

**THE “AMPARO” SUIT:
JUDICIAL PROTECTION OF HUMAN RIGHTS IN
LATIN AMERICA**

**(A COMPARATIVE CONSTITUTIONAL LAW STUDY
OF THE SUIT FOR “AMPARO”)**

VOLUME II

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I. THE AMPARO ACTION OR RECOURSE IN MIXED SYSTEMS OF JUDICIAL REVIEW, EXERCISED BEFORE ONE SINGLE TRIBUNAL: THE CASE OF THE SUPREME COURT OF NICARAGUA

In the middle of the XIX Century, the North American system of judicial review influenced some Latin American countries which also adopted the diffuse system of judicial review. Alexis De Tocqueville's influential book, *Democracy in America*,³⁵³ is considered to have played a fundamental role in this process, particularly regarding the Latin American countries with a federal form of state, all of whom adopted a form of constitutional justice, as was the case in Argentina (1860), Mexico (1857), Venezuela (1858) and Brazil (1890). The system was also adopted in other countries with a brief federal experience like Colombia (1850) and even without connection with the federal form of state in the Dominican Republic (1844), where it is still in force.

But all the Latin American diffuse systems of judicial review, except for Argentina which remained the most similar to the American model³⁵⁴, moved from the original diffuse system towards a mixed system, by adding the concentrated method of judicial review, or by adopting the mixed system from the beginning with its own natural characteristics. Even the Mexican system with the peculiarities of the *juicio de amparo* also moved from the original diffuse system to the current mixed system.

Due to the mixed character of the judicial review system, in all the countries that have adopted the mixed system of judicial review, except for Nicaragua, the amparo actions can be filed before a universe of courts, as happens in Mexico and Venezuela, already analyzed, and in Brazil, Colombia, Do-

353 The first edition in Spanish of the book was issued in 1836, one year after the French and English edition. On the influence of the De Tocqueville book on the matter, see J. Carpizo and H. Fix-Zamudio, "La necesidad y la legitimidad de la revisión judicial en América Latina. Desarrollo reciente", in *Boletín Mexicano de Derecho Comparado*, 52, 1985, p. 33; R.D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, Austin 1971, pp. 15, 33.

354 A. E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires 1952, who speaks about "Northamerican filiation" of the judicial control of constitutionality in Argentinian law, p. 6, 55, 115. Cf. R. Bielsa, *La protección constitucional y el recurso extraordinario. Jurisdicción de la Corte Suprema*, Buenos Aires 1958, p. 116; J.A.C. Grant, "El control jurisdiccional de la constitucionalidad de las Leyes: una contribución de las Américas a la ciencia política", *Revista de la Facultad de Derecho de México*, UNAM, T. XII, 45, 1962, p. 652; C.J. Friedrich, *The Impact of American Constitutionalism Abroad*, Boston 1967, p. 83.

minican Republic, Ecuador, Guatemala and Perú. In Nicaragua, on the contrary, only the Supreme Court can hear actions of amparo.

II. THE AMPARO ACTION OR RECOURSE IN MIXED SYSTEMS OF JUDICIAL REVIEW EXERCISED BEFORE A UNIVERSALITY OF COURTS: THE CASE OF MEXICO, VENEZUELA, BRAZIL, COLOMBIA, DOMINICAN REPUBLIC, ECUADOR, GUATEMALA AND PERÚ

In Nicaragua, the Supreme Court of Justice is the one called to hear and decide the recourse of amparo (Art. 164,3), which -according to Article 45 of the Constitution, corresponds to those “whose constitutional rights have been violated or are in danger of violation”. Only two other Latin American countries assign to their Supreme Court the monopoly to decide amparo actions, Costa Rica and El Salvador, but with the difference that there, the judicial review system followed is an exclusively concentrated one, exercised by a Constitutional Chamber of the Supreme Court.

The recourse of amparo in Nicaragua is set forth against any provision, act or resolution, and in general against any action or omission of any official, authority or agent that violates or attempts to violate the rights and guarantees enshrined in the Constitution; and the recourse of *habeas corpus* in regulated in favor of those whose freedom, physical integrity and safety have been violated or are in danger of being violated (Articles 188 and 189 of the Constitution). Both recourses are of the exclusive competence of the Supreme Court of Justice to hear them (Article 164,3).

According to the 1988 Law of Amparo, the recourse of amparo proceeds against any disposition, act or resolution and in general, against any action or omission of any public official, authority or agent which violates or threatens to violate the rights and guaranties declared in the Constitution (Article 3). Thus, no amparo recourse can be filled against private individual’s actions or omissions.

On the other hand, regarding the recourse of personal exhibition (*habeas corpus*), it proceeds in favor of those persons whose freedom, physical integrity and security are violated or in danger of being violated by any public official, authority, entity or public institution, autonomous or not, and acts restrictive of personal freedom of any inhabitant of the Republic performed by individuals (Art. 4)

As mentioned, the Supreme Court of Justice is the only competent tribunal to finally decide the recourse of amparo. According to Article 25 of the Amparo Law, the amparo recourse must be brought before the Courts of Appeals or its Civil Chambers, where the first path of the proceeding must be accomplished, including the suspension of the challenged act. The files must then be sent for the accomplishment of the final path of the procedure to the Supreme Court of Justice until the final decision. Even in cases in which the Courts of Appeals reject to hear the recourse, the plaintiff can bring the case by mean of an action de amparo before the Supreme Court, against the illegitimate act of fact (*vía de hecho*).

In cases of illegal detentions made by any authority, the recourse of personal exhibition must be filed before the Courts of Appeals or their Criminal Chambers. In cases of acts restrictive of freedom made by individuals, the *habeas corpus* must be filed before the Criminal District courts (Art. 54).

In Nicaragua, even though the Supreme Court is the only competent court to decide the amparo and personal exhibition recourses, as well as a recourse of unconstitutionality of statutes, the judicial review system is not a concentrated one but a mixed one, because all courts, in accordance with the principle of constitutional supremacy (Article 182 of the Constitution), can be considered as having the general power to decide upon the unconstitutionality of statutes when deciding concrete cases, with only *inter partes* effects.

The recourse of unconstitutionality is conceived as a direct action that can be brought before the Supreme Court by any citizen against any statute, decree or regulation (Article 2 of the Amparo Law).

The decision is thus conceived as a popular action, and the Supreme Court's decision when declaring the unconstitutionality of the impugned act, has also general and formal *res judicata* effects. The statute declared in contravention with the Constitution cannot be applied after the Court's decision has been adopted (Articles 18 and 19).

It must be highlighted that the question of the unconstitutionality of a statute, decree or regulation can also be raised in a particular case before the Supreme Court by the corresponding party in the proceeding of a recourse of cassation or of a recourse of *amparo*, in which cases, if the Supreme Court in its decision, in addition to the cassation of the judicial decision and to the constitutional protection to be granted to the party, must declare the unconstitutionality of the statute, decree or regulation, with the same general effects. Nonetheless, the decision cannot affect third party rights acquired from those statutes or regulations (Articles 20 and 22).

The *Amparo* Law also provides that in any judicial case in which a decision that cannot be challenged by mean of a cassation recourse has been adopted, resolving the matter with express declaration of the unconstitutionality of a statute, decree or regulation, the respective court must send its decision to the Supreme Court. The latter can ratify the unconstitutionality of the statute, decree or regulation and declare its inapplicability. In such case the decision cannot affect third party rights acquired from those statutes or regulations (Articles 21 and 22)

As mentioned, with the only exception of Nicaragua, in all other Latin American countries that follow the mixed system of judicial review combining the diffuse and concentrated method of judicial review of the constitutionality of statutes, the *amparo* recourse proceedings follows the diffuse trends, and can be filed before a universality of courts and not before one single court. It is the case of the already mentioned Mexican and Venezuela systems, and the systems of Brazil, Colombia, Dominican Republic, Ecuador, Guatemala and Perú.

1. The actions of constitutional protection in Brazil

Since 1934,³⁵⁵ the Constitution of Brazil has expressly established the *mandado de segurança* as a special means for the protection of fundamental rights, other than personal liberty -which is protected through the recourse for *habeas corpus*. Thus, in the Brazilian constitutional system there are two main special actions for the constitutional protection of fundamental rights: the *mandado de segurança* and the *habeas corpus* actions. In particular, the *mandado de segurança* is intended to protect actual individual rights not protected through *habeas corpus*, whoever the authority responsible for the illegality or abuse of powers may be.³⁵⁶

But after the 1988 Constitution, additionally to the *mandado de segurança* and the *habeas corpus* recourses, other two specific recourses had been regulated: the *mandado de injunção* and the *habeas data*³⁵⁷.

355 Art. 113,33 Constitution 1934. A. Ríos Espinoza, "Presupuestos constitucionales del mandato de seguridad", *Boletín del Instituto de Derecho Comparado de México*, UNAM, 46, 1963, p. 71. (Also published in H. Fix-Zamudio, A. Ríos Espinoza and N. Alcalá Zamora, *Tres estudios sobre el mandato de seguridad brasileño*, México 1963, pp. 71-96.

356 153,21 Constitution

357 See (in general): José Alfonso Da Silva, *Mandado de injunção e habeas data*, Sao Paulo, 1989; Dimar Ackel Filho, *Writs Constitutionais*, Sao Paulo, 1988; Nagib Slaibi Filho, *Anotações a Constituição de 1988*, Rio de Janeiro, 1989; Celso Agrícola Barbi, *Do Mandado de Segurança*, 7th Edition, Revista, aumentada e atualizada de acordo com o Código de Processo Civil de 1973 e legislação posterior, Editora Forense, Rio de Janeiro 1993; J. Cretella Júnior, *Comentários à ley do mandado de segurança (de acordo com a constituição de 5 de outubro de 1988*, 5th Edition, Editora Forense, Rio de Janeiro 1992.

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

The second action of protection provided in the Constitution is the individual or collective *mandado de segurança*, regulated in Law n° 1533 of December 31 1951³⁵⁸. This action is devoted to protect certain and determined rights that are not protected by *habeas corpus* or *habeas data*, when the party responsible for the illegal action or abuse of power is a public authority or an agent of an artificial person exercising attributions of the Authorities (Article 5, LXIX).

This recourse, which may be brought before any tribunal according to its competence, is not admissible when there are administrative recourses that can be brought against the act in question, or if the decisions are judicial, when there are recourses provided under procedural law by means of which the act may be corrected. Neither is the writ of *segurança* admitted against statutes, even those that are self-applicable.

The collective *mandado de segurança* is conceived as a means of protecting collective interests, which may be brought before the courts by political parties represented in the National Congress, trade union organizations, and legally organized entities or associations for the defense of the interests of their members or associates (Article 5, LXX).

Additionally, Brazil has a distinctive regulation which is the *mandado de injunção* similar to the writ of injunction, directed to protect the exercise of constitutional rights and freedoms and of the prerogatives inherent to nationality, the sovereignty of the people or citizenship when the lack of a regulatory state on the matter can make such rights unviable (Article 5, LXXI). The purpose of this action against a legislative or regulatory omission is to obtain the order of a judge imposing the obligation to the legislative body to carry out or comply with a determined act, the violation of which constitutes an impairment of a right.

If the regulatory omission is attributable to the highest authorities of the Republic, the competent Tribunal is the Supreme Federal Tribunal; in other cases the High Courts of Justice are competent. Whatever the case, the respective judge cannot surrogate the legislative body in the sense that it cannot legislate by means of the writ of *injunção*, but can simply order or instruct that the right established in the Constitution that is unviable because of lack of regulation be conceded.

Lastly, the 1988 Constitution introduced the *habeas data*, provided to assure firstly, that the information relative to the plaintiff found in records or databanks of governmental or public sector entities be heard; and secondly, for the rectification of data, when not achievable through judicial or administrative proceedings (Article 5, LXXII). *Habeas data* may therefore be defined as a constitutional action used to guarantee three aspects: the right of access to official records; the right to rectify such records, and the right to correct them. The recourse can be brought before any competent court, and even before the Supreme Federal Tribunal.

In Brazil there also exists an extraordinary recourse of constitutionality that can be filed before the Federal Supreme Tribunal, against the judicial decision issued on matters of protection of constitutional rights by the Superior Federal Court or by the Regional Federal Courts, when it is considered

358 See J. Cretella Junior, *Comentários à Lei do mandado de segurança. De acordo com a Constituição de 5 de Outubro de 1988*, Editora Forense, Rio de Janeiro, 1992,

that the courts have made the decisions in a way inconsistent with the Constitution, or in which the court has denied the validity of a treaty or federal statute, or when the decisions has declared the unconstitutionality of a treaty or of a Federal Law; and when they deem a local government law or act that has been challenged as unconstitutional or contrary to a valid federal law³⁵⁹.

In these cases the matter can reach the Federal Supreme Tribunal, which is the most important court on matters of judicial review (having Brazil a mixed system of judicial review) as happens with numerous Latin American that combine the diffuse system on judicial review with the concentrated one³⁶⁰.

In effect, the Brazilian system of judicial review, in its origin, like the Argentinean, can be considered one of the Latin American systems that followed the North American model more closely³⁶¹. It was after the 1934 Constitution, that a direct action of unconstitutionality was introduced. This action was conceived to be brought before the Federal Supreme Tribunal to impugned statutes. This is how the Brazilian system of judicial review began to be a mixed one.

In effect, the Federal Constitution of 1891 clearly influenced by the North American constitutional system³⁶² assigned the Supreme Federal Tribunal the power to review, through an extraordinary recourse, the decisions of the federal courts and of the courts of the Member States, in which the validity or the application of the treaties or Federal Laws was questioned, and the decisions were against; or in which the validity of laws or government acts of the states was questioned on the grounds of contravention to the Constitution or to federal laws; and the decisions considered the challenged laws or acts valid³⁶³. As a consequence of this express constitutional attribution, the Federal Law 221 of 1894³⁶⁴ assigned the power to judge upon the validity of obviously unconstitutional laws and executive regulations, and to decide their inapplicability in concrete cases, to all federal judges. Thus, the diffuse system of judicial review of legislation was established in Brazil at the end of the last century, and was perfected through the subsequent constitutional reforms of 1926, 1934, 1937, 1946 and 1967³⁶⁵. Therefore, we can say that the main feature of the Brazilian system of judicial review is its diffuse character, with all its consequences according to the American model.

359 Art. 199. III, b,c. Constitution.

360 See in general Mantel Goncalves Ferreira Filho, "O sistema constitucional brasileiro e as recentes inovacoes no controle de constitucionalidade" in *Anuario Iberoamericano de Justicia Constitucional*, n° 5, 2001, Centro de Estudios Políticos y Constitucionales, Madrid, España, 2001; José Carlos Barbosa Moreira, "El control judicial de la constitucionalidad de las leyes en el Brasil: un bosquejo", in *Desafios del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; Paulo Bonavides, "Jurisdicao constitucional e legitimidade (algumas observacoes sobre o Brasil)" en *Anuario Iberoamerioanolberoamericano de Justicia Constitucional* n° 7, Centro de Estudios Políticos y Constitucionales, Madrid, 2003; Enrique Ricardo Lewandowski, "Notas sobre o controle da constitucionalidade no Brasil", en Corzo Sosa, Edgar y otros, *Justicia Constitucional Comparada*, Ed. Universidad Nacional Autónoma de México, México D.F. 1993; Zeno Veloso, *Controle jurisdiccional de constitucionalidade*, Ed. Cejup, Belém, Brasil, 1999,.,

361 H. Fix-Zamudio and J. Carpizo, "Amerique latine" in L. Favoreu and J.A. Jolowicz (ed.), *Le contrôle juridictionnel des lois*, Paris 1986, p. 121.

362 O.A. Bandeira de Mello, *A teoria das Constituições rígidas*, Sao Paulo 1980, p. 157; J. Alfonso da Silva, *Sistema de defensa da Constituição brasileira*, Congreso sobre la Constitución y su Defensa, UNAM, México 1982, p. 29. (mimeo).

363 Art. 59, III, 1. 1981 Constitution.

364 Art. 13,10. Law 221 of 20 November 1984

365 O.A. Bandeira de Mello, *op. cit.*, pp. 158-237

As mentioned, in addition to the diffuse system of judicial review, a concentrated system of review was established in the 1934 Constitution, by attributing power to the Supreme Federal Tribunal to declare the unconstitutionality of member state Constitutions or laws (state laws) when required to do so by the Attorney General of the Republic.³⁶⁶ Thus, a direct action of unconstitutionality was established as of 1934, to defend federal constitutional principles, against Member state acts,³⁶⁷ later developed in subsequent Constitutions³⁶⁸ up to its extension after the 1965 Constitutional Amendment, to control all normative acts of state, whether federal or of the Member States.³⁶⁹

Consequently, the Brazilian system can be considered a mixed one in which the diffuse system of judicial review operates in combination with a concentrated system.³⁷⁰

In the American model and in the Argentinean experience the powers of the courts to control the constitutionality of legislation were derived from the principle of constitutional supremacy as applied by the Supreme Court. Contrary to that, the diffuse system of judicial review arose in Brazil from express provisions in the 1891 Constitution,³⁷¹ and it is still based on constitutional norms. In this respect, as previously mentioned, the Constitution establishes the power of the Supreme Federal Tribunal to judge through extraordinary recourses, cases decided in the last resort by other courts or judges, first, when the challenged judicial decisions are against any disposition of the Constitution or denied the enforcement of a Treaty or federal law; second, when they declared the unconstitutionality of a Treaty or of a federal law; and third, when they deemed a law or other local government valid when such law challenges the Constitution or a federal law.³⁷²

According to this norm, not only is the diffuse system of judicial review established, but the power of the Supreme Tribunal to intervene in all proceedings in which constitutional questions have been resolved, is also established.

As we have mentioned, the diffuse system of judicial review in Brazil follows the general trends of the American model also developed in Argentina. Therefore, all the courts of first instance have the power not to apply laws (federal, state or Municipal laws) that they deem unconstitutional, when a party to the proceeding has raised the question of constitutionality. Thus, the judges have no *ex officio* power to judge the constitutionality of the laws, and can only exercise it when the question of constitutionality has been raised by the interested party as an exception or defense in the process.³⁷³ The constitutional question, once raised, has a preliminary character regarding the final decision of the case, which the judge must decide beforehand.

366 Art. 12,2. 1934 Constitution.

367 J. Alfonso da Silva, *doc. cit.* p. 29

368 Also in the Law n° 2271 of 22 July 1954.

369 Cf. J. Alfonso da Silva, *doc. cit.*, p. 31

370 A. Buzaid, "La acción directa de inconstitucionalidad en el derecho brasileño", *Revista de la Facultad de Derecho*, UCAB, n° 19-22, Caracas 1964, p. 55; O.A. Bandeira de Mello, *op. cit.*, p. 157.

371 Cf., J. Alfonso da Silva, *doc. cit.*, pp. 32, 34; J. Alfonso da Silva, *Curso de direito constitucional positivo*, Sao Paulo 1984, p. 17.

372 Art. 119, III b,c, Constitution. J. Alfonso da Silva, *Sistema... doc. cit.*, p. 43; O.A. Bandeira de Mello, *op. cit.*, p. 215.

373 J. Alfonso da Silva, *Curso...* p. 18; J. Alfonso da Silva, *Sistema... doc. cit.*, pp. 33, 37, 58.

Of course, the decision of the courts on constitutional matters has only *in casu et inter partes* effects, and the unapplied law is considered null and void *ab initio*. Thus, the decision has *ex tunc*, retroactive effects.³⁷⁴

The constitutional question can also be considered in a second instance, through the normal appeals process, in which case, when the court of second instance is a collegiate court, the decision upon matters of unconstitutionality of legislation must be adopted by a majority vote decision of its members.³⁷⁵

As already mentioned, the Brazilian Constitution, ever since the establishment of the constitutional review judicial system in 1891, has always expressly regulated the power of the Supreme Court to review lower courts decisions on matters of constitutionality, through an extraordinary recourse that can be brought before the Tribunal, by the party to the process who has lost the case.³⁷⁶

Finally it must be said that when deciding constitutional questions, the Supreme Federal Tribunal must adopt its decision with the vote of the majority of its members.³⁷⁷ The decision, as the first instance one, when declaring the unconstitutionality of a law, has *inter partes* and *ex tunc* effects.³⁷⁸ In such cases, the Tribunal in fact recognizes the *ab initio* unconstitutionality of the law, in a decision which has declarative effects, but does not annul or repeal the law, which continues in force and to be applicable.

In the Brazilian system, an additional feature can be distinguished: once adopted by the Tribunal, the decision must be sent to the Federal Senate which has the power, according to the Constitution, to “suspend the execution of all or part of a statute or decree when declared unconstitutional by the Supreme Federal Tribunal through a definitive decision,³⁷⁹ in which case the effects of the Senate decisions have, of course, *erga omnes* and *ex nunc* effects.³⁸⁰

Anyway, it must be said that in Brazil, like in the North American system, a presumption of constitutionality also exists regarding laws and other state acts. Consequently, only when the unconstitutionality of a law appears to be without doubt, the Tribunal can declare its unconstitutionality. Thus, in case of doubt, it must reject the question and consider the law constitutional, and applicable in the concrete case.³⁸¹

From the above mentioned, it can be deduced that additionally to the diffuse and concentrated systems of judicial review, an indirect means for judicial review, through the actions for protection of fundamental rights and liberties, can also be identified in the Brazilian constitutional system.

Nevertheless, it has been traditionally considered that laws or any other normative act of state, cannot be the object of an action requesting either *habeas corpus* or a *mandado de segurança*³⁸². In this

374 J. Alfonso da Silva, *Sistema... doc. cit.*, pp. 41,64; A. Buzaid, *loc. cit.*, p. 91.

375 This qualified vote was first established in the 1934 Constitution (Art. 179), and is always required. See O.A. Bandeira de Mello, *op. cit.*, p. 159.

376 J. Alfonso da Silva, *Sistema... doc. cit.*, p. 44

377 D.A. Bandeira de Mello, *op. cit.*, p. 218

378 J. Alfonso da Silva, *Sistema... doc. cit.*, pp. 69, 71

379 Art. 42, VII Federal Constitution

380 J. Alfonso da Silva, *Sistema... doc. cit.*, p. 73.

381 Cf. T.B. Cavalcanti, *Do controle de constitucionalidade*, Rio do Janeiro, 1966, p. 69.

382 Cf. A. Alfonso da Silva, “*Sistema... doc. cit.*, p. 47; H. Fix-Zamudio, “Mandato de seguridad y juicio de amparo”, *Boletín del Instituto de Derecho Comparado de México*, UNAM; 46, 1963, pp. 11, 17. Also published in H. Fix-Zamudio, A. Ríos Espinosa, N. Alcalá Zamora, *op. cit.*, pp. 3-69; A. Ríos Espinosa, *loc. cit.*, p. 88

respect, as happened with the Argentinean recourse for *amparo* until recent changes within the Supreme Court decisions, the abstract control of the constitutionality of laws is not possible through the exercise of the actions for a *mandado de segurança*, or *habeas corpus*. In other words, no direct action against laws can be exercised through the *mandado de segurança*, or *habeas corpus* actions, even if they are what the Mexican system calls auto-applicative or self executing laws.³⁸³ Nevertheless, such actions can serve as an indirect means of judicial review, for the diffuse system, when they are exercised against an act of any authority when executed based on a law deemed unconstitutional. Thus, it is only the concrete situation that results from the execution or application of the law or normative act, the one that can be directly impugned by means of these actions for protection of fundamental rights, and only in an indirect way and in accordance with the diffuse method of review, that laws can be controlled by the courts on the grounds of their unconstitutionality.

2. The action of “tutela” in Colombia

During the constitution-making process of 1991, the intention of the drafters of the Colombian Constitution was to regulate the *amparo* as a constitutional right³⁸⁴, in the same trend of the Mexican and Venezuelan systems of *amparo*.

Nonetheless, in the final version of the Constitution, the National Constituent Assembly abandoned the proposal to set forth the *amparo* as a constitutional right in itself, regulating the *amparo* action as a specific judicial mean for the protection of only some constitutional rights, changing its general Latin American denomination of “action of *amparo*” to “action of *tutela*”³⁸⁵. Thus, even though at the beginning of the application of the reform we identified the Colombian system more in the general category of the Mexican and Venezuela *amparo*³⁸⁶, the statutory regulation and its very important application have molded the *tutela* as a specific mean for the protection of fundamental constitutional rights³⁸⁷, which are not all the rights enshrined in the Constitution, regulating it in parallel to the *habeas corpus* recourse, regulated in the Criminal Code.

383 H. Fix-Zamudio, *loc. cit.*, p. 16; A. Alfonso da Silva, *Sistema... doc. cit.*, pp. 46,47.

384 See the draft in Jorge Arenas Salazar, *La tutela. Una acción humanitaria*, Librería Doctrina y Ley, Bogotá 1992, pp. 47. See the comments in Allan R. Brewer-Carías, “El *amparo* a los derechos y libertades constitucionales y la acción de *tutela* a los derechos fundamentales en Colombia: una aproximación comparativa” en Manuel José Cepeda (editor), *La Carta de Derechos. Su interpretación y sus implicaciones*, Editorial Temis, Bogotá 1993, pp. 21-81; y en la obra colectiva *La protección jurídica del ciudadano. Estudios en Homenaje al Profesor Jesús González Pérez*, Tomo 3, Editorial Civitas, Madrid 1993, pp. 2.695-2.748.

385 Both words, “*amparo*” and “*tutela*” have the same meaning in Spanish. See the proposal in *Idem*, p. 49 ff.

386 See Allan R. Brewer-Carías,

387 See, in general, in regard to the *tutela* in Colombia, Jorge Arenas Salazar, *La Tutela Una acción humanitaria*, 1st Edition 1992, Ediciones Librería Doctrina y Ley, Santa Fe de Bogotá D.C., Colombia 1992; Manuel José Cepeda, *La Tutela Materiales y Reflexiones sobre su significado*, Presidencia de la República, Consejería para el desarrollo de la Constitución, Imprenta Nacional de Colombia, Bogotá D.C. 1992; Oscar José Dueñas Ruiz, *Acción de Tutela, Su esencia en la práctica, 50 respuestas básicas*, Corte Suprema, Consejo de Estado, Legislación, Ediciones Librería del Profesional, Santa Fe de Bogotá D.C., Colombia 1992; Federico González Campos, *La Tutela: Interpretación doctrinaria y jurisprudencial*, 2nd Edition, Ediciones Jurídicas Gustavo Ibáñez, Santa Fe de Bogotá D.C., Colombia 1994; Manuel José Cepeda, *Las Carta de Derechos. Su interpretación y sus implicaciones*, Temis Presidencia de la República Consejería para el Desarrollo de la Constitución, Santa Fe de Bogotá, Colombia 1993; Juan Manuel Charry U., *La acción de tutela*, Editorial Temis, Santa Fe de Bogotá 1992; Herán Alejandro Olano Correa et al., *Acción de Tutela (Práctica Forense y Jurisprudencia)*, 2nd Edition 1994, Tunja-Boyacá-Colombia 1994; Carlos Augusto Patiño Beltrán, *Acciones de Tutela cumplimiento populares y de grupo. Guía Práctica*, Editorial Leyer, Bogotá D.C., Colombia 2000; *Pensamiento Jurídico*.

Additionally, the Constitution also regulated the popular actions in order to protect collective rights and interests related to public patrimony, public space, public safety and public health, administrative morals, the environment, free economic competition and others of like nature defined by statute.

The “action of *tutela*”, has been regulated in Decree N° 2.591 of 1991, as an action that everybody has in order to claim before the courts, at all times and at in any place, through a preferential and summary procedure, by himself or by some one on his behalf, the immediate protection of their fundamental constitutional rights, whenever they are harmed by the action or the omission of any public authority or by individuals. In the latter case, the individuals are only those in charge of rendering a public service whose conduct seriously and directly affects collective interests, regarding which the aggrieved party finds himself in a position of subordination or defenselessness.

The Constitution does not exclude any State act from the *tutela* action, which includes judicial acts that harm fundamental rights. That is why Article 40 of the Decree 2591 provided for the action of *tutela* against judicial decisions. Nonetheless, this Article 40 of the Decree was annulled by the Constitutional Court in its October 1, 1992 decision, considering it unconstitutional³⁸⁸. Nonetheless, as abovementioned, the Constitutional Court has developed the doctrine of arbitrariness in order to admit the *tutela* against judicial decisions when it is thought that they are issued as a result of a judicial *voie de fact* ³⁸⁹.

The Decree set forth that the action of *tutela* can also be filed in states of exception, and when such exception measures refer to rights, the action of *tutela* can be exercised at least to defend its essential contents.

According to Article 86 of the Constitution, such action shall only proceed when the affected party does not have another means of judicial defense, unless it is used as a temporary measure to avoid irreparable damage. This does not mean that the remedy can only be brought before the courts after exhausting the ordinary means; but that the action of *tutela* is only available for constitutional protection, when there are no other judicial preferred and brief means to achieve such purpose. That is why, as stated in Article 6,2 of the Decree n° 2591, the action of *tutela* is inadmissible when the recourse of *habeas corpus* can be filed for the protection of the particular right.

For this reason, Decree n° 2.591 of 1991 established, among the causes of inadmissibility of such protection, that it shall not proceed “when other recourses or judicial means of defense are available unless being used as a temporary measure to avoid irreparable damage,” in the understanding that “irreparable damage is that which can only be wholly repaired by means of indemnification” (Article 6,1).

Therefore, pursuant to Decree N° 2.591, Article 8, “even when the affected party has other means of judicial defense, the action of *tutela* shall proceed when used as a temporary mechanism to avoid irreparable harm”. The statute also provides that “when used as a temporary mechanism to avoid irreparable harm, the action of *tutela* may be brought together with the action of annulment and others

La Acción de Tutela, Revista de Teoría del Derecho y Análisis Jurídico n° 7, Universidad Nacional de Colombia, Facultad de Derecho, Ciencias Políticas y Sociales, Santa Fe de Bogotá D.C. 1997.

388 See the decision n° C-543 of September 24, 1992 in *Derecho Colombiano*, Bogotá 1992, pp. 471 to 499; and in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá 001, pp. 1009 ff.

389 See the decisión n° T-231 of May 13, 1994 in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá 001, pp. 1022 ff,

that are admitted before the judicial review of administrative action jurisdiction. In these cases, the judge may determine that the particular act be not applied to the specific judicial situation the protection of which is being sought, for as long as the trial lasts.”

The Constitution set forth that the action of *tutela* for the protection of fundamental constitutional rights can be brought “before the judges”; and accordingly, Decree 2.591 of 1991 attributes the power “to hear the action of *tutela*, to the judges and tribunals with jurisdiction over the place where the violation or threat of violation takes place” (Article 37).

Decree 1380 of 2000, regarding the courts with jurisdiction in the place where the violation or threatens have taken place, before which the action must be filed, establishes the following rules, depending the defendant party. If it is 1) against any national public authority, before the Districts Superior Courts; 2) against any national or departmental decentralized entity for public utilities, before the Circuit courts; 3) against district or municipal authorities and against individuals, before the municipal courts; 4) against any general administrative act issued by a national authority, before the Cundinamarca Judicial review of administrative actions; 5) against any judicial entity, before the respective superior court; and 6) against the Supreme Court of Justice, the *Consejo de Estado* or the Superior Council of the Judiciary, or its Disciplinary Chamber before the same Corporation in the corresponding Chamber.

As mentioned above, in Colombia the action of *habeas corpus* also set forth in the Constitution (Article 30) is regulated in the Criminal Code as a right that proceeds in order to protect (“amparo”) personal freedom against any arbitrary act of any authority that tends to restrict it (Article 5). It can be filed when a person is captured violating its constitutional or legal guarantees, or its freedom deprivation is illicitly extended (Articles 430); before any criminal court in the place where the detainee is or where the person has been captured (Article 431).

Now, regarding the decisions on the actions of *tutela*, they are subject to appeal; and pursuant to Decree 2.591 of 1991, if no appeal has been filed, the decisions must be sent for their revision to the Constitutional Court (Article 31); the Court having discretionary power to determine which decisions of *tutela* will be reviewed (Article 33).

Since the 1991 Constitution, the Constitutional Court plays a very important role in matters of judicial review, being the Colombian system, like the Venezuelan and Brazilian ones, a mixed system³⁹⁰, set forth as such since the 1910 Constitution. In it, the power attributed to all courts to declare the inapplicability of laws they deem contrary to the Constitution, was set forth in parallel with a concentrated system of judicial review attributed to the then Supreme Court, also through the exercise of a popular action.³⁹¹

It was in the 1910 Constitution that the role of “guardian of the integrity of the Constitution” which is still today in the Fundamental text on the hands of the Constitutional Court, was attributed for the first time to the Supreme Court of Justice³⁹². It was also in that same Constitution that the principle of the diffuse system of judicial review acquired constitutional rank, as established in Article 7 of the 1991 Constitution, which states:

390 See in general Eduardo Cifuentes Muñoz, “La Jurisdicción constitucional en Colombia” en *La Jurisdicción constitucional en Iberoamérica*, Ed Dykinson, Madrid, España, 1997; Luis Carlos Sácchica, *La Corte Constitucional y su jurisdicción*, Ed. Temis, Bogotá, Colombia, 1993

391 Concerning the mixed character of the system see: J. Vidal Perdomo, *Derecho constitucional general*, Bogotá 1985, p. 42; D.R. Salazar, *Constitución Política de Colombia*, Bogotá 1982, p. 305; E. Sarria, *Guarda de la Constitución*, Bogotá, p. 78.

392 Cf. D.R. Salazar, *op. cit.*, p. 304.

Art. 215. The Constitution is the norm of norms. In all cases of incompatibility between the Constitution and a statute, the constitutional provisions shall be applied.

Anyway, since 1910, the Colombian constitutional system has mixed both the diffuse and the concentrated systems of judicial review, attributing now the concentrated power to annul, with *erga omnes* effects, to the Constitutional Court in a similar way to the Venezuelan system, by means of a popular action.

Regarding Article 7 of the Constitution, it provides the basis of the diffuse system of judicial review, according to which all judges have the power to decide not to apply a law in a concrete process, when they deem it contrary to the Constitution. The system, as it has been developed, functions entirely according to the North American model, particularly, because it has been conceived as an “exception of unconstitutionality.”

