penal Procedural Organic Code) procedures, is entitled as well to raise constitutional issues to the ordinary judge so it will be decided in the specific case.

Finally, Additionally, the Defender of the People's Defender has wide capacity to enforce respect for and the guarantee of human rights and to protect the legitimate, collective, and diffuse rights and interests of persons against illegal actions, power deviations, and mistakes made in the managing of public services. It is entitled to sue and file for remedies. In those procedures, of course, the Defender of the People and the other parties are entitled to raise constitutional issues on behalf of citizens.

II. STANDING IN THE AMPARO PROCEEDING AND THE PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS: THE INJURED PERSON

As with the previous Constitution of 1961, the Constitution of 1999 sets forth the action for *amparo* (protection) as a *constitutional right*,¹ being the courts obliged to protect, within the scope of their jurisdictions, citizens in the

1. See Allan R. Brewer-Carías, *El Derecho y la Acción de Amparo*, Vol.V of *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas-San Cristóbal, 1998, pp. 19 ff.

exercise of their constitutional rights and guarantees (art. 27). By means of this action, the amparo proceeding initiated before the first instance courts a procedure that must be oral, public, brief, and free and without any formality. The judge is entitled to immediately restore the former legal situation or a similar situation.²

This action can only be filed by the citizen affected in his constitutional rights, claiming immediate legal protection; that is, the standing to raise the action of *amparo* belongs to every individual or citizen whose constitutional rights and guarantees are affected.³ Such rights include even those not expressly listed in the Constitution or in international treaties on human rights ratified by the Republic but considered to be inherent in human beings.

Court decisions have been constant in granting the action of *amparo* a personal character. Therefore, standing belongs firstly to the citizen or “the individual directly affected by the infringement of constitutional rights and guarantees,”⁴ not only by state organs, but also by corporations, and even by other individuals.

On matter of amparo, is also possible to filed in order to claim for the protection of diffuse or collective interests, which includes, for instance, voters’ political rights.⁵ In these cases, the Constitutional Chamber has decided that any citizen or “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

2. See *Gaceta Oficial* No.33.891 dated 01-22-88. See in general Allan R. Brewer-Carías and Carlos M. Ayala Corao, *La Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales*, Caracas 1988.

3. Individual, political, social, cultural, educative, economic, Indian and environmental rights and their guarantees are listed in arts. 19-129, Constitution. In Venezuela, there exists no limitation established in other countries (e.g. Germany, and Spain, which reduces the action of amparo to protect just “fundamental rights”). See Allan R. Brewer-Carías, *El Amparo a los derechos y garantías constitucionales (una aproximación comparativa)*, Editorial Jurídica Venezolana, Caracas 1993; and *Judicial Protection of Human Rights in Latin America*, Cambridge University Press, New Yoir, 2009.

4. See for example, decision of the Constitutional Chamber dated 03-15-2000, in *Revista de Derecho Público*, Editorial Jurídica Venezolana, N° 81, 2000, pp. 322-323.

5. Decision of the Constitutional Chamber N° 483 of 05-29-2000 (Case: “Queremos Elegir” y otros), *Revista de Derecho Público*, Editorial Jurídica Venezolana, N° 82, 2000, EJV, pp 489-491. In the same sense, decision of the same Chamber N° 714 of 13-07-2000 (Case: APRUM), in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 319 ff.

corporate objects, aimed at protecting the interests of their members regarding those objects.”⁶

In addition, the Defender of the People has the authority to promote, defend, and guard constitutional rights and guarantees “as well as the legitimate, collective or diffuse interests of the citizens” (art. 280 and 281,2C). The Constitutional Chamber has admitted the standing of the Defender of the People to bring to suit in an action of *amparo* on behalf of the citizens as a whole. In one case the Defender of the People acted against a threat by the National Legislative Commission to appoint 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, since article 26 of the Constitution in force provides access to the judicial system to every person, whereby individuals are entitled to bring suit as well, unless a law denies them that action.⁷

Finally, it must be mentioned that the Constitution of 1999, expressly incorporated the action of *habeas data*, which was originated in Brazil and followed by Peru, Colombia and many other Latin American countries. It is set forth in article 28, as follows:

Every person has the right of access to information and data about himself or his goods filed in official or private records, with exceptions established by law, as well as to know the use of them and their purpose, and to request a competent court to make them up-to-date, to rectify them or destroy them, if they were erroneous or they affect in an illegitimate way his rights. In the same way, he may have access to documents of any kind containing information whose knowledge is interesting to communities or groups of individuals. The secrets of journalistic sources of information and other professions are excepted as determined by law.

