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THE AMPARO AS AN INSTRUMENT OF IUS CONSTITUTIONALE COMMUNE

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OUTLINE: I. *Introduction*. II. *The internationalization of the amparo proceeding*. III. *General features of the amparo proceeding in Latin American comparative constitutional law*. A. *The injured party*. B. *Justiciable constitutional rights*. C. *The extraordinary character of the amparo proceeding*. D. *The injury in the amparo proceeding*. E. *The injuring party*. F. *The injuring public actions or omissions*. G. *Adjudication in the amparo proceeding*. IV. *The enforcement of the ius commune principles of the amparo proceeding by the Inter-American Court of Human Rights*. V. *Final reflections*.

I. Introduction

The amparo proceeding is perhaps the most Latin American of all constitutional law institutions developed in the continent. It was conceived as a judicial remedy against any kind of violation affecting fundamental rights, in particular, when committed by public officials.[1]

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* Selected extracts of this text have been published previously in Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of the Amparo Proceeding* (CUP, New York, 2008).

[1] This remedy has been called different things, always meaning the same: Amparo (Guatemala), Acción de amparo (Argentina, Ecuador, Honduras, Paraguay, Uruguay, Venezuela), Acción de tutela (Colombia), Juicio de amparo (Mexico), Proceso de amparo (El Salvador, Peru), Recurso de amparo (Bolivia, Costa Rica, Dominican Republic, Nicaragua, Panama), Recurso de protección (Chile) or Mandado de segurança and mandado de injunçao (Brazil). See Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Stury of the Amparo Proceeding* (CUP, New York, 2008); *El amparo a los derechos y garantías constitucionales (una aproximación comparativa)* (Editorial Jurídica Venezolana, Caracas, 1993); Eduardo Ferrer Mac-Gregor, 'Breves notas sobre el

The amparo proceeding serves as the common judicial guarantee of rights. It is meant to protect, not only the rights established in national constitutional law, but also those found in the relevant applicable international law, those which are part of the 'constitutional block' (bloque de constitutionalidad) of all Latin American countries,[2] and which give common orientation to national legal orders. The long history of the amparo, which goes back to the early 19th century, has not made it lose its relevance. Today it connects national law with international law, thus allowing the development of a common comparative legal approach.

If the concept of ius constitutionale commune, as Armin von Bogdandy has pointed out, stems from the 'debate over the possibility of a regionally secured realization of the central promises of national constitutions',[3] then, the amparo proceeding for the protection of fundamental rights is one of its most important institutions. It allows national legal orders to become embedded in the larger context of international law and to develop common principles of interpretation. This has also generated important academic, political, and judicial communication between the different branches of government and courts, as well as a common language on the matter.

The trust placed by citizens on the judicial branch in Latin American countries varies from country to country and throughout history. Sometimes this level of trust is quite low but on other occasions, particularly during periods of democratic rule, the judiciary has enjoyed high levels of approval. Particularly at such times they have contributed substantively to updating and unfolding the potential of this legal institute, often jointly with the Inter-American system for the protection of human rights.

After the introduction of amparo proceedings in Mexico, the institution spread across all Latin America. In the different countries where it was adopted it took on slightly different forms, becoming in many cases more protective than the original Mexican institution.[4] The amparo was introduced in the second half of the nineteenth century in the constitutions of Guatemala (1879), El

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amparo latinoamericano (desde el derecho procesal constitucional comparado)', in Héctor Fix-Zamudio and Ferrer Mac-Gregor, *El derecho de amparo en el mundo* (Porrúa, Mexico City, 2006) 3-39.

[2] For a detailed analysis of this legal institute see Góngora Mera in this volume.

[3] See von Bogdandy in this volume.

[4] See Joaquín Brage Camazano, *La Jurisdicción constitucional de la libertad: Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos* (Porrúa, Mexico City, 2005) 156ff.

Salvador (1886) and Honduras (1894); and during the twentieth century, in the constitutions of Nicaragua (1911), Brazil (mandado de securança, 1934), Panama (1941), Costa Rica (1949), Venezuela (1961), Bolivia, Paraguay, Ecuador (1967), Peru (1976), Chile (recurso de protección, 1976), Uruguay (1988), and Colombia (acción de tutela, 1991). In 1957, the writ of amparo was introduced in Argentina through court decisions; it was regulated in a special statute in 1966, and subsequently included in the 1994 Constitution. Since 2000, the Supreme Court of the Dominican Republic also admitted the writ of amparo, which in 2006 was regulated in a special statute, and incorporated in the 2010 Constitution.

As a consequence of various constitutional processes, all Latin American countries, with the exception of Cuba, have adopted the writs of habeas corpus and amparo as specific judicial mechanisms exclusively designed for the protection of constitutional rights. In all countries of the region, the writs are expressly enshrined in the constitution;[5] and in all of them, except in Chile, the proceeding has been the object of statutory regulation.[6]

These statutes are, in general, of a special nature, adopted for the specific purpose of regulating amparo proceedings (Argentina, Brazil, Colombia, Dominican Republic, Mexico, Nicaragua,

[5] Argentina: Constitución Nacional de la República Argentina, 1994; Bolivia: Constitución Política de la República de Bolivia, 2009; Brazil: Constitução da República Federativa do Brasil, 1988 (last reform 2005); Colombia: Constitución Política de la República de Colombia, 1991 (last reform 2005); Costa Rica: Constitución Política de la República de Costa Rica, 1949 (last reform 2003); Cuba: Constitución Política de la República de Cuba, 1976 (last reform, 2002); Chile: Constitución Política de la República de Chile, 1980 (last reform, 2005); Dominican Republic: Constitución Política de la República Dominicana, 2010; Ecuador: Constitución Política de la República de Ecuador, 2008; El Salvador: Constitución Política de la República de El Salvador, 1983 (last reform, 2003); Guatemala: Constitución Política de la República de Guatemala, 1989 (last reform 1993); Honduras: Constitución Política de la República de Honduras, 1982 (last reform, 2005); Mexico: Constitución Política de los Estados Unidos Mexicanos, 1917 (last reform, 2010); Nicaragua: Constitución Política de la República de Nicaragua, 1987 (last reform 2005); Panama: Constitución Política de la República de Panamá, 1972 (last reform, 1994); Paraguay: Constitución Política de la República de Paraguay, 1992; Peru: Constitución Política del Perú, 1993 (last reform 2005); Uruguay: Constitución Política de la República Oriental del Uruguay, 1967 (last reform 2004); Venezuela: Constitución de la República Bolivariana de Venezuela, 1999 (last reform 2009).