Of course, in these cases of diffuse constitutional control, the judges cannot annul the law or declare its unconstitutionality, nor can the effects of their decision be extended or generalized. On the contrary, as happens in all other diffuse judicial review systems, the court must limit itself to deciding not to apply the unconstitutional law to the concrete case, of course only when it is pertinent to the resolution of the case. That decision has effects only concerning the parties to the case. Therefore, as with similar systems elsewhere, the law whose application has been denied in a concrete case, continues to be in force and other judges can moreover continue to apply it. Even the judge who chose not to apply it in a concrete case, can change his mind in a subsequent process.³⁹³

The creation of the Constitutional Court as the ultimate guardian of the Constitution originated the attribution of the Court to review all the judicial decisions resolving actions for tutela. As opposed to the Venezuelan or Argentinean cases, in Colombia there is not a specific matter for a recourse of revision, but an attribution that must be automatically accomplished in a discretionary way. In effect, the Decree regulating the procedure set forth that when a tutela decision is not appealed, it always must be automatically sent for revision to the Constitutional Court (Article 31). In cases in which the decisions are appealed, the superior court’s decision, whether confirming or revoking the appealed decision, must also be automatically sent to the Constitutional Court for its revision (Article 32).

For that purpose, the Constitutional Court must appoint two of its Magistrates in order to select, without express motivation and according to their criteria, the tutela decisions which are to be reviewed. Nonetheless, any of the Magistrates of the Court and the Peoples’ defendant can request the revision of the excluded decision, when they deem that the review can clarify the scope of a right or avoid a grave prejudice. Also, according to Decree 262 of February 2000, the General Attorney of the Nation can ask for the revision of tutela decisions when he deems necessary to defend the legal order, the public patrimony and the fundamental rights and guarantees (Art. 7,12).

All the decisions not excluded from review in a delay of 30 days, must be reviewed by the Court in a three month delay (Article 33). For that purpose, the Constitutional Court must appoint three magistrates who will integrate the Chamber called to decide (Article 34). All the review decisions that modify or revoke the tutela decision, that unify the constitutional judicial doctrine (*jurisprudencia*) or that clarify the scope of constitutional provisions must be motivated; the others must just be justified (Article 35). The Constitutional Court review decisions only produce effects regarding the concrete case. They must immediately be notified to the first instance court, which at his turn must notify it to the parties, and adopt the necessary decisions in order to adequate its own decision to the Court ruling.

393 Cf. L.C. Sachica, *El control...cit.*, p. 65.

3. The action of amparo in Dominican Republic

In the case of the Dominican Republic, as has been already mentioned, there are no constitutional or legal provisions regulating the amparo recourse as a specific judicial mean for protection of constitutional rights. The Constitution only refers to the recourse of habeas corpus for the protection of personal freedom, which has been regulated by the 1978 Habeas Corpus Law (*Ley de habeas corpus*), and based on such regulations, the Supreme Court traditionally limited the procedure of habeas data to the protection of the right to physical freedom and safety, excluding any possibility of using the habeas corpus recourse in order to protect other constitutional rights.

Nevertheless, as has been mentioned, the Supreme Court by means of a decision of February 24, 1999 (Case: *Productos Avon S.A.*) based in the American Convention on Human Rights, admitted the amparo recourse for the protection of constitutional rights and determined that the competent courts to decide on the matter of amparo are the courts of first instance in the place in which the challenged act or omission has been produced. A few months latter, by means of Resolution of June, 10 1999, the Supreme Court determined that the competent fist instance courts are those deciding civil matters.

The amparo action has been successfully used for the protection of constitutional rights. Among the multiple cases, the following can be mentioned: For instance, a 2002 case in which the Court of First Instance of the National District ordered the National Citizenship Registry to issue the Identification Card to two boys born in the Republic from Haitian illegally settled parents, arguing that the rejection of such documents constituted a violation of the boys identity and citizenship rights.

Other case decided by the same Court of First Instance of the National District originated in the order adopted by the Public prosecutor of the National District seizing of the *Listin Diario* Newspaper, which was considered contrary to the constitutional rights not to be applied statutes retroactively, to non discrimination, to freedom of press and to property rights³⁹⁴.

It must be mentioned that in Dominican Republic, a mixed system of judicial review exists combining the diffuse method of judicial review with the concentrated one. Regarding the diffuse method, the 1844 Constitution, as well as the 2002 Constitution set forth that "all statutes, decrees, resolutions, regulations or acts contrary to the Constitution are null and void" (Article 46). From this express regulation of the consequences of the constitutional supremacy principle, all the Courts can declare an act unconstitutional and not applicable to the concrete case³⁹⁵.

On the other hand, the Supreme Court of Justice has the exclusive power to hear the action of unconstitutionality of statutes that can be brought before the Court by the President of the Republic, the Presidents of the national Congress Chambers or by an interested party (Article 67,1).

4. The action of amparo in Ecuador

As it has been already analyzed, the 1988 Ecuadorian Constitution set forth the basic and extensive regulations not only regarding the action for amparo, but also regarding the action of habeas corpus and habeas data; which are statutorily developed in the 1997 Law on Constitutionality Control.

Regarding the amparo action, according to Article 46 of the Law, its purpose is to effectively protect the rights enshrined in the Constitution or in international declarations, covenants and instru-

394 See Samuel Arias Arzeno, "El Amparo en la República Dominicana: su Evolución Jurisprudencial", publicado en *Revista Estudios Jurídicos*, Vol. XI n° 3, Ediciones Capeldom, Septiembre-Diciembre 2002.

395 Cf. M Berges Chupani, "Report" in *Memoria de la Reunión de Cortes Superiores de Justicia de Ibero-America, El Caribe, España y Portugal*, Caracas, 1983, p. 380.

ments, in force in Ecuador, against any threat originated in an illegitimate act of public administration authorities that could have caused, have caused or can cause an imminent, grave and irreparable harm. It must be highlighted that in these cases, the amparo action can only be filed against actions from Public Administration, and not from other non executive entities of the State. The Constitution expressly excludes judicial decisions from the action of amparo.

The action can be filed in order to request the adoption of urgent measures directed to put an end to the harm or to avoid the danger of the protected rights. It can also be the object of an amparo action the omission in the issuing of an act or the absence of its enforcement.

The action may also be brought if the act or omission were carried out by persons that render public services or act by delegation or concession of a public authority. Only in such cases, an amparo can be filed against a private person.

As mentioned, according to Article 47 of the Law on Constitutional Control, the competent courts to hear the amparo action are the first instance courts where the challenged act has been in effect.

All decisions granting amparo adopted by the first instance courts by means of an advisory procedure must obligatorily be sent to the Constitutional Tribunal in order to be confirmed or revoked. When the first instance decision denies the amparo action (as well as the habeas corpus or habeas data actions), it can be appealed before the same Constitutional Tribunal (Articles 12,3; 31and 52).

The Constitutional Tribunal of Ecuador, in substitution of the former Constitutional Guarantees Tribunal, was vested in the 1998 Constitution with the power to declare the nullity on the grounds of unconstitutionality of any statute, decree, regulation or ordinance, when an action is brought before the Tribunal by the President of the Republic, the National Congress, the Supreme Court, one thousand citizens or by any person provided a previous favorable report from the Peoples' Defendant (Article 18).

But this power to annul statutes with *erga omnes* effects (Article 22) in a concentrated way, is combined in Ecuador with the diffuse method of judicial review which attributed to all courts the power to declare the unconstitutionality of statutes applying the Constitution with preference. The judicial review system in Ecuador, is thus a mixed one³⁹⁶.

In this respect, Article 272 of the Constitution sets forth:

"The Constitution prevails over any other legal norm. All the organic or ordinary statutes, decrees-law, ordinances, regulations or resolution dispositions, must conform to its provisions and in case they enter in contradiction with it or alters their provisions, they will have no value".

As a consequence of this supremacy principle, Article 274 of the Constitution sets forth the diffuse method of judicial review allowing any court at parties petitions or *ex officio*, to declare the inapplicability of any norm contrary to the Constitution, as follows:

396 See in general Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, Ecuador, 2004; Hernán Salgado Pesantes, "El control de constitucionalidad en la Carta Política del Ecuador" en *Una mirada a los Tribunales Constitucionales. Las experiencias recientes. Lecturas Constitucionales Andinas* n° 4, Ed. Comisión Andina de Juristas, Lima, Perú; Ernesto López Freire, "Evolución del control de constitucionalidad en el Ecuador" en *Derecho Constitucional para fortalecer la democracia ecuatoriana*, Ed. Tribunal Constitucional - Kas, Quito, Ecuador, 1999; Marco Morales Tobar, "Actualidad de la Justicia Constitucional en el Ecuador" en López Guerra, Luis (Coordinador). *La Justicia Constitucional en la actualidad*, Corporación Editora Nacional, Quito, Ecuador, pp. 77-165; Oswaldo Cevallos Bueno, "El sistema de control concentrado y el constitucionalismo en el Ecuador" en *Anuario Iberoamericano de Justicia Constitucional*, n° 6, 2002, Madrid, España, 2002.

Any court or judge, in the cases they are hearing, at party's request or ex officio, may declare a legal provision contrary to the Constitution or to international treaties or covenants as inapplicable, notwithstanding its power to decide the controversy.

According to the same article, this declaration will not have obligatory force except in the case in which it is issued, that is to say, has only *inter partes* effects; and the court or tribunal must write a report on the declaration of unconstitutionality of the statute that must be sent to the Constitutional Tribunal in order for it to resolve the matter in a general and obligatory way, that is to say, with *erga omnes* effects.

Thus, in matters of amparo, if when granting the constitutional protection the competent judges applying the diffuse method of judicial review has adopted decisions declaring the unconstitutionality of statutes³⁹⁷, they must also write the report on the question of constitutionality to be sent to the Constitutional Tribunal by the advisory proceeding for its confirmation or revocation (Art. 12,6) .

5. The "amparo" in Guatemala

In Guatemala the 1985 Constitution set forth the "amparo" as a specific judicial mean to protect people against the threat of violation of their rights, or to restore the rule of such rights when the violation has already occurred. According to the Constitution, "there is no scope that is not subject to amparo, and it shall be admitted provided that the acts, resolutions, provisions or statutes carry an implicit threat, restriction or violation of the rights guaranteed by the Constitution and the statutes" (Article 265).

In particular, according to Article 10 of the 1986 Amparo, personal exhibition and constitutionality Law, the amparo is due to protect all situations susceptible to risk, a threat, restriction or violation of the rights recognized in the Constitution and the statutes of the republic, whether the situation comes from public law persons or entities or private law entities. Article 9 of the Amparo Law specifies that amparo can be brought against the State, comprising decentralized or autonomous entities, against those entities sustained with public funds created by statute or by virtue of a concession, or those that act by delegation of the State, by virtue of a contract, concession or similar. Amparo can also be filed against entities to which persons must be integrated by law and other recognized by statute, like the political parties, associations, societies, trade unions, cooperatives and similar.

Article 10 of the Amparo Law enumerates as examples, the following cases in which everybody has the right to ask for amparo:

- a) To ask to be maintained or to be restituted in the enjoyment of the rights and guarantees set forth in the Constitution or any other statute;
- b) In order to seek a declaration in a concrete case, that a statute, regulation, resolution or authority act does not oblige the plaintiff because it contradicts or restricts any of the rights guaranteed in the Constitution or recognized by any other statute'
- c) In order to seek a declaration in a concrete case that a non legislative disposition or resolution of Congress, is not applicable to the plaintiff because it violates a constitutional right;
- d) When an authority of any jurisdiction issues a regulation, accord or resolution of any kind that abuses of power or exceeds its legal attributions, or when it has no attributions or they

397 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, Ecuador, 2004, p. 85.

are exercised in a way that the harm caused or that can be caused would be irreparable through any other mean of defense.

- e) When in administrative activities the affected party is compelled to accomplish unreasonable or illegal formalities, task or activities, or when no suppressive mean or recourse exists;
- f) When the petitions or formalities before administrative authorities are not resolved in the delay fixed by statutes, or in case that no delay exists, in a delay of 30 days once exhausted the procedure, or when the petitions are not admitted;
- g) In political matters, when the rights recognized in the Constitution or statutes, are injured by political organizations;
- h) In judicial and administrative matters, regarding which the statutes set forth procedures and recourses according to due process rules that can serve to adequately resolve them, if after the exhaustion of threat by the interested party, the threat, restriction or violation to the rights recognized in the Constitution and guaranteed by the statute, persist;

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

Pursuant to Articles 11 *et seq.* of the 1986 Law of Amparo, the competence to hear the amparo is attributed to all courts as follows:

1. To the *Constitutional Court*, as sole instance, in the cases of amparo brought against the Congress of the Republic, the Supreme Court of Justice, the President and the Vice President of the Republic (Article 11).
2. To the *Supreme Court of Justice*, in the cases of amparo brought against the Supreme Electoral Tribunal; Ministers or Vice Ministers of State when acting in the name of their Office; Chambers of the Courts of Appeal, Martial Courts, Courts of Second Instance of Accounts and Administrative judicial review Courts; the Attorney General; the Human Rights Commissioner; the Monetary Board; Ambassadors or Heads of Diplomatic Guatemalan Missions abroad; and the National Council of Urban and Rural Development.
3. To the ordinary Chambers of the *Court of Appeals*, in their respective jurisdictions, the amparos against: Vice Ministers of State and Director-Generals; judicial officials of any jurisdiction or branch of first instance; mayors and municipal corporations of departmental centers; the Head of the Comptroller General; the managers, heads or presidents of decentralized or autonomous State entities or their directors, councils or boards of directors of any kind; the Director-General of the Peoples' Registry; general assemblies and directors of professional associations; general assemblies and directors of political parties; consuls or heads of Guatemalan consulates overseas; regional or departmental councils of urban and rural development, and governors.
4. The *Judges of First Instance* in their respective jurisdictions, for amparos against: revenue administrators; minor judges; police chiefs and employees; mayors and municipal corporations not included in the previous article; all other officials, authorities and employees of any jurisdiction or branch not specified in previous articles; and private law entities.

The competent courts in matters of habeas corpus are the same mentioned above, except regarding the attributions assigned to the Constitutional Court that corresponds to the Supreme Court of Justice (Article 83).

In all the cases, amparo decisions are subjected to appeal before the Constitutional Court (Art 60), recourse that can be filed by the parties, the Public prosecutor and the Human Rights Commissioner (Article 63).

The Constitutional Court in its decision can confirm, revoke or modify the lower court resolution (Art. 67); and can also annul the whole proceeding when it is proved that in the proceedings the legal prescription had not been observed.

The judicial review system of Guatemala is also a mixed system, in which the Constitutional Court plays a principal role.

The Constitutional Court by means of the concentrated method of judicial review is empowered to hear actions of unconstitutionality against statutes, regulations or general dispositions (Article 133), that can be brought before the Court by the board of directors of the Lawyer's (Bar) Association (Colegio de Abogados), the Public prosecutor; the Human Rights Commissioner; or by any person with the help of three lawyers members of the Bar (Article 134). The statutes, regulations or general dispositions declared unconstitutional, will cease in their effects from the following day after the publication of the Constitutional Court decisions in the Official Gazette (Article 140). Thus, the Constitutional Court's decision has *erga omnes* effects.

But besides the Constitutional Court powers following the concentrated method of judicial review, in Guatemala the diffuse method of judicial review of legislation has also been traditionally set forth, derived from the principle of the supremacy of the Constitution. That is why Article 115 of the Amparo Law declared that all "statutes, governmental dispositions or any order regulating the exercise of rights guaranteed in the Constitution, shall be null and void if they violate, diminish, restrict or distort them. No statute can contravene the Constitution's disposition. The statutes that violate or distort the constitutional norms are null and void.

The consequence of this principles is the possibility of the parties to raise in any concrete case (including cases of amparo and habeas corpus), before any court, at any instance or in cassation, before the decision is issued, as an action or as an exception or incident, the question of the unconstitutionality of the statute in order to its inapplicability to the concrete case be declared (Article 116). In such cases, once raised the constitutional question before any court, it assumes the character of constitutional tribunal (Art. 120).

In cases of action of unconstitutionality in concrete cases, it can be brought before the competent court by the Public prosecutor or by the parties in 9 days. The court must decide in three days, and the decision can be appealed before the Constitutional Courts (Article 121). If the question of unconstitutionality of a statute supporting the claim is raised has an exception or incident, the competent court must resolve the matter (Article 123). The decision can also be appealed before the Constitutional court (Article 130).

6. The recourse of amparo in Perú

Article 200 of the Peruvian Constitution sets forth the action of *habeas corpus* against any action or omission by any authority, official or person that impairs or threatens individual freedom; the action of amparo to protect all other rights recognized by the Constitution impaired or threatened by any authority, official or person; and the action of *habeas data*, against any act or omission by any authority, official or person that impairs or threatens the rights referred to in Article 2, Subsections 5 and 6 of the

Constitution; that is, to request and receive information from any public office, except when they affect personal intimacy or were excluded for national security; to assure that public or private informatics services will not release information that affects personal and familiar intimacy.

In 2004 the first Constitutional Procedural Code in Latin America was sanctioned in Peru (Law 28.237)³⁹⁸, which repealed the previous statutes regulating the amparo and the habeas corpus recourses (Law 23.506 of 1982, and Law 25.398 of 1991).

This Code highlights the purposes of the habeas corpus, habeas data and amparo guaranties, which is to protect the constitutional rights, in order to restore things to the state they had previous to the violation or threat of violation of constitutional rights, or dispose the accomplishment of a legal order or of an administrative act (Article 1).

According to Article 2 of the Code, the constitutional remedies of habeas corpus, amparo and habeas data are admissible when the constitutional rights are threatened or violated by actions or obligatory acts omissions from any authority, public official or person. In case of a threat being invoked, it must be of certain and imminent execution.

The competent courts to hear the amparo recourses are the Civil Courts with jurisdiction on the place where the right was affected, or of the plaintiff or defendant residence (Article 51). But if the harm has been caused by a judicial decision, the amparo must be filed before the Civil Chamber of the respective Superior Court of Justice.

According to the same Code, the amparo shall only be admitted when previous procedures have been exhausted (Articles 5,4; 45). However, in case of doubt over the exhausting of prior procedures, the Code requires that the amparo suit be given preference (Article 45).

Regarding the habeas corpus recourse, the competent judges are the Criminal ones (Article 28).

According to Article 202,2 of the Constitution, it is attributed to the Constitutional Tribunal the power to hear in last and definitive instance, the judicial decisions denying the habeas corpus, amparo and habeas data. Thus, all the habeas corpus, habeas data and amparo decisions can reach the Constitutional Tribunal of Perú, by means of a recourse of constitutional damage (*agravio*) that can be filed against the second instance judicial decision denying the claim (Article 18, Code). If this constitutional damage recourse is denied, the interested party can file before the Constitutional Tribunal a recourse of complaint (*queja*), in which case, if the Tribunal considered the complaint duly supported, it will proceed to decide the constitutional damage recourse, asking from the superior court the envoy of the corresponding files (Article 19).

If the Constitutional Tribunal considers that the challenged judicial decision has been issued as a consequence of a defect or vice in the procedure that has affected its sense, will annul it and order the reposition of the procedure to the situation previous to when the defect happened. In cases in which the vice only affects the challenged decision, the Tribunal must repeal it and issue a substantive ruling (Article 20).

This Constitutional Tribunal of Peru, reinstalled in 1996, plays a very important role in the judicial review system, which nevertheless, is a mixed one, combining the diffuse system of judicial review with the concentrated one attributed to the Tribunal³⁹⁹.

398 See: Samuel B. Abad Yupanqui *et al.*, *Código Procesal Constitucional*, Ed. Palestra, Lima 2004. See (in general): Alberto Borea Odria, *Las garantías constitucionales: Habeas Corpus y Amparo*, Libros Peruanos S.A., Lima 1992; Alberto Borea Odría, *El amparo y el Hábeas Corpus en el Perú de Hoy*, Lima, 1985.

399 See in general Domingo García Belaúnde, "La jurisdicción constitucional en Perú" en García Belaúnde, Domingo y Fernández Segado Francisco (Coord.), *La jurisdicción constitucional en Iberoamérica*, Ed. Dykin-

Article 138 of the 1993 Constitution sets forth the diffuse method of judicial review, providing:

Article 138. The power to administer justice derives from the people and is exercised by the Judiciary, through its hierarchical organs according to the Constitution and the statutes. In any process, if an incompatibility exists between a constitutional norm and a legal norm, the courts must prefer the former. Likewise, must prefer the legal norm over the norms with inferior rank.

Thus, all courts can exercise judicial review of legislation in concrete cases, having their decisions in such cases *inter partes* effects⁴⁰⁰.

Nonetheless, the Peruvian diffuse method of judicial review has a peculiarity that makes it unique in comparative law because the ordinary judges when deciding the inapplicability to a case of statutes based on constitutional arguments, according to Article 14 of the Organic Law on the Judiciary, must obligatorily send its decision to the Supreme Court of Justice. It is then the Supreme Court, through its Constitutional Law and Social Chamber, the one that eventually determines if the decision of the ordinary court was adequate or not, validating the non applicability of the statute to the concrete case.

But additional to the diffuse method of judicial review, in Peru a concentrated method is also set forth by attributing the Constitutional Tribunal the power to hear in unique instance the actions of unconstitutionality (Article 202,1) regarding norms of legal rank (statutes), legislative decrees, urgency decrees, treaties approved by Congress, Congress internal regulations, regional norms and municipal ordinances (Art. 77, Code).

This action can be brought before the Tribunal by: 1. The President of the Republic; 2. The Prosecutor General of the nation; 3. The Peoples defendant; 4. By a number equivalent to 25% of representatives to the Congress; 5. By 5.000 citizen whose signatures must be validated by the National Jury of Elections. If it is a local government regulation the action can be filed by 1% of the citizens of the corresponding; 6. The presidents of Regions with the vote of the Regional Coordinating Councils, or the provincial mayors with the vote of the local Councils, in matter of their jurisdiction; and 7. The professional associations (*Colegios*) in matters of their specialty (Article 203; Article 99 Code).

The decision of the Constitutional Tribunal, in these cases of the concentrated method of judicial review when declaring the unconstitutionality of a norm, must be published in the Official Gazette. The day after such publication the statute will began to have no effects, and the decision of the Constitutional Tribunal will have no retroactive effects (Article 204). Thus, the decision has *erga omnes* and *ex nunc* effects, and the authority of *res judicata*, being obligatory to all public entities (Articles 81, 82 Code).

son, Madrid, España, 1977; Domingo García Belaunde, "La jurisdicción constitucional y el modelo dual o paralelo" en *La Justicia Constitucional a fines del siglo XX, Revista del Instituto de Ciencias Políticas y Derecho Constitucional*, año VII, n° 6, Palestra editores, Huancayo, Perú; Domingo García Belaunde (Coordinador) *La Constitución y su defensa*, Ed Jurídica Grijley, Lima, 2003, p. 96. César Landa, *Teoría del Derecho procesal Constitucional*, Ed. Palestra, Lima, Perú, 2004; José Palomino Manchego, José, "Control y magistratura constitucional en el Perú" in Juan Vega Gómez, and Edgar Corzo Sosa (Coordinadores.), *Instrumentos de tutela y justicia constitucional, Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, UNAM, México. Quiroga León, Aníbal, "El derecho procesal constitucional peruano" en Vega Gómez, Juan y Corzo Sosa, Edgar (Coord.) *Instrumentos de tutela y justicia constitucional, Memoria del VII Congreso Iberoamericano de Derecho Constitucional*, Instituto de Investigaciones Jurídicas, UNAM, México, pp. 471 y ss.

400 See Aníbal Quiroga León, "Control difuso y control concentrado en el derecho procesal peruano" en *Revista Derecho* n° 50, diciembre de 1996, Facultad de Derecho de la Pontificia Universidad Católica del Perú, Lima, Perú, 1996, pp. 207 ff.

CHAPTER VIII

THE JUSTICIABLE CONSTITUTIONAL RIGHTS BY MEANS OF THE "AMPARO" AND HABEAS CORPUS ACTIONS

I. CONSTITUTIONAL RIGHTS AND JUSTICIABILITY

Justiciability is the quality or state of being appropriate or suitable for review by a court⁴⁰¹. Regarding specific Latin American actions for protection of constitutional rights, justiciability is the quality of a right of being suitable to be protected.

Amparo and habeas corpus recourses are specific constitutional means set forth in the Constitutions for the protection of constitutional rights. Consequently, not all individual rights are justiciable by means of the amparo and habeas corpus recourses; but only certain rights, those enshrined in the Constitution what places them out of reach from the Legislative branch of government. There lays the importance that in the Latin American systems of judicial protection constitutional declarations of human rights have; and also lays one of the main differences between the North American injunction remedies and the Latin American amparo.

Both are extraordinary remedies, but injunctions are equitable remedies that can be filed for the protection of any personal or property rights, even those of statutory origin, provided that they cannot be effectively protected by ordinary common law courts. Amparo, on the contrary, is an action that can only be filed for the protection of rights of constitutional origin and rank.

It is the case, for instance, of the due process of law rights enshrined in the American Convention on Human Rights, like the right to a fair trial. According to Article 8,1 of the Convention "every person has the right to a hearing, with due guarantees and within a reasonable time, *by a competent, independent, and impartial tribunal, previously established by law*, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature". And regarding the right to personal liberty, Article 7,2 and 7,5 set forth the right of every person not to "be deprived of his physical liberty except for the *reasons and under the conditions established beforehand by the constitution* of the State Party concerned or by a law established pursuant thereto"; and the right of "any person detained *shall be brought promptly before a judge or other officer authorized by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings".

These rights are also enshrined in the national Constitutions and due to their declaration in the Convention, have constitutional rank, therefore, they are protected by the amparo and habeas corpus recourses, the latter being regulated in Article 7,6 of the Convention which sets forth the right of any-

401 Brian A. Garner (Editor in Chief), *Black's Law Dictionary*, Wets Group, St. Paul, Minn. 2001., p. 391.

one who is deprived of his liberty to “be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”; right that cannot “be restricted or abolished”.

These provisions prohibit, in Latin America, any possibility for the creation or special commissions to try any kind of offenses; and also prohibits for civilians to be tried by ordinary military courts and of course by military commissions. It also prohibits the creation of special courts to hear some criminal procedures after the offenses have been committed, in the sense that every person has the right to be heard only before courts existing prior to the offenses. For instance, in the Cantoral Benavides case, the Inter American Court on Human Rights decided that Peru violated Article 8,1 of the Convention because Mr. Cantoral Benavides had been prosecuted by a military judge, which was not the “competent independent and impartial judge” provided for in that provision. Consequently the Court considered that Peru had also violated Article 7.5 of the Convention because the victim had been brought before a criminal military court⁴⁰². By ruling this way it can even be considered that the Court has ruled that not any judiciary body can examine the legality and reasonability of a detention, but only those that do not violate the principle of “natural judge”⁴⁰³.

And this is in fact one of the cores of the due process of law rights according to the Convention, the right to be heard by a competent court set forth not only by statute but by a statute that must be sanctioned previously to the offense. This is a provision tending to proscribe ad hoc courts or commissions. The Inter American Court has referred to this due process of law right in the Ivcher Bronstein case. In such case, the Peruvian Executive Commission of the Judiciary, weeks before a Resolution depriving Mr. Bronstein of his Peruvian citizenship was issued, altered the composition of a Chamber of the Supreme Court and empowered such Chamber to create in a transitory way, specialized Superior chambers and Public Law specialized courts. The Supreme Court Chamber created one of such courts and appointed its judges, who heard the recourses filed by Mr. Bronstein. The Inter American Court ruled as follows:

114. The Court considers that, by creating temporary public law chambers and courts and appointing judges to them at the time that the facts of the case sub judice occurred, the State did not guarantee to Mr. Ivcher Bronstein the right to be heard by judges or courts “previously established by law”, as stipulated in Article 8(1) of the American Convention⁴⁰⁴.

The Inter American Court also ruled on these matters in the Castillo Petruzzi and others Case, where it decided that:”

402 Case *Cantoral Benavides*, August 18, 2000. Paragraph 75: Also, the Court considers that the trial of Mr. Luis Alberto Cantoral-Benavides in the military criminal court violated Article 8(1) of the American Convention, which refers to the right to a fair trial before a competent, independent and impartial judge (*infra* para. 115). Consequently, the fact that Cantoral-Benavides was brought before a military criminal judge does not meet the requirements of Article 7(5) of the Convention. Also, the continuation of his detention by order of the military judges constituted arbitrary arrest, in violation of Article 7(3) of the Convention. Paragraph 76: The legal principle set forth in Article 7(5) of the Convention was not respected in this case until the accused was brought before a judge in the regular jurisdiction. In the file, there is no evidence of the date on which this occurred, but it can be reasonably concluded that it took place in early October 1993, since on October 8, 1993, the 43rd Criminal Court of Lima ordered that the investigation stage of a trial be opened against Cantoral-Benavides.

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

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

129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create “[t]ribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”⁴⁰⁵.

Particularly regarding the need of a competent court, and referring to the military courts, the Inter American Commission on Human Rights has considered that “to prosecute ordinary crimes as though they were military crimes simply because they had been committed by members of the military breached the guarantee of an independent and impartial tribunal”⁴⁰⁶; and the Inter American Court ruled in the *Castillo Petruzzi et al.* case that due process of law rights were violated when ordinary common offenses are transferred to the military jurisdiction; that judging civilians for treason in such courts imply to exclude their “natural judge” to hear those proceedings; and that because military jurisdiction is set forth for the purpose of maintaining order and discipline within the Armed Forces, civilians cannot incur in conducts contrary to such military duties. The Courts ruled as follows:

128. The Court notes that several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then, only under certain circumstances. This was the definition in Peru’s own law (Article 282 of the 1979 Constitution). Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process is violated. That right to due process, in turn, is intimately linked to the very right of access to the courts”⁴⁰⁷

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

117. In a democratic Government of Laws, the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order⁴⁰⁸.

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

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

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

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

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

118. In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not⁴⁰⁹.

In contrast with the aforementioned, the absence of similar constitutional provisions in the United States allows those discussions to continue regarding the validity of military commissions set up by a military order of Nov. 13, 2001, to try non-citizens for “acts of international terrorism”, after the September 11 terrorist attacks. This discussion was reported on March 26, 2006, in *The New York Times*⁴¹⁰ showing the struggle for supremacy between the courts and the Government, which can be briefed as follows:

According to the Detainee Treatment Act sanctioned on December 2005, the federal courts jurisdiction has been excluded over cases brought by detainees at the United States naval base at Guantánamo Bay, Cuba. In the case, *Hamdan v. Rumsfeld*, referred to a person held since 2002, the court must decide whether it retains the right to proceed with this case; a matter that has not being discussed since the immediate aftermath of the Civil War, in which the Supreme Court permitted Congress to divest the Court of jurisdiction over a case it has already agreed to decide. In the *Ex Parte McCardle* case, after arguments had been heard in an appeal brought by William H. McCardle, a Mississippi newspaper editor who was taken into custody and charged by the military government with fomenting insurrection; Congress, fearing that a Supreme Court ruling in favor of the editor could result in invalidating military control of the former Confederate state, enacted a law to deprive the court of jurisdiction. The court then dismissed the appeal, rejecting the argument that with the new statute it was permitting Congress to usurp the judicial function.

In the new case *Hamdan v. Rumsfeld* n° 05-184, the administration also filed a motion with the court in January 2006, just days after the Detainee Treatment Act was signed into law, urging immediate dismissal of Mr. Hamdan’s appeal. On February 21, the court declined to act on the motion, announcing instead that it would take up the jurisdictional question as part of the argument on the merits of the case. Contrary to the *McCardle* case in which the Congress spoke clearly in the court-stripping amendment, the Detainee Treatment Act seems to be ambiguous on its application to pending, as opposed to future, cases.

According to the Detainee Treatment Act, Guantánamo detainees are tried by a military commission and will have only a circumscribed right to a subsequent appeal in federal court, in which they can not raise the basic challenge to the commission’s operation that Mr. Hamdan is presenting in his Supreme Court case. Military commissions are not new in the United States; they were first used during the war with Mexico in the 1840’s. But there have been none since the World War II era.

The main point to be resolved is if any Congressional enactment or inherent power authorized the administration to set up a special tribunal without the procedural protections offered by American military law and required by the Geneva Conventions; and if conspiracy, is or is not a war crime, and if it is or not subject to trial by military commissions. In the end, the question at hand is if the Geneva

409 *Idem*, Paragraph 118

410 See Linda Greenhouse “Detainee case Will Pose delicate Question for Courts. A White House Challenge to Jurisdiction”, *The New York Times* March 27, 2006, p. A12.

Conventions apply in the cases related to the Guantanamo detainees, and if their protections can or cannot be invoked by individual detainees⁴¹¹.

The reference to the case is made in order to highlight what happens in cases such as the United States where there is no express constitutional rank with the right to be tried by judicial competent independent and impartial courts established before the offenses were committed, as set forth in the American Convention on Human Rights; and if the discussions regarding the struggle on the supremacy between the courts and the Government can still be developed as above mentioned; as well as the exclusion of any injunctive protection of rights in such cases. In Latin America, after so many cases and stories of ad hoc commissions or special courts to try people with no due process of law rights, the provisions of the American Convention and those set forth in the Constitutions, do not allow even the discussion to be sustained. The due process of law, with all its content, is a constitutional right, and its enforcement is out of the reach of Congress and no legislation can be passed to restrict the courts jurisdiction. And being it a constitutional right, the amparo and habeas corpus protection can always be sought by the affected party, and eventually reach the American Court on Human Rights for the protection, as shown in the aforementioned cases.

The consequence of the need of constitutional rank for a right to be justiciable by means of amparo and habeas corpus is that the rights that are only set in statutes and other lower rank norms cannot be protected by mean of amparo and habeas corpus, and it is thus compulsory to seek their judicial protection by means of the ordinary remedies.

Thus, articles of the Bolivian Amparo Law where it is set that the amparo is devoted to protect rights and guaranties "recognized in the Constitution and the laws" (Article 94); the reference to "laws" must not be interpreted as an alternative (Constitution " or "laws), but in an accumulatively (Constitution and the laws). In the case of Guatemala, if it is true that Article 1 of the Amparo law refers to "rights inherent to persons protected by the Constitution, the laws and international agreements ratified by Guatemala", including "laws", it only refers to amparo as a "constitutional guaranty of defense"; thus, based on constitutional reasons.

II. AMPARO FOR THE JUSTICIABILITY OF CONSTITUTIONAL RIGHTS ONLY IN CASES OF CONSTITUTIONAL VIOLATIONS

Consequently, even in cases of rights enshrined in the Constitution, the amparo recourse is only admissible when the constitutional provision referred to the right has been violated.

Thus, it is not possible to file an action of amparo just basing it in the violation of the statutory provisions which regulate the right. It is, for instance, the case of property rights, widely regulated in the Civil Codes, regarding which all the conducts affecting those regulations in general terms had their own ordinary remedies. One example is the civil injunctions set forth in the Civil Code and the Civil Procedure Codes for the immediate protection of possession rights in cases of trespasses (*interdictos*) which are effective judicial remedies for the protection of a land owner or occupant rights. Thus, in cases of property trespass, the *interdicto of amparo* or of new construction are effective means for protection, and no amparo action can be filed in such cases.