6. See decision of the Constitutional Chamber N° 656 of 06-05-2001 (Case: Defensor del Pueblo vs. Comisión Legislativa Nacional), in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 453 ff.

7. *Idem*.

In these cases, it is the citizen or “individual, personally or in his goods, involved” the one entitled to bring the action.⁸

III. THE GENERAL CITIZEN’S ACCESS TO CONSTITUTIONAL JURISDICTION BY MEANS OF THE *ACTIO POPULARIS* FILED AGAINST STATUTES

According to the European model of the concentrated method of judicial review, the citizens do not have access to Constitutional Jurisdiction in order to challenge statutes before the competent Constitutional Court or Tribunal, asking for their annulment based on constitutional questions. In the European countries where the concentrated method of judicial review is applied, in general, only a limited list of public officials has the necessary standing to file constitutional complaints before the Constitutional Jurisdiction. The citizens are excluded from such Jurisdiction.

This is also the general situation in Latin America in the countries where the concentrated method of judicial review is applied, and where in general, also only a limited number of public officials have the necessary standing to challenge the constitutionality of statutes.

Nonetheless, there are a few countries where the situation is completely the contrary, guarantying the effective and broad Citizen’s access to Constitutional Jurisdiction, by means of the filing of a popular action against any statute. It is the case of Colombia, El Salvador, Nicaragua, Panama and Venezuela where the right to have access to Constitutional Jurisdiction has been guarantied to any citizen, without any special standing conditions.

In Venezuela, in this regard, the Constitutional Chamber of the Supreme Tribunal, being the “Constitutional Jurisdiction” of the country, has the power to control the constitutionality of statutes and other acts of organs exercising public power issued in direct and immediate execution of the Constitution or being ranked equal to a law; and to annul them on the grounds of unconstitutionality⁹ (articles 266.1, 334, 336 of the Constitution). For such purpose, the Law has guarantied the citizen’s access to judicial review by

8. Decision N° 332 of the Constitutional Chamber dated 03-14-2001 (Case: Insaca vs. Director de Drogas y Cosméticos del Ministerio de Sanidad y Asistencia Social), in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 483 ff.

9. Arts. 266,1 ; 334 and 336 of the Constitution.

means of *popular action*¹⁰ that can be filed by anyone without any specific standing requirements.

In that sense, according to the 2004 Organic Law of the Supreme Tribunal of Justice,¹¹ any citizen or corporation having legal capacity can file the action of unconstitutionality regarding statutes;¹² and although the challenged statute must affect in some way the “rights or interests” of the plaintiff,¹³ the apparent restriction deriving from this phrase¹⁴ has been cleared up by the former Supreme Court of Justice, considering that it must be interpreted in a “rigorously restrictive” way, due to the fact that its objective is to assure the “defense of the Constitution’s majesty and supremacy.”¹⁵ The Constitutional Chamber of the Supreme Tribunal, in decision N° 1077 dated 08-22-01, specified the following regarding this popular action:

... in our legal order, the popular action of unconstitutionality exists when any individual having capacity to sue, has a procedural and legal interest to raise it, without the requiring the existence of any particular fact harming the plaintiff’s private legal sphere. The claimant is a guardian of constitutionality and that guardianship entitles him to act, whether or not he has suffered a harm coming from the unconstitutionality of a law.¹⁶

The same general right all citizens have to challenge statutes before the Constitutional Jurisdictions in those countries establishing the popular action,

10. Idem, pp.137 ff.

11. See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004.

12. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Vol VI, La justicia constitucional*, op. cit., pp. 144 ff.

13. Cfr. Allan R. Brewer-Carías, *Las Garantías constitucionales de los derechos del hombre*, Editorial Jurídica Venezolana, Caracas 1976, p. 53.

14. See L.H. Faría Mata, “¿Eliminada la Acción Popular del Derecho Positivo Venezolano?”, in *Revista de Derecho Público*, Editorial Jurídica Venezolana, N°11, Caracas 1982, pp. 5-18.