[6]Argentina: Ley Nº 16:986: Acción de Amparo, 1966; Bolivia: Ley Nº 254: Código Procesal Constitucional 2012; Brazil: Lei Nº 12:016 Mandado de Segurança, 2009; Colombia: Decretos Ley N° 2591, 306 y 1382: Acción de Tutela, 2000; Costa Rica: Ley Nº 7135: Ley de la Jurisdicción Constitucional, 1989; Dominican Republic: Ley Orgánica del Tribunal Constitucional y de los Procesos Constitucionales, 2011; Ecuador: Ley Orgánica de Garantías Constitucionales y Control de Constitucionalidad, 2009; El Salvador: Ley de Procedimientos Constitucionales, 1960; Guatemala: Decreto Nº 1-86: Ley de Amparo: Exhibición personal y Constitucionalidad, 1986; Honduras: Ley sobre Justicia Constitucional, 2004; Mexico: Ley de Amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política, 2013; Nicaragua: Ley Nº 49: Amparo, 1988; Panama: Código Judicial, Libro Cuarto: Instituciones de Garantía, 1999; Paraguay: Ley Nº 1:337/88: Código Procesal Civil, Titulo II: El Juicio de Amparo, 1988; Peru: Ley Nº 28:237: Código Procesal Constitucional, 2005; Uruguay: Ley Nº 16:011: Acción de Amparo, 1988; Venezuela: Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales, 1988 (reformed by the National Assembly in 2014).

Uruguay, Venezuela); or else they refer, in general, to the constitutional jurisdiction or to constitutional procedures (Bolivia, Guatemala, Peru, Costa Rica, Ecuador, El Salvador, Honduras, Dominican Republic). Only in Panama and Paraguay is the amparo regulated in the general procedural codes. Chile is the only country that has not promulgated a statute regulating the amparo, the general procedural rules that govern it were established by the Chilean Supreme Court.

In some constitutions, for example in Guatemala, Mexico and Venezuela, the writ of amparo is meant to protect all constitutional rights and freedoms, including personal liberty, in which case the habeas corpus is considered a type of amparo, and is referred to, for instance, as a writ for personal exhibition (Guatemala) or amparo for the protection of personal freedom (Venezuela). However, in general, in all other Latin American countries (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Peru and Uruguay), in addition to the writ of amparo, a separate writ of habeas corpus has always been expressly established in the constitution for the specific protection of personal freedom and integrity. In recent times, in some countries (Argentina, Ecuador, Paraguay, Peru and Venezuela), in addition to the writs of amparo and habeas corpus, constitutions have also provided for a writ of habeas data (Argentina, Brazil, Ecuador, Paraguay, Peru, Venezuela), by which any person can file a suit requesting access to data which refers to them and is stored in public or private registries or data banks. If the information found is false, inaccurate or discriminatory, claimants may seek its suppression, rectification, confidentiality and update.

Today, there are three different scenarios in Latin America regarding available mechanisms for the protection of constitutional rights. In the first scenario three different remedies are provided for: the writs of amparo, habeas corpus and habeas data. This is the situation in Argentina, Brazil, Ecuador, Paraguay and Peru. Some countries have two remedies: the amparo and the habeas corpus. This is the case in Bolivia, Colombia, Costa Rica, Chile, the Dominican Republic, El Salvador, Honduras, Nicaragua, Panama and Uruguay. Venezuela also has two remedies, but these are the writs of amparo and habeas data. The third scenario is the one found in Mexico and Guatemala, where only one general writ of amparo, which also protects the right to personal freedom, exists.

In general terms, the rights protected by amparo proceedings are all those set forth in the constitution or those having constitutional rank. However, some constitutions reduce the protective

scope of amparo protection to only some constitutional guarantees or fundamental rights, as is the case in Colombia, Chile and Mexico. This model, where the only rights protected by the amparo are the rights to life, liberty and security, was also followed in Germany and Spain, and more recently in the Philippines.

As mentioned before though, in Latin America, the writ of amparo is not only a remedy of national constitutional law, but also an international law institution. It was enshrined in the American Convention on Human Rights of 1969 (ACHR, the American Convention or the Convention) as the 'right to judicial protection', that is, the right to 'a simple and prompt recourse, or any other effective recourse, before a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state or by this Convention' (article 25). State parties to the Convention have the duty 'to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state'; to develop 'the possibilities of judicial remedy'; and 'to ensure that the competent authorities shall enforce such remedies when granted'.

In the words of the Inter-American Court of Human Rights (IACtHR, or the Inter-American Court), this article of the American Convention is a 'general provision that gives expression to the procedural institution known as amparo'.[7] The American Convention also foresees the writ of habeas corpus for the protection of the right to personal freedom and security (article 7). Examining both the writs of habeas corpus and amparo, the IACtHR has declared that the '"amparo" comprises a whole series of remedies and that habeas corpus is but one of its components', so that in some instances 'habeas corpus is considered either as the "amparo" of freedom or as an integral part of the "amparo"'.[8]

These provisions of the American Convention can be seen as the conclusion of a process of internationalization of the protection of human rights. In particular, article 25, on the right to judicial protection of rights, has become an institution of the ius constitutionale commune. After a long evolution, the IACtHR has interpreted the human right to 'effective judicial protection' in the broadest sense, to include the right of access to justice. Thus, the Court has followed the lead of

[7] See IACtHR, *Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*, Advisory Opinion OC-8/87, Series A No 8 (30 January 1987) para 32.
[8] ibid para 34.

Judge Antonio Cançado Trindade in his dissenting opinion in the case of *Genie Lacayo v Nicaragua* of 29 January 1997, where he considered the provision not only as one of the 'basic pillars of the Convention', but also 'of the rule of law (État de Droit) itself in a democratic society (in the sense of the Convention)';[9] an argument that was subsequently affirmed in the jurisprudence of the Inter-American Court in the judgment of *Castillo Páez v Peru* of November of that same year.[10] In this context, the right of amparo is only one of the pieces of the human right to judicial protection – a basic pillar of democracy – but it does not exhaust it. Access to justice, together with the guarantees of due process, (that is, article 25(1) in connection with article 8), make up this pillar.[11]

As stated by the IACtHR in *La Masacre de las Dos Erres v Guatemala*, the amparo is part of the 'realm of article 25 of the American Convention, therefore it has to meet certain requirements, including suitability and effectiveness'.[12] Thus, there are minimum parameters under which member states should fulfill their obligation to ensure all people not only of the existence but also the effectiveness of a simple and fast remedy to protect their rights. States must uphold these standards when adopting and regulating the amparo.

II. The internationalization of the amparo proceeding

The internationalization of the amparo proceeding in Latin America can be traced back to the 1948 American Declaration of the Rights and Duties of Man of the Organization of American States, the first international human rights declaration in the world. Article 18 of this declaration enshrined the 'right to access to justice', in the following terms:

> *'Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. A simple and brief procedure should be available for the courts to protect*

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[9] IACtHR, *Case of Genie-Lacayo v Nicaragua* (13 September 1997), Application for Judicial Review of the Judgment of Merits, Reparations and Costs, Series C No 45, Dissenting opinion of judge Antônio A Cançado Trindade, para 18.

[10] See IACtHR, *Case of Castillo Páez v Peru* (3 November 1997), Series C No 34, Merits, para 82.