As was decided by the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela,

The amparo action protects one aspect of the legal situations of persons referred to their fundamental rights, corresponding the defense of subjective rights -different to fundamental rights and public liberties- to the ordinary administrative and judicial recourses and actions. For instance, it

411 *Idem*

is not the same denying a citizen the condition to have property rights, than discussing property rights between parties, the protection of which corresponds to a specific judicial action of recovery (*reivindicación*). But if the right to defend its property means the denial of a fundamental right, the proprietor is denied of a right the enjoyment of which must be protected.

This means that in the amparo proceedings the court judge the actions of public entities or individuals that can harm fundamental rights; but in no case can it review, for instance, the applicability or interpretation or ordinary law by the Administration or the courts, unless than from them a direct violation of the Constitution can be deducted. The amparo is not a new judicial instance, nor the substitution of ordinary judicial means for the protection of rights and interest; it is the reaffirmation of constitutional values, by mean of which the court hearing an amparo can decide regarding the contents or the application of constitutional provisions regulating fundamental rights, can review the interpretation made by public administration or judicial bodies, or determine if the facts from which constitutional violations are deducted constitute a direct violation of the Constitution”⁴¹².

This relates the subject, of course, to the general condition of the extraordinary character of the amparo action, in the sense that it can only be filed when no other appropriate and effective ordinary judicial means of protection are legally provided. This condition is set forth in a similar way to the “inadequacy” condition provided for the equitable injunction remedies in North America, in the sense that they are only admissible when there is no adequate remedy at law⁴¹³.

This inadequacy, of course, can result from the factual situations that impede granting the protection as was resolved since the well know case of *Wheelock v. Nooman* (NY 1888), in which an injunction was granted to require the defendant to remove great boulders which he had left on the plaintiff’s property beyond the terms of the license to do so. The plaintiff in the case could not easily remove the boulders and sued the cost of removal of the trespassing rocks because of their size and weight⁴¹⁴. On the contrary, the remedy at law is adequate if the defendant left litter on the property because the plaintiff can pay for someone to remove the trash and then sue the defendant for the cost incurred, as was decided in *Connor v. Grosso* (Cal. 1953)⁴¹⁵.

But in other cases in the United States, the extraordinary character of the injunctive remedies derives from the fact that the law cannot provide an adequate remedy because of the nature of the right involved, which was the case of the constitutional claims in the case of school segregation which violated rights that require equitable intervention.

It is because of this nature of the rights that can be protected by means of amparo, as constitutional rights, that this specific action for protection can only be filed when the Constitution is directly infringed.

The Venezuelan First Court on Judicial Review of Administrative action Jurisdiction, in a decision of December 6, 1989, issued just after the Amparo Law was sanctioned (1988), fixed this doctrine, as follows:

412 Decision n° 828 of July, 27, 2000 (case: *Seguros Corporativos (SEGUCORP), C.A. et al. vs. Superintendencia de Seguros*), in *Revista de Derecho Público*, n° 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 290 ff.

413 See Owen M. Fiss and Doug Rendleman, *Injunctions*, 2d Ed, The Foundation Press, Mineola, New Cork, 1984, p. 59.

414 See the reference in William M. Tab and Elaine W. Shoben , *Remedies in a Nutshell*, Thomson West, St. paul,2005, p. 24.

415 *Idem*.

The amparo is admissible only in cases of violations of constitutional rights and guaranties. These rights and guaranties can be regulated in norms of inferior rank, but those are not the norms that can be alleged as violated, and reference must be made to the text that originates them. The extraordinary character of the amparo impedes that through it, the fulfillment or regulations and conditions set forth in statutory norms, those matters that can be discussed by other ordinary means be argued. If it were not conceived like this, the amparo jurisdiction would substitute any other, and the critics and fear would be raised by this new institution"⁴¹⁶.

Of course, and even if the constitutional right and guaranty can be regulated through statutory norms, the amparo action cannot be founded in the sole violation of such statutory provisions. As was subsequently ruled by the Supreme Court of Venezuela in decision of August 14, 1990, the amparo can only be filed because of direct and immediate contraventions of constitutional rights and guaranties; and for that purpose:

It is necessary to demonstrate the sole harm to such norms and not to others of infra constitutional character. Thus, the action for amparo, is always of constitutional nature, it is justified in the measure that the rights or guaranties harmed or threatened are of such same rank. In conclusion, it is not enough to allege the violation of inferior rank norms, which are not the ones to be protected by amparo but for other means. Even if they apply constitutional provisions, it is indispensable, and also enough, to demonstrate the direct violation of a constitutional provision"⁴¹⁷.

Consequently, as a matter of principle, all constitutional rights and guaranties are justiciable by mean of the amparo recourse, provided that the Constitution is directly infringed, notwithstanding the right to also be regulated by statutes. That is why, for instance, the Peruvian Code on Constitutional Jurisdiction is precise when it sets that the "amparo shall not be admitted in defense of a right that lacks direct constitutional founding or when it is does not directly refer to the protected constitutional aspects of such right." (Articles 5,1 and 38), which confirms the already mentioned principle of the amparo protection only regarding the violation of the Constitution provisions regarding the rights.

III. AMPARO AND HABEAS CORPUS FOR THE PROTECTION OF ALL CONSTITUTIONAL RIGHTS

Almost all Latin American countries set forth the habeas corpus recourse for the protection of personal freedom and safety, and the amparo recourse for the protection of all the other constitutional

416 See in *Revista de Derecho Público*, n° 41, Editorial Jurídica Venezolana, Caracas, 1990, p. 99. This doctrine has been followed by the First Court on Judicial review of Administrative action in the decisions of August 22, 1990 in FUNEDA *15 años de Jurisprudencia*, *op. cit.*, p. 138; of September 16, 1992, in *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 151; and of December 4, 1992, in *Revista de Derecho Público*, n° 52, Editorial Jurídica Venezolana, Caracas, p. 165 and in FUNEDA, *15 años de Jurisprudencia*, *op. cit.*, p. 140.

417 See in *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990 p. 143. See also, Supreme Court of Justice decisions (Politico Administrative Chamber) of November 8, 1990, in *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 141; of April 4, 1990, in *Revista de Derecho Público*, n° 42, Editorial Jurídica Venezolana, Caracas, 1990; p. 112; of January 31, 1989, *Revista de Derecho Público* n° 37, Editorial Jurídica Venezolana, Caracas, 1989, p. 112; of August 14, 1989, in *Revista de Derecho Público*, n° 39, Editorial Jurídica Venezolana, Caracas, 1989, p. 144; of March 4, 1993, in *Revista de Derecho Público*, n°s 53-54, Editorial Jurídica Venezolana, Caracas, 1993, p. 254; and of the First Court on Judicial Review of Administrative Action of September 7, 1992, in FUNEDA en *15 años de Jurisprudencia*, *op. cit.*, p. 127.

rights and guarantees. The only exception in this pattern, are Mexico and Venezuela, where the personal freedom and safety are also protected through the general amparo suit or action, being thus the habeas corpus only a kind or a specie of the amparo. On the contrary, in all others Latin American Countries the habeas corpus is regulated as a separate action or recourse for the specific protection of personal freedom and safety.

The reason for the Mexican and Venezuelan exception is, precisely, the conception that those countries have of the amparo as a constitutional right and not exclusively as an adjective mean for protection of human rights.

But what is important regarding the amparo and habeas corpus recourses, is that in almost all the Latin American countries, by means of a general amparo suit or action or of both, amparo and habeas corpus recourses or actions, all constitutional rights are protected, without any exception. The exception in this regard are the countries where the amparo has been reduced to protect only certain constitutional rights, as is the case of the "tutela" action in Colombia and of the action for protection in Chile, conceived only for the protection of some constitutional rights qualified as "fundamental" or enumerated in the constitutional text. It is also the case of Mexico, where the amparo suit is established for the protection of only the "individual guarantees".

Thus two general systems can be distinguish in Latin America regarding the amparo: those in which all constitutional rights and guaranties can be protected through the amparo and habeas corpus recourse; and those where the amparo recourse is directed to protect only some constitutional rights, those qualified as "fundamental rights" or " individual guarantees".

In the first system, the rights protected in principle are those enshrined in the Constitutions, thus the use of the expression "constitutional rights", in order, first, to comprise the rights enumerated in the constitutional texts; second, those that even not being enumerated in the Constitutions are inherent to human beings; and third, those enumerated in the international instruments on human rights ratified by the State. In the words of the Argentinean Amparo Law (Article 1) and in the Uruguayan 1988 Amparo Law (Article 72), the constitutional protection refers to the rights and freedoms "expressly or implicitly recognized by the Constitution"

Is the case of Venezuela, where the action of amparo is conceived as a means for the protection of the enjoyment and practice of absolutely all the constitutional rights and guarantees, as well as those inherent to human beings not enumerated in the Constitution or in the international instruments on human rights; the expression "instruments" comprising not only treaties, conventions and covenants but also declarations. This is what is expressly set forth in Article 27 of the Constitution.

Consequently, all constitutional rights listed in Title III (Human Rights, Guarantees and Duties) of the Constitution as the citizenship rights, the civil (individual) rights, the political rights, the social and family rights, the cultural and educational rights, the economic rights, the environmental rights and the indigenous people rights, can be protected by means of the amparo action (Articles 19-129). And additionally, other rights and guaranties derived from other constitutional provisions not included in Title III on "Human Rights, Guarantees and Duties", like the constitutional guarantee of the independence of the Judiciary⁴¹⁸, or the constitutional guarantee to the legality of taxation (that taxes can only by set forth by statute)⁴¹⁹, can also be protected by means of amparo.

418 Decision of the former Supreme Court of Justice, Political Administrative Chamber, dated march, 25, 1994 (Case *Arnoldo Echegaray*).

419 See Allan R. Brewer-Carías, "Derecho y Acción de Amparo", *Instituciones Políticas y Constitucionales*, Vol. V., Caracas, 1998, pp. 209 y ss. See decision of the First Court on judicial review of Administrative Action,

But as aforementioned, the amparo action in Venezuela is also admissible for the protection of all “constitutional rights and guaranties, even those inherent to persons that are not expressly enumerated in the Constitution or in international instruments on human rights” (Art. 27, Constitution). This declaration leaves no loophole regarding right or guarantee to be constitutionally protected; particularly because of the open clause enshrined in Article 22 of the Constitution.

This clause, extensively used by the Latin American supreme courts to identify rights and guaranties not expressly listed in the Constitution, has its antecedent in the IX Amendment of the United States Constitution, even though, in contrast, in the United States the Supreme Court has had little occasion to interpret it. One of the few cases, though, is the case *Griswold v. Connecticut* decided on June 7, 1965, 381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510; 1965⁴²⁰, in which Justice Goldberg, delivering the opinion of the Court, held the unconstitutionality of the Connecticut’s birth-control law because it intruded upon the right of marital privacy, which was considered as embraced by the concept of liberty, even if it was not explicitly mentioned in the Constitution. The Court based its ruling precisely on the Ninth Amendment to the Constitution, declaring that:

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the **Ninth Amendment** and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the **Ninth Amendment**, which specifically states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people

Rather, the **Ninth Amendment** shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court’s opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, e. g., *Bolling v. Sharpe*, 347 U.S. 497; *Aptheker v. Secretary of State*, 378 U.S. 500; *Kent v. Dulles*, 357 U.S. 116; *Cantwell v. Connecticut*, 310 U.S. 296; *NAACP v. Alabama*, 357 U.S. 449; *Gideon v. Wainwright*, 372 U.S. 335; *New York Times Co. v. Sullivan*, 376 U.S. 254. The **Ninth Amendment** simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments...

In sum, the **Ninth Amendment** simply lends strong support to the view that the “liberty” protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. *Cf.* *United Public Workers v. Mitchell*, 330 U.S. 75, 94-95.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] . . . as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of

case *Fecadove*. See the reference in Rafael Chavero G, *El Nuevo régimen del amparo constitucional en Venezuela*, Caracas, 2001, p. 157.

liberty and justice which lie at the base of all our civil and political institutions'" Powell v. Alabama, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe v. Ullman, 367 U.S. 497, 517.

The Court thus concluded that:

"The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family -a relation as old and as fundamental as our entire civilization- surely does not show that the Government was meant to have the power to do so. Rather, as the **Ninth Amendment** expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution."

In sum, the Supreme Court concluded affirming that "the right of privacy in the marital relation is fundamental and basic a personal right retained by the people" within the meaning of the Ninth Amendment", thus considering unconstitutional the Connecticut law that prohibits the use of contraceptives.

The application of open clause on human rights in Venezuela, similar to the Ninth Amendment, has already been analyzed, expanding the scope of the constitutional rights protected by means of amparo. The same has happened in the other Latin American Countries, which had developed both the amparo and habeas corpus recourses for the protection of all human rights declared in the Constitutions and in the International Treaties.

Is the case of Costa Rica, where Article 48 of the Constitution is absolutely clear when it guarantees the right of every person to file the action of habeas corpus to guarantee their freedom and personal integrity and the action for amparo to maintain or reestablish the enjoyment of all other rights conferred by this Constitution as well as those of a fundamental nature established in international instruments on human rights, enforceable in the Republic. In the same sense it is regulated in the Ecuadorian Law where amparo is set for "the judicial effective protection of all rights enshrined in the Constitution and those contained in the declarations, covenants, conventions and other international instruments in force in Ecuador (Article 46).

Other legislations, in order to precise the extension of the constitutional amparo and habeas corpus protection, tend to be exhaustive in the listing of the constitutional rights to be protected, as is the case of Peru. For instance, when distinguishing the amparo and habeas corpus actions, the Constitutional Procedure Code (Law 28.237 of 2004) expressly lists and identifies the following rights as protected by mean of the *habeas corpus*:

1. Personal integrity and the right not to be submitted to torture or inhuman or humiliating treatment, nor coerced to obtain declarations.
2. The right not to be forced to render oaths nor be compelled to declare or recognize their own guilt, that of their spouse, or their family members up to the fourth level of consanguinity or second of affinity.
3. The right not to be exiled or banished or confined except by final judicial decision.
4. The right not to be expatriated nor kept away from one's residence except by legal order or by application of the Immigration Law.

5. The right of the foreigner to whom political asylum has been granted, not to be expelled from the country to the country that is persecuting him, or under no circumstance if his freedom or safety is in danger through being expelled.
6. The right of nationals or resident foreigners to enter, transit or leave national territory, except by legal order or application of the Immigration or Health Law.
7. The right not to be detained except by written and justified judicial order, or by the police forces for having committed a flagrant crime; or if he or she has been detained, to be brought before the corresponding Court within 24 hours or as soon as possible.
8. The right to voluntarily decide to render military service, pursuant to the law governing such matter.
9. The right not to be arrested for debt.
10. The right not to be deprived of the national identity document, or to obtain a passport or its renewal within the Republic or overseas.
11. The right not to be held incommunicado, except in those cases established under the Constitution (Article 2, 24, g).
12. The right to be assisted by a freely chosen defense lawyer at the moment of being summonsed or arrested by the police or other authority, without exception.
13. The right to have removed the surveillance of one's domicile or suspended police trailing, when arbitrary and unjustified.
14. The right of the person on trial or condemned to be released from jail, if his or her freedom has been decided by a judge.
15. The right to have the correct procedure observed in the case of the processing or detention of persons, pursuant to Article 99 of the Constitution.
16. The right not to be subject to a forced disappearance.
17. The right of the person under arrest or imprisoned not to be subject to treatment that is unreasonable or disproportional, in respect of the form and conditions in which the order of detention or imprisonment is carried out.

The article adds that "*habeas corpus* shall also be admitted in defense of constitutional rights associated with individual freedom, especially when due process and the inviolability of the home are concerned."

As far as the action of amparo is concerned, pursuant to the same Peruvian Code on Constitutional Procedure, such action shall be admitted in defense of the following rights expressly listed in article 37:

1. To equality and not to be discriminated because of origin, sex, race, sexual orientation, religion, opinion, economic or social condition, language or any other;
2. To publicly exercise any religious creed;
3. To information, opinion and expression;
4. To contract freely;
5. To the artistic, intellectual and scientific creation;
6. To the inviolability and secrecy of private documents and communications;
7. To assembly;
8. To honor, intimacy, voice, image and to the rectification of incorrect or harmful information;
9. To associate;

10. To work;
11. To unionize, collectively bargain and go on strike;
12. To property and to inherit;
13. To petition before the competent authority;
14. To participate individually and collectively in the political life of the country;
15. To citizenship;
16. To effective judicial protection;
17. To education and the right of the parents to choose the school and participate in the education of their children;
18. To teach according to constitutional principles;
19. To social security;
20. To compensation and a pension;
21. To the freedom to lecture;
22. To have access to the media, pursuant to Article 35 of the Constitution;
22. To enjoy an environment that is balanced and appropriate for developing one's life;
23. To health; and
24. To others recognized by the Constitution.

Fortunately, the last item referred to all “the other rights recognized in the Constitution” resolves the problems that normally have the practice to list in some statutes, specific situations with the risk of leaving things behind.

The Guatemalan Amparo Law also tends to exhaust the cases in which the amparo action can be filed⁴²¹, when setting in Article 10 that its admission extends to any situation that presents a risk, a threat, a restriction or a violation of the rights recognized by “the Constitution and the laws of the Republic of Guatemala”, whether such situation is caused by public or private law entities or individuals. Therefore, as it is listed in the same Article 10, every person shall have the right to request amparo, in the following cases, among others:

- a) To be maintained or reinstated in the enjoyment of the rights and guarantees established in “the Constitution or any other law”.
- b) To seek a decision to declare, in specific cases, that a law, regulation, resolution or act of the authorities shall not be enforced against the plaintiff because it contravenes or restricts a right that is guaranteed by “the Constitution or any other law”.
- c) To seek a decision to declare in specific cases, that a provision or resolution (not merely legislative) of the Congress of the Republic is not applicable to the plaintiff since it violates a constitutional right.
- d) When an authority of any jurisdiction issues a regulation, decision or resolution of any kind, abusing its power or exceeding its legal powers, or when such powers are non-existent or exercised in such a way that the harm caused or likely to be caused “cannot be corrected by any other legal means of defense”.

421 See: Jorge Mario García La Guardia, “La Constitución y su defensa en Guatemala”, en el libro editado por la UNAM, *La Constitución y su defensa*, México, 1984, pp. 717-719; and *La Constitución Guatemalteca de 1985*, México, 1992.

- e) When in administrative proceedings, the affected party is forced to comply with unreasonable or unlawful requirements, procedures or activities, or when “there is no means or recourse available to suspend their effect”.
- f) When petitions and procedures before administrative authorities are not resolved in the delay established by law, or, in absence of such delay, within thirty days following the exhaustion of the corresponding procedure; and also when petitions are not admitted for processing.
- g) In political matters, when rights recognized by the law or by the by-laws of political organizations are infringed. Nevertheless, in purely electoral matters, the court analysis and examination shall be limited to legal aspects, accepting such questions of fact that are considered proven in the recourse of review.
- h) In matters of judicial and administrative order, for which procedures and recourses are established by law, and by means of which such matters may be appropriately discussed in accordance with the legal principle of due process, if after the interested party has made use of the recourses established by law, there is still a threat, restriction or violation of the rights guaranteed by the Constitution and the law.

Even in the cases where this article of the Amparo law refers to rights protected in “the Constitution or the laws”, the violation of the right must be a constitutional one. If it is just a legal one, the affected party has the ordinary means for protection, thus the amparo is not admitted when these ordinary means exists.

IV. AMPARO AND HABEAS CORPUS FOR THE PROTECTION OF ONLY SOME CONSTITUTIONAL RIGHTS

As already mentioned, in contrast with the general trend of the Latin American system of amparo and habeas corpus for the protection of all constitutional rights, in the case of Chile and Colombia, the specific action for protection of constitutional rights and freedoms is only established in the Constitution with respect to certain rights and guarantees which are listed as *fundamental*. These systems follow the general trend set by German and Spanish regulations on the amparo recourses.

1. The European antecedents

In Germany, in addition to the abstract judicial review of norms exercised by the Federal Constitutional Tribunal at the request of some State political organs, judicial review can also be exercised by the Constitutional Tribunal as a result of a constitutional complaint or “amparo” recourse that any person can bring before the Tribunal when he claims that one of his basic or fundamental rights has been directly violated by a normative state act. This “constitutional complaint”, only constitutionalized in 1969 was originally established in the 1951 Federal Statute of the Constitutional Tribunal (Art. 90. Federal Constitutional Tribunal Law) and was conceived as a specific judicial means for the protection of fundamental rights and freedoms against any action of the state organs which violates them. Therefore, it is not a specific action only directed to obtain judicial review of legislation, but it can be used for that purpose, when exercised against a statute.

The constitutional complaint after the 1969 constitutional amendment is expressly established in Article 93, section 1, n^o 4^a of the Constitution when attributing the Federal Constitutional Tribunal power to decide:

On complaints of unconstitutionality, which may be entered by any person who claims that one of his basic (fundamental) rights or one of his rights under paragraph (4) of article 20, under articles 33, 38, 101, 103, or 104 has been violated by public authority.⁴²²

Therefore, the constitutional complaint can be brought before the Tribunal against any state act, whether legislative, executive or judicial, but in all cases, it can only be exercised once the ordinary judicial means for the protection of the fundamental rights that have been violated are exhausted (Art. 90, 2 Federal Constitutional Tribunal Law). Consequently, the constitutional complaint is a subordinate mean of judicial protection of fundamental rights,⁴²³ and if there are other judicial recourses or actions that can serve the purpose of protecting fundamental rights, the constitutional complaint is not admissible, except when the Constitutional Tribunal considers the matter as being of general importance or when it considers that the claimant is threatened by a grave and irremediable prejudice if it is sent to the ordinary judicial means for protection (Art. 90, 2 Federal Constitutional Tribunal Law).

The most important feature of the German constitutional complaint, when comparing it with the Latin American *amparo*, is that it is set in the Constitution only for the protection of the rights listed in Article 93,1 of the Constitution, which are the following:

First, the fundamental rights (*Grundrechte*), enshrined in Articles 1 to 19 of the Constitution, which are the followings:

1. Man's dignity (Art. 1);
2. Freedom to develop its own personality (Art. 2-1);
3. Right to life and to physical integrity (Art. 2-2);
4. Equality (Art. 3);
5. Ideological and Religion freedom (Art. 4-1);
6. Freedom of cult (Art. 4-2);
7. Conscience objection (Art. 4-3 y Art. 12-a2);
8. Freedom of expression and to inform (Art. 5-1);
9. Freedom to teach and to research (Art. 5-3);
10. Marital freedom, family protection and non discrimination because of extra matrimonial birth (Art. 6);
11. Right to education (Art. 7);
12. Freedom of assembly (Art. 8);
13. Freedom of association (Art. 9);
14. Inviolability of communications secret (Art. 10);
15. Freedom of residence and of movement (Art. 11);
16. Freedom to freely choose a profession and the place of work (Art. 12);
17. Inviolability of domicile (Art. 13);
18. Private property rights and to inherit (Art. 14);
19. Right to German nationality (Art. 16-1);

422 See also Arts. 90-96 FCT Law.

423 Art. 19.4 of the Constitution establishes in general that "Should any person's rights be violated by public authority resource to the courts shall be open to him. If jurisdiction is not specified, recourse shall be to the ordinary courts."

20. Right to political asylum for aliens (Art. 16-2); and
21. Right to petition (Art. 17).

Additionally, it also can be protected by the constitutional complaint, the constitutional rights enshrined in Articles 20-4, 33, 38, 101, 103 and 104 of the same Constitution, which are the following:

21. Right to resist against who acts against the constitutional order (Art 20-4);
22. Equal rights and obligations of Germans in all Status of the Federation (Art. 33-1);
23. Right to have access in equal terms to public positions (Art. 33-2);
24. Right to vote and to be elected (Art. 38);
25. Prohibition of extraordinary courts and right to “natural judge” (Art. 101);
26. Right to be heard by courts (Art. 103-1);
27. Right to *non bis in idem* principle (Art. 103-3); and
28. Judicial guarantees for deprivation of liberty (Art. 104).

In all these cases, the constitutional complaint can be exercised directly against a statute or any other normative state act on the grounds that it directly impairs the fundamental rights of the claimant. In that case, it leads directly to the exercise of a judicial review of normative state acts function by the Constitutional Tribunal. As a result of this constitutional complaint, if the statute is considered unconstitutional, it must be declared null (Art. 95, 3, B FCT Law).

The basic condition for the admissibility of constitutional complaints against laws is, of course, the fact that the challenged statute or normative state act, must personally affect the claimant’s fundamental rights, in a direct and current way, without the need for any further administrative application of the norm. On the contrary, if this further administrative application is needed, he must wait for the administrative execution of the statute and complain against it. This direct prejudice caused by the normative act on the rights of the claimant, as a basic element for the admissibility of the complain, justifies the delay of one year after its publication established for the introduction of the action before the Tribunal (Art. 93, 1, B FCT Law).

It also explains the power of the Constitutional Tribunal to adopt provisional protective measures regarding the challenged statute, *pendente litis*, in the sense that the Tribunal can even theoretically, suspend the application of the challenged law (Art. 32 FCT Law).

Finally, regarding this constitutional complaint, Article 93, section 1, n° 4b of the Constitution, also empowers the constitutional tribunal to decide:

On complaints of unconstitutionality, entered by communes (municipalities) or association of communes (municipalities) on the ground that their right to self-government under Article 28 has been violated by a law other than a Lander Law open to complaint to the respective land constitutional court.

Hence, the direct constitutional complaint against laws is not only attributed to individuals for the protection of their fundamental rights, but also to the local government entities, for the protection of their autonomy and right to self-government guaranteed in the Constitution, against federal statutes that could violate them. In these cases, it also results in a direct means of judicial review of statutes of legislation.

The 1978 Spanish Constitution, when setting forth the amparo recourse, in a certain way followed the features of the German constitutional complaint and also, of the amparo recourse originally established in the Republic in the thirties.

Thus, apart from the direct and incidental methods of judicial review, in the Spanish system a recourse of amparo has been created for constitutional protection also of fundamental rights, which can be brought before the Constitutional Tribunal by any person with direct interest in the matter, against state acts of a non legislative character (Art. 161,1,b, Constitution; and Art. 41,2 Organic Law 2/1979)

However, if the recourse for protection is based on the fact that the challenged state act is based on a statute that at the same time infringes fundamental rights or freedoms, the Tribunal must proceed to review its constitutionality through the procedural rules established for the direct action or recourse of unconstitutionality (Art. 52,2 Organic Law 2/1979).

The Spanish recourse of amparo, following the German constitutional complaint features, reduces the constitutional protection to only certain constitutional rights and freedoms also qualified as “fundamental”, recognized in Article 14, in the first section of the Second Chapter (Arts. 15 a 20) and in the second paragraph of Article 30 of the Constitution, which are the following:

1. Equality before the law (Art. 14);
2. Right to life and physical and moral integrity (Art. 15);
3. Ideological, religious and freedoms and freedom of cult (Art. 16);
4. Right to personal freedom and safety (Art. 17);
5. Right to honor, personal and familiar intimacy and to one’s image Arts. 18-1 and 18-4);
6. Inviolability of domicile (Art. 18-2);
7. Secrecy of communications (Art. 18-3);
8. Right to freely choose one’s residence, to move within the territory and to freely leave Spain (Art. 19);
9. Right to freedom of expression and to freely propagate one’s thought (Art. 20-1-a);
10. Right to produce and to literary, artistic, scientific and technical creations (Art. 20-1-b);
11. Freedom of teaching (chair) (Art. 20-1-c);
12. Right to communicate and to receive true information by any mean (Art. 20-1-d);
13. Right to meet and to demonstration (Art. 21);
14. Right to association (Art. 22);
15. Right to participate in public affairs (Art. 23-1);
16. Right to equal access to public functions or positions (Art. 23-2);
17. Right to obtain effective protection by courts and judges (Art. 24-1);
18. Right to have the ordinary and predetermined judge, to defense and to be assisted by a lawyer, to be inform of the accusation, to a public process without undue delays and with the guaranties of using the pertinent means of evidence for its defense, not to self incriminate, not to confess culpability and to the presumption of innocence (Art. 24-2);
19. Principle of criminal legality (*nullum crime sine legge*) (Art. 25-1);
20. Rights of the detainees to a pay work and to the benefits of social security, to have access to culture and to the integral development of one’s personality (Art. 25-2);
21. Right to education and to the liberty to teach (Art. 27-1);
22. Freedom to create teaching centers, within the constitutional principles (Art. 27-6);

23. Freedom to freely unionized trade (Art. 28-1);
24. Right to strike (Art. 28-2);
25. Right to personal and collective petition (Art. 29); and
26. Right to conscience objection (Art. 30-2).

It must be said that notwithstanding the very ample enumeration of fundamental rights that can be protected by means of the amparo recourse before the Constitutional Tribunal, there are other constitutional rights not protected by the recourse which although constitutional, do not qualify as “fundamental rights”.

This limitative approach to the justiciable rights by means of amparo is exceptionally followed in Latin America only in Chile and Colombia.

2. The Chilean “acción de protección” for the protection of some constitutional rights

In Chile, as in the majority of Latin American Countries, constitutional rights are protected by means of the action of habeas corpus, aimed at protecting any individual who is arrested, detained or imprisoned in breach of the Constitution; and by the recourse of protection, which is only aimed at guaranteeing the amparo of determined constitutional rights, in cases of arbitrary or illegal actions or omissions, or of privation, disturbance or threat in the legitimate exercise of the rights and guarantees established in Article 19, numbers 1, 2, 3 (paragraph 4), 4, 5, 6, 9 (final paragraph), 11, 12, 13, 15, 16 of the Constitution regarding to freedom to work and the right of freedom of choice and freedom of contract, and to what is established in the fourth paragraph and numbers 19, 21, 22, 23, 24 and 25. These rights are the following:

1. The right to life and to the physical and psychological integrity (19,1);
2. Equality before the law (19,2);
3. Right to be judged by one’s natural judges (19,3);
4. Right to respect for private and public life and the honor of the individual and his family (19,4);
5. Right to the inviolability of home and all forms of private communication (19,5);
6. Freedom of conscience and of manifestation of all cults (19,6);
7. Right to choose the health system (19,9 fine);
8. Freedom of teaching (19,11);
9. Freedom to express opinions and to disseminate information (19,12);
10. Right to assemble (19,13).
11. Right to associate (19,15);
12. Freedom to work, and the right to free selection and contracting (19,16);
13. Right to affiliate to trade unions (19,19);
14. Economic freedom (19,21);
15. Right to a non-discriminatory treatment (19,22);
16. Freedom to acquire ownership (19,23);
17. Property right (19,24);
18. Right of authorship (19,25); and
19. Right to live in a contamination-free environment (20).

Apart from these constitutional rights and freedoms, the other rights enshrined in the Constitution have no specific means of protection, but rather their protection corresponds to the ordinary courts through ordinary judicial procedures.

3. The Colombian “action de tutela” for the protection of fundamental rights

In the case of Colombia, in similar way, the Constitution also sets forth two means of general protection of constitutional rights: the *habeas corpus* and the action of “tutela”; the latter designed in Article 86 of the Constitution for the immediate protection of “fundamental constitutional rights”, which are not all the rights and guarantees enshrined in the Constitution.

In effect, Title II of the Constitution, on referring to “the rights, guarantees and duties”, regulates them in several Chapters, as follows: Chapter 1, concerning “fundamental rights”; Chapter 2, concerning social, economic and cultural rights; and Chapter 3, concerning collective rights and the environment. From this it results that in principle, only the rights listed in Chapter I (Articles 11 to 41) as “fundamental rights” are the only constitutional rights that can be protected by the “action of tutela”, being the other constitutional rights excluded from this means of protection, and thus, protected by the ordinary judicial mean.

On the other hand, Article 85 of the Constitution also defines which of the “fundamental rights” are of “immediate application,” which, in principle, would imply that the action of tutela would only be admitted in these cases.

Such rights “of immediate application” and therefore susceptible of constitutional protection through the action of tutela, are the following:

1. Right to life (Article 11).
2. Right to not be disappeared, or be submitted to torture or inhuman or degrading treatment (Article 12).
3. Right to equality (Article 13).
4. Right to personality (Article 14)
5. Right to intimacy (Article 15).
6. Right to the free development of own personality (Article 16).
7. Prohibition of slavery, servitude, and human trade (Article 17).
8. Freedom of conscience (Article 18).
9. Freedom of cult (Article 19).
10. Freedom of expression (Article 20).
11. Right to honor (Article 21).
12. Right to petition (Article 23).
13. Freedom of movement (Article 24).
14. Right to exercise one’s profession (Article 26).
15. Freedom to teach (Article 27).
16. Personal freedom (Article 28).
17. Right to due process and defense (Article 29)
18. Right to habeas corpus (Article 30).
19. Right to review judicial decisions (Article 31).
20. Right to not testify against oneself (Article 33).

21. Prohibition of deportation, life imprisonment, or confiscation penalties (Article 34).
22. Right to assemble (Article 37).
23. Right to political participation and to vote (Article 40).

Other rights enshrined in other articles of the Constitution can also be considered as fundamental rights, like the “fundamental rights” of children listed in Article 44 to life, physical integrity, health and social security

Apart from these constitutional expressly declared as fundamental rights and freedoms, other constitutional in principle, would not have constitutional protection under the “action of tutela”, unless it is a right not expressly provided in the Constitution as being “fundamental”, nature that the Constitutional Court can determine (Article 2, Decree of 1991). That is why, Decree N° 306 of 19-02-92 which regulates Decree 2.591 of 1991, expressly declares:

Article 2. Pursuant to Article 1 of Decree 2.591 of 1991, the action of tutela only protects fundamental constitutional rights, and therefore, may not be used to enforce respect of rights that only have legal rank, or to enforce compliance with laws, decrees, regulations or any other regulation of an inferior level.

The Constitutional Court, in every case, has played a fundamental role in broadening protection by means of tutela to include rights not defined as “fundamental”, such as the right to health, but interdependent of others such as the right to life. For that purpose in one of its first decisions, n° T-02 of May 8th, 1992, issued in a case regarding educational rights, the Constitutional Court fixed the following principal criteria to identify “fundamental rights”:

Being the human persons the subject, reason and purpose of the 1991 Constitution, the “first and most important criteria for the tutela judge to determine the fundamental constitutional rights, is to determine if it is or not an essential right to human beings”. Thus, “in order to verify if a constitutional fundamental right derives from the concept of essential rights to human being, the tutela judge must rationally research from Articles 5 and 94 of the Constitution”. The first article sets forth the recognition by the State, without any discrimination, of the primacy of the inalienable rights of persons and protects the family as a basic institution of society. The second sets forth the open clause regarding human rights, in the sense that the listing of rights and guaranties in the Constitution and international conventions, cannot be understood as denial of others that being inherent to human persons, are not expressly therein.