15. Decision of the Plenary Session dated 06-30-82, in *Revista de Derecho Público*, Editorial Jurídica Venezolana, N° 11, Caracas 1982, p.138. According to this criterion, therefore, as the Supreme Court in Plenary Session has said, the popular action “may be exercised by any and all citizens with legal capacity.” Decision dated 11-19-85, in *Revista de Derecho Público*, Editorial Jurídica Venezolana, N° 25, Caracas 1986, p.131.

16. Decision N° 1077 dated 09-22-01, Constitutional Chamber (Case: Servio Tulio León Briceño), in *Revista de Derecho Público*, Editorial Jurídica Venezolana, N° 83, Caracas 2000, pp. 247 ff .

also exists regarding citizens that wants to be a party in the corresponding process before the Constitutional Jurisdiction, whether contesting or defending the challenged act.

IV. THE CITIZEN'S INITIATIVE IN ORDER TO CONTROL THE CONSTITUTIONALITY OF PARLIAMENT'S OMISSIONS

The so-called judicial review of legislative omissions is another new institution of judicial review that following the trend initiated in Portugal,¹⁷ has been established in many Latin American countries, like Brazil and Venezuela. In the latter country, article 336 of the 1999 Constitution grants the Constitutional Chamber the power to:

“Declare the unconstitutionality of the omission of the municipal, state, or national legislative power in failing to issue indispensable rules or measures to guarantee the enforcement of the Constitution, or issuing them in an incomplete way; establishing the terms, and if necessary, the guidelines for their correction.

According to this provision no specific requirement of standing has been established, being possible for any citizen to claim before the Constitutional Jurisdiction against legislative omissions,¹⁸ in a way similar to *a popular action*.

This general Citizen's access to Constitutional Jurisdiction on matters of legislative omissions, contrasts with the initial Portuguese antecedent, where for instance, the standing to sue was reduced to the President of the Republic, the Ombudsman, or the Presidents of the Autonomous Regions.¹⁹

V. THE CITIZENS INICIATIVE IN ORDER TO OBTAIN AN ABSTRACT INTERPRETATION OF THE CONSTITUTION BY THE CONSTITUTIONAL JURISDICTION

Finally, among the competencies of the Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela, acting as “Constitutional

17. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, op.cit., p. 269.

18. The Constitutional Chamber has called it “legislative silence and functioning.” Decision N° 1819 of 08-08-2000 of the Political-Administrative Chamber (Case: Rene Molina vs. Comisión Legislativa Nacional), in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 264 ff.

19. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, op.cit., p. 269.

Jurisdiction,” mention must be made of the power it has to decide requests for abstract interpretation of the Constitution, without being the request related to any constitutional proceeding. The Constitutional Chamber itself has created this judicial mean that do not exist in any other country, from its interpretation of article 335 of the Constitution.²⁰

The purpose of such action of constitutional interpretation that any citizen can file providing having a personal interest on the matter has the purpose of securing a declaration by the Constitutional Chamber on the scope and content of a constitutional provision. It has been regarded as a form of citizen participation in order to clarify the doubts and ambiguities that can exist in some constitutional provisions.²¹ The Constitutional Chamber, in creating the action, in decision No. 1077 dated 09-22-2000, relied on article 26 of the Constitution, which establishes the citizen’s right of access to justice. From this the Chamber deduced that although this action was not set forth in the legal order, it was not forbidden either and, therefore, any citizen having a legal interest may raise before the Constitutional Jurisdiction the interpretation of a provision of the Constitution, in order to obtain a judicial decision of plain certainty on the scope and content of the specific provision.²²

Regarding the standing to bring this action for constitutional interpretation before the Supreme Tribunal, the Constitutional Chamber gave it to any citizens providing that a particular interest must exist. In this sense, the Chamber has ruled that:

A public or private person shall have a current, legitimate legal interest, grounded in his own concrete and specific legal situation, which necessarily requires the interpretation of constitutional rules applicable to the situation, in order to end the uncertainty impeding the development and effects of said legal situation.²³

For the action for interpretation to be allowed, the petition must specify the nature of the obscurity, ambiguity, or contradiction of the provisions of the constitutional text, or within one of them in particular, or with respect to the

20. See Allan R. Brewer-Carías, “Le recours d’interprétation abstrait de la Constitution au Vénézuéla”, en *Le renouveau du droit constitutionnel, Mélanges en l’honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70.

21. Decision N° 1077 dated 09-22-01, Constitutional Chamber (Case: Servio Tulio León Briceño), in *Revista de Derecho Público*, N° 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 247 ff.