[11] That is why Anamari Garro Vargas believes that it 'is not the same to state that the system of effective legal remedies is one of the pillars of the Convention and of the rule of law in a democratic system, than arguing that one of these pillars is a simple and effective remedy to protect the fundamental rights'. See Anamari Garro Vargas, *La improcedencia del recurso de amparo contra las resoluciones y actuaciones jurisdiccionales del Poder Judicial a la luz de la Constitución costarricense y del artículo 25 de la Convención Americana sobre Derechos Humanos* (Doctoral dissertation, Universidad de los Andes, Santiago de Chile, 2012) 213.

[12] See decision in IACtHR, *Case of 'Los Dos Erres Massacre' v Guatemala* (24 November 2009), Series C No 211, Preliminary Objections, Merits, Reparations and Costs, para 107.

every person (que lo ampare) against acts of authority that, to his prejudice, violate any of the fundamental rights constitutionally enshrined.'

Article 8 of the Universal Declaration of Human Rights, adopted by the United Nations in December of the same year, is worded in similar terms. After these first two international declarations on human rights, the 1950 European Convention on Human Rights also regulated the 'right to an effective remedy' (not necessarily of a judicial nature) before a national authority, even when the violation was committed by persons acting in an official capacity (article 13).

Subsequently, article 2(3) of the 1966 International Covenant on Civil and Political Rights of the United Nations, also included the right to an effective remedy (also not necessarily of a judicial nature) against human rights violations. This right could also be exercised against violations committed by persons acting in their official capacity.

Nonetheless, it was in the 1969 American Convention on Human Rights that the amparo proceeding was declared 'the right to judicial protection', in the following terms:

'Article 25. Right to Judicial Protection
1. Everyone has the right to simple and prompt recourse, or any other effective recourse, before a competent court or tribunal for protection (que la ampare) against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties'.

To ensure this right, the Convention imposes the following obligations on states parties:

'a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
b. to develop the possibilities of judicial remedy; and
c. to ensure that the competent authorities shall enforce such remedies when granted'.

The American Convention, in article 7 on the right to personal liberty and security, also provides for the writ of habeas corpus as follows:

> *6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court decides without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful…*

Examining the habeas corpus and the amparo jointly, the IACtHR came to the following conclusion:

> *'The amparo comprises a whole series of remedies and that habeas corpus is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms in the legal systems of the States parties, indicates that in some instances habeas corpus functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the amparo of freedom' or as an integral part of amparo.'*[13]

These provisions of the American Convention were the result of a process of internationalization in the protection of human rights – a process that began with the constitutionalization of the amparo proceeding. As a consequence of this process of internationalization, the right to a judicial guarantee of human rights (amparo and habeas corpus) has become an international obligation of state parties. A failure to regulate such remedies internally or to ensure their effective functioning constitutes a breach of the Convention.

This implies, according to the Inter-American Court on numerous decisions, that:

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[13] The Inter-American Court of Human Rights has considered 'the writs of habeas corpus and of "amparo" among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society'. ibid para 42; IACtHR, *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, Series A No 9 (6 October 1987) para 33.

> *'The general obligation that the State should adapt its domestic laws to the provisions of the Convention to guarantee the rights it embodies, which is established in Article 2, includes the issuance of rules and the development of practices leading to effective enforcement of the rights and freedoms embodied in the Convention, and also the adoption of measures to derogate norms and practices of any kind that entail a violation of the guarantees established in the Convention. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of effet utile), and to this end the State must adapt its actions to the protection norms of the Convention.'*[14]

In effect, the most important consequence of the internationalization of the amparo, is that state parties are not only obligated '*to respect*' the right to amparo recognized in their constitutions, but also '*to ensure* to all persons subject to their jurisdiction the free and full exercise' of such right, without any discrimination (all this in accordance with article 1(1) ACHR). This 'implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[15]

To comply with this obligation, the actions of states parties may not be limited to formal measures. That is, the obligation is not fulfilled merely 'by the existence of a legal system designed to make it possible' but rather it is also required that the government 'conduct itself so as to effectively ensure the free and full exercise of human rights'.[16] Referring to the amparo as a judicial guarantee of human rights, the IACtHR has held that '[…] for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress'; 'the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking'.[17]

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[14] See decision in IACtHR, *Case of Yatama v Nicaragua* (23 June 2005), Series C No 127, para 170 (footnotes omitted).
[15] IACtHR, *Case of Velásquez Rodríguez v Honduras* (29 July 1988), Series C No 4, Merits, para 166.
[16] ibid para 167.
[17] IACtHR, *Judicial Guarantees in States of Emergency* (n13), para 24. See in a similar sense IACtHR, *Case of Mayagna (Sumo) Awas Tingni Community v Nicaragua* (31 August 2001), Series C No 79, para 113; *Case of Ivcher*

Now, in accordance with article 25 ACHR, and considering in particular that the writ of amparo has been considered by the IACtHR, as 'one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention';[18] the following four elements can be said to characterize the amparo in the Inter-American context:

First, the amparo is not only conceived as a specific judicial recourse or action, that is, as a judicial guaranty; but also as a fundamental human right in itself, that is to say, the right of citizens to be protected by the judiciary, as reaffirmed in the Mexican and Venezuelan legal systems. The wording of the ACHR confirms this. Article 25 provides for the 'right to judicial protection', in the sense of individuals having at their disposal an effective, simple and prompt judicial means for the protection of their rights. Additionally, the right to judicial protection is considered one of the 'fundamental' rights that cannot be suspended or restricted in a state of emergency (article 27).

This differentiates the provisions of the American Convention from those of the International Covenant on Civil and Political Rights (article 2(3)) and of the European Convention on Human Rights (article 13), which only provide for an effective remedy, without qualifying it as 'judicial'. Conversely, under the regime of the ACHR, protection can be obtained not only through a writ of amparo but also through other judicial means ('any other effective remedy') for the protection of human rights. Accordingly, many Latin American lawmakers have determined that the writ of amparo has an extraordinary nature, in the sense that it is admitted only when there are no other effective judicial means to protect human rights (similar to Anglo-American injunctions).

However, despite the fact that the American Convention considers the amparo as a right in itself, in most Latin American countries, the amparo has been regulated as a specific adjective institution or remedy. Only in Mexico and in Venezuela can it be said that the amparo is also conceived as a civil right in itself, one that can be exercised by multiple judicial recourses, in addition to the writ of amparo.

Bronstein v Peru (6 February 2001), Series C No 74, Merits, Reparations and Costs, para 136; *Case of Cantoral Benavides v Peru* (18 August 2000), Series C No 69, Merits, para 164; *Case of Durand and Ugarte v Peru* (16 August 2000), Series C No 68, Merits, para 102.

[18] See IACtHR, *Castillo Páez v Peru* (n10), para 82; *Case of Suárez Rosero v Ecuador* (12 November 1997), Series C No 35, Merits, para 65; and *Case of Blake v Guatemala* (24 January 1998), Series C No 36, Merits, para 102. See the references in Cecilia Medina Quiroga, *La Convención Americana: Teoría y jurisprudencia* (IIDH, San José, 2003) 358.