Both articles, being interpreted on the lights of the American Convention on Human Right, allow to infer what can be considered inalienable, inherent and essential, as the Constitutional Court ruled: “something is inalienable because it is inherent, and something is inherent because it is essential”, being also another characteristic of the constitutional fundamental rights, the existence of correlative duties.

The Constitutional Court in the same decision also developed ancillary criteria to determine the fundamental rights, such as the concept of rights of immediate application, which do not require previous statutory regulation for its enforcement; and the location of the corresponding articles in the Titles of the Constitution, even though the latter cannot be considered as crucial. Thus, the list of “fundamental rights” of Chapter I of Title II of the Constitution does not exhaust the “fundamental rights” and does not exclude other rights for being considered fundamental and justiciable by means of tutela⁴²⁴.

424 See decision T-02 of May 8th, 1992, in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá, 2001, pp. 49-54.

But, as abovementioned, the Constitutional Court has also developed its criteria of the connection of the rights seeking protection by means of amparo with other fundamental rights, particularly applying such criteria in cases of economic, cultural and social rights. The Constitutional Court thus has ruled that the acceptance of the tutela action regarding these (economic, social and cultural) rights is only possible in cases in which also a violation of a fundamental right exists. In the decision n° T-406 of June 5th, 1992, the Court heard a tutela brought before a court in a case of public drainage flooding, seeking the protection of the right to public health, the right to a healthy environment and to the population's health. The action was rejected by the lower court which considered that no fundamental rights were involved in the case, but the Constitutional Court admitted the action considering that the right to have sewage system, in circumstances in which it could evidently affect constitutional fundamental rights, as human dignity, right to life, rights of the disabled, it must be considered as justiciable by means of tutela⁴²⁵.

4. The Mexican amparo suit for the protection of only the "individual guarantees"

In Mexico, as already mentioned, if it is true that the amparo suit has been regulated in the Constitution for the protection of all constitutional rights, these, according to the wording of Article 103,1 are only the "individual guarantees" declared and enumerated in Section I, Articles 1 to 29 of the Constitution.

The *jurisprudencia* or judicial obligatory doctrine traditionally established by the Supreme Court, in effect, has been that "the amparo suit was established...not to safeguard the entire body of the Constitution but to protect the individual guarantees" enumerated in the first twenty nine articles of the Constitution⁴²⁶

This constitutional interpretation has in reduced the scope of the amparo protection, only to the following "individual guaranties": prohibition of slavery (Article 2); right to education, and right to educate; (Article 3); economic and occupation freedom (Article 4); prohibition to render services without remuneration (Article 5); freedom of expression of ideas (Article 6); freedom of writing and publishing (Article 7); right to petition (Article 8); right to assemble and association (Article 9); right to bear arms (Article 10); right to movement and travel (Article 11); prohibition of nobility title (Article 12); right to natural judge (Article 13); guarantee of non retroactivity of laws, and due process of law rights (Article 14, 19, 20, 21, 23); rights regarding extradition (Article 15); personal freedom and detention and search guarantees (Article 16, 17, 18, 19, 22); right to justice and access to justice (Article 17, 21); freedom of religion (Article 24); right to privacy of correspondence, mail (Article 25); right to inviolability of home (Article 26); right to property and land ownership (Article 27); prohibition of monopolies (Article 28). Articles 1 and 29 regulate the suspension of guarantees.

This restricted scope of the amparo has provoked multiple discussions and interpretations tending to extend it. In this regard, mention must be made of the opinion of Ignacio L. Vallarta, who served as President of the Supreme Court (1878-1882), and who sustained that the individual guaranties cannot be reduced to those enumerated in the first 29 articles of the Constitution, because they can also be declared in other articles of the Constitution, provided that they contain and contain an explanation, a regulation, a limitation of extension of the individual guarantees. He wrote that:

425 See decision T-406 of June 5th, 1992 in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá, 2001, pp. 55-63.

426 See Suprema Corte de Justicia, *Jurisprudencia de la Suprema Corte*, Thesis 111, II, 246. See the referentes in Ignacio Burgoa, *El juicio de amparo*, Editorial Porrúa, México 191, p. 231, and Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Texas, Austin and London, 1971, p. 112.

“in the case of individual guarantees, it will frequently be necessary to refer to texts other than those that define them in order to decide with certainty whether one of them has been violated. Because of the intimate connection that exists between the articles containing guarantees and others that, although they do not mention them, nonetheless presuppose them, explain them or complement them; because of the undeniable correlation that exists between them, [the guarantee] cannot be considered in isolation without weakening them, without contradicting their spirit, without frequently rendering their application impossible...for instance, in order to know if persons may be deprived of the property guaranteed by Article 27, under the form of taxation, it would be necessary to consider Article 31, which provides that [such] contribution be proportional and equitable; similarly, to determine whether the personal liberty defined in Article 5 is violated by requiring the performance of the public services, it would be necessary to [interpret] it in terms of the same article 31, which specifies certain limits on that liberty... [or] finally, in order to explain the competence to which Article 16 refers, it is necessary to examine Article 50, which established the constitutional distribution of powers between the three branches of government”⁴²⁷.

According to this doctrine, as concluded by Vallarta, the amparo suit is admissible only in the cases defined in Article 103, “but it can be based on the concordance of the guarantees found in Section I of the Constitution with articles not included under that heading”⁴²⁸. This concordance doctrine has been the main tool for the extension of the constitutional protection of amparo, particularly regarding social guarantees referred to agrarian and labor matters included in Articles 27 and 123 of the Constitution, considered also as citizens’ guarantees⁴²⁹.

Nonetheless, constitutional rights not included in the first articles of the Constitution, according to the *jurisprudencia* of the Supreme Court, traditionally were not protected by means of amparo. In this regard, the Supreme Court maintained that “the violation of political rights does not give grounds for the admissibility of amparo because these [rights] are not individual guarantees”⁴³⁰. Nonetheless, also by means of the concordance doctrine in other cases the Supreme Court has given protection to political rights, by saying that “even when political rights are in question, if the act complained of may involve the violation of individual guarantees, a fact that cannot be judge *a priori*, the complaint... should be admitted”⁴³¹; and that “although the Court has established that amparo is inadmissible against the violation of political rights, this jurisprudence refers to cases in which federal protection is sought against authorities exercising political functions and whose acts are directly and exclusively related to the exercise of rights of that nature. It cannot be applied to cases in which amparo is sought against judicial decisions, that although affecting political rights, may also violate individual guarantees”⁴³²

427 See Ignacio L. Vallarta, *Cuestiones constitucionales. Votos del C. Ignacio L. Vallarta, presidente de la Suprema Corte de Justicia en los negocios más notables*, III, pp. 145-149. See the references in Ignacio Burgoa, *op. cit.*, p. 253; Richard D. Baker, *op. cit.*, p. 113t

428 *Idem.*

429 See Ignacio Burgoa, *op. cit.*, p. 263.

430 See Suprema Corte de la Nación, *Jurisprudencia de la Suprema Corte*, thesis 345, III, 645, *cit.*, by Richard D. Baker, *op. cit.*, pp. 130, 156.

431 See Suprema Corte de la Nación, *Jurisprudencia de la Suprema Corte*, thesis 346, III, 656, *cit.*, by Richard D. Baker, *op. cit.*, p.157.

432 See Suprema Corte de la Nación, *Mendoza Eustaquio y otros*, 10 S. J. (475) (1922), *cit.* by Richard D. Baker, *op. cit.*, pp. 130, 156.

CHAPTER IX

THE QUESTION OF THE JUSTICIABILITY OF SOCIAL CONSTITUTIONAL RIGHTS BY MEANS OF THE "AMPARO" ACTION

I. THE QUESTION OF THE JUSTICIABILITY OF SOCIAL RIGHTS

The most important question on the justiciability of constitutional rights in Latin America refers to those rights of economic, social and cultural character. As was argued by the Colombian Constitutional Court in the already mentioned decision n^o T-406 of June 5th, 1992:

The majority of the economic, social and cultural rights imply the rendering of an activity by the State and thus, an economic expenditure that in general terms depends on political decisions. It is based on these propositions that it is sustained that the provisions setting forth such rights cannot only be subject to the existence of a legislation issued by Congress in order to assure their enforcement. Nonetheless, the new principles of the Social State and the new relations deriving from the Welfare State impose the questioning of that solution...

The *raison d'être* of these rights derives from the fact that its minimal satisfactions are an indispensable condition for the enjoyment of the civil and political rights. In other words, without the satisfaction of minimal conditions of existence, or in the sense of Article 1 of the Constitution, without respect to human dignity regarding the material conditions of existence, any aspiration of effectively ensuring the classical freedom and equalitarian rights enshrined in Chapter I of Title II of the Constitution, would be just simple and useless formalism...

...The judicial intervention in cases of economic, social and cultural rights is necessary when it is indispensable in order to assure the respect a constitutional principle or of a fundamental right.

The Constitution is a present time legal (juridical) norm and has to be immediately applied and respected. From that, to sustain that the social, economic and cultural rights are reduced to a political responsibility link between the constituent and the legislator, is not only ingenuity regarding the existence of such link, but also an evident distortion regarding the sense and coherence that the Constitution must maintain. If the responsibility of the Constitution's efficiency would be in the hands of the legislator, the constitutional norm would not have any value and the validity of the constituent's will, would stay subject to the legislator's will⁴³³.

Eventually the Constitutional Court of Colombia concluded its ruling saying that due to the fact that "the application of social, economic and cultural rights pose the political problem, not of genera-

433 See See decision T-406 of June 5th, 1992 in Manuel José Cepeda, *Derecho Constitucional Jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá, 2001, p. 61.

tion of resources but of allocation of them, the admission of tutela regarding social, economic and cultural rights can only be accepted in cases where a violation of a fundamental right exists"⁴³⁴.

Consequently, for instance, the Constitutional Court has protected the right to health of a military servicemen and to be treated in a military hospital, although he was not formally entitled to have such treatment because his military oath was yet to be given, considering that the right must be protected "when the health service is needed and is indispensable in order to preserve the right to life, in which cases the State is obligated to render it to persons in need"⁴³⁵. So when there are no such connections, the social right in itself cannot be protected by means of tutela, as for instance has been the case of the constitutional right to a dignified dwelling or housing, regarding which, the Constitutional Court has ruled that, "as happens with other rights of social, economic and cultural contents, no subjective right is given to persons to ask the State in a direct and immediate way, to plainly satisfy such right"⁴³⁶

For the same reason of the political character of the possible enforcement of social, economic and cultural rights, its justiciability has been widely discussed in contemporary constitutional law.

For instance, this has been the feature of the North American Supreme Court doctrine, even in the aftermath of the so called "The Rights Revolution" that shaped North America in the last decades of the XX Century. As Charles R. Repp has pointed out referring to the Supreme Court's scattered attention to individual rights in the thirties (when less than 10 percent of the Court's decisions involved individual rights other than property rights), and the revolutionary changes that occurred in the following decades:

By the late sixties, almost 70 percent of its decisions involved individual rights, and the Court had, essentially, proclaimed it the guardian of the individual rights of ordinary citizen. In the process, the Court created and expanded a host of new constitutional rights, among them virtually all the rights now regarded as essential to the Constitution: freedom of speech and the press, rights against discrimination on the basis of race or sex, and the right to due process in criminal and administrative procedures⁴³⁷

This very important "Rights Revolution" in the United States led the Supreme Court to guarantee civil rights that were not effectively protected before, like the non discrimination rights derived from the implementation of *Brown v. Board of Education* 347 U.S. 483 (1954) overturning the racial segregation in public schools; the extension of freedom of speech guaranteed in the First Amendment; restricting federal and state actions, from *Fiske v. Kansas* 274 U.S. 380 (1927); the due process of law rights of accused persons and prisoners, following *Mapp v. Ohio* 367 U.S. 643 (1961) and *Gideon v. Wainwright* 372 U.S. 335 (1963); the women's rights regarding sex discrimination beginning in *Reed v. Reed* 404 U.S. 71 (1971) and in *Fontinero v. Richardson*, 411 U.S. 677 (1973).

But if it is true that in matters of judicial protection of civil and individual rights in the United States it is possible to talk about a Revolution, nothing similar can be said regarding social and cultural rights, many of them the Supreme Court had denied to even qualify them as fundamental rights, as happened with the right to education, to housing and to social welfare.

434 *Idem.* p. 61

435 See Decision T-534 of September 24, 1992, in pp. 461 ff.

436 See Decision T-251 of June 5, 1995, in p. 486.

437 See Charles R. Repp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective*, The University of Chicago Press, Chicago and London, 1998, p. 2. See also, pp. 26 ff.

All were referred in the case *San Antonio Independent School District et al. v. Rodriguez et al.*, 411 U.S. 1; 93 S. Ct. 1278; 36 L. Ed. 2d 16; (1973)⁴³⁸, decided by the Supreme Court on March 21, 1973, in which it was ruled that though education “is one of the most important services performed by the State (as was ruled in *Brown v. Board of Education*), it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution”, thus denying such right the quality of “fundamental right”. The decision was issued as a result of the attack to the Texas system of financing public education by Mexican-American parents whose children attend the elementary and secondary schools in an urban school district in San Antonio, Texas. They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base

The Court considered that:

“[The] financing system did not impinge upon any fundamental right protected by the Constitution, so as to require application of the strict judicial scrutiny test under which a compelling state interest must be shown, since education, notwithstanding its undisputed importance, is not a right afforded explicit or implicit protection by the Constitution; even assuming that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of the right of free speech and the right to vote, nevertheless the strict judicial scrutiny rule is not applicable where the state’s financing system does not occasion an absolute denial of educational opportunities to any of its children, and where there is no indication or charge that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process”.

In support of this decision, the Court referred to the case *Lindsaey v. Normet*, 405 U.S. 56 (1972) decided only the year before, in which it “firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny” In that case, which denies constitutional rank to the right to have dwelling, the matter referred to the procedural limitations imposed on tenants in suits brought by landlords under Oregon’s Forcible Entry and Wrongful Detainer Law. The tenants argued that the statutory limitations implied “fundamental interests which are particularly important to the poor,” such as the “need for decent shelter” and the “right to retain peaceful possession of one’s home.” The Supreme Court in the reference to this case, highlighted the following analysis made by Mr. Justice White, in his opinion for the Court, as instructive:

“We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent... Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.”

In a similar way, the court in its decision also referred to the case of *Dandridge v. Williams*, 397 U.S. 471 (1970), arguing that the Court’s explicit recognition of the fact that the “administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings” provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. The Court then concluded that:

“As in the case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. The Court refused to apply the strict-scrutiny test despite its contemporaneous recognition in *Goldberg v. Kelly*, 397 U.S. 354,364 (1970) that “welfare provides the means to obtain essential food, clothing, housing, and medical care.”

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Nonetheless, in the end, the discussion is not whether social, economic and cultural rights like education, health, social welfare or housing are or are not fundamental constitutional rights, but even if they have such rank, they can be justiciable, that is to say, if they can be enforced by means of judicial actions against the State.

II. THE CASE OF THE RIGHT TO HEALTH IN LATIN AMERICAN CONSTITUTIONS AND THE STATE'S OBLIGATIONS

This is the main issue on the discussion in Latin America. Without doubts, the Constitutions of all Latin American countries recognized the constitutional and even the fundamental character and rank of social, economic and cultural rights, but not always the courts had decided actions for amparo of such rights, particularly when brought against the State.

One important constitutional right whose justiciability has been discussed in Latin America is the right to health, enshrined in all the Constitutions; justiciability that is conditioned, first, by the way the right is declared in the Constitutions; second regarding the scope given to the amparo action; and third by the concrete cases resolved by the Courts.

Not all the Latin American Constitutions set forth the right to health in the same way. Some refer to the matter as a public asset, as is the case of El Salvador, where the Constitution declares that “the health of the inhabitants of the republic is a public asset” (Art 65). In similar terms, it is set in the Constitution of Guatemala (Art. 95); and in both texts it is declared that the State and the individuals are obligated to take care of its preservation and reestablishment.

Nonetheless, in almost all Constitutions the “right to health” is listed as a constitutional right (Bolivia, Art. 7,a; Brazil, Art. 6 y 196; Ecuador Art. 46; Nicaragua, Art. 59); Venezuela, Art. 84), that corresponds to everybody in equal terms as it is expressed in the Constitution of Nicaragua (Art. 59); and is reaffirmed in the Constitution of Guatemala, by saying that “the enjoyment of health is a fundamental right of human beings, without any kind of discrimination” (Art. 93).

This constitutional formula of “right to health”, though, in fact what reveals in a general declaration of principles regarding the commitment of the State and the society toward human beings, rather than a strict constitutional right, due to the absence of an *alter* party in the declaration. In fact nobody can be obligated to promise the health of a person, and conversely, nobody can have the “right” not become ill.

Nonetheless, it can be said that with this formula of the “right to health” in reality, what the Constitutions are setting forth is the constitutional right of everybody to the protection of health, or to be protected in their health, by the State. Thus, the State, as well as the whole society, has the obligation

to watch for the maintenance and recuperation of people's health. That is why other Latin American Constitutions provide in a more precise way, the "right to the protection of health" (Honduras, Art. 145); or refer to the right of everybody to the protection of their health" (Chile Art. 19,9; México, Art. 4; Perú, Art. 7); or the right "for their health to be taken care of or protected" (Cuba, Art. 50); or that everybody has to have the guarantee "to have access to the services for the promotion, protection and recovery of health" (Colombia, Art. 49). In Panama, Article 105 of the Constitution provides that:

The individual, as part of the community, has the right to the promotion, protection, maintenance, restitution and rehabilitation of health, and the obligation to maintain it, understood as the complete physical, mental and social welfare".

In some cases, as it happens in the Venezuelan Constitution, both formulas have been put together, when Article 83 of the Constitution provides as follows: "Health is a fundamental social right... all persons have for their health to be protected". In similar sense, Article 68 of the Constitution of Paraguay referring to the "right to health", says: "In the interest of community, the State will protect and promote health as a fundamental right of persons".

But a right for health to be protected by the State, in fact, is a right to have access to the service that takes care of health. Nonetheless, only a few Constitutions assure the equalitarian right to have such access, in some cases without cost, regarding public health services. In the case of Chile, where the Constitution provides that "the State protects the free and equalitarian access to the actions for promotion, protection and recovery of health and of rehabilitation of the individuals" (Art. 19,9). The Cuban Constitution, in Article 50, sets forth that the State guarantees the rights of persons to have their health being taken care of and protected "with the rendering of free medical and hospital assistance".

In the case of Chile, in the same constitutional provision a distinction is made between the health public programs and services render, regarding which it is provided that "the public health programs and actions are free for all", but, "the public services of medical attention will be free for those who need them" (Art. 43). The Constitution also provides that "in no case the emergency attentions will be denied in public or private premises" (Art. 43). In similar sense the Constitution of Paraguay sets forth that "Nobody will be deprived of public assistance in order to prevent or treat diseases, pests or plague, or of help in cases of catastrophes or accidents" (Art. 68).

The Constitution of El Salvador provides that the State must "give free assistance to the sick who lacked resources, and in general to all inhabitants, when the treatment is an efficient mean to prevent the dissemination of a transmissible disease"; (Art. 66); and in Uruguay, the Constitution provides that "the State must freely provide the means for protection and of assistance only to those in need and to those without enough resources" (Art. 44). In other cases, the Constitutions refer to the statute to "define the terms through which the basis attention for all the inhabitants will be free and obligatory" (Colombia, Art. 49); or for the definition of "the rules and modes for the access to the health services" (México, Art. 4).

From all these constitutional regulations, additionally to the general duties imposed to everyone, the communities and society in general have the duty to preserve healthy conditions, in particular a series of constitutional duties are set forth regarding the State and public bodies, which in a certain way are the ones that can orient the scope of the justiciability of the right to health.

For instance, in the Panamanian Constitution it is set forth that "It is an essential State function to watch for the health of the population" (Art. 105); and the Constitution of Guatemala, provides as an "obligation of the State on health ad social assistance" that "The State must watch for the health and social assistance of all inhabitants. It will develop, through its institutions, actions for the prevention,

promotion, recovery, rehabilitation, coordination and the complementary ones in order to seek the most complete physical, mental and social welfare" (Article 94).

The Venezuelan Constitution, after declaring health as a fundamental right, declares as an "obligation for the State, who must guarantee it as part of the right to life. The State must promote and develop policies devoted to raise the quality of life, the collective welfare and the access to the..." (Art. 83). In the Constitution of Honduras, Article 145 provides that "The state must maintain an adequate environment for the protection of people's health".

And the Constitution of Cuba sets forth that the State guarantees the right of persons to have their health taken care of and protected" (Art. 50) "by means of rendering free medical and hospital assistance through the network of rural medical services, polyclinics, hospitals, prophylactic and special treatment facilities; by rendering free stomatology assistance; by means of the development of plans for sanitary and health education, periodical medical exams, general vaccination and other disease preventive measures".

In Ecuador, Article 42 of the Constitution prescribes that the State guarantees the right to health, and the promotion and protection of health, "by means of the development of the alimentary safety, the provision of drinking water and basic sanitation, the promotion of family, labor and community healthy environment and the possibility to have permanent an uninterrupted access to health services, according the equity, universality, solidarity, quality and efficiency principles".

Article 106 of the Panamanian Constitution provides that in matters of health; it is for the State basically to develop activities, integrating the prevention, restoration and rehabilitation, among other purposes for "the protection of the mother, the child and the adolescent by means of guaranteeing integral attention during the gestation, nursing, growth and development of youth and adolescence; the fighting of transmissible diseases by means of environmental sanitation, development of access to drinking water and to adopt measures for the immunization, prophylaxis and treatment, collectively and individually rendered to all the population; and to create, according to the needs of each region, facilities in which integral health services are rendered, and drugs are given to all the population. This health services and medication will be freely rendered to whom lacks economic resources".

In Bolivia the State has the "obligation to defend human persons by protecting the health of the population, to assure the continuity of subsistence and rehabilitation means of disabled persons; to commit the raise family group life conditions (Art. 158.I). The Constitution of Peru provides that "the State determines the health policy" (Art. 9); and in similar terms the Constitution of El Salvador prescribes that "The State will determine the national health policy and will control and supervise its application" (Art. 65). In Nicaragua, Article 59 of the Constitution provides that the State must establish basic conditions for health promotion, protection, recovery and rehabilitation, and that it must direct and organize health programs, services and actions and promote popular participation in its defense".

In Brazil, the State has the duty to guarantee health "through social and economic policies tending to reduce the risk of sickness and other risks and the universal and equalitarian access to actions and services for health promotion, protection and recovery" (Art. 196). In Ecuador, the State must promote "the culture for health and life, with emphasis on alimentary and nutrition education of mothers and children and in sexual and reproductive health, by means of society participation and the social media collaboration (Art. 43).

For such purpose, the State must formulate "a health national policy and will watch for its application; control the functioning of entities in the sector; recognize, respect and promote the development of traditional and alternative medicine, the exercise of which will be regulated by statute, and will promote the scientific and technological advancement in health are, subjected to bioethics principles. Will also adopt programs tending to eradicate alcoholism and other toxic manias" (Art. 44).

According to all these express constitutional provisions, in some case vaguely and in others very detailed and precise, the protection of health can be considered in general as a constitutional obligation of the State, which does not exclude the possibility for individual to render health care services. In this regard, for instance, the Chilean Constitution provides that “everyone has the right to choose the health care system to which want to belong, be it public or private” (Art. 19), which implies the right of individuals to render health care services. This is expressly set in the Brazilian Constitution by providing that “sanitary assistance is of free private initiative”, but subjected to express constitutional restrictions such as the ones provided in Article 199, “private institutions may participate in a complementary way in the Unique Health System, according the rules set forth by it, by means of public law contract or agreement, favor being given the philanthropic institutions and non-profit entities”; that “it is forbidden that public funds be directed to help or subsidize profit-oriented private”; and that also “it is forbidden the direct or indirect participation of foreign companies or capital in the sanitary assistance in the country, except in cases provided by statute”.

Anyway, except for this provision, in the other Latin American countries, it can be said that in general, no private initiative to render health care services is provided, and what is provided is the State’s power to regulate all health care services. As it is provided in the Venezuelan Constitution: “The State shall regulate both public and private health care institutions” (Art. 85); or as it is provided in Article 19 of the Chilean Constitution, in which additionally to declaring that the coordination and control of the activities related to health corresponds to the State, it declares that “the State shall give preference to guarantee the execution of health assistance, whether undertaken by public or private institutions, in accordance with the form and conditions set by statute which may establish obligatory payments”

Article 44 of the Uruguayan Constitution provides that “The State must legislate on all questions related to public health and hygiene, tending to the physical, moral and social improvement of all inhabitants of the country”. In Honduras, Article 149 assigns to the State the power to supervise all the private activities related to health. In Brazil, Article 197 of the Constitution, due to the public importance of health activities and services, empowers the public bodies directly or by third parties, to regulate, supervise and control them. Also, the Colombian Constitution provides in Article 49 that it is for the State to establish “the policies for the rendering of health care services by private entities, and to supervise and control them.”

The general consequence of the Constitutions providing for State obligations to render health care services to answer individual’s constitutional right to receive health care materializes in public utilities or public services. As provided expressly in the Colombian Constitution: “health care and environment sanitation are public services that the State has to meet (Article 49); and the Bolivian Constitution adds that “The social services and assistance are State functions” being the regulations related to public health of coercive and obligatory character (Art. 164).

In this regard, the majority of Latin American Constitutions contained the general principles regarding public and private health care services, integrated in a national or unique system (Chile, Art. 45; Paraguay, Art. 69; Venezuela, Art. 84; Brazil, Art. 198).

III. THE JUSTICIABILITY OF THE RIGHT TO HEALTH

The people’s constitutional right to health -particularly due to the obligations imposed to the States to provide services for the maintenance and recovery of people’s health- pose the question of its justiciability by means of the amparo recourses or actions. Being constitutional rights, in principle they can be enforced by courts through the specific means for the protection of human rights.

Nonetheless, this has only been expressly regulated in one Latin American country: Peru. The Peruvian Constitutional Procedure Code, which expressly provides that the amparo recourse can be filed for the defense of the right “to health” (Article 37,24). In the case of Chile, the Constitution refers to the recourse of protection only to protect the “right to choose the system of health” (Article 19,9). No other specific regulation exists regarding amparo and right to health, which does not exclude the judicial protection. On the contrary, as a matter of principle, amparo actions can be brought before the courts for the protection of the right to health.

Nonetheless, the decisions of the courts in this regard have not been as protective as the constitutional provisions can allow. In general terms, and taking into account judicial decisions of the Constitutional Courts or Constitutional Chambers of Supreme Courts, as well as other court decisions of Peru, Colombia, Costa Rica, Chile and Venezuela, it is possible to distinguish two general tendencies: First, of wide protection in three cases: in cases in which it exists a concrete legal relationship between the plaintiff and the public entity defendant party, like the one derived from the social security system paid by the individual; in cases in which the right to health is protected because of its connection with other fundamental rights as the right to life; and in cases in which the courts have denied the programmatic character to the right to health; and second, of limited protection in cases which impose the State obligations to render services of health care which surpass the resources originally set forth.

The first cases related to amparo decisions for protection of the rights to health in concrete legal situations usually derived from the social security obligations regarding insured persons. This is the case of the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela decision n° 487 of April 6th, 2001 (Case: *Glenda López y otros vs. Instituto Venezolano de los Seguros Sociales*), in which the Court started by pointing out that the right to health or to the protection of health is “an integral part of the right to life, set forth in the Constitution as a fundamental social right (and not simply as an assignments of State purposes), whose satisfaction mainly belongs to the State and its institutions, thorough activities intended to progressively raise the quality of life of citizens and the collective welfare”. This implies, according to the Court’s decision that “the right to health is not to be exhausted with the simple physical care of the illness of a person, but it must be extended to the appropriate care in order to safeguard the mental, social, environmental etc., integrity of persons, including the communities, as collective imperfect entities, in the sense that they do not have by-laws organizing them as artificial persons”.

In the concrete case heard by the Court, the violation of the right to health (and also the threat regarding the right to life) was alleged by HIV/AIDS infected persons, as caused by the Venezuelan Institute for Social Security, which they considered was obligated to “give medical integral care to its affiliates”. The Constitutional Chamber thus ruled that because the omission of the Institute “to provide the plaintiffs, in a regular and permanent way, the drugs for the treatment of HIV/SIDA prescribed by the specialist attached to the Hospital Domingo Luciani, and to practice the specialized medical exams directed to help the efficient treatment of HIV/AIDS”; the right to health and even the right to life of the plaintiff were put in danger⁴³⁹.

The second cases are related to the protection of the right to health as a consequence of the protection of the right to life, as has been decided in Colombia and Costa Rica.

As mentioned before, the Colombian Constitution does not include, among the fundamental rights protected by means of the action of tutela, the right to health or to the protection of health, so that the Constitutional Court has constructed the possibility of its protection establishing its connec-

439 Véase en *Revista de Derecho Público*, n° 85-88, Editorial Jurídica Venezolana, Caracas, 2001, pp. 139-141.

tion to the right to life. In the decision n° T-484/92 of August 11, 1992⁴⁴⁰, when deciding a revision recourse of a tutela decision against the Institute of Social Security, the plaintiff in the case, also infected with HIV/AIDS, claimed that it was infected while being covered by the Social Security program and had a favorable decision of the first instance Court which ordered the Institute to continue to render the plaintiff the health care services that we had been receiving. The Constitutional Court, when deciding, affirmed that “health is one of those assets that because of its inherent character to the dignified existence of man, is protected and especially, regarding persons that because of its economic, physical or mental conditions are in a manifest weakness condition” (Article 13, Constitution); being it a right that “seeks the assurance the fundamental right to life (Article 11 Constitution). Thus, the assistance nature imposes a primordial and preferential treatment by public entities and the legislator, in order for its effective protection”. The Court, moreover, when connecting the right to health with the right to life, pointed out that:

The right to health comprises in its legal nature a bunch of elements that can be classified in two great blocks: First, those that identify it as an immediate condition to the right of life, thus, attacking peoples health is equivalent to attacking life itself. Thus conducts that harass the safe environment (Article 49,1), are to be treated in a concurrent manner with the health problems. Additionally, the recognition of the right to health forbids personal conducts that can cause damage to others, originating criminal and civil liabilities. Because all of these aspects, the right to health comes out as a fundamental right. The second block of elements place the right to health within an assistance character derived from the Welfare State, due to the fact that its recognition imposes concrete actions, developed through legislation, in order to render a public service not only for medical assistance, but also regarding hospital, pharmaceutical and laboratory rights. The threshold between the right to health as fundamental and assistance is imprecise and above all subject to the circumstances of each case (Article 13 Constitution), but in principle it can be asserted that the right to health is fundamental when related to the protection of life”.

Based on the foregoing, regarding the concrete case of the petitioner infected with HIV/AIDS who was been treated by the health care services from the Institute of Social Security, the Court ratified the inferior decision’s on tutela, bearing in mind that in the particular circumstance, the prevention of the right to health, was the condition for the protection of the his fundamental right to life.

In a similar sense, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, in decision n° 2003-8377 of August 8th, 2003⁴⁴¹, deciding an amparo recourse filed by the People’s Defendant on behalf of the aggrieved person against the Costa Rican Institute of Social security because of the denial of the requested treatment for the disease known as Gaucher type 1, arguing that such denial “harmed the right to life and to health of the minor” who required the prescribed drug for “maintaining his life”, the Constitutional Chamber after referring to the doctrine of the right of life in previous Court’s decisions, including the right to health, concluded that “the Constitution provides in its Article 21 that he human life is inviolable, from which it derives the right every citizen has to health, thus corresponding to the State to ensure public health... (n° 5130-94 of 17:33 hrs on 7 September 1994)”.

The Chamber added that “the preeminence of life and health, as superior values of people, is present and is of obligatory protection by the State, not only in the Constitution, but also in the various international instruments ratified by the country”, making reference to Article 3 of the Universal Declaration on Human Rights, Article 4 of the American Convention on Human Rights; Article 1 of the American Declaration on Rights and Duties of Man; Article 6 of the International Covenant on Civil

440 File n° 2130, Case: *Alonso Muñoz Ceballos*,

441 File. 03-007020-0007-CO, Case: *Tania González Valle*.

and Political Rights; Article 12 of the International Covenant on Economic, Social and Cultural Rights; and Articles 14 and 26 of the Convention on Chile Rights (Law 7184 of July 18, 1990).

Due to the responsibilities of the State derived from these norms, the Constitutional Chamber comes in to analyzing the mission and functions of the Costa Rican Institution of Social Security making reference to its previous decision n° 1997-05934 of September 23, 1997, in which “it was considered that the denial from the Costa Rican institutions on Social Security to provide patients infected with HIV/AIDS the adequate therapy harms their fundamental rights”. Departing from this premise, the Chamber analyzes the concrete case of the protected Tania González Valle, being proved in the files that she was not receiving the prescript treatment. Regarding the arguments of the Institutions based on financial aspects, the Chamber pointed out that:

“This Court is conscientious regarding the scattered financial resources of the social security system, nonetheless it considers that the principal challenge the Costa Rican Institution of Social Security faces in this stage of its institutional development, -where Costa Rica has achieved life standards qualities similar to those of developed countries-, is to optimize the management of available resources of the system of health insurance and reduce the administrative costs in order to efficiently invest these resources. The Chamber considers that the prescript drugs are undoubtedly onerous, nonetheless, due to the exceptional characteristics of the illness suffered, which is lethal, and due to the impossibility for her parents to contribute for the acquisition of the drugs, based on Articles 21 and 173 of the Constitution, and 24 and 26 of the Convention on the Child’s Rights, it proceeds to confirm the recourse. The acceptance of the recourse implies that the Costa Rican Institution on Social Security must immediately provide Tania Gonzalez Valle with the drug “Cerezyme” (Imuglucerase) in the conditions prescribed by her doctor”.

In Peru, the Constitutional Court in a decision of April 20, 2004⁴⁴², also ruled regarding the right to health when deciding an extraordinary revision recourse filed against an amparo decision issued by the Superior Court of Justice of Lima. The latter had partially adjudicated the amparo action brought against the Peruvian State (Ministry of Health), demanding for the plaintiff, an HIV/AIDS infected “integral health care by means of the constant provision of drugs needed to treat HIV/AIDS, as well as the performance of periodical exams and tests that the doctor orders”.