22. *Idem*.

23. *Idem*

nature and scope of applicable principles. The decision issued by the Constitutional Chamber in these cases, have general and binding effects.²⁴

CONCLUSION

From the above overview of the system of judicial review in Venezuela, the general conclusion that can be formulated is that, in general, the citizen's right to have access to Constitutional Jurisdiction has been guaranteed in a very extended way; a situation that contrast with the general trend in many countries to exclude the citizens access to the Constitutional Jurisdiction, limiting such access only to certain public officials.

Nonetheless, this broad citizen's access to judicial review does not guaranty that the Constitutional Jurisdiction will effectively enforce the Constitution. As we all know, judicial review of constitutionality²⁵ as the power assigned to the courts to decide upon the constitutionality of statutes and other governmental acts; can only exist in legal systems where the State, and its government and Parliament, are subjected to limits, according to the principles of the rule of law (*Estado de derecho*), and functions according to the principles of representative democracy.

That is why, judicial review is above all, an institutional tool essentially linked to democracy, understood as a political system not just reduced to the fact of having elected governments, but where separation and control of power and the respect and enforcement of human rights is possible through an independent and autonomous judiciary. And precisely, it has been because of this process of reinforcement of democracy in Latin American countries that judicial review of the constitutionality of legislation and other governmental actions has become an important tool in order to guarantee the supremacy of the Constitution, the rule of law, and the respect of human rights. It is in this sense that judicial review of the constitutionality of state acts has been considered as the ultimate result of the consolidation of the *rule of law*, when precisely in a democratic system the courts can serve as the ultimate guarantor

24. The Constitutional Chamber in decision N° 1347 dated 11-09-2000, outlined the binding character of its interpretations, by pointing out that "The interpretations of this Constitutional Chamber, in general, or those issued in proceedings of interpretative remedy, shall be understood as binding regarding the core of the studied case", in *Revista de Derecho Público*, No. 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 264 ff.

25. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989, p. 215.

of the Constitution, effectively controlling the exercise of power by the organs of the state.²⁶

On the contrary, as happens in all authoritarian regimes even having elected governments, if such control is not possible, the same power of judicial review vested, for instance, upon a politically controlled Supreme Court or Constitutional Court, in spite of the provision guarantying the citizen's right to Constitutional Jurisdiction, it can constitute the most powerful and diabolical instrument for the consolidation of authoritarianism, the destruction of democracy, and the violation of human rights.²⁷

Unfortunately this is what has been happening in my country, Venezuela, where after decades of democratic ruling through which we constructed one of the most formally complete systems of judicial review in South America, with perhaps the most broad provisions guarantying the citizen's right to Constitutional Jurisdiction, that system has been the instrument through which the politically controlled judiciary, and particularly the subjected Constitutional Chamber of the Supreme Tribunal, have been consolidating the authoritarian regime we now have; not being possible to exercise any control over the Constitutional Jurisdiction. In such a system, the citizens petitions before the Constitutional Jurisdiction in order for the Constitutional Chamber to annul statutes that have violated the Constitution have been systematically dismissed; the powers given to the Constitutional Chamber to control the legislative omissions have been used in order to provide the government with political control of other branches of government, as has happened with the Electoral Power;²⁸ and the self made recourse of constitutional interpretation has been used by citizens affected to the government or by representatives of the government to obtain from the Constitutional Chamber interpretations of the Constitution, that in fact have modified or mutate the Constitution in the

26. See Hans Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)," in *Revue du droit public et de la science politique en France et à l'étranger*, T. XLV, 1928, pp.197-257

27. See 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*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, Sept. 2005, pp. 463-489.

28. See Allan R. Brewer-Carías, *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, No. 2, Caracas 2007; "Judicial Review in Venezuela", en *Duquesne Law Review*, Volume 45, Number 3, Spring 2007, pp. 439-465.

sense seek by the government, avoiding the procedure for constitutional revisions that always need popular approval.

In a system of judicial review with various means devoted to assure the control of unconstitutional statutes and other State acts, even with the provisions in order to guaranty in a broad way citizen's access to Constitutional Jurisdiction, if the rule of law does not exists, and democracy is not effective, what outcome is that the judicial review system results in being the most perverse tool for defrauding the Constitution and the democratic system, as it has unfortunately happened in Venezuela under the authoritarian government we have had during the past decade (1999-2009), crushing any real possibility of judicial review.

New York, May 2009