Second, the remedy is directed at protecting all the rights of every person. As mentioned before, the rights protected are not only those recognized in the constitution, and domestic statutes, but also those of the ACHR. This right belongs to everybody in the broadest sense, without distinction or discrimination of any kind: individuals, nationals, foreigners, legally capable or not, corporations or entities of public or private law;[19] including those acting in representation of diffuse or collective constitutional rights, the violation of which affects the community as a whole, as expressly established in the Argentinean, Brazilian, Colombian and Venezuelan constitutions.

Perhaps because of European influence, the Chilean and Colombian constitutions have limited the rights that can be protected by means of the 'recurso de protección' and 'acción de tutela', respectively; a limitation that is eventually incompatible with the international obligations of these states under the ACHR.[20] Several Latin American constitutions expressly state that the rights protected through judicial means are not only those of the constitution, but also those recognized in international human rights law, as is the case in Argentina, Colombia, Costa Rica and Venezuela. Some constitutions also include within the protective scope of the writ of amparo human rights recognized in statutes (Argentina, Bolivia, Ecuador, Guatemala and Paraguay).

Third, the judicial remedy established must be simple, prompt and effective.[21] Regarding simplicity, it refers to a procedure that has none of the dilatory procedural formalities of ordinary judicial remedies. The special character of the protection sought, constitutional and not ordinary, necessitate this. Regarding the prompt character of the remedy, the IACtHR has considered that a remedy is not prompt, when there is an unreasonable delay in the decision; those resolved after 'a long time'.[22]

[19] It is true that article 1(2) of the Convention provides that 'for the purposes of this Convention, 'person' means every human being'. Nonetheless, article 25 states that 'everyone' should enjoy the judicial guarantee of rights. Thus, everyone, and not only natural persons, have the right to the writ of amparo for the protection of their rights.
[20] However, it must be highlighted that fortunately the courts in Colombia have been gradually correcting this restriction through constitutional interpretation, in such a way that today, due to the interrelation, universality, indivisibility, connection and interdependence of rights, there are almost no constitutional rights that cannot be protected by means of the 'acción de tutela'.
[21] See IACtHR, *Suárez Romero v Ecuador* (n18), para 66.
[22] See IACtHR, *Case of Ivcher Bronstein v Peru* (n17), para 140.

The effective character of the remedy refers to the fact that it must be capable of producing the results for which it has been created.[23] In the words of the Inter-American Court of Human Rights:

> *'[...] it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.'*[24]

Thus, in order to be effective, it is not enough that the remedy is regulated in internal law. The existence of other basic conditions is necessary in order for the remedy to function and be applied with the expected results. In this regard, for a judicial remedy to be effective, above all, it is necessary for the judiciary to be truly independent and impartial. The IACtHR has had the opportunity to adjudicate on this matter. In the *Ivcher Bronstein* case (2000), it held that Peruvian courts at that time were not independent or impartial, so that the claim lodged by the plaintiff could not be effective.[25] The Inter-American Court has also considered that a remedy is not effective when the specific court – and not the court system as a whole – dealing with a claim or petition is not impartial.[26]

Fourth, the remedy should cover any act, omission, fact or action that violates human rights and, of course, which threatens to violate them, regardless of the origin or the author of the harm or threat (whether public authorities or private individuals and corporations). Thus, the writ of amparo against private individuals has been broadly admitted in Latin America, following a trend that began in Argentina in 1957. In some countries, this is expressly provided for in the text of the constitution

[23] See IACtHR, *Case of Velásquez Rodríguez v Honduras* (n15), para 66.
[24] IACtHR, *Judicial Guarantees in States of Emergency* (n1312), para 24.
[25] See IACtHR, *Case of Ivcher Bronstein v Peru* (n17), para 139.
[26] See IACtHR, *Case of the Constitutional Court v Peru* (31 January 2001), Series C No 71, Merits, Reparations and Costs, para 96.

(Argentina, Bolivia, Paraguay and Peru). In other constitutions, it is admitted only regarding certain individuals, such as those who exercise public functions, special prerogatives, or who are in a position of control, for example, concession holders that render public services. This is the case, for example, in Colombia, Ecuador and Honduras. In other countries, the amparo against private individuals has been introduced through statutes or case law (Chile, Costa Rica, Nicaragua, the Dominican Republic, Uruguay and Venezuela). Not all Latin American countries allow for a writ of amparo against individuals, a situation that is distant from the orientation of the American Convention. This is the case in Brazil, El Salvador, Guatemala, Mexico and Panama.

The scope of the writ of amparo is further limited in some countries of the region, in the sense that some public acts cannot be reviewed by courts in the framework of amparo proceedings. This runs counter to the ACHR, pursuant to which there is not a single state act that could escape from its scope. If the amparo is a legal means for the protection of human rights, individuals should be able to file it against any public act or conduct that violates their rights. It is inconceivable that certain state acts cannot be challenged through the writ of amparo.

Nevertheless, a trend toward exclusion can be identified as follows. In some cases, the exclusion refers to acts of certain public authorities, such as the electoral authorities, whose acts are expressly excluded from the writ of amparo in Costa Rica, Mexico, Nicaragua, Panama, Peru and Uruguay. In Peru, an exclusion from the scope of constitutional protection of the amparo is established with respect to the acts of the National Council of the Judiciary. Only a few countries, like Guatemala, Honduras, Mexico and Venezuela, admit the possibility of filing a writ of amparo against statutes. This stands in stark contrast to the trend set forth by the American Convention.

In other countries, a writ of amparo cannot be filed against judicial decisions, notwithstanding that judges too can infringe constitutional rights when adjudicating. As a matter of principle, no judge should be empowered to violate constitutional rights in his decisions; therefore, the writ of amparo should also be admitted against judicial decisions. Nonetheless, only some countries like Colombia, Honduras, Guatemala, Mexico, Panama and Venezuela expressly admit the writ of amparo against judicial decisions. Other countries have expressly excluded it (Argentina, Uruguay, Costa Rica, the Dominican Republic, Panama, El Salvador, Honduras, Nicaragua and Paraguay).

The case of Colombia must be highlighted. Although it had express provisions allowing the 'acción de tutela' against judicial decisions, in 1992, the Constitutional Court considered it contrary to the principle of res judicata, annulling the respective article of the statute.[27] Nonetheless, in spite of the aforementioned annulment, all the main courts and the Council of State have progressively admitted the 'acción de tutela' against judicial decisions when these are considered arbitrary or the product of judicial voi de fait.[28] This is also the case in Peru, where the writ of amparo against judicial decisions is admitted when regular procedures are flaunted.

III. General features of the amparo proceeding in Latin American comparative constitutional law

A. The injured party

The general principle is that only the injured party can initiate proceedings, excluding ex officio amparo proceedings, except in some countries, on matters of habeas corpus (Guatemala). The injured party is the person whose constitutional rights have been violated (action in personam). A person does not need to be a natural person (national or foreign); but may also be a legal or artificial person (corporations, associations, etc). On matters of collective rights, the writ of amparo may also be filed by the group or association on behalf of its members, even if said group or association is not formally a legal entity (Paraguay). For these purposes, a collective amparo has been developed in many Latin American countries, for instance for the protection of environmental rights in Colombia. Such collective amparos are occasionally linked to the granting of standing to the ombudsperson.