The Constitutional Tribunal, referring to the rights that are protected by means of the action of amparo, admitted that “the right to health is not among the fundamental rights set forth in Article 2 of the Constitution, but is rather recognized in Articles 7 and 9 of the Constitution in the Chapter related to social and economic rights”; nonetheless, concluded in a “similar way decided by the Colombian Constitutional Court, that when the violation of the right to health compromises other fundamental rights, like the right to life, the right to physical integrity and the right to the free development of one’s personality, such right acquires fundamental right character and, therefore, must be protected by means of amparo action (*STC N.º T- 499 Corte Constitucional de Colombia*)”.

The nature of the economic and social rights, as is the case of the right to health, originates State obligations directed to provide social assistance. The Tribunal argued that the right health, as all the so called *prestacionales* (“rendering”) rights, like social security, public health, housing, education and other public services, it represents “one of the social goals of the State through which individuals can achieve their complete auto determination”. Individuals can then “demand” the accomplishment of State duties by “asking the State to adopt adequate measures in order to achieve the social goals”. However, “not in all cases the social rights are by themselves legally enforceable, due to the need of a budget support for its accomplishment”.

442 File N.º 2945-2003-AA/TC, Case: *Azanca Alhelí Meza García*

Notwithstanding the above mentioned, the Constitutional Tribunal pointed out that “there were not just programmatic provisions with mediate effects as has been traditionally considered when differentiating them from the so called civil and political rights of immediate efficacy, because the indispensable guarantee for the enjoyment of the civil and political rights is precisely its minimal satisfaction. Accordingly, without dignified education, health and life quality, it would be difficult to talk about freedom and social equality, which motivates both the Legislator and the Judiciary to think jointly and interdependently on the recognition of such rights. Their satisfaction also requires a minimum action from the State, by means of the establishment of public services to render health care in equal conditions for all the population.

In this regard, the Tribunal ruled that “the social rights must be interpreted as true citizen guarantees that bind the State within a vision that tends to reevaluate the legal validity of constitutional norms, thus of the enforcement of the Constitution”. Thus, the enforcement of these rights implies the need to surpass the programmatic conception allowing the improvement of the social prescriptions of the Constitution, as well as the State obligation, to which it is necessary to impose quantified goals in order to guaranty the force of the right”. According to the Tribunal criteria, “this new vision of the social rights allows to recognize in its essential content, principles like solidarity and human being dignity respect, which are the funding of the Welfare State based on the rule of Law”.

After analyzing these principles, the Tribunal considered as “erroneous the argument of the State defendant when arguing that the right to health and the national policy of health are just programmatic norms that more than a concrete right only signify a plan of action for the State”; adding that it would be naïve “to sustain that the social rights are reduced to be just a link for political responsibility between the Constituent and the legislator, which would be “an evident distortion regarding the Constitution’s sense and coherence”.

Regarding the right to health and its inseparable relation to the right to life, the Tribunal ruled that according to the Constitution “the defense of human beings and the respect of their dignity... presupposes the unrestricted enforcement of the right to life”; because “the exercise of any right, privilege, faculty or power has no sense or turns out to be useless in cases of non existence of physical life of somebody in favor of which it can be recognized”. The Tribunal continued its ruling saying:

28. Health is a fundamental right due to its inseparable relation with the right to life, which is ir-resoluble, due to the fact that an illness can provoke death or in any case, the deterioration of life conditions. Thus the need to materialize actions tending to take care of life is evident, which supposed a health care oriented to attack the illness signs...

Since the right to the protection of health is recognized in Article 7 of the Constitution, persons have also a right to attain and preserve a plain physical and psychical condition; consequently, they have “the right to be assigned sanitary and social measures for nourishing, clothing, dwelling and medical assistance, according to the level allowed by public funds and social solidarity”.

The Tribunal then considered the question of the justiciability of social rights, like the right to health, ruling that “they cannot be requested in the same way in all cases, due to the fact that it is not a matter of specific rendering, because its depend on budget allocations; on the contrary, that would suppose that each individual could judicially ask at any moment for an employment or for a specific dwelling or for health”; concluding that:

33. To judicially demand a social right will depend on various factors, such as seriousness and reasonability of the case, its relation to other rights and State’s budget resources, provided that concrete actions can be proved for the accomplishment of social policies”...

The Tribunal then analyzed the State's actions in the case, due to the pleading of the plaintiff's rights which affects his own life, ruling that "if it is true that in developing countries it is difficult to demand immediate attention and satisfaction of social policies for the whole population, [this Tribunal] reaffirms that its justification is valid only when concrete State actions are observed for the achievement of the resulting effect; on the contrary, the lack of attention would result in an unconstitutional omission situation".

Regarding the public policies in matters of HIV/AIDS the Tribunal considered that "in general, regarding social rights such as the right to health, no rendering obligation results in it itself because it depends on the State's financial resources, which nevertheless, in no way can justify a prolonged inaction, because it would result in an unconstitutional omission". The conclusion in the case was "the granting of the legal protection to a social right as the right to health, due to the fact that in this particular case the conditions justifying it are fulfilled" not only "due to the potential damage to the right to life, but also because of the motives on which the legislation is based in the matter which has organized the means for maximum protection to the AIDS infected persons".

1. The right to health and the State's financial resources

In other cases, the justiciability of the right to health regarding HIV/AIDS treatment has been completely subordinated to the disposal of resources. This has been the sense of some 2000/2001 Chilean courts' decisions regarding action for protections suits. In one case, the action was filed against the Ministry of Health, for failing to provide medical treatment to a group of HIV patients, arguing violation to the right to life and the right to equal protection. The plaintiff asked to be treated with the same therapy that was been given to others HIV patients, which the Ministry had denied arguing that it lacked enough economic resources for providing it to all Chilean HIV patients. The Court of appeals of Santiago ruled that the obligation of the Ministry of Health, according to the Law regulating health care provisions (Law n° 2763/1979), was to provide health care in accordance with the resources that are available to it considering reasonable the explanation provided by the Ministry based on the lack of economic resources to provide the best available treatment to the plaintiffs. The decision was confirmed by the Supreme Court⁴⁴³.

In another 2001 decision, the same Ministry of Health was sued for the same reasons by HIV patients on a more critical conditions, and even though the Court of appeals of Santiago ruled in favor of the petitioners, ordering the Ministry to provide them immediately with the best available treatment, the Supreme Court reversed the ruling, arguing that the Ministry had acted in accordance to the law⁴⁴⁴.

2. The rejection to protect the right to health in an abstract way

Finally, it must be mentioned a recent ruling of the Venezuelan Constitutional Chamber of the Supreme Court, that while contradicting previous rulings, decided that the right to health was not able to be protected by means of amparo actions, but only through political mechanisms of control regarding public policies.

The Chamber in a decision n° 1002 of May 26, 2004 (Case: *Federación Médica Venezolana*), rejected an amparo action brought by the Venezuelan Medical Federation "defending diffuse society rights

443 See the reference in Javier A. Curso, "Judicialization of Chilean Politics" in Rachel Sieder, Line Schjolden and Alan Angeli (Ed.), *The Judicialization of Politics in Latin America*, Palgrave Macmillan, New York, 2005, pp. 119-120.

444 *Idem.* p. 120.

and interests, and in particular those of the physicians”, seeking protection to health, against the “*omissive*” conduct of the Ministry of Health and Social Development and the Venezuelan Institute of Social Security, because it failed to “directly provide an efficient service of health to the population in all the national territory, by means of promptly providing the necessary equipment and resources”.

The Constitutional Chamber, in order to reject the claim, began by establishing a distinction that is not reflected in the Constitution, “between the civil and political rights and those of third generation”, pointing out that:

The dichotomy between civil and political rights and the economic, social and cultural ones was established since the preparatory works of the two United Nations Covenants, and particularly, in the 1951 decision of the General Assembly not to frame on both instruments the regulation of the two categories of rights as an expression of the idea that the civil and political rights were rights that can be immediately enforced –because of implied abstention duties from the State-; whereas the economic, social and cultural rights were implemented by means of rules of that ought to be progressively developed – due to the fact that they implied positive obligations. Such criterion was also followed in the European Social Charter –in which’s negotiation process existed the conviction that it would be difficult to guaranty the application of economic, social and cultural rights by means of judicial control- and in the American Convention on Human Rights”.

The Constitutional Chamber, after recognizing the indivisibility of human rights, in the sense that the full enjoyment of the civil and political rights is impossible without the enjoyment of economic, social and cultural rights –as declared in the Teheran Conference on Human Rights and accepted by the General Assembly of United Nations in Resolution No. 32/130-; pointed out that such assertion did not vanish the uncertainty regarding the role of States in economic, social and cultural rights and its obligations deriving from such rights. The doubt subsists, because as explained by the Constitutional Chamber, the implementation of economic, social and cultural rights “faces the debt crisis and the resulting impoverishment of Latin American countries, so the satisfaction of such rights depends on the availability of existing resources, the State being committed only to provide means in order to progressively achieve its goals”.

But, as pointed out by the Chamber, due to the fact that the 1999 Venezuelan Constitution set forth not only the Welfare State based on the Rule but on the consideration of the economic, social and cultural rights as “fundamental rights”, this situation imposes the need to do a theoretical effort to framework the protection of such rights, in order to not issue decisions that could be qualified as demagogic because of their impossibility to enforce.

The Constitutional Chamber began its argument by saying that the idea of the Welfare State based on the Rule of law refers to a State devoted to satisfying the basic needs of individuals, in order to the achievement of higher living standards in the population; but from that sole idea it is not possible to deduct rights, or consider that they are within the subjective sphere of citizens. From this idea what results is the aspiration to satisfy basic needs of individuals as a guiding principle of administrative activity. Regarding the justiciability of rights, the Constitutional Chamber added:

In contrast, at least in the 1999 Constitution, the economic, social and cultural rights are declared as fundamental rights, which implies specific consequences, among them, -in principle- the applicability of the protection by means of amparo, because the Constitution, in contrast to what is established in other legal orders, does not exclude certain rights from that guaranty, nor its immediate applicability, due to the fact that our constitutional order has a normative immediate value and application, rejecting what are known as programmatic rights.

Consequently, having such economic, social and cultural rights a fundamental rights character; they are undoubtedly judicially protected, because on the contrary, we will not be facing a right but a moral value aspiration”.

But after affirming this, the Constitutional Chamber built the denial of such justiciability of social right, stating that “the point is to determine when one is asking for the enforcement of an economic, social or cultural right, and when one is asking that the Public Administration perform the Welfare State based on the Rule of Law State clause, given that the ways to ask in both cases differ”. This distinction derives from the recognition of the political value of the State’s activity devoted to satisfy the existence needs, and from the definition of the essential core of each of the rights that is stake”. From this, the Chamber went to rule on the non justiciability of social rights, arguing that they were only submitted to political control, emphasizing that:

In the first case we must begin affirming that the policy, is basically manifested itself, through acts, and also through application, design, planning, evaluation and follow-up regarding the government trends and public expenses, so that policy does not exhaust itself in the legal framework. In this context the acts are subjected to judicial review, but only regarding its legal elements (conformity of the concrete action to the law, and not in a general or abstract way). The opportunity and convenience criteria are out or reach of judicial review, as well as the political elements of the administrative or governmental acts, or the opportunity and convenience reasons of statutes (See Decision N° 1393/2001 SC/TSJ). The contrary would be a violation of the freedom each State must have in order to adopt and apply the policies it considers effective to obtain its goals (where the guaranties to obtain services are located), which explain that -in principle- the only control regarding those aspects are the political ones through the different means of participation set forth in the Constitution and the laws (during the accomplishment of governmental and administrative functions, and in case of evident incapacity of Public Administration to plan in an efficient way its activity to satisfy the existence needs, citizens will withdraw the confidence given to their representatives by mean of election, as a sign of a process of de legitimization of political actors”.

...the point is to emphasize the impossibility for the judge to challenge the opportunity and convenience of the Administration, of the government or of the legislation, or the material or technical impossibility that in some occasions exists of enforcing the judicial decisions that order the accomplishment of certain duties...

...in the public activity, the State has freedom to organize itself, which cannot be legitimately substituted by the Judiciary. It has it as a consequence of the accomplishment of its constitutional duties resulting from the nature of such functions, that is, as a derivation of the principle of separation of powers that sets forth a scope reserved to each power and excludes the substitution of wills, and that the Government-Judiciary relation prevents for judicial review to be the measure for the sufficiency of the rendering burden”.

The Constitutional Chamber then went to quote the doctrine of the Spanish Constitutional Tribunal and of the German federal Constitutional Tribunal, regarding the absence of judicial review in political acts or political order acts, generalizing as follows:

“Policies are in principle, outside the scope of judicial review, but not for that reason they escape control only that this applicable control is the political one also set forth in the Constitution. The State organs act under their own responsibility, which can be challenged in the political level, meaning that they cannot be unvested of the authorization in their political management. But that process of de-legitimizing can not be qualified by the Judiciary, unless when determining an administrative liability for damages caused by the political activity and putting aside that a funda-

mental right be affected by the decision, in which case, eventually, the control will not be regarding the political elements of the act and turn to be a control regarding its juridical elements...”

From the abovementioned, the Constitutional Chamber then concluded that:

a) The economic, social and cultural rights have, as all rights, judicial protection; b) In order to know if one is facing one of such rights, it must exist a perfectly defined juridical relation where the harm to them comes from a change to the juridical sphere of a citizen or of collectivity; c) The State activity directed to satisfy the existence need is an activity with political contents; d) That such activity can manifest itself by acts or through policies; e) That such acts can be the object of judicial control in their juridical elements, not in the political; f) That the policies, in principle, can not be the object of judicial control but of political control; g) That such judicial impossibility cannot be understood as the rejection of the citizens right to action”.

The Constitutional Chamber eventually ruled that “resulting from the principle of separation of powers, the Judiciary cannot substitute the Legislative or the Executive definition of social policies, the violation of which, could led to a government by judges”, adding that “due to the fact that the economic, social and cultural policies depend on the existing resources, the Judiciary has the power to control in positive way, that bearing in mind the economic situation of the State, it has made a maximal use of the available resources -including legislative measures-; and in negative sense, the absolute absence of economic, social and cultural policies (which voided the essential core of the respective rights), as well as those policies openly directed to harm the juridical situation that protect the economic, social or cultural rights, cases that impose the State the burden of proof, also implying regarding the former, the analysis of the distribution of social spending”.

Regarding the amparo action, the Constitutional Chamber concluded affirming that being “of a reestablish nature, the possibility to judicially control the economic, social and cultural policies are not comprised by this constitutional guaranty, but it is completely within the nature of the functions of the People’s Defendant.

Finally, referring the right to health, and the claim of the *Federación Médica Venezolana* asking to the court to order the accomplishment of economic resources to the hospitals, and budget allocation for the acquisition of medical equipment and hospital materials, the Chamber rejected it considering that it is a very evident political activity, abstract in nature, which makes it “impossible to be the object of an amparo action directed to restore concrete juridical situations”. In the proceedings of the public hearing on the case, the Chamber finally ruled that “social or third generation rights, contrary to those of first or second generation, have a specific structure” that originates certain differences which impose the precision on what can be referred the judicial protection regarding such rights, pointing out that:

“Such rights, by themselves, are not in the subjective sphere of citizens due to the fact that, *ab initio*, they are guiding principles of the administrative activity; they are the basis of the Social and Justice State based on the Rule of law clause, and thus, they are elements defining the goals, in the sense that they qualified what must be considered of public interest.

Consequently, the enforcement of the third generations of rights is not possible, being the political control the only way to verify its accomplishment. Faced to the evident incapacity of Public Administration to efficiently plan its activities, the citizens will withdraw the confidence given to their representatives by means of suffrage, as demonstration of the de-legitimizing of the actors”⁴⁴⁵.

445 See in *Revista de Derecho Público*, nº 97-98, Editorial Jurídica Venezuela, Caracas 2004, p. 143 ff

IV. THE QUESTION OF THE PROTECTION OF RIGHTS IN SITUATIONS OF EMERGENCY

One last issue must be mentioned regarding the justiciability of rights, and it is the question of the admissibility of amparo actions in situations of emergency.

For instance, Article 6,7 of the 1988 Venezuelan Amparo Law used to provide that the amparo action was inadmissible "in case of suspensions of rights and guarantees" when referred to the protection of such. This decision of suspension, according to Article 241 of the 1961 Constitution, could only be decided when in cases of interior or exterior conflict, a situation of emergency was declared. To the contrary, the American Convention on Human Rights provides that even in cases of emergency, the judicial guaranties of rights cannot be suspended. Thus, due to the prevalent rank that the American Convention on Human Rights has regarding internal law, as set forth in Article 23 of the 1999 Venezuelan Constitution, the abovementioned Venezuelan Amparo Law restriction was tacitly repealed. Thus, the prevalent regulation in Latin America is that the action for amparo can be filed even in states of emergency, as declared in Article 1st of the Decree regulating the action for tutela in Colombia. Also regarding the habeas corpus, in a similar sense, Article 62 of the Nicaraguan Law of Amparo sets forth that in case of suspension of the constitutional guaranties of personal freedom, the recourse of personal exhibition will remain in force.

The Peruvian Constitutional Procedure Code establishes the principle that during the emergency regimes, the amparo and habeas corpus as well as all the others constitutional proceedings, will not be suspended. According to Article 23 of the Code, when the recourses are filed in relation to the suspended rights, the court must examine the reasonability and the proportionality of the restrictive act, following these criteria:

- 1) If the claim refers to constitutional rights not suspended;
- 2) If referred to the suspended rights, the founding of the right's restrictive act does not have direct relation with the motives justifying the declaration of state of emergency;
- 3) If referred to the suspended rights, the right's restrictive act happens to be evidently unnecessary or unjustified bearing in mind the conduct of the aggrieved party or the factual situation briefly evaluated by the judge.

In particular, regarding the habeas corpus guarantee, the Argentinean Habeas Corpus Law provides that in case of state of siege when the personal freedom of a person is restricted, the habeas corpus proceeding is directed to prove, in the concrete case:

- 1) The legitimacy of the declaration of state of siege;
- 2) The relation between the freedom depriving order and the situation that originates the declaration of state of siege;
- 3) The illegitimate worsened detention way and conditions which in no case can be effective in prisons.

On October 1986, the Inter-American Commission on Human Rights submitted to the Inter American Court of Human Rights a request for advisory opinion seeking the interpretation of Articles 25,1 and 7,6 of the American Convention on Human Rights, in order to determine if the writ of habeas corpus is one of the judicial guaranties that, pursuant to the last clause of Article 27,2 of that Convention, may not be suspended by a State Party to the Convention.

Article 27 of the Convention authorizes States, in time of war, public danger, or other emergency that threatens the independence or security of a State Party, to take measures derogating its obliga-

tions under the Convention; but with the express declaration that such does not authorize any suspension of the following articles:

Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

The Inter American Court on Human Rights issued its *Advisory Opinion OC-8/87* of January 30, 1987 (Habeas Corpus in Emergency Situations), declaring that since “in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms the free exercise of which must, under normal circumstances, be respected and guaranteed by the State...it is imperative that “the judicial guarantees essential for (their) protection” remain in force. Article 27(2)”⁴⁴⁶; adding that these “judicial remedies that must be considered to be essential within the meaning of Article 27(2) are those that ordinarily would effectively guarantee the full exercise of the rights and freedoms protected by that provision and the denial of which or restriction would endanger their full enjoyment”⁴⁴⁷.

The Court also advises that the guaranties must not only be essential but also *judicial*, expression that “can only refer to those judicial remedies that are truly capable of protecting these rights” before independent and impartial judicial bodies⁴⁴⁸; concluding that:

42. From what has been said before, it follows that writs of habeas corpus and of “amparo” are among those judicial remedies that are essential for the protection of various rights the derogation of which is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society.

43. The Court must also observe that the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of “amparo” in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.

In the same year 1986, the Government of Uruguay also submitted to the Inter-American Court a request for an advisory opinion on the scope of the prohibition of the suspension of the judicial guaranties essential for the protection of the rights mentioned in Article 27,2 of the American Convention; resulting in the issue of the *Advisory Opinion OC-9/87* of October 6, 1987 (Judicial Guarantees in States Of Emergency), in which the Court, following its aforementioned *Advisory Opinion OC-8/97*, empathized that “the declaration of a state of emergency... cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency”; “therefore, any provision adopted by virtue of a state of emergency which results in the suspension of those guaranties is a violation of the Convention”⁴⁴⁹. The conclusion of the Court then was:

1. That the “essential” judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective rem-

446 *Advisory Opinion OC-8/87* of January 30, 1987 (Habeas corpus in emergency situations), paragraph 27.

447 *Idem*, paragraph 29.

448 *Idem*, paragraph 30.

449 *Advisory Opinion OC-9/87* of October 6, 1987 (Judicial Guarantees in States Of Emergency), paragraphs 25, 26.

edy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms the suspension of which is not authorized by the Convention⁴⁵⁰.

The Inter American Court also concluded that the “essential” judicial guarantees which are not subject to suspension, “include those judicial procedures, inherent to representative democracy as a form of government (Art. 29©), provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights referred to in Article 27(2) of the Convention and the suppression of which or restriction entails the lack of protection of such rights”; and that “the above judicial guarantees should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention”⁴⁵¹.

This doctrine of Inter American Court is a very important one for the protection of human rights in Latin America, due to the unfortunate past experiences some countries have had in situations of emergency or of state of siege, particularly under military dictatorship or internal civil war cases; where there has been no effective judicial protection available to persons’ life and physical integrity; where it has been impossible to prevent their disappearance or their whereabouts been kept secret; and other times no means have been effective to protect persons against torture or other cruel, inhumane, or degrading punishment or treatment.

Nonetheless, according to the Inter American Court on Human Rights doctrine following the provisions of the American Convention, the discussion that has been held in the United States regarding the possibility to exclude the habeas corpus protection to the so called “combatant enemies” which had been kept for years in custody without any judicial guaranty to protect their rights, cannot be held.

The matter was decided by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548; 2004 in a case referred to aliens that had been captured abroad, from 2002 and onward, by United States authorities during hostilities with the Taliban regime in Afghanistan, and that were held in executive detention at the Guantanamo Bay Naval Base in Cuba. They filed various habeas corpus actions in the United States District Court for the District of Columbia against the United States and some federal and military officials, alleging that they were being held in federal custody in violation of the laws of the United States, that they had been imprisoned without having been charged with any wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court’s jurisdiction was invoked under the federal habeas corpus provision (28 USCS § 2241©(3)) that authorized Federal District Courts to entertain habeas corpus applications by persons claiming to be held in custody “in violation of the Constitution or laws or treaties of the United States.” The District Court dismissed the actions for jurisdiction, on the ground that aliens detained outside the sovereign territory of the United States could not invoke a habeas corpus petition; and the United States Court of Appeals for the District of Columbia Circuit, in affirming, concluded that the privilege of litigation in United States courts did not extend to aliens in military custody who had no presence in any territory over which the United States was sovereign (355 US App DC 189,321 F3d 1134). On certiorari, the United States Supreme Court reversed and remanded, holding that the District Court had jurisdiction, under 28 USCS § 2241, to review the legality of the plaintiffs’ detention.

Notwithstanding this Supreme Court decision, the Senate of the United States voted on November 2005 an amendment to a military budget bill, to strip captured “enemy combatants” at Guantánamo

450 *Idem.* paragraph 41,1

451 *Idem.*, paragraph 41,2 and 41,3.

Bay, of the legal tool given to them by the Supreme Court when it allowed them to challenge their detentions in United States courts⁴⁵².

As mentioned before, a law banning the habeas corpus action could not even be proposed in Latin American Countries, due to its regulation in the Constitutions and in the Inter American Convention on Human Rights as a right that cannot be suspended even in situations of emergency. The same occurs, for instance, regarding personal freedom related to the length of administrative detention that in general is established in the Latin American Constitutions. Thus, no legal regulation or amendments can be approved extending that restrictive police custody, as for instance has occurred in Europe also due to the war against terrorism⁴⁵³. In Latin America, on the contrary, due to the constitutional rank of the regulation, the only way to extend police custody length restriction is through a constitutional amendment or reform.

452 See Eric Schmitt, "Senate Approves Limiting Rights of U.S. Detainees", *The New York Times*, November 11, 2005.

453 As reported by Katrin Bennhold, in "Europe Takes Harder Line With Terror Suspects", *The New York Times*, April 17, 2006: "In December, France increased its period of detention without charge for terror suspects to six days from four; it retained rules that have allowed uncharged suspects to be denied access to a lawyer during the first three days.

Italy last year extended custody to 24 hours from 12 and authorized the police to interrogate detainees in the absence of their lawyers. In 2003, Spain extended the period in which suspected terrorists can be held effectively incommunicado to a maximum 13 days, according to the advocacy group Human Rights Watch.

Britain has gone furthest. The latest law doubles the period during which a terror suspect can be held in custody without charge to 28 days. It was just 48 hours in 2001, and Prime Minister Tony Blair fought for an extension to three months. The new law followed one filed soon after the attacks of Sept. 11, 2001, that allowed foreign terror suspects to be held indefinitely without charge. The House of Lords declared that measure unlawful in late 2004.

CHAPTER X

THE PROTECTED PERSONS: THE INJURED PARTY IN THE AMPARO SUIT INDIVIDUAL AND COLLECTIVE ACTIONS AND THE GENERAL STANDING CONDITIONS

I. THE PARTIES IN THE AMPARO SUIT

The Latin American amparo is always conceived as a suit, that is, as a proceeding initiated by a party or parties, the injured or offended party, by mean of an action or a recourse brought before the competent court, against another party (the injurer or offender party) whose actions or omissions has violated or has caused harm to his constitutional rights.

The final outcome of the amparo suit is always a judicial order, similar to the North American writs of injunction, mandamus or error, directed to the injuring party ordering to do or to abstain from doing something or a decisions suspending the effects or annulling the damaging act causing the harm.

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

What is clear in the Latin American amparo legislations, is that the amparo is not only the remedy, or the final court written order (writ) commanding the addressee to do or refrain from doing some specific act⁴⁵⁴. It is, above all, a suit that is specifically designed to protect constitutional rights following an adversary procedure according to the "cases or controversy" condition derived from Article III of the North American Constitution; which opposes one or multiple injured or complaining parties acting as plaintiffs, against one or multiple injuring parties acting as defendants, ending with a judicial decision or judicial order directed to protect the constitutional rights of the injured party. Also being considered as parties the interested third parties that can be harmed or benefited by the action and its results, as well as the Public Prosecutor (Attorney General) or the People's Defendant.

454 Bryan A. Garner (ed), *Black's Law Dictionary*, Secod Pocket Edition, St. Paul, Minn. P. 2001

That is why in the amparo suit the procedural adversary principle or principle of bilateralism⁴⁵⁵ prevails, in the sense that the judicial proceeding of the suit, although it has to be brief and speedy, must always assure the presence of both parties and the respect of the constitutional guaranties of defense. Thus, a judicial guarantee of constitutional rights as is the amparo suit can in no way transform itself in a proceeding violating the other constitutional guarantees like the right to defense. Except regarding preliminary judicial orders, the principle of *audi alteram partem* (hear the other party or listen to both sides) must then always be respected. That is why, for instance, the Supreme Court of Justice of Venezuela in a 1996 judicial review procedure, annulled Article 22 of the 1988 Amparo Law, which allowed the courts to adopt final decisions on amparo in cases of grave violations of constitutional rights, reestablishing the constitutional harmed right without any formal or summary inquiry and without hearing the plaintiff or potential injurer. Even if the Article could be constitutionally interpreted as only directed to allow the adoption of *inaudita partem* preliminary decisions or injunctions in the proceeding⁴⁵⁶, the Supreme Court considered the Article as a vulgar and flagrant violation of the constitutional right to self defense⁴⁵⁷, and annulled it.

Accordingly, one of the most important aspects of the amparo suit legislations in Latin America, refers to the parties in the suit, which can only be initiated at the party's request. Thus, no case of *ex officio* amparo proceeding is possible or admissible.

The suit must be initiated by means of an action or recourse brought before a court by the injured party or parties, as the complainant or plaintiff, against the injurer party or parties, as defendants, called to the proceeding because they provoked the harm or violation to the constitutional rights of the former. The initiation of the suit can be an action or recourse, the latter when exercised against an administrative act or a judicial decision which is to be challenged only after the exhaustion of the available administrative or judicial recourses. When through an action, the amparo can be brought directly before the courts against facts, acts or omissions, without the need to exhaust previous recourses.

This principle of bilateralism regarding the amparo, which always implies the existence of a controversy between two parties, always initiated by a complainant or injured party against an injurer party, can be considered as the common trend in Latin America. The only exception in this regard is Chile, where in the absence of a statutorily regulated amparo, it has been considered that the proceeding of the recourse for protection is not based on a controversy between parties, but on a request raised by a party before a court, being the procedural relation the one established between a complainant and a court, and not between an injured and an injurer party⁴⁵⁸.

455 José Luis Lazzarini, *El Juicio de Amparo*, Editorial La Ley, Buenos Aires, 1987, pp. 270 y ss.

456 As was asked to be decided by the Supreme Court. See Allan R. Brewer-Carías, "Derecho y Acción de Amparo", *Instituciones Políticas y Constitucionales*, Vol V, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas, 1998, pp. 389 y ss.

457 Decision of the Supreme Court of Justice of May, 21 1996, in *Gaceta Oficial Extra*. n° 5071 of May, 29, 1996. See the comments in Allan R. Brewer-Carías, "Derecho y Acción de Amparo", *Instituciones Políticas y Constitucionales*, Vol V, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas, 1998, pp. 389 y ss; and in Rafael Chavero, *El Nuevo Régimen del Amparo Constitucional en Venezuela*, Caracas, 2001, pp. 212, 266 y ss. and 410 y ss.

458 See for example Sergio Lira Herrera, *El recurso de protección. Naturaleza jurídica, doctrina, jurisprudencial, derecho comparad*, Santiago de Chile 1990, pp. 157 y ss.; Juan Manuel Errazuziz G. y Jorge Miguel Otero A, *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago, 1989, pp. 39, 40 y 157. In contrary sense, Enrique Paillas considers that in the recourse for protection the principle of bilateralism applies. See Enrique Paillas, *El recurso de protección ante el derecho comparado*, Editorial Jurídica de Chile, Santiago, 1990, pp.105.

Regarding the plaintiff, the Latin American amparo legislations have detailed regulations in relation to who can be the specific aggrieved or injured party, in the sense of who has standing to sue for constitutional judicial protection; in relation to how can the injured party act in the judicial proceeding; and in relation to the conditions the constitutional right harms or violations most have for the action to be brought before the courts.

In respect to the defendants or injurer party, the Latin American amparo laws also set forth extensive regulations regarding the authorities that can be sued before the courts for constitutional violations, as well as the individuals or private persons that can be sued before the competent courts when responsible for the harm or the violation of a constitutional rights; how can all the injurer or offender parties act in the judicial proceeding; and also, the specific public or private acts or omissions that have caused those harms or violations in the plaintiff's constitutional rights.

II. THE INJURED PARTY

In the amparo suit, the injured party, also named the claimant, the complainant or the petitioner, who in the proceeding is the plaintiff, is the person holder of a constitutional right that has suffered an actionable wrong, that is, whose constitutional right have been violated, thus having sufficient concrete interest in bringing the case before a court, and regarding the outcome of the controversy. Being the amparo action an action *in personam* for the protection of constitutional rights, the litigant must be the injured or aggrieved person. That is why, it is generally considered that the amparo action needs to be personalized, as attributed to the particular person enjoying the harmed right, that is, the person who has a justiciable interest in the subject matter of the litigation in his own right, or a personal interest in the outcome of the controversy. As ruled regarding injunctions in *Parkview Hospital v. Com., Dept. of Public Welfare*, 56 Pa. Commw. 218, 424 A. 2d 599 (1981): to bring an action "requires an aggrieved party to show a substantial, direct, and immediate interest in the subject matter of the litigation"⁴⁵⁹. Or as ruled in *Warth v. Seldin*, 422 U.S. 4909, 498-500 (1975): the plaintiff must "allege such a personal stake in the outcome of the controversy" as to justify the exercise of the court's remedial powers on his behalf, because he himself has suffered "some threatened or actual injury resulting from the putatively illegal action"⁴⁶⁰.

It is in this sense that Article 23 of the Nicaraguan Amparo law provides that only the aggrieved party can file the amparo, defining as such, "any natural or artificial person being harmed or in a situation of imminent danger of being harmed by any disposition, act or resolution, and in general, by any action or omission from any public officer, authority or its agent, that violates or threatens to violate the rights and guaranties enshrined in the Constitution".

A few questions must be emphasized regarding the injured or aggrieved party: first, the matter of standing to sue; second, the quality of the persons entitled to sue, in the sense of it being a physical person or human being and also artificial persons or corporation, including public law entities; third, the possibility for the Public Prosecutors or Peoples' Public Defendants to sue in amparo; and forth, regarding the third parties that can intervene in the proceedings on the side of the claimant.

459 See the reference in Kevin Schroder et al, "Injunction", *Corpus Juris Secundum*, Thomson West, Volume 43A, 2004, p. 331, note 4.

460 M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties Under the Constitution*, University of South Carolina Press, 1993, p. 4

1. Injured persons and standing

In the amparo suit, having the action a personal character, the plaintiff or injured party can only be the holder of the violated right; thus, the aggrieved party can only be the person whose constitutional rights have been injured or threatened of being harmed⁴⁶¹. Thus, nobody can sue in amparo alleging in his own name a right belonging to another⁴⁶².

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

“A qualified interest of who is asking for the restitution or reestablishment of the harmed right or guaranty, that is, that the harm be directed to him and that, eventually, its effects affect directly and indisputably upon him, harming his scope of subjective rights guaranteed in the Constitution. It is only the person that is specially and directly injured in his subjective fundamental rights by a specific act, fact or omission the one that can bring an action before the competent courts by mean of a brief and speedy proceeding, in order that the judge decides immediately the reestablishment of the infringed subjective legal situation”⁴⁶³.

Thus the amparo action has been qualified as a “subjective action”⁴⁶⁴, that can only be brought before the courts personally by the aggrieved party which having the personal, legitimate and direct interest⁴⁶⁵, is the one that directly or through his duly appointed representative has the standing to sue⁴⁶⁶.

Even though this is the general rule in Latin America, a few legislations authorized other persons different to the injured parties or their representatives, to file the amparo suit on their behalf. It is then possible to distinguish in matter of amparo, the *legitimatio* or standing *ad causam* from the *legitimatio* or standing *ad processum*⁴⁶⁷.