B. Justiciable constitutional rights

As a matter of principle, the amparo proceeding (writs of habeas corpus or amparo) has been established exclusively for the protection those rights enshrined in the constitution or that have acquired constitutional rank and value. Thus, the writ of amparo cannot be based only on the violation of statutory provisions, showing the importance of constitutional recognition of rights.

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[27] See Constitucional Court of Colombia, Sentence C-543 (24 September 1992), in Manuel J Cepeda, *Derecho Constitucional Jurisprudencial: Las grandes decisiones de la Corte Constitucional* (Legis, Bogotá, 2001) 1009ff.

[28] ibid 1022ff; see also Constitucional Court of Colombia, Sentence T-231 (13 May 1994).

Consequently, in Latin America, all constitutional or fundamental rights, including economic, cultural and social rights, are in principle justiciable. Chile and Colombia constitute exceptions. The scope of amparo protection has been reduced to only certain constitutional rights, those specifically qualified and listed as 'fundamental rights'. Nonetheless, in the case of Colombia, the Colombian Constitutional Court has recognized such character to other rights, extending protection based on their connection to others that are expressly considered fundamental rights, like the right to life.

C. The extraordinary character of the amparo proceeding

Because the writ of amparo was specifically created as a judicial mechanism for the protection of constitutional rights, it is an extraordinary remedy and is not meant to substitute all other ordinary judicial remedies established for the protection of personal rights and interests. This principle led to two general rules of admissibility. First, the writ of amparo is only admissible when there are no other judicial means for granting constitutional protection, that is, when no other adequate judicial remedy is available in order to obtain the immediate protection of violated constitutional rights. Second, the writ of amparo is admissible when other legally available remedies are inadequate to obtain the immediate protection of the harmed or threatened constitutional rights.

Nonetheless, in some countries, the plaintiff must first exhaust existing ordinary judicial or administrative remedies in order to file a writ of amparo (Brazil, Colombia, Guatemala, Mexico and Peru). Moreover, the general rule in Latin America is that if the plaintiff has chosen and filed a writ of amparo, he cannot activate additional proceedings, as established, for instance, in Chile, Peru, Mexico, Argentina and in Venezuela.

The matter of the general rules governing procedure in amparo proceedings is also connected to its extraordinary character. In general terms, proceedings should be simple and brief. They should not be extended, suspended, nor interrupted, and they should not be excessively formal (substantive law should prevail over formal provisions). The need for immediate protection of the injured person justifies such procedural requirements.

D. The injury in the amparo proceeding

The injury in the amparo proceeding consists of damages or harm affecting or destroying the object of the right, or threats that, without destroying such object, put the enjoyment of the right at risk or diminish it. These injuries, harms or threats to constitutional rights must fulfill a series of conditions, commonly established in the laws of amparo, for the writ to be admissible.

In addition to these general conditions, specifically regarding harms, it is also necessary that they be reparable. Regarding threats, they must affect the rights in an imminent manner. Thus, the type of injury inflicted on constitutional rights conditions the purpose of the amparo proceeding. In the case of (reparable) harms, the amparo has a restorative effect; and in the case of (imminent) threats, the amparo has a preventive effect.

Harms, in addition, must have a personal and direct character, in the sense that they must personally affect the plaintiff. They must also be actual and real; manifestly or ostensibly arbitrary, illegal and illegitimate. Furthermore, they must not be consented to by the plaintiff, whether expressly or tacitly, the latter occurring when the plaintiff does not file the amparo within the respective legal term. Only in some countries, can the writ of amparo be filed at any moment (Ecuador and Colombia).

E. The injuring party

Since the final result of amparo proceedings is a judicial order addressed to some clearly identified individual, public official or public entity, the writ of amparo must always be filed against an individual, a public official or a public entity that must be individuated and identified in the complaint. Nonetheless, when it is impossible for the plaintiff or for the judge to clearly identify the defendant, the constitutional complaint can be filed and eventually protection can be granted, if the fact or action causing the harm can be clearly determined.

Historically, the amparo was created to protect individuals against the state, that is, against public officials or public entities. One of the main trends of the Latin American amparo today is the admission of the writ of amparo against private individuals, juridical persons, corporations or

institutions. This development began in Argentina in the *Samuel Kot* case of 1958. The Supreme Court of the Nation ruled that 'nothing in the letter and spirit of the Constitution can be interpreted as circumscribing the protection of constitutional rights to attacks by the state'. Admitting the writ of amparo against private individuals constitutes recognition that it is not only the origin of the injury to constitutional rights, but the rights themselves that are important.[29] Many Latin American countries followed suit: Bolivia, Chile, the Dominican Republic, Paraguay, Peru, Uruguay and Venezuela.

Other countries of the region, such as Guatemala, Colombia, Costa Rica, Ecuador, Honduras and Mexico, restrict the admissibility of writs of amparo against private individuals. Only those individuals or corporations that are in a position of superiority regarding citizens or that in some way, exercise public functions or activities, or provide public services or public utilities, can be defendants in amparo proceedings.

Finally, the writ of amparo, is only admissible against public authorities in Brazil, El Salvador, Panama, and Nicaragua.

F. The injuring public actions or omissions

The universal character of the amparo proceeding means that any act, fact or omission of any public authority, entity or public officials causing an injury to constitutional rights can be challenged through this mechanism. In this sense, for instance, the Guatemalan Amparo Law provides that 'no sphere of competence shall be excluded from the writ of amparo', it is admissible against 'any act, resolution, disposition and statute of authority which could imply a threat, a restriction or a violation of the rights guaranteed in the constitution and in statutory law' (article 8). That is also why Venezuelan courts have held that 'there is no state act that can be excluded from review in amparo proceedings, the purpose of which is not to annul state acts but to protect public freedoms and restore their enjoyment when violated or harmed', thereby admitting that the constitutional writ of

[29] See José L Lazzarini, *El juicio de amparo* (La Ley, Buenos Aires, 1987) 228; Brage Camanazo, *La jurisdicción constitucional de la libertad* (n4), 99; Néstor Pedro Sagüés, *Acción de amparo* (Astrea, Buenos Aires, 1988) 13, 512, 527ff. Nonetheless, when the 1966 Law 16.986 was issued, it only referred to the writ of amparo against the state, that is 'against every act or omission of the authorities' (article 1), the amparo against individuals was regulated in articles 321(2) and 498 of the Code of Civil and Commercial Procedure.

amparo may be filed even against acts excluded from judicial review, when the harm or violation of constitutional rights or guarantees has been alleged.[30]

Notwithstanding this general principle of universality, which also finds expression in the ACHR, a series of exceptions can be identified in many Latin American amparo laws, regarding some particular and specific state acts or activities (of legislative, executive, administrative or judicial nature) that are expressly excluded from the scope of amparo proceedings.

In general, the writ of amparo is inadmissible against statutes (Bolivia, Brazil, Colombia, Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Panama, Peru, Paraguay, Nicaragua and Uruguay). Guatemala and Honduras are exceptions in this sense. In Mexico and Venezuela, amparo proceedings are admissible only against self-executing statutes, those that can violate constitutional rights without the need for any further state act of execution or application.

Regarding administrative acts and actions, the general rule is the admissibility of the writ of amparo action against all acts, facts or omissions from public entities or bodies of the public administration at all its levels. This includes decentralized, autonomous, or independent bodies as well as acts issued by the head of the executive branch. In Argentina and Peru, an exception is established regarding political questions, or acts of government.

In contrast with the general admission of the writ of amparo against executive and administrative acts, including those administrative acts issued by courts and tribunals, the same cannot be said regarding judicial decisions issued on jurisdictional matters. In most countries of the region, judicial decisions are expressly excluded from the scope of amparo proceedings and considered inadmissible. There are some exceptions. In Mexico, it has been the long-standing tradition to admit the writ of amparo against judicial decisions. Guatemala, Honduras, Panama, Peru and Venezuela also admit this remedy against judicial decisions.

Regarding the acts of other independent state organs, some exceptions have also been established regarding the electoral bodies of Costa Rica, Mexico, Nicaragua, Panama, Peru, and Uruguay.

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[30] See the former Supreme Court of Justice, *Case of Anselmo Natale* (31 January 1991), Case No 22, in (1991) 45, Revista de Derecho Público, 118.

The writ of amparo can also be filed against omissions of authorities. That is, when the competent entities or public officials fail to comply with their general obligations, thereby causing harm or threat to constitutional rights. In such cases, the judicial order of mandamus will be a command directed at the concerned public authority to perform the constitutional duty which had been refused or neglected.

G. Adjudication in the amparo proceeding

The purpose of the amparo proceeding is for the plaintiff to obtain a judicial decision from the competent court granting immediate protection to harmed or threatened constitutional rights. For instance, the judicial decision may preserve the status quo, or command or prohibit actions. Two general types of decisions can be issued by courts for the protection of constitutional rights. First, preliminary or interlocutory measures ('medidas preventivas o cautelares'), that can be ordered from the beginning of the procedure and whose effects are subject to the final court ruling. These are ordered to prevent the fulfillment of the threat to constitutional rights or guarantees, or to prevent the configuration of an irreparable situation that would make the amparo futile. The second type of decision, a definitive ruling, prevents the violation from occurring or restores the enjoyment of the threatened or harmed rights.

Definitive rulings may order different things. They may be prohibitory, that is, issued to restrain an action, to forbid certain acts or to command a person to refrain from doing specific acts. They may be of a mandatory character, in the sense that they require the undoing of an act, or the restoring of the status quo ante by compelling the execution of some act, or commanding a person to do a specific act. An amparo order can also be directed at a court, which normally happens when the writ of amparo is filed against judicial decisions. Lastly, definitive rulings may also be declaratory, when courts are called on to declare the constitutional right of the plaintiff regarding other parties.

Although the amparo is a remedy that is restorative in character, in general terms, the immediate effect of the decision is to suspend the effects of the challenged act regarding the plaintiff. Amparo proceedings are not directed at annulling state acts. In principle, this is a task for constitutional and administrative courts. On the contrary, when an amparo is filed against a judicial decision, the

effects of the ruling granting amparo protection also consists in the annulment of the challenged judicial act or decision, as is the case in Venezuela.

Regarding appeals to amparo rulings, in some countries an appeal is not possible since it is the highest court in the country that rules on writs of amparo (Constitutional Chamber of the Supreme Court of Justice). This is the case in Costa Rica, Nicaragua and El Salvador. In other countries of the region, amparo decisions can be appealed before higher courts; and they can only reach the highest supreme or constitutional court, through the extraordinary channels established in almost all Latin American countries. Mostly, such appeals are aimed at ensuring the uniformity of constitutional interpretation and rights' enforcement.

Apex courts that receive appeals regarding writs of amparo may have the discretion to decide whether they will review the decision (Honduras, Mexico and Venezuela). In Brazil, Guatemala and Peru, the review of an amparo decision on appeal is mandatory. The constitutional tribunals of Bolivia, Ecuador and Colombia must automatically, and not only at the behest of a party, review judicial decisions on matters of amparo.

IV. The enforcement of the ius commune principles of the amparo proceeding by the Inter-American Court of Human Rights

As mentioned before, article 25(1) of the American Convention establishes the framework for amparo proceedings, under which both the IACtHR and national courts and tribunals, must exercise the conventionality control[31] to ensure the right of amparo for the protection of human rights and to overcome the restrictions to the institution of amparo that still persist in many countries. In the

[31] On the conventionality control see Ferrer Mac-Gregor in this volume and Ernesto Rey Cantor, *Control de convencionalidad de las leyes y derechos humanos* (Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, Mexico City, 2008); Juan C Hitters, 'Control de constitucionalidad y control de convencionalidad: Comparación' (2009) 7, Estudios Constitucionales (Centro de Estudios Constitucionales de Chile, Universidad de Talca), 109-128; Susana Albanese (ed), *El control de convencionalidad* (Ediar, Buenos Aires, 2008); Eduardo Ferrer Mac-Gregor, 'El control difuso de convencionalidad en el Estado constitucional', in Héctor Fix-Zamudio and Diego Valadés (eds), *Formación y perspectiva del Estado mexicano* (El Colegio Nacional-UNAM, Mexico City, 2010) 151-188; 'Interpretación conforme y control difuso de convencionalidad el nuevo paradigma para el juez mexicano', in Miguel Carbonell and Pedro Salazar (eds), *Derechos Humanos: Un nuevo modelo constitucional* (UNAM-IIJ, Mexico City, 2011) 339-429; Carlos M Ayala Corao, *Del diálogo jurisprudencial al control de convencionalidad* (Editorial Jurídica Venezolana, Caracas, 2013) 123. See also Jaime O Santofimio and Allan R Brewer-Carías, *Control de convencionalidad y responsabilidad del Estado* (Universidad Externado de Colombia, Bogotá, 2013).

IACtHR's own words, 'the sense of the protection afforded by Article 25 of the Convention', consists of:

> *'the real possibility of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action, and that in such case, the remedy is useful to restitute to the interested party the enjoyment of his right and to repair it.'*[32]

Based on this, I have maintained that article 25 ACHR, embodying the 'right of amparo', cannot be restricted. Thus, when regulating the writ of amparo domestically, the scope of protection should not exclude certain rights; state actions; or categories of persons. Something else entirely, is when the scope of the amparo is so broad that it becomes a procedural delaying technique that in practice prevents any effective, simple and fast protection of rights.