The standing *ad causam* in the amparo suit refers to the person or entity that enjoys the particular constitutional right which has been violated. The standing *ad processum* refers to the particular capac-

461 See decisions of the former Politico-Administrative Chamber of the Supreme Court of Justice of June 18, 1992, *Revista de Derecho Público* n° 50, Editorial Jurídica Venezolana, Caracas, 1992, p. 135; and of August 13, 1992, *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992 p. 160

462 See decision of the former Politico-Administrative Chamber of the Supreme Court of Justice of February 14, 1990, in *Revista de Derecho Público*, n° 41, Editorial Jurídica Venezolana, Caracas, 1990, p. 101

463 See decision of the former Politico-Administrative Chamber of the Supreme Court of Justice of August 27, 1993 (Case: *Kenet E. Leal*), in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 322

464 See decision First Court on Judicial Review of Administrative Action, of November 18, 1993, in *Revista de Derecho Público*, nos. 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 325-327.

465 See decisios of the former Politico-Administrative Chamber of the Supreme Court of Justice of October 22, 1990 and October 22, 1992, in *Revista de Derecho Público*, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 140 and of November 18, 1993, in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 327.

466 See decision of the First Court on Judicial Review of Administrative Action of August 21, 1992, in *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 161.

467 See in general, Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea Buenos Aires 1987, pp. 81 ff; Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad*, Editorial Porrúa, México 2005, pp. 162 ff.; Sergio Lira Herrera, *El recurso de protección. Naturaleza jurídica. Doctrina. Jurisprudencia. Derecho Comparado*, Santiago 1990, pp;

ity the persons has to act in the procedure (procedural capacity), that is, the ability to appear in court and to use the appropriate procedures in support of a claim, which can refer to his own rights or to the rights of others.

In conclusion, any person whose constitutional rights have been violated or threatened to be violated, has the right to seek protection from the courts by means of the action for amparo; whether being *natural persons* or human beings without distinction of being citizens, disabled or foreigners; or being *artificial persons* or entities. And the word persons is used in the sense of human beings or entities that are recognized by law as having rights and duties, including corporations or companies⁴⁶⁸.

Exceptionally, though, in some countries the amparo suit has been admitted when filed by groups or communities without formal legal “personality” attributed by law, as has happened in Chile with the recourse for protection⁴⁶⁹ in some cases filed by affected individual or collective entities without having personality (Case: RP, *Federación Chilena de Hockey y Patinaje*, C. de Santiago, 1984, RDJ, T, LXXXI, n° 3, 2da.P., Secc.5ta, p. 240)⁴⁷⁰

2. Natural persons: Standing at *causam* and *ad processum*

The general principle in Latin America, is that all natural persons, as human beings, when their constitutional rights are arbitrarily or illegitimately harmed or threatened with violation, have the necessary standing to file the action for protection, as is expressly set forth in all the Amparo Laws, when referring to “persons” in general, comprising human beings and juridical or artificial persons, without distinctions,

Regarding the natural persons, of course, the expression is not equivalent to “citizens”, being the latter those persons who by birth or naturalization are members of the political community represented by the State. But if it is true that the amparo is a judicial guarantee granted to all persons, citizens or foreigners; regarding the protection of political rights, like the right to vote, being the citizens the only persons entitled to those rights, only they have the right to sue in amparo for their protection.

As natural persons, foreigners also have the same general rights as nationals, having the needed standing to exercise the right to amparo. Only in Mexico an exception can be found regarding the decisions where the President of the Republic is constitutionally authorized to adopt measures expelling foreigners, in which case it has been recognized that they cannot challenge such decisions *vía amparo*⁴⁷¹.

468 Argentina (article 5: “any individual or juridical persons”), Colombia (Article 1: “any person”); Ecuador (article 48: “natural or juridical persons”); El Salvador (article “3 and 12: “any person”); (Guatemala (article 8: “persons”), Honduras (article 41: “any aggrieved person”; article 44: “any natural or juridical person”), Mexico (article 39: affected person”); Panamá (article: 2615: “any person”); Peru (article 39: “the affected”); Uruguay (article 1: any physical or juridical person, public or private”); Venezuela (article 1: “natural or juridical persons”).

469 The Chilean Constitution in matter of standing refers to “el que” (who), not mentioning “persons” (art. 20) See, Juan Manuel Errazuriz and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago 1989, pp. 15, 50; 9.

470 Nonetheless, in other judicial decisions the contrary criteria has been sustained. See the reference in Sergio Lira Herrera, *El recurso de protección. Naturaleza jurídica. Doctrina. Jurisprudencia. Derecho Comparado*, Santiago 1990, pp. 144-145.

471 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 230.

Except this particular case, the general trend in Latin America has been to apply an extensive interpretation regarding standing *ad causam*, allowing all affected persons to file the amparo suit. As an example of this trend, the interpretation of the Venezuelan Law of Amparo can be mentioned, regarding the expression of its Article 1 which entitles “all natural persons inhabitants of the Republic” (Art. 1) to file amparo suits. The main problem with this article resulted from the condition to be “inhabitant of the Republic”, that is, to physically be in the territory of the Republic as resident, tourist or in any other situation, which was originally interpreted to deny the right to amparo to persons not living in the country. The Supreme Court of Justice, progressively widened the interpretation, admitting the amparo action filed by a person not inhabitant of the Republic, no matter his nationality or legal condition, providing, according to a decision of August 27, 1993, “that his constitutional rights and guarantees had been directly harmed or threatened by any act, fact or omission carried out, issued or produced in the Republic”⁴⁷².

The following year this same Supreme Court, by mean of the exercise of its diffuse judicial review powers, declared unconstitutional the limiting reference of Article 1 of the Law when stressing the character of “inhabitants of the Republic”, ruling on the contrary, that any person whether or not living in the Republic whose rights are harmed in Venezuela, has enough standing to file an amparo action⁴⁷³

Minors, of course, also have standing *ad causam*, and through their representatives (parents or tutors) can file amparo actions for the protection and defense of their constitutional rights, and only exceptionally they are allowed to act personally. Is the case of México, were the Amparo law provided that a minor “can ask for amparo without the intervention of his legitimate representative when he is absent or impaired”; adding that “in such case, the court, without being impeded to adopt urgent measures, must appoint a special representative in order to intervene in the suit” (Art. 6).

The standing *ad processum* regarding natural persons, that is, the possibility to appear before the court, in principle corresponds to the same injured persons for the defense of their own rights. Thus, as a matter of principle, no other person can judicially act on behalf of the injured person, except when legally prescribed, for instance in the case of minors or incapacitated that must act in court through their representatives.

A general exception for this principle refers to the action of habeas corpus, in which case, generally, being the injured person impeded to act personally because he is under detention or has his freedom restrained, normally the Law authorizes anybody to file the action on his behalf⁴⁷⁴. In México, the Law imposes the injured party the obligation to expressly ratify the filing of the amparo suit, to the point that if the complaint is not ratified it will be considered as not filed (Art. 17). In some cases, as is the case of Guatemala (art. 86) and Honduras (art. 20), the courts even have *ex officio* power and the obligation to initiate the habeas corpus suit, in cases where they happen to have knowledge of the facts.

472 See in *Jurisprudencia Ramírez & Garay*, Tomo CXXVI, p. 667. See the references in Allan R. Brewer-Carías, “Derecho y Acción de Amparo”, Vol V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1998, p. 319

473 Decision of December 13, 1994 (Case: *Jackroo Marine Limited*). See the reference in Rafael Chavero, *El Nuevo Régimen del Amparo Constitucional en Venezuela*, Caracas, 2001, pp. 98-99,

474 Argentina (article 5: anybody on his behalf”); Bolivia (article 89: anybody in his name); Guatemala (art 85: any other person); Honduras Art. 19: any person); Mexico (article 17: any other person in his name); Nicaragua (article 52: any inhabitant of the republic); Peru: (article 26: anybody in his favor); Venezuela (article 39: anybody acting on his behalf).

But regarding the amparo suit, as mentioned, the principle of its personal character prevails, in the same sense as the rule of standing to seek injunctive relief in the United States, which only is attributed to the person affected⁴⁷⁵. Thus, the injured party is the one that in principle can file the action, as is expressly set forth for instance in Ecuador⁴⁷⁶. In Costa Rica, even though the Amparo Law provides that the action can be filed by anybody (Article 33), the Constitutional Chamber has interpreted that it refers to anybody that has been injured in his constitutional rights⁴⁷⁷; and in case of an amparo action filed by a person different from the injured party, in order for the proceeding to continue, the latter must approve the filing. Otherwise, there would be lack of standing⁴⁷⁸.

Some Amparo Laws, in order to guarantee the constitutional protection, set forth the possibility for other persons to act on behalf of the injured party, and file the action in his name. It can be any lawyer or a relative as established in Guatemala (Article 23), it can be anybody, as for instance in Colombia, where anyone can act on behalf of the injured party when the latter is in a situation of inability to assume his own defense (Article 10)⁴⁷⁹. What the Legislator wanted to assure in this case, was the possibility for an effective protection of the rights, for instance, in cases of physical violence infringed by parents regarding their children, in which case a neighbor is the person that can intervene filing an action for tutela. Otherwise, in such cases, the action for protection could not be filed, particularly because the parents are the legal representatives of their children⁴⁸⁰

Also, in Ecuador, any spontaneous agent justifying the impossibility of the affected party to do so can file the action in his name, which nonetheless must be ratified within the three subsequent days (Art. 48). In Honduras the Amparo Law authorizes anyone to act on behalf of the injured party, without needing a power of attorney, in which case Article 44 provides that the criteria of the affected party shall prevail (Art. 44). In Uruguay (Art. 3) and Paraguay (Art 4), the Amparo Laws provides that in cases where the affected party, by himself or through his representative, cannot file the action, then anybody can do it on his behalf, being subjected the acting person to liability if initiating the amparo with fraud malice or frivolity (Article 4). In similar sense the Peruvian Code also set forth a general rule on the matter, that:

Article 41. Any person can appear in court in the name of another person without procedural representation, when it is impossible for the latter to file the action on his own behalf, whether because his freedom is being concurrently affected, has a founded fear or threat, there is a situation of imminent danger or any other analogous cause. Once the affected party is in the possibility of acting, he must ratify the claim and the procedural activity followed by the person acting in fact.

Another aspect to be pointed out is that being the amparo suit a judicial process, some Latin American Amparo Laws impose the need for the parties in the amparo suit to act personally or through formal representatives, and in any case to formally appoint an attorney to assist them, as set forth in the Panamanian Judicial Code (Art. 22618). In Venezuela, according to what is provided in the

475 See Kevin Schroder et al, "Injunctions" in *Corpus Juris Secundum*, Vol. 43A, West 2004, p. 229

476 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, p. 81

477 Decisión 93-90. See the reference in Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José, 2001, p. 234.

478 Decisión 5086-94. See the reference in Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, san José 2001, p. 235.

479 See Carlos Augusto Patiño Beltrán, *Acciones de tutela, cumplimiento, populares y de grupo*, Editorial Leyer, Bogotá 2000, p. 10i

480 See Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Lexis, Bogotá 2005, p. 122.

Attorneys Law (Ley de Abogados), in all judicial processes the parties must be assisted by lawyers, which was also considered to be applicable to the amparo suit⁴⁸¹. Nonetheless, in more recent decisions, the Constitutional Chamber of the Supreme Tribunal, due to the non formalistic character of the amparo proceeding, has ruled that even though the injured party does not need to be assisted by an attorney when filing the action, it must appoint one in the course of the proceeding or the court must appoint one to act on his behalf⁴⁸²

3. Artificial persons: Standing at *causam* and *ad processum*

As mentioned before, artificial persons also have the right to file amparo actions when their constitutional rights have been violated. If it is true that “human rights” are of the exclusivity of human beings, they are constitutional rights that are not only attributed to human beings but to all other persons, with rights and obligations, like associations, foundations, corporations or companies. These artificial persons, like human beings, also have constitutional rights such as the right to non discrimination, the due process of law guaranties, the right to defense or property rights.

The action of tutela in the Constitution of Colombia can only be used for the protection of immediately applicable “fundamental rights”, which in principle are individual rights, artificial persons, however, may file the action of tutela for the protection of rights such as that of petition (Article 22), due process and defense (Article 29) and review of judicial decisions (Article 31).

Thus, in case of violations of those rights, the entities have the needed standing *ad causam* to file the action of amparo, as is accepted in almost all Latin American Amparo laws⁴⁸³. Even in the Dominican Republic, where the amparo suit was admitted by the Supreme Court, even without constitutional or legal provision, precisely in a suit brought before the Court by a commercial company (Productos Avon SA)⁴⁸⁴. Of course, like all artificial persons, they must act by means of their directors or representatives as regulated in their by-laws (México, Article 8).

The main question regarding the artificial persons as injured parties with standing to file amparo suits refers to the possibility for the public artificial persons or entities that are part of the State general organization to file amparo suits.

It is clear that historically, the amparo suit, being a specific judicial mean for the protection of constitutional rights, was originally conceived as a constitutional guarantee for individuals or private persons facing public officers or public entities; that is, as a guarantee for protection against the State. So initially, it was unconceivable that a public entity could file an amparo against other public or private entity; but currently it is accepted in most Latin American Countries that public entities can be holders of constitutional rights and file actions of amparo for their protection, as is the case, for in-

481 See for instantes decisions of the First Court on Judicial Review of Administrative Action of November 18, 1993 (*Caso: Carlos G. Pérez*), *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 353-354; of September 14, 1989, *Revista de Derecho Publico* n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 105; and of March 4, 1993 and March 25, 1993, *Revista de Derecho Público*, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1993, p. 258 v

482 See decision of July, 19 2000 (Case: *Rubén Guerra*). See the reference and comments in Rafael Chavero, *El Nuevo Régimen del Amparo Constitucional en Venezuela*, Caracas, 2001, pp. 129-135.

483 In Ecuador, the standing of artificial persons to file an amparo action has been denied by Marco Morales Tobar in “La acción de amparo y su procedimiento en el Ecuador”, *Estudios Constitucionales. Revista del Centro de Estudios Constitucionales*, Año 1, n° 1, Universidad de Talca, Santiago, Chile 2003, pp. 281-282.

484 See for instante, Juan de la Rosa, *El recurso de amparo, Estudio Comparativo*, Santo Domingo, 2001, p. 69.

stance, of Argentina⁴⁸⁵, Uruguay (where it is expressly regulated in the Amparo Law when referring to “public or private artificial persons”) or Venezuela. Among the amparo cases decided in Argentina as a consequence of the emergency economic measures adopted by the Government in 2001, freezing all deposits in saving and current accounts in all the Banks, and converting them from US dollars into Argentinean devaluated pesos, one that must be mentioned is the *Case San Luis*, decided by the Supreme Court on March 5, 2003, in which not only the Court declared the unconstitutionality of the Executive but in the case, “ordered the Central Bank of the Argentinean Nation the reimbursement to the Province of San Luis of the amounts of North American dollars deposited, or its equivalent in pesos at the value in the day of payments, according to the rate of selling of the free market of exchange”. The interesting aspect of the suit was that it was filed by the Province of San Luis against the National State and the Central Bank of the Argentinean Nation, that is, a Federated State (Provincia de San Luis) against the National State for the protection of the constitutional rights to property of the former⁴⁸⁶.

In other countries, on the contrary, as in the case of Peru, the Code of Constitutional Procedure expressly declares the inadmissibility of the amparo suit when referring to “conflicts between public law internal entities. The constitutional conflicts between those entities, whether public powers of the State, organs of constitutional level of importance, local or regional governments, will be settled through the corresponding constitutional procedures” (Article 5,9). The Code substituted the Law 25011 provision that declared inadmissible actions of amparo, but “when filed by the public offices, including public enterprises, against public powers of the State and the organs created in the Constitution, against acts accomplished in the regular exercise of their functions” (Article 5,4, Code)⁴⁸⁷.

Thus, and particularly because of the assumption of economic activities by public entities in the same level of activities as private persons, the amparo also protect them, when their constitutional rights are illegitimately harmed. In some countries, as is the case of Mexico, it is expressly admitted for public corporations to file amparo suits but only when their economic interests (*intereses patrimoniales*) are harmed (Article 9). In no other way can a public entity in México, for instance a State, a Municipality or a public corporation file an amparo suit, because it would otherwise result in a conflict between authorities that cannot be resolved through this judicial action⁴⁸⁸. The Supreme Court has decided that “it is absurd to pretend that a public dependency of the Executive could invoke the violation of individual guaranties seeking protection against acts of other public entities also acting within the Executive branch of government”⁴⁸⁹. In another decision the Supreme Court has ruled that: “it is not possible to concede the extraordinary remedy of amparo to organs of the state against acts of the state itself manifested through other of its agencies, since this would establish a conflict of sovereign

485 See José Luis Lazzarini, *El juicio de Amparo*, Ed. La Ley, Buenotes 1987, p. 238-240; 266.

486 See the comments in Antonio María Hernández, *Las emergencias y el orden constitucional*, Universidad Nacional Autónoma de México, Rubinzal-Culsoni Editores, México, 2003, pp. 119 y ss.

487 See the comments regarding this provision in the repealed Law 2501, 1in Victor Julio Orchetto Villena, *Jurisdicción y procesos constitucionales*, Editorial Rhodas, Lima, p. 169.

488 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 244-245; Richard D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University Press of Texas, Austin 1971 pp. 107-109

489 See Tesis jurisprudencial 916, *Apéndice al Semanario Judicial de la Federación*, 1917-1988, Segunda Parte, Salas y Tesis Comunes, p. 1500. See the reference in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 245, note 427.

powers, whereas the amparo suit is concerned only with the complaint of private individual directed against an abuse of power”⁴⁹⁰

In some countries, discussions have arisen regarding the possibility of the exercise of the amparo suit between public entities in a federal system in order to protect the constitutional guarantee of political autonomy and self government. In Germany, for example, a constitutional complaint may be brought before the Federal Constitutional Tribunal by municipalities or groups of municipalities when alleging that their right to constitutional autonomy or self government, recognized in the Constitution (Article 28-2) has been violated by a federal legal provision. In the case of violations by a law of the *Lander*, such recourse shall be brought before the Constitutional Tribunal of the respective *Lander* (Article 93,1,4 of the Constitution). A similar situation, albeit debatable, is to be found in Austria with regard to the constitutional recourse. Whatever the case, of course it would not be an amparo for the protection of fundamental rights, but rather of a specific constitutional guarantee of the autonomy of local entities.

In the case of Mexico, Article 103, III and 107 of the Constitution set forth the amparo suit in case of controversies arisen “because laws or acts of federal authority infringe or restrict the States sovereignty”; provision that could be understood as establishing the action of amparo for the protection of the distribution of power between the federal and state level of the State, that is, for the protection of the federated States constitutional autonomy regarding the invasions from the federal State. Nonetheless, the Supreme Court has denied such possibility arguing that:

“the amparo suit was established in Article 103 of the Constitution not for the protection of all the constitutional text, but for the protection of individual guarantees; and what is established in Section III must be understood in the sense that a federal law can only be challenged in the amparo suit when it invades or restricts the sovereignty of the States, when there is an affected individual which in a concrete case claims against the violation of his constitutional guarantees”⁴⁹¹.

The same discussion has been raised in Venezuela, also a federal state, regarding the guarantee of the political autonomy of the States and Municipalities, recognized and guaranteed in the Constitution, in order to determine if their violation could give rise to constitutional protection through an action of amparo. In this sense, in 1997 several Municipalities brought an action of unconstitutionality against a national statute limiting the income that higher-level state and municipal officials could have; action to which the claimants joined an action of amparo for the protection of the constitutional autonomy impaired by the Law. In the end the constitutional protection was denied by the then Supreme Court of Justice, in a decision of October 2, 1997 in which the Court ruled that if “it is undoubted that artificial persons, and consequently, political-territorial entities can be holders of the majority of rights enshrined in the Constitution, as for instance, the rights to defense, non discrimination of property” they are also “holders of public powers and prerogatives, public functions exclusively directed to obtain constitutional goals”; and that if it is true that those prerogatives are also guaranteed in the Constitution, these institutional guaranty cannot be equivalent to the guaranty of constitutional rights; thus not admitting the amparo as a means for protection of such guaranties. Additionally, the Court ruled that being the amparo an extraordinary action that “can only be filed when no other efficient means for constitutional protection exists”, due to the fact that in Venezuela the Constitution sets

490 See Tesis 450, III, pp. 868-868. See the reference in Richard D. Baker, *Judicial Review in México. A Study of the Amparo Suit*, University Press of Texas, Austin 1971 p.108

491 See Tesis jurisprudencial 389, *Apéndice al Semanario Judicial de la Federación*, 1917-1995, Tribunal Pleno, p. 362. See the reference in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 246, note 425.

forth a series of recourses directed to impede the miss knowledge or invasion of public prerogatives between territorial entities, the amparo cannot be used for those purpose. The Court concluded affirming that:

“the territorial entities, as artificial persons, can have standing to sue in amparo; but only regarding the protection in strict sense of constitutional rights and guaranties, thus excluding from the amparo the protection of their prerogatives and powers, as well as to resolve the conflicts among those entities between themselves or regarding other Public Power entities”⁴⁹²

The Constitutional Chamber latter, in a decision n° 1595 of November 2000, confirmed the ruling rejecting an amparo action, this time filed by a State of the Federation against the Ministry of Finance which, it was alleged, affected their financial autonomy, arguing as follows:

“The object of the amparo is the reinforced protection of constitutional rights and guaranties, which comprises the rights enumerated in the Constitution, some of which are outside of Title III (see for instance articles 143,260 and 317 of the Constitution), as well as those set forth in international treaties on human rights ratified by the Republic, and any other inherent to human persons.

The aforementioned does not imply to restrict the notion of constitutional rights and guaranties only to the rights and guaranties of natural persons, because also artificial persons are holders of fundamental rights, Even the public law artificial persons can be holders of rights.

But what has been said allows to conclude that the political-territorial entities as the States and the Municipalities, can only file amparo suits for the protection of the rights and liberties they can be holders of, as the right to due process, or the right to equality or to the retroactivity of the law. Conversely, they cannot file an amparo in order to protect the autonomy the Constitution recognized to them or the powers or competencies derived from the latter.

The autonomy of a public entity only enjoys protection through amparo when the Constitution recognizes it as a concretion of one funded fundamental right, like the universities autonomy regarding the right to education (Article 109 of the Constitution).

In the concrete case, the claimants have not invoked a constitutional right of the States which could have been violated, but the autonomy the Constitution assures, and in particular, “the guaranty of the financial autonomy regulated in Articles 159; 164, section 3; and 167, sections 4 and 6 of the Constitution”.

Nonetheless, under the concept of constitutional guaranty there cannot be submitted contents completely strange to the range of constitutionally protected public freedoms, as is pretended, due to the fact that the guarantee is closely related with the right. The guarantee can be understood as the constitutional reception of the rights or as the existing mechanisms for its protection. Whether in one or other sense the guarantee is consubstantial to the right, thus it is not adequate to use the concept of guarantee to expand the amparo’s scope of protection, including in it any power or competency constitutionally guaranteed. The latter would conduct to the denaturalization of the amparo, which would lose its specificity and convert it in a mean for the protection of all the Constitution”⁴⁹³.

492 See the reference and comments in Rafael Chavero, *El Nuevo Régimen del Amparo Constitucional en Venezuela*, Caracas2001, pp. 122- 123

493 Case *State Mérida and other v. Ministry of Finances*, in *Revista de Derecho Público*, n° 84, Editorial Jurídica venezolana, Caracas, pp 315 ff.

The restrictive criteria has been also followed by the Constitucional Chamber of Costa Rica, arguing that “the object and matter of the amparo is not to guarantee in an abstract way the enforcement of the Constitution, but the threats and violations of the enjoyment of fundamental rights of persons...and in the case examined that situation is not present”. The case referred to an alleged violation of the official procedures followed to facilitate the operation of a cellular mobile network by a company, concluding the Chamber that “the violation of Constitutional norms cannot be demanded through an amparo action”⁴⁹⁴.

On the other hand, in systems such as Brazil’s, where the *mandado de segurança* can only be brought against the State and not against individuals, it is argued that the State itself or its agencies cannot file the suit⁴⁹⁵.

III. STANDING AND THE PROTECTION OF COLLECTIVE AND DIFFUSE CONSTITUTIONAL RIGHTS

Constitutional rights are commonly identified with individual or civil rights that corresponds to individuals who enjoy them in a personalized way. That is why the amparo action, as a judicial mean for the protection of constitutional rights, has also been traditionally characterized as a personal action that can only be brought before the competent courts by the particular person holder of the rights or his representatives. Some legislations like the Brazilian one, regarding the *mandado de segurança* set forth that in case of rights threatened or violated covering a few persons, any of them can file the action (Article 1,2). In Costa Rica, also, regarding the constitutional right to rectification and response in cases of offenses, the Constitutional Jurisdiction Law provides that when the offended are more than one person, any of them can file the action; and in cases in which the offended could be identified with a group or an organized collectivity, the standing to sue must be exercised by their authorized representative (Article 67).

Nonetheless, some rights are collective by nature in the sense that they correspond to a group more or less defined of persons, in which case its violations affects not only the right of each of the individuals who enjoy them, but also the group of persons or collectivity to which the individuals belongs. In these cases, the amparo action can also be filed by the group or association of persons representing their associates, even if those associations do not have the formal character of an artificial person. That is why, for instance, the Amparo Law of Paraguay, when defining standing to sue in matters of amparo, additionally to physical or artificial persons, refers to political parties duly registered, entities with guild or professional identities and societies or associations that without being given the character of artificial persons, according to their by-laws their goals are not contrary to public good (*bien público*) (Art. 5). In Argentina, the Amparo Law also provides the standing to file amparo actions by these associations that without being formally artificial persons can justify, according to their by-laws that they are not against “public interest” (*bien público*) (Article 5).

In Venezuela, the 1999 Constitution expressly sets forth the constitutional right of everybody to have access to justice, not only to seek for the enforcement of specific personal rights and interests, but even to enforce “collective or diffuse interests” (Art. 26); which opened the possibility of amparo actions that can be filed on behalf of collective or diffuse interest.

494 See Vote 285-90. See the reference in Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, p. 235

495 See Celso Agrícola Barbi, *Do mandado de Segurança*, Editora Forense, Rio de Janeiro, 1993, pp. 68 ff; José Luis Lazzarini, *El Juicio de Amparo*, Editorial La Ley, Buenos Aires, 1987, pp. 267-. 268.

The Constitutional Chamber of the Supreme Tribunal of Justice in a decision n° 656 of May 5, 2001 (Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*, defined the diffuse and the collective interests or rights, as concepts established not for the protection of a number of individuals that can be considered as representing the entire or an important part of a society, which are affected on their constitutional rights and guarantees destined to protect the public welfare by an attack to their quality of life. The Constitutional Chamber defined the collective rights, when the “damage is specifically located in a groups that can be determined as such, even if it is not quantifiable or individualized, as would be that case of the inhabitants of an area of the country affected by an illegal construction that creates problems with the public services in the area”. These focused specific interests are the collective ones, which “refer to a determined and identified sector of the population (even though not quantified), individually, within the group there exists or might exist a legal bond uniting them. This is the case of damages to professional groups, to groups of neighbors, to labor unions, to the inhabitants of a certain area, etc.”

In a different sense, regarding the diffuse rights, they affect the population as a whole because they are intended to assure the people, in a general way, an acceptable quality of life (basic conditions of existence). When they are affected, the quality of life of the entire community or society in its different scopes diminishes, and an interest arises in each member of that community and of the other components of society, in preventing that situation to occur, and that it be repaired if that situation already occurred. Thus, the Constitutional Chamber has ruled, in these cases:

“it is a diffuse interest (that originates rights), since it spread among all the individuals of a society, even though from time to time the damage to the quality of life may be limited to groups that are able to be individualized as sectors that suffer as social entities. It can be the case of the inhabitants of a given sector or people pertaining to a same category, or the member of professional groups, etc. Nevertheless, those affected shall be no specified individuals, but a totality or groups of individuals or corporations, since the damaged goods are not susceptible of exclusive appropriation by one subject ...

Despite the concept that rules the diffuse interest or right as part of the defense of the citizenship, it is aimed at satisfying social or collective needs, before the personal ones. Since the damage is general (to the population or broad parts of it), the diffuse right or interest unites individuals who do not know each other, who individually lack of connection or legal relations among them, who at the beginning are undetermined, but united only because of the same situation of damage or danger they are involved in as members of a society and due to the right that arises in everyone to the protection of their quality of life, set forth in the Constitution...

The common damage to the quality of life, which concerns any component of population or society as such, despite the legal relations they may have with other of these undetermined members, is the content of the diffuse right or interest.

In this sense, damages to the environment or to the consumers, for example, even in the case that they occur in a certain place, have expansive effects that harm the inhabitants of large sectors of the country and even the world, and respond to the undetermined obligation of protecting the environment or the consumers. Thus according to the doctrine of the Constitutional Chamber,

The diffuse interests are the wider ones, where the damaged good is the most general good, since it concerns the entire population and, contrary to the collective interests or rights, they arise from an obligation of uncertain object; while in the collective ones, the obligation may be concrete, yet not demandable by individualized persons.

Consumers are all the inhabitants of the country. The damage to them as such responds to a *supra* individual or *supra* personal right, and to an uncertain obligation in favor of them, from those

managing goods and services. Their quality of life diminishes, whether they realize it or not, since many massive communicational mechanisms shall annul or alter the conscience of the damage. Their interest, or the one of those affected, for example, due to the damages to the environment, is diffuse and so is the right raised to preventing or impeding the damage.

The interest of the neighbors, whose neighborhood is worsened in its public services by a construction, for example, responds as well to a supra personal legal right, yet it can be determined, located in specific groups, and it is the interest that allows a collective action. That is the collective interest. It gives origin to collective rights and may refer to a certain legal object.

The truth in both cases (diffuse and collective interest) is that the damage is suffered by the social group equally, even if some members do not consider themselves damaged, since they consent the damage. This concept differs from the personal damage directed to a personal legal right. This difference does not impede the existence of mixed damages, the same fact damaging a personal legal right and a supra individual one."⁴⁹⁶

Now, regarding the standing to bring before courts action for amparo seeking the protection of collective and diffuse constitutional rights, the same Constitutional Chamber of the Supreme Court, for instance, has admitted the filing of an action of *amparo* to protect political electoral rights filed by one voter exercising his own right, even having granted precautionary measures with *erga omnes* effects "to both individuals and corporations who have brought to suit the constitutional protection, and to all voters as a group"⁴⁹⁷.

The Constitutional Chamber, with this same orientation, has interpreted Article 26 of the Constitution in a wide way regarding the action of *amparo* of collective or diffuse interests by stating that:

"Consequently, any individual with legal capacity to bring suit, who is going to impede a damage to the population or parts of it where he belongs to, is entitled to bring to suit grounded in diffuse or collective interests, and where he had suffered personal damages, he shall claim for himself (jointly) the compensation of such. This interpretation, grounded in Article 26, extends the standing to companies, corporations, foundations, chambers, unions and other collective entities, whose object is the defense of the society, as long as they act within the boundaries of their corporate object, aimed at protecting the interests of their members regarding their object. Article 102 of the Organic Law of Urban Planning follows this orientation.

In the Venezuelan legislation, currently, an individual shall not bring to suit a compensation for the damaged collectivity, when claiming diffuse interests. Such claim corresponds to entities such as the Public Prosecutor or the Defender of the People.

When the damages harm groups of individuals that are legally bound or pertain to the same activity, the action grounded in collective interests, whose purpose is the same as the one of the diffuse interests, shall be brought to suit by the corporations that gather the damaged sectors or groups and even by any member of that sector or group as long as he acts in defense of that social segment...

Due to the foregoing, it is not necessary for whoever brings a suit grounded on diffuse or collective interests, if it is a diffuse one, to have a bond previously established with the offender. It is necessary that he acts as a member of the society, or its general categories (consumers, users, etc.),

496 See decision of the Constitutional Chamber n° 656 of 06-05-01 (Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*).

497 Decision of the Constitutional Chamber n° 483 of 05-29-2000 (Case: "*Queremos Elegir*" y otros), *Revista de Derecho Público*, n° 82, 2000, Editorial Jurídica Venezolana, pp 489-491. In the same sense, decision of the same Chamber n° 714 of 13-07-2000 (Case: *APRUM*).

and invokes his right or interest shared with the citizenship, since he participates with them in the damaged factual situation because of the infringement or detriment of the fundamental rights concerning the collectivity, which generates a common subjective right that despite being indivisible, may be enforced by anyone in the infringed situation, since the legal order acknowledges those rights in Article 26 of the Constitution. It is a legal interest guaranteed in the Constitution. It cannot be appropriated individually and exclusively by any individual, since anyone damaged is able to enforce it, unless it is restricted by law, which can be claimed to whoever owes the obligation of certain object.

Even though it is a general right or interest enjoyed by the plaintiff, which allows various plaintiffs, he himself shall be threatened, shall have suffered the damage or shall be suffering it as a part of the citizenship, whereby whoever is not residing in the country, or is not damaged shall lack of standing; this situation separates these actions from the popular ones.

Whoever brings suit based on collective rights or interests, shall do it in his condition of member of the group or sector damaged, therefore, he suffers the damage jointly with others, whereby he assumes an interest of his own and gives him or her the right to claim the end of the damage for himself and the others, with whom shares the right or interest. It shall be a group or sector not individualized, otherwise, it would be a concrete party.

In both cases, if the action is admitted, a legal benefit will arise in favor of the plaintiff and his common interest with the society or collectivity of protecting it, maintaining the quality of life. The defense of society's interests is guaranteed.

The plaintiff is given the subjective right to react against the damaging act or concrete threat, caused by the offender's violation of the fundamental rights of the society in general.

Whoever is entitled to act shall always plea for an actual interest, which does not terminate for the society in one single process.

If an individual brings suit grounding his action in diffuse rights or interests, yet the judge considers that it is about them, he shall subpoena the Defender of the People or the entities established by law in particular subjects, and shall notify through an edict all the parties in interest, whether there are processes in which the law excludes and grants representation to other individuals. All these legitimate interested parties shall intervene as third party claimants, if the judge admits them as such taking into consideration the existence of diffuse rights and interests.⁴⁹⁸

The Constitutional Chamber has also determined the general conditions of standing in these cases of collective or diffuse rights, in a decision n° 1948 of February 17, 2000 (Case: *William O. Ojeda O. vs. Consejo Nacional Electoral*), in which it ruled that is necessary that the following elements be combined:

- “1. That the plaintiff sues based not only on his personal right or interest, but also on a common or collective right or interest.
2. That the reason of the claim (or the action of amparo filed) be the general damage to the quality of life of all the inhabitants of the country or parts of it, since the legal situation of all the member of the society or its groups has been damaged when their common quality of life was worsened.
3. That the damaged goods not be susceptible of exclusive appropriation by one subject (as the plaintiff).

498 See decision of the Constitutional Chamber N° 656 of 06-05-2001, Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*.

4. That it concern an indivisible right or interest that involves the entire population of the country or a group of it.
5. That a bond exists, even if it is not a legal one, between whoever demands in general interest of the society or a part of it (social common interest), raised from the damage or danger in which collectivity is (as such). This damage or danger and the possibility of it happening are known by the judge due to common knowledge.
6. That a necessity of satisfying social or collective interests exist, before the individual ones.
7. That a person is obliged to an undetermined obligation, the enforcement of which is general."⁴⁹⁹

One of the most important issues regarding these collective and diffuse amparo actions relates to the standing of the "representative". The Constitutional Chamber, on the matter, has ruled the following criteria:

"Any person capable in procedure that tends to impede harms to the population or sectors of it to which he appertains, can file actions in defense of diffuse or collective interest...This interpretation founded in Article 26 (of the Constitution), extend standing to the associations, societies, foundations, chambers, trade unions and other collective entities, devoted to defend society, provided they act within the limits of their societal goals referred to watch for the interest of their members".

The Chamber added that:

"Those who file actions regarding the defense of diffuse interest do not need to have any previously established relation with the offender, but has to act as a member of society, or of its general categories (consumers, users, etc.) and has to invoke his right or interest shared with the population's, because he participates with all regarding the harmed factual situation due to the noncompliance of the diminution of fundamental rights of everybody, which give birth to a communal subjective right, that although indivisible, is actionable by any one place within the infringed situation"⁵⁰⁰.

But in spite of all the aforementioned progressive decisions regarding the protection of collective and diffuse rights, like the political ones, in a recent decision dated November 21, 2005, the Constitutional Chamber has reverted, and in the case, originated by a claim filed by the director of a political association named "Un Solo Pueblo" against the threat of violations of the political rights of the aforesaid political party and of all the other supporters of the calling of a recall referendum regarding the President of the Republic, ruled that:

The action of amparo was filed for the protection of constitutional rights of an undetermined number of persons, whose identity was not indicated in the filing document, in which they are not included as claimants.

499 Decision n° 1.048 of the Constitutional Chamber dated 02-17-00, Case: *William Ojeda vs. Consejo Nacional Electoral*.

500 Decisión of the Constitutional Chamber of June 30, 2000 (Case *Defensoría del Pueblo*). See the reference and comments in Rafael Chavero, *El Nuevo Régimen del Amparo Constitucional en Venezuela*, Caracas, 2001, pp. 110-114.

It is the criteria of this Chamber, those that could result directly affected in their constitutional rights and guaranties by the alleged threat attributed to the Ministry of Defense and the General Commanders of the Army and the National Guard are, precisely, the persons that are members or supporters of “Un solo Pueblo”, or those who prove they are part of one of the groups that promoted the recall referendum; in which case they would have standing to bring before the constitutional judge, by themselves or through representatives, seeking the reestablishment of the infringed juridical situation or impeding the realization of the threat, because the *legitimitio ad causam* exists in each one of them, not precisely as constitutionally harmed or aggrieved.

Due to the foregoing, the Chamber considers that Mr. William Ojeda, who said he acted as Director of the political association called “Un Sólo Pueblo”, quality that he furthermore has not demonstrated, lacks of the necessary standing to seek for constitutional amparo of the constitutional rights set forth in Articles 19, 21 and 68 of the Constitution regarding the members, supporters and participants of the mentioned political association as well as the political coalition that proposed the recall referendum of the President of the Republic, and consequently, this Chamber declares the inadmissibility of the amparo action filed⁵⁰¹.

Besides the foregoing inconsistencies in judicial doctrine, “Collective suits” of amparo for the protection of diffuse rights have been expressly constitutionalized in Argentina, where the Constitution provides in Article 43, that the amparo suit can be filed by “the affected party, the People’s Defendant and the registered associations that tend to those goals”:

Against any form of discrimination and regarding the rights for the protection of environment, the free competition, the user and the consumer, as well as the rights of collective general incidence, the affected party, the People’s Defendant and the registered associations that tend to those goals, could file this action.

Regarding the associations that can file the collective amparo suits, the Supreme Court of Argentina has also considered that they do not require formal registration⁵⁰².

Three specific collective actions result from this article: amparo against any form of discrimination; amparo for the protection of the environment; and amparo for the protection of free competitions, the user and the consumer. That is why regarding discrimination, the object of this amparo is not a discrimination regarding a particular individual but a group of persons between which a nexus or common trend exists which originates the discrimination.⁵⁰³

On the other hand, regarding the protection of the environment, it was formalized the trend that began to be consolidated after a 1983 case in which an amparo was filed for the protection of the ecologic equilibrium regarding the protection of dolphins. The Supreme Court accepted in that case, the possibility for anybody individually or in representation of his family, to file an amparo action when

501 See Case: *William Ojeda vs. Ministro de la Defensa y los Comandantes Generales del Ejercito y de la Guardia Nacional*, in *Revista de Derecho Público*, nº 104, Editorial Jurídica Venezolana, Caracas, 2005.

502 Decisions 320:690, Case: *Asociación Grandes Usuarios and Decision 323:1339*, Asociación Benghalensis. See the referentes in Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad*, Editorial Porrúa, México 2005, pp. 92-93.

503 See Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad*, Editorial Porrúa, México 2005, pp. 94.

pursuing the maintenance of the ecological equilibrium, due to the right any human being has to protect his habitat⁵⁰⁴.

In Peru, Article 40 of the Constitutional Procedure Code authorizes any person to file the amparo suit “in cases referred to threats or violation of environmental rights or other diffuse rights that enjoy constitutional recognition, as well as the non lucrative entities whose goals are the defense of such rights”.

In Brazil, Article 5, LXIII of the Constitution sets forth the *mandado de securanca colectivo*, as a sort of *mandado de seguranca* for the protection of actual rights not protected by habeas-corpuz or habeas-data, when the responsible of the illegality or abuse of power is a public authority or an agent of a artificial person acting in exercise of public power attributions, but that can be filed by: a) political parties with representation in national Congress, b) trade unions, class institutions or associations legally established and functioning at least for one year in defense of the interests of its members. This *mandado de securanca* is thus not intended to protect individual rights, but diffuse or collective rights.

It must also be mentioned, that since 1985 a “collective civil action” has been developed in Brazil, with similar trends as the Class Actions of the United States, very widely used for the protection of group rights, like consumers though limiting the standing to the public entities (national, state and municipal) and to associations⁵⁰⁵.

In Ecuador, Article 48 of the Amparo Law also authorizes any person, natural or artificial to file the amparo action, “when it is a matter of protection of the environment”. Thus, any person, including the indigenous communities through their representative, can file the amparo suit⁵⁰⁶

It also must be mentioned the case of Costa Rica, where the collective amparo has also been admitted in matters of environment by the Constitutional Chamber of the Supreme Court. Article 50 of the Constitution, in effect, provides that “any person has the right to a healthy and ecologically equilibrated environment”; thus, it has standing to denounce the acts which infringe that right and to claim the reparation of the harm caused”. Even though not expressly referring to the amparo suit, the Constitutional Chamber did refer to a similar norm of the previous Constitution (Article 89) which gave standing to anybody “to file amparo actions for the defense of the right to the conservation of the natural resources of the country. Even tough it does not exist a direct and clear suit for the claimant as in the concrete case of the State against an individual, all inhabitants, regarding the violations of Article 89 of the Constitution, suffer a prejudice in the same proportion as if it where a direct harm, thus it is accepted that an interest exists in his favor that authorizes him to file an action for the protection of such right to maintain the natural equilibrium of the ecosystem”⁵⁰⁷.

Even in the Dominican Republic, where no constitutional provision exists regarding the amparo suit, the Supreme Court not only has created it but, accordingly, the courts have admitted that any person legally capable and with interest in the general enforcement of collective human rights, as the

504 See Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea Buenos Aires 1987, pp. 81-89.

505 See Antonio Gidi, “Acciones de grupo y “amparo colectivo” en Brasil. La protección de derechos difusos, colectivos e individuales homogéneos”, in Eduardo Ferrer Mac-Gregor (Coordinator), *Derecho Procesal Constitucional*, Colegio de Secretarios de la Suprema Corte de Justicia de la Nación, Editorial Porrúa, Tomo III, México 2003, pp. 2.538 ff.

506 Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, p. 76.

507 Decision 1700-03. See the reference Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José, 2001, pp.239-240.

right to education, can file an action for amparo due that the matter is not only and exclusively a private one⁵⁰⁸.

In Mexico, contrary to the current tendency of other countries, the amparo suit continues to have an essential individual character, based in the personal and direct interest⁵⁰⁹. The only cases in which the amparo in certain way protects collective interest are those related to the agrarian amparo, for the protection of peasants and of collective agrarian land owners⁵¹⁰.

In Colombia, the general principle is also that the action for tutela is a personal and private action, that can only be filed by the holder of the individual right protected by the constitutional norm. Thus it is not a public or popular action. The tutela action can only be exercised in person, seeking the protection of a personal, fundamental right, of constitutional rank of the person on whose behalf it is filed⁵¹¹. That is why, Article 6,3 of the Tutela Law expressly provides that the action of tutela is inadmissible when the rights seeking to be protected are "collective rights, as the right to peace and others referred to in Article 88 of the Constitution", particularly because for that purposes a special judicial means for protection is established called "popular actions". Article 6,3 of the Tutela Law added that the foregoing will not prevent that the holder of rights threatened to be violated or that have been violated can file a tutela action in situations compromising collective rights and interest and of his own threatened or violated rights, when it is a matter to prevent an irremediable harm".

According to Article 88 of the Constitution, the diffuse or "collective" rights are protected not by the tutela action, but by means of the "popular actions" or the group actions. The former are those established in the Constitution for the protection of rights and interests related to public property, public space, public security and health, administrative morale, environment, economic free competition and others of similar nature. All these are diffuse rights, and for its protections, the law 472 of 1998 has regulated these popular actions.

This statute also regulates other sort of actions, for the protection of rights in cases of harms suffered by a plural number of persons. These group actions are similar to the class actions of North American Law.

Regarding the popular actions, they can be filed by any person, the Non Governmental Organizations, the Popular or Civic Organizations, the public entities with control functions, when the harm or threat is not initiated by their activities, the General Prosecutor, the Peoples 'Defendant and the District and Municipal prosecutors, and the mayors and public officers that because of their functions they must defend and protect the abovementioned rights (Art. 12).

Regarding the group actions set forth for the protection of a plurality of persons in cases of suffering harm in their rights in a collective way, the Law 472 of 1998 establishes these actions basically with indemnizatory purposes, and they can only be filed by 20 individuals, acting all of them on their own behalf. Thus, these are not actions directed to protect the whole population or collectivity, but only a plurality of persons that have the same rights, and seek for its protection.

508 See decisión 406-2 of June 21, 2001, First Instante Court of San Pedro Macoris. See the reference in Miguel A. Valera Montero, *Hacia un Nuevo concepto de constitucionalismo*, Santo Domingo, 2006, pp. 388-389.

509 See Eduardo Ferrer Mac-Gregor, *Juicio de amparo e interés legítimo: la tutela de los derechos difusos y colectivos*, Editorial Porrúa, México 2003, p. 56.

510 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 233 ff.

511 Juan Carlos Ezquerro Portocarrero, *La protección constitucional del ciudadano*, Lexis, Bogotá, 2005, p. 121.

These group actions have some similarities with the class actions regulated in Rule 23 of the Federal Rules of Civil Procedure filed for the protection of civil rights, that is, the “civil rights class actions”. According to that Rule, in cases of a class of persons who have question of law or fact common to the class, but have so numerous members that joining all of them would be an impracticable task, then the action can be filed by one or more of its members as representative plaintiff parties on behalf of all, provided that the claims of the representative parties are typical of the claims of the class and that such representatives parties will fairly and adequately protect the interests of the class. (Rule 23, Class Actions, a).

The class actions have been applied in cases of violation of civil rights, particularly regarding to the right of non discrimination. It was the case decided by the Supreme Court *Zablocki, Milwaukee County Clerk v. Redhail* case of January 18, 1978, 434 U.S. 374; 98 S. Ct. 673; 54 L. Ed. 2d 618, as a result of a class action brought before a federal court under 42 U.S.C.S. § 1983, by Wisconsin residents holding that the marriage prohibition set forth in Wisconsin State § 245.10 (1973) violated the equal protection clause, U.S. Const. amend. XIV. According to that statute, Wisconsin residents were prevented from marrying if they were behind in their child support obligations or if the children to whom they were obligated were likely to become public charges. The Court found that the statute violated equal protection in that it directly and substantially interfered with the fundamental right to marry without being closely tailored to effectuate the state’s interests.

Another Supreme Court decision, *Lau et al. v. Nichols et al.*, dated January 21, 1974, 414 U.S. 563; 94 S. Ct. 786; 39 L. Ed. 2d 1; 1974 also decided in favor of a class, on discrimination violations. In the case, non-English speaking students of Chinese ancestry brought a class suit in a federal court of California against officials of the San Francisco Unified School District, seeking relief against alleged unequal educational opportunities resulting from the officials’ failure to establish a program to rectify the students’ language problem. The Supreme Court eventually held that the school district, which received federal financial assistance, violated dispositions that ban discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance, and furthermore violated the implementing regulations of the Department of Health, Education, and Welfare, by failing to establish a program to deal with the complaining students’ language problem.

IV. THE PEOPLES’ DEFENDANT STANDING ON THE AMPARO SUIT

As the amparo suit has been instituted in Latin America as a specific judicial means for the protection of constitutional rights, another general tendency in Latin American constitutionalism is for the creation in the Constitution or Legislation (Costa Rica) of a specific autonomous State entity or body with the objective of protecting and seeking for the protection of constitutional rights, called the Defendant of the People (People’s Defendant) or of Human Rights.

In some cases, the institution follows in general lines the classical Scandinavian Ombudsman, initially conceived as a parliamentary independent entity for the protection of citizens’ rights regarding Public Administration. In other Latin American countries, it is more conceived as an autonomous institution, from both parliament and the Executive as well as from the Judicial Power.

In the first group, closer to the European model, the Argentinean Constitution in the chapter referred to the Legislative Power (Art. 86) establishes the Defendant of the People for the protection of human rights regarding Public Administration. It is conceived as an independent entity in the scope of the Congress, acting with functional autonomy and without receiving instructions from any authority. Its mission is the defense and protection of human rights guaranteed in the Constitutions and statues against Public Administration facts, acts or omissions, and to control the exercise of adminis-

trative functions. The Peoples defendant is nominated by the Congress, by 2/3 of the votes of the members present in the voting and can only be removed in the same way.

In the Constitution of Paraguay, the Peoples' Defendant is a parliamentary commissioner for the protection of human rights, for the channeling of popular claims and for the protection of communitarian interests, without having any judicial or executive functions (Art. 276). It is elected by the Chamber of Representatives, from a proposal by the Senate, with the vote of 2/3 of its members.

In Guatemala, the Constitution establishes a Procurator on Human Rights as a parliamentary commissioner, elected by Congress from a proposal made by a Commission on Human Rights integrated by representatives of the political parties in Congress. His mission is to defend human rights and to supervise Public Administration (Article 274). The Law on amparo in Guatemala gives the Public Prosecutor and the Procurator on Human Rights sufficient standing to file amparo actions "for the defense of the interests assigned to them" (Article 25).

In the majority of the Latin American Constitutions, the Peoples' defendant or the Procurator for the Defense of Human Rights are created without any specific reference to Public Administration, thus they face all State organs, for the protection of human rights. This is the case of Colombia, Ecuador and El Salvador, even though in the last two countries, it is regulated attached to the Public Prosecutor's Office (*Ministerio Público*).

In Colombia, the Peoples' Defendant, elected by the representative Chamber of Congress from a proposal formulated by the president of the Republic, is created as part of the Public Prosecutor Office (Article 281), with the specific mission of watching for the promotion, exercise and divulgation of human rights. Within its powers is to invoke the right to habeas corpus and to file actions for tutela, without prejudice of the interested party rights. The Tutela Law also authorizes the Peoples' Defendant to file these actions on behalf of anyone when asked to do so, in cases of the person being in a non protective situation (Articles 10 and 46), or regarding Colombians residing outside the country (Article 51). In such cases, the Peoples' Defendant will be considered party in the process together with the injured party (Article 47).

In El Salvador, the Procurator for the Defense of Human Rights in part of the Public Ministry, together with the Public Prosecutor and the Attorney General of the Republic (Art. 191), all elected by the Legislative Assembly by a 2/3 vote of its members. Within its functions are to watch for the respect and guarantee of human rights and to promote judicial actions for their protection (Article 194).

Other countries have a Peoples Defendant as a complete independent and autonomous institution regarding the classical branches of government, as is the case of Ecuador, with the Peoples' Defendant, also elected by the Congress with the vote of the 2/3 of its members (Article 96). Among its functions are to defend and encourage the respect of the fundamental constitutional rights, to watch for the quality of the public services and to promote and support the habeas corpus and amparo actions at the person's request. The Law regulating the matter in Ecuador also authorizes the Peoples' defendant to file habeas corpus and amparo actions (Articles 33 and 48).

In Mexico, the Constitution has also established that Congress and the state legislatures must create entities for the protection on human rights, receiving grievances regarding administrative acts or omissions of any authority except the judicial power, that violate such rights. At the national level, the entity is named National Commission on Human Rights. Nonetheless, the Amparo Law authorizes the Federal Public Prosecutor to file action for amparo in criminal and family cases, but not in civil or commercial cases (Article 5, 1,IV),

In Bolivia, the Constitution also creates the Peoples' Defendant for the purpose of watching for the enforcement and respect of the persons' rights and guarantees regarding administrative activities on all the public sector, as for the defense, promotion and divulgation of human rights (Article 127). The

Peoples defendant does not receive instructions from the public powers and is elected by Congress (Article 128). Among its functions are to file the actions of amparo and habeas corpus without needing any power of attorney. (Article 129).

In Peru, the Constitution also creates the Peoples' Defendant Office as an autonomous organ, the head of which is elected by Congress also with 2/3 votes of its members (article 162), for the purpose of defending persons and community human and fundamental rights, to supervise for the accomplishment of public administration duties and the rendering of public services to the people. The Constitutional Procedure Code authorizes the People' Defendant, in exercising its competencies, to file amparo actions (Article 40).

In Nicaragua the Constitution only establishes that the National Assembly will appoint the Procurator for the defense of Human Rights (Article 138,30).

The tendency to create an independent and autonomous organ of the State for the protection of human rights has reached the extreme regulation in the 1999 Venezuelan Constitution, which establishes a *penta* separation of powers, between the Legislative, Executive, Judicial, Electoral and Citizens branches of government, creating within the Citizens Power the Peoples' Defendant. Also the Public Prosecutor Office and the General Comptroller Office form part of the Citizens Power (Article 134).

The Peoples' Defendant is created for the promotion, defense and supervision of the rights and guaranties set forth in the Constitution and in the international treaties on human rights, as well as for the citizens' legitimate, collective and diffuse interests (Article 281). In particular, according to Article 281 of the Constitution, it also has among its functions to watch for the functioning of public services power and to promote and protect the peoples' legitimate, collective and diffuse rights and interests against arbitrariness or deviation of power in the rendering of such services, being authorized to file the necessary actions to ask for the compensation of the damages caused from the malfunctioning of public services. It also has among its functions, the possibility of filing actions of amparo and habeas corpus.

In Venezuela, the Constitutional Chamber has admitted the standing of the Defender of the People to file actions for *amparo* on behalf of the citizens as a whole, as was the case of the action filed against the Legislative body pretension to appoint the Electoral National Council members without fulfilling the constitutional requirements. In the case, decided on June, 6, 2001, the Constitutional Chamber, when analyzing Article 280 of the Constitution, pointed out that:

“As a matter of law, the Defender has standing to bring to suit actions aimed at enforcing the diffuse and collective rights or interests; not being necessary the requirement of the acquiescence of the society it acts on behalf of for the exercise of the action. The Defender of the People is given legitimate interest to act in a process defending a right granted to it by the Constitution itself, consisting in protecting the society or groups in it, in the cases of Article 281 *eiusdem*.

...The forgoing, according to this Chamber criteria, makes clear that the issue of the protection of diffuse and collective rights and interests may be raised by the Defender of the People, through the action of amparo, and it is declared this way.

As for the general provision of Article 280 *eiusdem*, regarding the general defense and protection of diffuse and collective interests, this Chamber considers that the Defender of the People is entitled to act to protect those rights and interests, when they correspond in general to the consumers and users (6, Article 281), or to protect the rights of Indian peoples (paragraph 8 of the same Article), since the defense and protection of such categories is one of the faculties granted to said entity by Article 281 of the Constitution in force. It is about a general protection and not a protection of individualities.

Within this frame of action, and since the political rights are included in the human rights and guarantees of Title III of the Constitution in force, which have a general projection, among which the ones provided in Article 62 of the Constitution can be found, it must be concluded that the Defender of the People on behalf of the society, legitimated by law, is entitled to bring to suit an action of amparo tending to control the Electoral Power, to the citizen's benefit, in order to enforce Articles 62 and 70 of the Constitution, which were denounced to be breached by the National Legislative Assembly..." (right to citizen participation).

Due to the difference between diffuse and collective interests, both the Defender of the People, within its attributions, and every individual residing in the country, except for the legal exceptions, are entitled to bring to suit the action (be it of amparo or an specific one) for the protection of the former ones; while the action of the collective interests is given to the Defender of the People and to any member of the group or sector identified as a component of that specific collectivity, and acting defending the collectivity. Both individuals and corporations whose object be the protection of such interests may raise the action, and the standing in all these actions varies according to the nature of the same, that is why law can limit the action in specific individuals or entities. However, in our Constitution, in the provisions of Article 281 the Defender of the People is objectively granted the procedural interest and the capacity to sue"⁵¹².

V. THE QUESTION OF OTHER PUBLIC (STATE) INSTITUTIONS STANDING ON THE AMPARO SUIT

Another important issue regarding standing in filing amparo suits is to determine if other State entities can file amparo actions on behalf of the people, in defense of collective or diffuse rights. In contrast with what has occurred in the United States, it can be said that in general terms, beside the Peoples' Defendant standing, no other public entity can assume the defense of the rights of the peoples by means of filing amparo suits.

In the United States, in the Supreme Court decision *In Re Debs*, 158 U.S. 565, 15 S.Ct. 900,39 L.Ed. 1092 (1895), the standing of the Attorney General for the protection of the State's general interest as the property on the mail in injunctive proceedings, was admitted, even being a party against the members of a railway trade union which threatened the functioning of railways. A few years before, the Congress had approved the Sherman Antitrust Act which granted authority to the Attorney General to commence injunctive proceedings to prevent restraints to trade.

Half a century later, after the Supreme Court decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); 349 U.S. 294 (1955) declared the dual school system ("separate but equal") unconstitutional, by means of the Civil Rights Act of 1957, the Congress authorized the Attorney General to bring injunctive suits to implement the Fifteenth Amendment referred to right to vote in a non discriminatory basis. As referred by Owen R. Fiss:

"The very next congressional initiative, the Civil Rights Act of 1960, was in large part intended to perfect the Attorney General's injunctive weaponry on behalf of voting rights. In each of the subsequent civil rights acts, those of 1964 and 1968 the pattern was repeated; the Attorney General was authorized to initiate injunctive suits to enforce wide range of rights -public accommodations (e.g. restaurants), state facilities (e.g. parks), public schools, employments, and housing"⁵¹³.

512 Decision of the Constitutional Chamber n° 656 of 06-05-2001, Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*.

513 See Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Pres, Bloomington & London, 1978, p. 21

Thus, after *Brown*, it can be said that the United States ceased to participate in civil rights proceedings just as *amicus curia*, and in his name the Attorney General began to play prominent role acting in civil rights proceedings even before having specific authorization from Congress. As mentioned by Fiss: "The civil rights era forced the Attorney General and the courts to re-examine the non-statutory powers of the United States to sue to enforce the Constitution"⁵¹⁴.

The standing of the Attorney General was finally generally admitted regarding the protection of human rights in the case *United States v. City of Philadelphia*, 644 F.2d. 187 (3d Cir. 1980), in which the United States authority to sue a city and its officials for an injunction against the violation of the XIV Amendment rights of individual because of police brutality, was admitted; the United States was considered as suing as class representative for the city of Philadelphia. The United States Court of Appeals, Third Circuits ruled in the matter, as follows:

Article II section 3 of the Constitution charges the Executive to "take care that the Laws be faithfully executed." Independent of any explicit statutory grant of authority, provided Congress has not expressly limited its authority, the Executive has the inherent constitutional power and duty to enforce constitutional and statutory rights by resort to the courts. When Federal courts have upheld executive standing without explicit congressional authority, they have looked to other provisions of the Constitution, such as the commerce clause (See, e. g., *Sanitary District of Chicago v. United States*, 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925); *In re Debs*, 158 U.S. 564 15 S. Ct. 900, 39 L. Ed. 1092 (1895) and cases cited *infra*, p 218. and the fourteenth amendment (See *United States v. Brand Jewelers*, 318 F. Supp. 1293 (S.D.N.Y. 1970) and to a general statutory scheme defining federal rights but lacking the specific remedy of executive suit (See, e. g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d. 407 (1967); *United States v. American Bell Telephone Co.*, 128 U.S. 315, 9 S. Ct. 90, 32 L. Ed. 450 (1888); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 8 S. Ct. 850, 31 L. Ed. 747 (1888)). In addition, 28 U.S.C. § 518 (b) affords the Attorney General statutory authority to "conduct and argue any case in a court of the United States in which the United States is interested." The Supreme Court has held that this statute confers on the Executive general authority to initiate suits "to safeguard national interests." (*United States v. California*, 332 U.S. 19, 27, 67 S. Ct. 1658, 1662, 91 L. Ed. 1889 (1946)). Moreover, the Supreme Court has held that the Executive's general constitutional duty to protect the public welfare "is often of itself sufficient to give it standing in court." (*In re Debs*, 158 U.S. 564, 584, 15 S. Ct. 900, 906, 39 L. Ed. 1092 (1895)).

Thus, the standing of the Attorney General in the United States as well as of other public agencies has been admitted to file injunctions seeking the protection of some constitutional rights of citizens. For example, the standing of the United States and of the Secretary of Education, has been recognized to seek an injunction against a university to stop the release of student records in violation of a federal statute (*United States v. Miami University*, 294 F. 3d 797, 166 Ed. Law Rep. 464 2002 FED App. 0213P (6th Cir. 2002)⁵¹⁵. In general terms, the standing of the United States, the States and the Municipalities has been accepted in all cases in which they act in its capacity as protectors of the public interest, like public welfare, public safety or public health. That is why actions for injunction in cases of the illegal practice of medicine, and other allied professions had been brought by the attorney general, a State board of health or a county attorney⁵¹⁶,

514 See Owen M. Fiss and Doug Rendleman, *Injunctions*, Second Edition, University Casebook Series, The Foundation Press, Mineola, New York, 1984, p. 35.

515 See the reference in Kevin Schroder et al, "Injunction", *Corpus Juris Secundum*, Thomson West, Volume 43A, 2004, p. 252.

516 See the referentes to specific cases in Kevin Schroder et al, "Injunction", *Corpus Juris Secundum*, Thomson West, Volume 43A, 2004, p.271 ff.

Contrary to this North American tendency, in the Latin American countries except for the already mentioned standing assigned to the Peoples' Defendant, no other public officer or agency can claim the representation of collective or diffuse rights in order to file an amparo suit. This has even been expressly ruled in Venezuela, where the Constitutional Chamber of the Supreme Court deciding an amparo suit initiated by a Governor of one of the federated States, in a decision of November 21, 2000 ruled the following:

The States and Municipalities cannot file actions for diffuse and collective rights and interest, except if a statute expressly authorizes them.

The collective and diffuse rights and interests pursue to maintain in all the population or sectors of it, an acceptable quality of life, in those matters related to the quality of life that must be rendered by the State of by individuals. They are rights and interest that can coincide with individual rights and interests, but that according to Article 26 of the Constitution and unless the statute denies the action, can be claimed by any person invoking a right or interest shared with the people in general or a sector of the population, and who fears or has suffered, being part of such collectivity, a harm in his quality of life.

Now, being for the State to maintain the acceptable quality of life conditions, its bodies or entities cannot ask from it to render an activity; thus, within the structure of the State, the only institution that can file such actions is the Peoples' Defendant due to the fact that it represents the people and not the State, as well as other public entities when a particular statute gives them such actions⁵¹⁷.

In this sense, the Venezuelan Constitutional Chamber has denied the standing to file collective actions for amparo to the governors or mayors. In an action for judicial review of a statute with a joint amparo claim, of May 6, 2001, the Chamber decided that:

[The] actions in general grounded in diffuse or collective rights and interests may be filed by any Venezuelan person or legal entity, or by foreign persons residing in the country, who have access to the judicial system through the exercise of this action. The Venezuelan State, as such, lacks of it, since it has mechanisms and other means to cease the damage to those rights and interests, specially through administrative procedures; but the population in general is entitled to bring them in the way explained in this decision, and those ones can be brought by the Defender of the People, since as for Article 280 of the Constitution, the Defendant of the People is in charge of the promotion, defense and guardianship of the legitimate, collective and diffuse interest of the citizens. According to this Chamber, said provision does not exclude or prohibit the citizens the access to the judicial system in defense of the diffuse and collective rights and interests, since Article 26 of the Constitution in force sets forth the access to the judicial system to every person, whereby individuals are entitled to bring to suit as well, unless a law denies them the action. Within the structure of the State, since it does not have those attributions granted, the only one who is able to protect individuals in matters of collective or diffuse interest is the Defender of the People (in any of its scopes: national, state, county or special). The Public Prosecutor (except in the case that a law grants it), Mayors, or Municipal auditors lack both such attribution and the action, unless the law grants them both).⁵¹⁸

517 Case *William Dávila. Gobernación Estado Mérida*. See the comments in Rafael Chavero, *El Nuevo Régimen del Amparo Constitucional en Venezuela*, Caracas, 2001, p. 115.

518 Decision of the Constitutional Chamber n° 656 of June 5, 2001, Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*.

VI. THE INJURED THIRD PARTY

As in all suits, and particularly in matters of amparo and protection of constitutional rights, it is possible that third parties not originally connected with the suit, have some personal interest in the action filed because the omission, the particular situation or the challenged act, also affects their constitutional rights, coinciding whether with the claimant or plaintiff or with the allegations of the defendants.

Injured third parties, thus, may be added in the proceedings so that their rights in the subject matter may be also determined and enforced by the corresponding court when coinciding with the plaintiff allegations. Of course the general rule is the same as in the injunctions proceeding in the United States: persons with a unity of interest in the subject matter of the suit and who are entitled to, and seek the same character of relief, may join the plaintiff claim⁵¹⁹. Consequently, a person is allowed to intervene in an amparo proceeding adhering to the plaintiff claim and in defense of it because they have a direct interest in the matter that can be affected with the final decision; claim that cannot be modified nor expand by the third party.

Some Latin American Amparo Laws refer specifically to the intervention of third parties, as is the case of Guatemala where Article 34 of the Law establishes the obligation of

“the authority, the person denounced or the claimant, if they arrive to know of any person with direct interest in the subject matter or the suspension of the challenged act, resolution or procedure, whether because they are party in the proceedings or because they have any other legal relation with the exposed situation; to tell the foregoing to the court, indicating name and address and in a brief way, the relation with such interest. In this case the court must hear the referred person, as well as the Public prosecutor, considered as a party”.

In Mexico, Article 5 of the Amparo Law, in addition to the aggrieved person or persons and to the challenged authority or authorities, are declared also as parties in the amparo suit, “the affected third party or parties”, having the possibility to intervene in such character, the following:

- a) The counterpart of the injured when the claimed act is issued in a non criminal trial or controversy, or any of the parties in the same trial when the amparo is filed by a person strange to the procedure:
- b) The offended or the persons that according to the law, have right to have the damage repaired or to demand for civil liability derived from the commitment of the crime, in amparo suits filed against criminal judicial decisions, when the latter affects the reparation or the liability;
- c) The person or persons that have argued in their own favor regarding the challenged act against which the amparo is filed, when being acts adopted by authorities other than judicial of labor; or that without arguing in their favor, they have direct interest in the subsistence of the challenged act.

In the case of Peru, the Constitutional Procedural Code following the universal procedural rules, provides that when in the suit for amparo, it appears for the court the need to incorporate third parties not initially summoned, the judge must incorporate them if from the suit or the answer it is evident that the final decision will affect other parties (Art. 43). Additionally, Article 54 of the Code provides the right to anybody having legal and relevant interest in the outcome of the trial to be incorporated to

519 See the comments in reference in Kevin Schroder et al, “Injunction”, *Corpus Juris Secundum*, Thomson West, Volume 43A, 2004, p. 332.

the procedure and be declared as third interested party, being incorporated to the proceedings at the stage as it is.

Finally, regarding third parties, and without prejudice to what has been said about the intervention of the Peoples' Defendants in the amparo suits, before the extension of this public officer, it has been a legal tradition in Latin American regulations referred to habeas corpus and amparo, to consider the Public Prosecutor (Ministerio Público) in its character of general guarantor for the respects of constitutional rights in the judicial proceedings, as a *bona fide* third party that must be summoned to allow its participation in the proceedings.

In this respect, for instance, the Argentinean Habeas Corpus Law regulates the intervention of the Public Prosecutor, for which purpose the court once received the complaint, must notify its representatives, which will have in the proceedings the same rights given to all those that intervene in it, without any need to notify them for the accomplishment of any procedural act. The Public Prosecutor can file arguments and make the appeals considered necessary (Article 21).

The same occurs in México, where the Amparo Law guarantees the Public prosecutor its right to intervene in the procedure (Article 5, I, IV). In similar sense the Venezuelan Law of Amparo allows the intervention of the Public prosecutors in all amparo suits, but points out that its non intervention cannot affect the continuity or validity of the procedure (Article 14).

In similar sense regarding the participation of the Public Prosecutor as third party in good faith, in the United States, particularly in matters of judicial protection of civil rights, the participation of the Attorney General in injunctive proceedings as *amicus curiae* has been even encouraged by the courts. In the Texas prison case *Estelle v. Justice*, 426 U.S. 925; 96 S. Ct. 2637; 49 L. Ed. 2d 380 (1976) the matter was definitively resolved: the trial Judge in the case invited the Attorney general to participate as "*litigating amicus*", with the same rights normally associated with the party status, for instance to present evidence and to cross-examine witnesses. This participation was challenged by the State but finally was accepted.