In this sense, the IACtHR noted in the *Case of 'Los Dos Erres Massacre' v Guatemala* that even though it considered that in Guatemala the amparo remedy was an 'adequate remedy to protect individuals' human rights',[33] its 'inadequate use,' its 'current structure' and 'the provisions that regulated it', coupled with 'the lack of due diligence and tolerance by the courts when processing them', have shown that it does not grant effective judicial protection. In addition, courts 'have allowed the abusive use of the appeal as a delaying practice in the proceeding',[34] so that 'its inadequate use has impeded its true efficiency, as it is not capable of producing the result for which it was conceived'.[35] It concluded by stating:

> *'Based on the foregoing, the Court considers that, within the framework of the current Guatemalan legislation, in the this case the recourse of amparo has been transformed into a means to delay and hinder the judicial process, and into a factor for impunity. Consequently, this Court believes that in this case the State violated the rights to a fair trial and right to judicial protection, which constitute the victims'*

[32] See decision in IACtHR, *Case of Castañeda Gutman v Mexico* (6 August 2008), Series C No 184, para 100.
[38] See decision in the IACtHR, *Case of 'Los Dos Erres Massacre' v Guatemala* (n12), para 121.
[34] ibid para 120.
[35] ibid para 121.

> *access to justice, recognized in Articles 8(1) and 25(1) of the Convention, and also failed to comply with the provisions contained in Articles 1(1) and 2 thereof.'*[36]

Regarding restrictions or limits to substantive aspects of the writ of amparo, I disagree with the IACtHR's decision in the *Case of Jorge Castañeda Gutman v Mexico* of 6 August 2008, when it accepted that states can set limits on the admissibility of the writ of amparo, and considered that 'it is not inherently incompatible with the Convention that a State limits the application for amparo to specific matters'.[37]

First of all, it should be noted that to exclude the scope of amparo protection in 'some areas' cannot be regarded as an issue of 'admissibility', because it is not a procedural matter. The exclusion of certain rights or certain state actions from the protective scope of the writ of amparo constitutes a substantive matter that cannot be limited under article 25(1) ACHR. A different question is the capacity of states to establish procedural conditions of admissibility of legal proceedings. However, this can never mean a denial of the right to judicial protection of certain human rights, or against certain state acts that violate them.

The 'clarification' that the Court itself made in *Castañeda Gutman*, indicating that restrictions by states to the amparo would not be incompatible with the Convention 'provided that it [the State] offers another remedy of a similar nature and equal scope for those rights that cannot be heard by the courts using the amparo proceeding'.[38] This confirms the fact that it is not possible to restrict the right to an amparo proceeding, because if a right is not guaranteed by the specific provisions regulating the 'writ of amparo' it should be guaranteed by other judicial remedies of 'similar nature and equal scope'. In short, guaranteed by other legal means of amparo protection.

When faced with a restriction to formal amparo proceedings, the IACtHR and national courts have the obligation to analyze all judicial remedies available in order to determine if there is 'another recourse of similar nature and equal scope' established for the protection of the right. That is, if another legal means for amparo has been established. That is precisely why in *Castañeda Gutman*, the IACtHR concluded – regarding the protection of the political right to be elected – that 'since an

[36] ibid para 124.
[37] See decision in the IACtHR, *Case of Castañeda Gutman v Mexico* (n32), para 92.
[38] ibid.

amparo proceeding was not accepted in electoral matters', and the victim did not have other effective protective remedies, the state had not provided the victim 'an appropriate remedy to claim the alleged violation of his political right to be elected, and therefore violated Article 25 of the Convention'.[39]

In the case of the *Constitutional Court v Peru* of 31 January 2001, the IACtHR had the opportunity to render judgment regarding restrictions to the scope of amparo proceedings based on 'political questions'. It was a case brought by dismissed judges of the Constitutional Tribunal, removed by congress without the proper guarantees of judicial protection. When analyzing the decision of the Peruvian Constitutional Tribunal on the writ of amparo filed by the dismissed judges, the IACtHR considered that '[t]he exercise of the power of sanction, specifically that of the dismissal of senior officials, cannot be openly evaluated in a jurisdictional seat, because it constitutes an act that is exclusive to the Congress of the Republic, equivalent to what, in doctrine, is called non-actionable political questions',[40] noting however, that the Court itself had established that:

> *'this power is not unlimited or absolutely discretionary, but is subject to certain parameters, one of which, and perhaps the principal one, is that it should be exercised according to the principle of reasonableness, because it would not be logical or fair to decide to impose a measure of sanction following a situation of total uncertainty or lack of substantiation. Accordingly, in cases where an act of a political nature, such as the one questioned in this application for amparo, manifests an evident infringement of this principle and, by extension, others such as that of the democratic rule of law or due material process, it is an unobjectionable fact that this body can evaluate its coherence in the light of the Political Constitution of the State.'*[41]

The Inter-American Court passed up the opportunity to perform a conventionality control with respect to the unconventional denial of amparo against judicial decisions in a case against Ecuador. Specifically the issue was raised in *Acosta Calderón v Ecuador* of 24 June 2005, where the representatives of the victims, alleged that even 'with the constitutional amendments of 1996 and

[39] ibid para 131.
[40] ibid para 95.
[41] ibid para 95.

1998, the exercise of the guarantee of legal protection is not regulated in accordance with the rule of [Article] 25 of the Convention, since it expressly prohibits that the amparo action be presented against judicial orders'.[42] The IACtHR, however, instead of scrutinizing this important aspect, merely stated that it was not ruling on the allegations of the representatives because 'these amendments are not within the conditions of the current case'.[43]

The acts of electoral bodies are also sometimes excluded from the protective scope of the writ of amparo. This was the case in Peru where article 5(8) of the Procedural Code excluded the constitutional writ of amparo against the decisions of the National Electoral Court. The Constitutional Court of Peru annulled this provision by invoking the binding nature of the jurisprudence of the Inter-American Court, including its advisory opinions.[44]

The IACtHR also rendered a decision regarding the exclusion of amparo or effective legal protection against acts of electoral authorities in Nicaragua. In *Yatama v Nicaragua* of 23 June 2005, the Court first found that the Supreme Electoral Council of Nicaragua had not respected the guarantees of due process of Yatama's political party by rejecting the nomination of candidates for the 2000 elections, thus affecting the right to political participation of candidates (paragraphs 160-164). The IACtHR also considered that the state had violated the right to judicial protection or amparo, provided for in article 25(1) ACHR, because its domestic law excluded acts of the National Electoral Council from the scope of the writ of amparo. The Inter-American Court found, in essence, that 'the inexistence of effective domestic remedies places the individual in a situation of defenselessness' so that 'the absence of an effective remedy to violations of the rights recognized in the Convention is itself a violation of the Convention by the State Party'.[45]

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[42] See IACtHR, *Case of Acosta Calderón v Ecuador* (24 June 2005), Series C No 129, paras 87f.
[43] ibid para 98.
[44] See the ruling of the Constitutional Court of Peru, *Colegio de Abogados del Callao v Congreso de la República* (19 June 2007), Tribunal Constitucional Pleno Jurisdiccional 00007-2007-PI/TC-19; mentioned in Carlos Ayala Corao, 'El diálogo jurisprudencial entre los Tribunales internacionales de derechos humanos y los Tribunales constitucionales', in Boris Barrios González (ed), *Temas de Derecho Procesal Constitucional latinoamericano*: *Memorias I Congreso panameño de Derecho Procesal Constitucional y III Congreso Internacional Proceso y Constitución* (Universal Books, Panama City, 2012) 176. Before this law was annulled though, the amparo was admitted if the decision of the National Elections Board did not have a jurisdictional nature or, having it, when it violated effective judicial protection (due process). See Samuel B Abad Yupanqui, *El proceso constitucional de amparo* (Gaceta Jurídica, Lima, 2004) 128, 421, 447.
[45] See IACtHR, *Case of Yatama v Nicaragua* (n14), paras 167f.

The IACtHR continued by asserting that although the Nicaraguan Constitution had established that the resolutions of the Supreme Electoral Council on electoral matters were not subject to judicial review, that could not mean 'that the Council should not be subject to judicial controls, as are the other branches of government', saying, correctly, that 'the requirements arising from the principle of the independence of the powers of the State are not incompatible with the need to establish recourses or mechanisms to protect human rights'.[46] The Court stated:

> *'irrespective of the regulations that each State establishes for its supreme electoral body, the latter must be subject to some form of jurisdictional control that allows it to be determined whether its acts have been adopted respecting the minimum guarantees and rights established in the American Convention, as well as those established in its own laws; which is not incompatible with regard for the functions inherent in this body concerning electoral matters.'*[47]

As a remedy, the IACtHR ordered the state of Nicaragua to:

> *'adopt, within a reasonable time, the necessary legislative measures to establish a simple, prompt and effective judicial recourse that allow the decisions of the Supreme Electoral Council, which affect human rights, such as political rights, respecting the corresponding treaty-based and legal guarantees, and to abrogate the provisions that prevent the filing of such recourse.'*[48]

V. Final reflections

The amparo proceeding is a central institution of the Latin American ius constitititutionale commune. It emerged from a two centuries long constitutional tradition, characterized by the insertion of very extensive declarations on human rights, and consequently, of the judicial means to assure their protection in the constitution. The protection of rights though is only possible when an independent and impartial judiciary exists, and courts can effectively fulfill their duties.

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[46] ibid para 174.
[47] ibid para 175.
[48] ibid para 254.

It should not be surprising then, that the writ of amparo has been a very effective means for the protection of constitutional rights, particularly in democratic regimes, where the judiciary functions as an independent branch of government. Unfortunately, in many Latin American countries, the judiciary has not always accomplished its fundamental duty, and all the constitutional declarations and provisions for amparo rights, are no match for the rather dismal situation regarding the effectiveness of the judiciary as a whole, and its standing as an efficient and just protector of fundamental rights.[49]

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 truly impartial and independent judiciary. Courts must be out of the reach and control of the other branches of government, empowered to interpret and apply the law impartially and protect citizens, particularly regarding when it comes to the enforcement of rights against the state. The judiciary must be built upon the principle of separation of powers. If this principle is not enforced and the government controls courts and judges, no effective guaranty of constitutional rights will be available, particularly when the offending party is a governmental agency.[50]

This has been the unfortunate situation of Venezuela during the past years.[51] The existence of a very progressive constitution in force since 1999, which contains one of the most extensive declarations of constitutional rights in all Latin America, including a provision considering the writ of amparo as a constitutional right in itself, and provisions affirming the independence and impartiality of the

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[49] On the judiciary, see the introduction to this volume.

[50] See Allan R Brewer-Carías, 'El principio de la separación de poderes como elemento esencial de la democracia y de la libertad, y su demolición en Venezuela mediante la sujeción política del Tribunal Supremo de Justicia,' (2012) 12, *Revista Iberoamericana de Derecho Administrativo - Homenaje a Luciano Parejo Alfonso***,** 31-43.

[51] See Allan R Brewer-Carías, 'La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999–2004', in *XXX Jornadas J.M. Domínguez Escovar: Estado de derecho, administración de justicia y derechos humanos* (Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005) 33-174; 'La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006))', in *Cuestiones Internacionales: Anuario Jurídico Villanueva 2007* (Centro Universitario Villanueva, Marcial Pons, Madrid, 2007) 25-57; 'Sobre la ausencia de independencia y autonomía judicial en Venezuela, a los doce años de vigencia de la constitución de 1999 (O sobre la interminable transitoriedad que en fraude continuado a la voluntad popular y a las normas de la Constitución, ha impedido la vigencia de la garantía de la estabilidad de los jueces y el funcionamiento efectivo de una "jurisdicción disciplinaria judicial")', in *Colección Estado de Derecho*, vol 1: Independencia Judicial (Acceso a la Justicia org., Editorial Jurídica Venezolana, Caracas, 2012) 9-103; 'La demolición de las instituciones judiciales y la destrucción de la democracia: La experiencia venezolana', in *Instituciones Judiciales y Democracia: Reflexiones con ocasión del Bicentenario de la Independencia y del Centenario del Acto Legislativo 3 de 1910* (Consejo de Estado, Sala de Consulta y Servicio Civil, Bogotá, 2012) 230-254.

judiciary, has been overpowered by facts. The authoritarianism that has developed since 2000,[52] where the executive has gained complete control of the judiciary,[53] has reduced the declaration of constitutional rights to dead letter and the writ of amparo to complete ineffectiveness.[54] In addition, not only can citizens not claim their constitutional rights before national courts, but the withdrawal of Venezuela in 2013 from the American Convention on Human Rights has also closed off the possibility of accessing the Inter-American Court of Human Rights – a dire situation indeed.[55]

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[52] See Allan R Brewer-Carías, *Dismantling Democracy: The Chávez Authoritarian Experiment* (CUP, New York, 2010); *Authoritarian Government v The Rule of Law*: *Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution* (Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas, 2014).

[53] See Chavero Gazdik, *La justicia revolucionaria: Una década de restructuración (o involución) judicial en Venezuela* (Aequitas, Caracas, 2011); Allan R Brewer-Carías, *Estado Totalitario y Desprecio a la Ley: La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela* (Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas, 2014).

[54] See Jorge C Kariakidis Longhi, *El amparo constitucional venezolano: mitos y realidades* (Editorial Jurídica Venezolana, Caracas, 2012); Antonio Canova González and others, *El TSJ al servicio de la revolución: La toma, los números y los criterios del TSJ venezolano (2004-2013)* (Galipán, Caracas, 2014).

[55] See Carlos Ayala Corao, 'Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela' (2012) 20, Revista Europea de Derechos Fundamentales, 45-82; also in (2012) 10, Estudios Constitucionales (Centro de Estudios Constitucionales de Chile - Universidad de Talca), 643-682; (2012) 131, Revista de Derecho Público, 39-73; *Anuario de Derecho Constitucional Latinoamericano 2013* (Konrad-Adenauer-Stiftung: Programa Estado de Derecho para Latinoamérica, Universidad del Rosario, Bogotá, 2013) 43-79.