However, since the expansion of injunctive process for the protection of civil rights, beginning with school desegregation cases following the Supreme Court's decisions in *Brown v. Board of Education of Topeka*, (1955), the Attorney General has had a very important role intervening in what has been called "structural injunctions". Through them, on civil rights massive violation matters, the courts have undertaken to judicially supervise the authorities' institutional policies and practices, in many cases with the active participation of the Attorney General in the litigation as *amicus curiae*. As defined by Tabb and Shoben:

Structural injunctions are modern phenomenon born of necessity from development in Constitutional law where the Supreme Court has identified substantive rights whose enforcement requires substantial judicial supervision. These rights concern the treatment of individuals by institutions, such as the right not to suffer inhumane treatment in prisons or public mental hospital. Enforcement of such rights by injunction has become an implicit part of the Constitutional guarantee of protecting individual liberties from inappropriate government action⁵²⁰.

520 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp. 87-88.

CHAPTER XI

THE MOTIVES FOR THE AMPARO SUIT: THE INJURY OR THE THREAT OF VIOLATION TO THE PLAINTIFF'S CONSTITUTIONAL RIGHTS

The amparo action, as a specific judicial means for the protection of constitutional rights and guaranties, can be filed by the plaintiff when he is personally affected in his own rights, in a direct and present way; or when he is threatened to be harmed in those rights in an imminent way.

The personal character of the amparo suit is then related to the direct harm caused to the plaintiff or to the threat that affects such rights (which must be an imminent one).

I. THE GENERAL PERSONAL AND DIRECT CHARACTER OF THE INJURY

The claimant or plaintiff in the amparo suit must have suffered a direct, personal and present injury in his constitutional rights or must have been threatened in them.

That is, in cases of injury it must personally affect the claimant, in a direct and present way regarding his constitutional rights. If it harms only statutory established rights, or another person's rights or only affects the plaintiff in an indirect way, the action is inadmissible.

The Mexican Constitution, in this regard, refers to the need for the plaintiff to have "a personal and direct" harm (Art. 107,I), in the sense that his personal constitutional rights must have been directly affected. That is why the claimant must be the 'affected" person (Argentina: Article 5; Peru: Article 39), the "aggrieved" person (Nicaragua, Article 23) or the one who "suffers" the harm (Brazil: Article 1). Consequently if the harm does not affect the plaintiff in his constitutional rights, in a personal and direct way, the action is considered inadmissible⁵²¹.

The foregoing means, first, that the rights that must be directly affected or harmed for the amparo action to be admissible must be of constitutional order, and second, that the harm must directly and personally affect the plaintiff. Consequently, rights just recognized in statutes without constitutional rank, cannot be protected by means of amparo actions, and this is one of the main distinctions between the North American injunctions and the amparo.

In this sense, in Venezuela the courts have ruled that the harm caused must always be the result of a violation of a constitutional right that must be "flagrant, vulgar, direct and immediate, which does not mean that the right or guarantee are not due to be regulated in statutes, but it is not necessary for

521 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, pp. 386-387.

the court to base its decision in the latter to determine if the of the violation of the constitutional right has effectively occurred"⁵²².

In other words, only direct and evident constitutional violations can be protected by means of amparo; thus, for instance, as ruled in 1991 by the Venezuelan courts, the internal electoral regime of political parties or of professional associations could not be the object of an amparo action founded in the right to vote set forth in the Constitution, "which only applies to the national electoral process [not being applied] to the internal electoral process of the political parties", concluding that the amparo only protects constitutional rights and guaranties and not legal (statutory) ones, and much less the ones contained in association's by-laws"⁵²³. In other decisions, the courts declared inadmissible amparo actions for the protection of rights when the allegations were only founded "in legal (statutory) considerations", as the right to work commonly conditioned by statutes regarding dismissals. Thus, the amparo is not the judicial mean for the protection of such right if the violation is only referred to the labor Law provisions"⁵²⁴.

As mentioned, the violation of the constitutional right must be a direct violation caused by a concrete action or omission which the claimant must allege and must proof. The courts in Venezuela have ruled in this regard that

"the amparo action can only be directed against a perfectly and determined act or omission, and not against a generic conduct; against an objective and real activity and not against a supposition regarding the intention of the presumed injurer, and against the direct and immediate consequences of the activities of the public body or officer. It is necessary, though, that the denounced actions directly affect the subjective sphere of the claimant, consequently excluding the generic conducts, even if they can affect in a tangential way on the matter.

That is why the amparo action is not a popular action for denouncing against the illegitimacy of the public entities of control over convenience or opportunity, but a protector remedy of the claimant sphere when it is demonstrated that it has been directly affected"⁵²⁵.

In another decision, the Supreme Court of Justice ruled about the need that:

The violation of the constitutional rights and guaranties be a direct and immediate consequence of the act, fact or omission, not being possible to attribute or assign to the injurer agent different re-

522 See Supreme Court of Justice, Case *Tarjetas Banvenez*, July 10, 1991, in *Revista de Derecho Público*, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 169-170. See also decisión of may 20, 1994, Corte Primera de lo Contencioso Administrativa (Case *Federación Venezolana de Deportes Ecuestres*); in *Revista de Derecho Público*, n° 57-58, Editorial Jurídica Venezolana, Caracas, 1994, p.

523 See decision of August, 8, 1991, *Revista de Derecho Público*, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, p. 129.

524 See decision of October 8, 1990, *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 139-140. In similar sense, the violation of the right to self defense because the right to cross examination of a witness was denied according to article 349 of the Procedural Civil Code, cannot be founded in article 68 of the Constitution because that would signify to analyze the violation of norms of statutory rank and not of constitutional rank. See decision of the Politico Administrative Chamber of the Supreme Court of Justice of November 8, 1990, *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 140-141

525 See decisión of December 2, 1993, *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 302-303

sults to those produced or to be produced. The right's violation must be the product of the harming act"⁵²⁶.

The main consequence of being the injury a direct and immediate one regarding the claimant is that he has to prove his assertions, that is to say, in the amparo action the injured party has the burden to prove the personal and direct harm. Similar to the rules on injunctions, as resolved by the North American courts, according to which, "the party seeking an injunction, whether permanent or temporary, must establish some verifiable injury"⁵²⁷. That is why, regarding documental proofs, the claimant must always present them with the filling of the action (Amparo Laws: Argentina, Article 7; Uruguay, Article 5).

II. THE ARBITRARY, ILLEGAL AND ILLEGITIMATE MANIFEST INJURY

On the other hand, the harm or injury caused to a constitutional right in order for an amparo action to be admitted, must be manifestly arbitrary, illegal or illegitimate, and consequence of a violation of the Constitution.

In this regard, for instance, the Argentinean Amparo Law, is precise in indicating that for an amparo action to be admissible it must be filed against any "manifestly arbitrary or illegal" act or omission of a public authority, that "harms, restricts, alters or threatens the constitutional rights and guaranties" (Art. 1). This feature of the challenged official action or omission to be manifestly illegal or arbitrary, is a consequence of the presumption of validity that as a general principle of public law, all official acts have. The Uruguayan Amparo law refers to acts issued with "manifest illegitimacy" (Art. 1); and the Brazilian Law, in similar sense, also set forth expressly that the *mandado de segurança* is established for the protection of constitutional rights when being violated "*ilegalmente ou com abuso do poder*" (Art 1)⁵²⁸.

The challenged act or omission, thus, must be manifestly contrary to the legal order (*legalidad*), that is, the rules of law contained not only in the Constitution, but also in statutes and regulations; or it must be manifestly illegitimate, because it lacks of any legal support; or because it is manifestly arbitrary, that is, an act not reasonable or unjust; in other words, contrary to justice or to reason⁵²⁹. The same principle applies in the United States imposing to the plaintiff in civil right injunctions the burden to prove the alleged violations in order to destroy the presumption that the official acts are valid, which has been considered a limitation on judicial power to protect rights. As M. Glenn Abernathy and Perry have commented:

"The courts do not automatically presume that all restraints on free choice are improper. The burden is thrown on the person attacking acts to prove that they are improper. This is most readily seen in cases involving the claim that an act of the legislature is unconstitutional...Judges also ar-

526 See decisión of August 14, 1992, *Revista de Derecho Público*, nº 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 145

527 See Kevin Schroder, John Glenn and Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol. 43A, Thomson West, 2004, p 54.

528 The principle is also referred to in Chile and Ecuador. Juan Manuel Errazuriz G and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago, 1989, pp. 51-55; Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, p. 79.

529 See Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea, Buenos Aires 1987, pp. 28-29.

gue that acts of administrative officials should be accorded some presumption of validity. Thus a health officer who destroys food alleged by him to be unfit for consumption is presumed to have good reason for his action. The person whose property is so destroyed must bear the burden of proving bad faith on part of the official, if an action is brought as a consequence"⁵³⁰.

Consequently, when expressly established in the statutes or not, the same principle applies in Latin America, in the sense that in the amparo action, the act or omission challenged by the plaintiff because it harms his rights, must be manifestly illegal, illegitimate, arbitrary or issued with abuse of power, which implies the need for the claimant on the contrary, to build his arguments upon reasonable basis, and to prove that the challenged act or omission of the public official is an unreasonable one.

III. THE ACTUAL AND REAL CHARACTER OF THE INJURY

Another general condition of the injury in order to be protected by the amparo action is its actual character, as is expressly provided in the Argentinean (Article 1) and Uruguayan (Amparo, Art 1) Laws, in the sense that the harm must be presently occurring and must not have ceased. In similar sense as it is the rule regarding the injunctions in the United States:

"A petitioner is not entitled to an injunction where no injury to the petitioner is shown from the action sought to be prevented. Ordinarily, a person, in order to be entitled to injunctive relief, whether prohibitory or mandatory in its nature, must establish an actual and substantial, serious, injury, or an affirmative prospect of such an injury"⁵³¹.

The actual character of the injury regarding the amparo suit, as argued by the Venezuelan courts, signifies that the injury "must be alive, must be present in all its intensity", in other words, the actual character of the harm "refers to the present character, not to the past, nor to facts already happened, which appertain to the past, but to the present situation which can be prolonged in an indefinite length of time"⁵³².

In this regard, Article 6,1 of the Amparo law of Venezuela establishes as a cause of inadmissibility of the amparo action, that the violation would have not ceased, that is, "it must be actual, recent, alive"⁵³³. The principle is the same in Argentina, where if the harm has ceased, the claim by mean of amparo must be declared inadmissible⁵³⁴. In Honduras (Art. 46,6 Constitutional Justice Law) and Nicaragua (Art. 51,3, Amparo Law) prescribes that the recourse for amparo is inadmissible when the effects of the challenged act have ceased, in which case the court could reject *in limine (de plano)* the claim. Also in México, Article 73,XVI of the Amparo law declares inadmissible the amparo action when the challenged acts have ceased in their effects, or when even those acts subsist, they cannot produce material or legal effects whatsoever, because they have lost their object or substance. In Peru,

530 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, University of South Carolina Press, 1993, p. 5

531 See Kevin Schroder, John Glenn and Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol. 43A, Thomson West, 2004, p. 66.

532 See decision of the First Court on Judicial Review of Administrative Action of May 7, 1987 (Caso: *Desarrollo 77 C.A.*), in *FUNEDA 15 años de Jurisprudencia cit.*, p. 78.

533 See decision of the First Court on Judicial Review of Administrative Action of November 13, 1988, in *FUNEDA, 15 años de la Jurisprudencia, cit.*, p. 134

534 Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea, Buenos Aires 1987, p. 27

the Constitutional procedure Code also prescribes the inadmissibility of the amparo action when at the moment of its filing the threat or the violation of the constitutional rights has ceased (Art. 5,5).

In this regard, the First Court on Judicial Review of administrative actions of Venezuela resolved the inadmissibility of an action for amparo because, during the proceedings, the challenged act was repealed⁵³⁵. The Supreme Court also decided that in the proceedings of an amparo suit the harm must not have ceased before the judge decision; on the contrary, if the harm has ceased, the judge must declare *in limine litis*, the inadmissibility of the action⁵³⁶. For instance, in the case of an amparo against the omission of a court to decide a case, which as alleged harms the rights of somebody, if before the filing of the action or during the proceeding the challenged court has decided, from that moment on the harm can be considered to have ceased⁵³⁷.

In similar sense, the Constitutional Chamber of Costa Rica has determined that it has not jurisdictional present interest to examine the circumstances for the suspension [of the effects on an act], when [the act has been repealed], and thus, when the affected party has been reestablished in the enjoyment of his rights before filing the recourse⁵³⁸. But regarding the actual character of the harm, it is possible to consider that when new a fact modifies to such an extreme an already known and declared situation as not being present at the moment the harm occurred, then the new argument could provoke different or contradictory results regarding the previous ones. This could occur, for instance, when the amparo judge, that must know regarding an specific, actual and determined situation, could determine the existence of a new fact that had not occurred at the moment of the filing, and that could alter or modify that situation, in which case, the action can be admitted and decided protecting the plaintiff, even if it had been beforehand rejected⁵³⁹.

Regarding the actual character of the harm for granting the amparo or constitutional protection, the rule in federal cases in the United States is that an actual controversy must exist not only at the time the action was initiated, but at all stages of the proceeding, even at appellate or certiorari review. Nonetheless, in the important case *Roe v. Wade*, 410 U.S. 113 (1973), in which the Supreme Court expanded the women's right to privacy, striking down states laws banning abortion. The Court recognized that even if this right of privacy was not explicitly mentioned in the Constitution, it was guaranteed as a constitutional right for protecting "a woman's decision whether or not to terminate her pregnancy", even though admitting that the states legislation could regulate the factors governing the abortion decision at some point in pregnancy based on "safeguarding health, maintaining medical standards and in protecting potential life".

535 See decision of the First Court on Judicial Review of Administrative Action of August 14, 1992 in *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 154.

536 See decisions of the Politico Administrative Chamber of the former Supreme Court of Justice of December 15, 1992, *Revista de Derecho Público* n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 164; and of May 27, 1993, *Revista de Derecho Público*, nos 53-54, Editorial Jurídica Venezolana, Caracas, 1993, p. 264. Cfr. Decision of the First Court on Judicial Review of Administrative Actions of December 12, 1992 (Caso *Allan R. Brewer-Carías*), *Revista de Derecho Público*, n° 49, Editorial Jurídica Venezolana, Caracas, 1992, pp. 131-132

537 See Rafael Chavero G., *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001, pp. 237-238.

538 Decision n° 1051-97, in Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, pp. 244-245.

539 Cfr. decision of the Politico Administrative Chamber of the former Supreme Court of Justice of August 5, 1992, *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 145.

But the point in the case was that, pending the procedure, the pregnancy period of the claimant came to term, so the injury claimed lost its present character. Nonetheless, the Supreme Court ruled in the case that

“[When], as here, pregnancy is a significant fact in the litigation, the normal 266-day human generation period is so short that pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non mootness. It truly could be ‘capable of repetition, yet evading review’⁵⁴⁰.

In Peru, even though the same general rule is established regarding the inadmissibility “when at the filing of the action the harm or threat to a constitutional rights has ceased”, it has been considered that when the harm or threat ceases after the action has been filed, the Constitutional Procedure Code allows the continuation of the proceedings, taking into account the harm produced, and that the amparo be granted⁵⁴¹.

On the other hand, as established in the Amparo laws of México (Art. 73, IX) and Honduras (Art. 46,5), in cases of injuries or harms produced to constitutional rights, the amparo action can only be filed when the injury is a reparable one or the harm is reversible; thus, the amparo action is inadmissible when the challenged act provoking the harm has already been accomplished or has already been completed (*consumado*) in an irreparable way. That is, amparo actions cannot be the adequate remedy regarding *fait accompli*.

In México, the classical example regarding this condition of admissibility of the amparo suit, has been the situation of an executed death sentence⁵⁴², in which case it will be wholly irrelevant to file an amparo action. The non admissibility condition applies to all cases “when it is materially or juridically impossible to return the injured party to the position occupied prior to the violation”⁵⁴³; or when in general terms the challenged act is in fact irreparable because it is “physically impossible to turn back the things to the stage they had before the violation”⁵⁴⁴.

This is also the general condition for the admissibility of the injunctions in the United States, as has been decided by the courts, constructing the following judicial doctrine:

The purpose of an injunction is to restrain actions that have not yet been taken and, therefore, an injunction will not lie to restrain an act already completed at the time the action is instituted, since the injury has already been done and the claim is rendered moot. There is no cause for the issuance

540 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, University of South Carolina Press, 1993, pp. 4-5

541 See Luis Sanz Dávalos, “Las innovaciones del Código Procesal constitucional en el proceso constitucional de amparo”, in Susana Castañeda et al, *Introducción a los procesos constitucionales. Comentarios al Código Procesal Constitucional*, Jurista Editores, Lima 1005, p 126.

542 Tesis 32, II, 90. Supreme Corte, Jurisprudencia de la Suprema Corte. See the reference in Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Austin Press, Austin 1971, p. 95, note 11.

543 See Robert D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Austin Press, Austin 1971, p.96

544 Tesis “Actos consumados de modo irreparable”, Apéndice al Semanario Judicial de la federación 1917-1988, Segunda Parte, salas y Tesis Comunes, pp. 106-107. See the referente in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Edit. Porrúa, México 2002, p. 388, notes 232 and 233.

of an injunction unless the alleged wrong is actually occurring or is actually threatened or apprehended with reasonable probability and a court cannot enjoin an act after it has been completed. An act which has been completed, such that it no longer presents a justiciable controversy, does not give grounds for the issuance of an injunction⁵⁴⁵.

IV. THE RESTORATIVE NATURE OF AMPARO SUIT AND THE REPARABLE CHARACTER OF THE INJURY

In general terms, regarding violations of constitutional rights, the amparo action in Latin America has a restorative character, tending to reconstitute the affected right to the situations existing when the right was harmed, eliminating the detrimental act or fact, or to restore the personal situation of the plaintiff to one closer to the existing before the injury. Regarding threats to rights, the amparo action has a preventive character, in the sense that it seeks to impede the injury to be produced or completed.

In this sense, regarding constitutional rights that has been violated, the amparo action has similarities with the so called reparative injunctions in the United States, which seeks to eliminate the effects of a past wrong or to compel the defendant to engage in a course of action that seeks to correct those effects⁵⁴⁶. As has been explained by Owen M. Fiss:

To see how it works, let us assume that a wrong has occurred (such as an act of discrimination). Then the missions of an injunction –classically conceived as a preventive instrument– would be to prevent the recurrence of the wrongful conduct in the future (stop discriminating and do not discriminate again). But in *United States v. Louisiana* (380 U.S. 145, (1965)), a voting discrimination case, Justice Black identified still another mission for the injunction –the elimination of the effects of the past wrong the past discrimination). The reparative injunction –long thought by the nineteenth-century textbook writers, such as High (*A Treatise on the Law of Injunction* 3, 1873) to be an analytical impossibility– was thereby legitimated. And in the same vein, election officials have been ordered not only to stop discriminating in the future elections, but also to set aside a past election and to run a new election as a means of removing the taint of discrimination that infected the first one (*Bell v. Southwell*, 376 F.2d 659 (5TH Cir. 1976)). Similarly, public housing officials have been ordered both to cease discriminating on the basis of race in their future choices of sites and to build units in the white areas as a means of eliminating the effects of the past segregative policy (placing public housing projects only in the black areas of the city) (*Hills v. Gautreaux*, 425 U.S. 284 (1976)).⁵⁴⁷

Accordingly, as also decided by the former Supreme Court of Justice of Venezuela, in 1996:

One of the principal characteristics of the amparo action is to be a restorative (restablecedor) judicial means, the mission of which is to restore the infringed situation or, what is the same, to put the claimant again in the enjoyment of his constitutional rights which has been infringed. The abovementioned characteristic of this judicial means, besides been recognized by court decisions doctrine and by legal writers, is set forth in the Amparo Law, when establishing in Article 6,3, as a motive for the inadmissibility of the action, “when the violation of the constitutional rights and guarantees, turns on in an evident irreparable situation, being impossible to restore the infringed

545 See Kevin Schroder, John Glenn, Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol 43A, Thomson West, 2004, p. 73.

546 Seen Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press 1978, p.7.

547 Seen Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press 1978, pp.7-10

legal situation. It is understood that the acts that by means of the amparo can not be turned up thinks to the stage they had before the violation are irreparable⁵⁴⁸.

Due to this restorative character of the amparo, no new juridical situations can be created by means of this judicial action, nor is it possible to modify those in existence⁵⁴⁹. The Constitutional Chamber of the Supreme Tribunal of Justice, in a decision of January 20, 2000 ruled in this sense that a claimant cannot pretend to obtain the claimed asylum right by means of an amparo action, which through he pretended to obtain the Venezuelan citizenship but without following the established procedure. The Court ruled in the case, that:

“This amparo action has been filed in order to seek a decision from this court, consisting in the legalization of the situation of the claimant, which would consist in the constitution or creation of a civil and juridical status the petitioner did not have before filing the complaint for amparo”.

Thus this petition was considered “contrary to the restorative nature of the amparo”⁵⁵⁰.

In another decision issued on April 4, 1999, the former Supreme Court in a similar sense, declared inadmissible an amparo action in a case in which the claimant was asking to be appointed as judge in a specific court or to be put in a juridical situation that he did not have before the challenged act was issued. The Court decided that in the case, it was impossible for such purpose to file an amparo action, declaring it inadmissible, thus ruling as follows:

“This Court must highlight that one of the essential characteristics of the amparo action is it reestablishing effects, that is, literally, to put one thing in the stage it possessed beforehand, in its natural stage, which for the claimant means to be put in the situation he had before the production of the claimed violation. The foregoing means that the plaintiff claim must be directed to seek ‘the reestablishment of the infringed juridical situation’; the amparo actions are inadmissible when the reestablishment of the infringed situation is not possible; when through them the claimant seeks a compensation of damages, because the latter cannot be a substitution of the harmed right; nor when the plaintiff pretends the court to create a right or a situation that did not exist before the challenged act, fact or omission. All this is the exclusion for the possibility for the amparo to have constitutive effects”⁵⁵¹.

What in the suit for amparo can certainly be done is to restore things to the stage they had at the moment of the injury, making the challenged and proved infringing fact or act regarding a constitutional right or guarantee, to disappear. Thus when the violation to a constitutional right turns up to be an irreparable situation, the amparo actions is inadmissible. This is congruent with what Article 29 of the Venezuelan Constitution and Article 1 of Amparo Law provide in that the amparo action seeks to “the immediate restoring of the infringed juridical situation or to the situation more similar to it”⁵⁵².

548 See decisión of February 6, 1996, case: Asamblea legislativa del Estado Bolívar. See in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 185, 242-243.

549 See decisions of the Politico Administrative Chamber of the former Supreme Court of Justice, of October 27, 1993 (Case *Ana Drossos*), and November 4, 1993 (Case *Partido Convergencia*), in *Revista de Derecho Público*, n^{os} 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 340.

550 See Case *Domingo Ramírez Monja*. See the reference in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, p. 244.

551 Decision of April 21, 1999, Case *J. C. Marín*. See the reference in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, pp. 244-245

552 See First Court on Judicial review of Administrative Action, decision of January 14, 1992, in *Revista de Derecho Público*, n^o 49, Editorial Jurídica Venezolana, Caracas, 1992, p. 130; and decision of the former Su-

In this regard, the former Supreme Court of Justice declared inadmissible an amparo action against a undue tax collecting act, once paid, considering that in such case it was not possible to restore the infringed juridical situation⁵⁵³; and the First Court on Judicial review of administrative action on a decision of September 7, 1989, declared inadmissible an amparo action referred to maternity protection rights (pre and post natal leave) filed after the childbirth, ruling that:

“It is impossible for the plaintiff to be restored in her presumed violated rights to enjoy a pre and post natal leave during 6 month before and after the childbirth, because we are now facing an irremediable situation that can not be restored, due that it is impossible to date back the elapsed time”⁵⁵⁴.

In similar sense, the former Supreme Court of Justice in a decision of November 1, 1990, considered inadmissible an amparo action, when the only way to restore the infringed juridical situation was declaring the nullity of an administrative act, which the amparo judge cannot do in its decision⁵⁵⁵.

The abovementioned can be considered the general trend regarding the amparo regulations in Latin America. In México, Article 73,X of the Amparo Law prescribes that the amparo in inadmissible against acts adopted in a judicial or administrative proceeding, when due to the change of the juridical situation, the violations claimed in the proceeding must be considered as completed in an irreparable way. It is also the general trend regarding the tutela in Colombia where the Law provides that the action is inadmissible “when it is evident that the violation originated a completed harm, unless the action or omissions harming the rights continues”.

In conclusion, in general terms, the amparo suit imposes the need for the harm to possibly be amended, or if it has not been initiated, to be restored by a judicial order impeding its execution, or if it has continuous effects, for its suspension in case it has not been initiated; and regarding those effects already accomplished, the possibility to date back things to the stage before the harm commenced. What the amparo judge cannot do is create situations that were inexistent at the moment of the action’s filing; or to correct harms to rights when it is too late to do so. As resolved by the First Court on Judicial Review of administrative action of Venezuela, regarding a municipal order for the demolition of a building, in the sense that if the demolition was already executed, the amparo judge cannot decide the matter, because of the irreparable character of the harm⁵⁵⁶.

The First Court also ruled in a case decided in February 4, 1999 regarding a public university position contest that, “the pretended aggrieved party is seeking to be allowed to be registered itself in the public contest for the Chair of Pharmacology in the School of Medicine José María Vargas, but at the present time, the registration was impossible due to the fact that the delay had elapsed the previous

preme Court of Justice, Politico Administrative Chamber, of March 4, 1993, in *Revista de Derecho Público*, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1993, p. 260.

553 CSJ-CP 21-3-88- *Revista de Derecho Público*, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 114

554 See decision of First Court on Judicial Review of Administrative Actions of September 17, 1989, *Revista de Derecho Público* n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 111.

555 See decisions of the Politico Administrative Chamber of the former Supreme Court of Justice of November 1, 1990, *Revista de Derecho Publico*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 152-153; Cfr. decision of the First Court on Judicial Review of Administrative Actions of September 10, 1992, *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 155.

556 See the January 1st, 1999 decision (Case: *B. Gómez*). See the reference in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 242.

year, and consequently the harm produced must be considered as irreparable, declaring the inadmissible the action for amparo⁵⁵⁷.

Another example that can also be mentioned refers to the right to the protection of health, different to a possible right to have one's health restored. The former Supreme Court of Justice, in a decision of March 3, 1990, ruled as following:

"The Court considers that the infringed juridical situation is reparable by means of amparo, due to the fact that the plaintiff can be satisfied in his claims through such judicial means. From the judicial procedure point of view, it is possible for the protection of health the possibility for the judge to order the competent authority to assume precise conduct for the medical protection of the claimant conduct. The claim of the petitioner is to have a particular and adequate health care, which can be obtained via the amparo action, seeking the reestablishment of a harmed right, and this can be obtained by means of amparo. In this case, the claimant is not seeking her health to be restored to the stage it had before, but to have a particular health care, which is perfectly valid"⁵⁵⁸.

In Peru, the Constitutional Procedure Code also prescribes that the amparo action, as well as all constitutional proceedings, are inadmissible when at the moment of its filing, the violation of the constitutional rights has become irreparable (Art. 5,5). Nonetheless, being the purpose of the constitutional processes to protect constitutional rights, reestablishing the things to the stage they had before the constitutional rights violation or threat or prescribing the accomplishment of a legal mandate or an administrative act, the Code establishes that if after the filing of the claim, the aggression or threat has ceased because of a voluntary decision of the aggressor, or if the harm turns up to be irreparable, the court, taking into account the injury, will grant the claim indicating the scope of its decision and ordering the defendant to refrain from performing again the actions or omissions that provoked the filing of the suit.

V. THE PREVENTIVE NATURE OF AMPARO SUIT AND THE IMMINENT CHARACTER OF THE THREAT

The amparo suit is not only the effective judicial means for the restoration of the injured constitutional rights that has been harmed, similar to the reparative or restorative civil rights injunctions, but it is also the effective judicial means for the protection of such rights and guaranties when threatened to be violated or harmed. This latter amparo suit is then similar to the preventive civil rights injunctions which, in this case, "seeks to prohibit some discrete act or series of acts from occurring in the future"⁵⁵⁹, and is designed "to avoid future harm to a party by prohibiting or mandating certain behavior by another party. The injunction is 'preventive' in the sense of avoiding harm"⁵⁶⁰.

557 See Case C. *Negrín*. See the reference in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 243.

558 See in *Revista de Derecho Público*, n° 42, Editorial Jurídica Venezolana, Caracas, 1990, p. 107

559 See Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press, 1978, p. 7

560 See William M. Tabb and Eliane W. Shoben, *Remedies*, Thomson West, 2005, p. 22. The last sentence is very important from the terminological point of view when comparing the injunctions with the amparo suits: in Spanish the word "*preventivo*" is used in procedural law (*medidas preventivas o cautelares*) to refer to the "temporary": or "preliminary" orders or restraints that in North America the judge can issue during the proceeding. So the preventive character of the amparo and of the injunctions cannot be confused with the "*medidas preventivas*" or temporary or preliminary measures that the courts can issue during the trial for the immediate protection of rights, facing the prospect of an irremediable harm that can be caused.

All the amparo laws on Latin America expressly refers to the possibility of filing the amparo suit not only against actual violation of constitutional rights but also and basically against threats (*amenaza*) of harming or injuring constitutional rights and guaranties; threats that in general terms must also be real and certain, but additionally, must be immediate, imminent, possible and realizable (Nicaragua, Articles 51, 57, 79; Peru, Article 2; Venezuela, Articles 2; 6,2).

As decided by the Venezuelan courts: to threaten means to provoke fear to others or to make others feel in danger regarding their rights; conversely, a violation is a situation in which a fact has already been accomplished, so no threat is possible⁵⁶¹. In this regard, the Colombian Constitutional Court has drawn the distinction between harm and threat, as follows:

“The harm has implicit the concept of injury or prejudice. A right is harmed when its object is damaged. A right is threatened when that same object, without being destroyed, is put in a situation of suffering a decrease”⁵⁶².

“Harm and threat of fundamental rights are two different concepts clearly distinguishable: the former needs an objective verification that the tutela judges must do, by proving its empirical occurrence and their constitutional repercussions; the latter, conversely, adds subjective and objective criteria, conforming itself not by the intention of the public officer or the individual, but by the result the action or omission can have regarding the spirit of the affected person. Thus, in order to determine the constitutional hypothesis of the threat, the confluence of subjective and objectives elements are needed: the fear of the plaintiff that feels his fundamental rights are in danger of perish and the validation of such perception by means of external objective elements, the significance of which is the one offered by the temporal and historical circumstances in which the facts are developing”⁵⁶³

A threat is then, a potential harm or violation, that is imminent and to occur soon, regarding which the same Constitutional Court of Colombia has said:

“A threat to a fundamental constitutional right has multiple expressions: it can be referred to the specific circumstances of a person regarding the exercise of the right; to the existence of positive and unequivocal signs regarding the intention of a person capable to execute acts that can violate the right; or be represented in the challenge of someone (attempt), with direct repercussion on the right; also it can be constituted by non deliberated acts that, according to its characteristics, can lead the amparo court to be convinced that if no order is issued, impeding the conduct to continue, the violation of the right will be produced; also it can correspond to an authority omission whose extension in time allows the risk to appear or to increase; its configuration is also feasible in case of the existence of a norm –authorization or mandate- contrary to the Constitution, the application of which in the concrete case would be in itself an attack or a disregard of the fundamental”⁵⁶⁴

561 Decision First Court on Judicial Review of Administrative Actions of July 16, 1092, *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 155

562 Decision T-412 of June 17, 1992. See he references in Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá 2005, p. 147; and in Federico González Campos, *La tutela. Interpretación doctrinaria y jurisprudencial*, Ediciones Jurídicas Gustavo Ibáñez, Bogotá, 1994, pp. 46-47.

563 Decision T-439 of July 2, 1992. See he references in Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá, 2005, p. 148

564 See decision T- 349 of August 27, 1993. See the references in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, pp. 238-239.

Of course there are some constitutional rights that if they are not protected against threats, they could lose all sense in their selves. It happens with the right to life, in the sense that if someone has received imminent death threats, the only way to guarantee the right to life is by avoiding the concrection of the threats, for instance, providing the person with due police protection.

According to Article 2 of the Venezuelan Amparo Law, the threats that can be protected by the amparo suits, must be imminent, adding Article 6,1 of the same Law that the action for amparo will not be admitted when the threat of violation of a constitutional right has ceased, or when the threat against a constitutional right or guarantee is not "immediate, possible and feasible (Art. 6,2)⁵⁶⁵. Regarding these general conditions, the Venezuelan former Supreme Court of Justice, ruled that they must be concurrent conditions when referred to the constitutional protection against harms that will soon be done by someone to the rights of others⁵⁶⁶.

In similar sense, the Constitutional Chamber of the Supreme Court of Costa Rica has ruled that "according to Article 29 (of the Constitutional Jurisdiction Law), the amparo against a threat regarding a fundamental right can only be granted if the threat is certain, real, effective and imminent; thus, those probable prejudices not capable of being objectively apprehended cannot be protected by amparo,"⁵⁶⁷

In this regard, the *jurisprudencia* of the Supreme Court of México has developed as a non admissibility cause for the amparo suit, when the action refers to "future and probable acts"⁵⁶⁸. This refers to acts that have not yet occurred, thus referring to injuries that not only do not presently exist but may never be inflicted; in other words, "simple futurity is not in itself a sufficient bar to the suit. If the execution of the act is imminent and certain, although not formally completed or in process, the amparo suit is admissible"⁵⁶⁹. In the same sense in Ecuador, regarding the "imminent" character of the harm prescribed in Article 95 of the Constitution must be to occur in the near future, as a true potential injury that is not a mere conjecture. Additionally, the harm must be concrete and real and the claimant must prove how it affects his rights⁵⁷⁰.

In the same sense, in Mexico the courts have ruled regarding the imminent character of the harm that they are those that have been sufficiently proved that they will occur, because for instance, previ-

565 Cfr. See decisions of the Politico Administrative Chamber of the former Supreme Court of Justice of June 9, 1988, *Revista de Derecho Público*, n° 35, Editorial Jurídica Venezolana, Caracas, 1988, p. 114; and of August 14, 1992, *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, pp. 158-159; and of the First Court on Judicial Review of Administrative Actions of June 30, 1988, *Revista de Derecho Público*, n° 35, Editorial Jurídica Venezolana, Caracas, 1988, p. 115..

566 See decisions of the Politico Administrative Chamber of the Supreme Court of Justice of June 24, 1993, *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 289; and of March 22, 1995 (Case: *La Reintegradora*), in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwod, Caracas 2001, p. 239

567 See Vote 295-93. See the references in Rubén Hernández Valle, *Derecho Procesal constitucional*, Editorial Juricentro, 2001, p. 222.

568 Tesis jurisprudencial 74, *Apéndice al Semanario Judicial de la Federación*, 1917-1988, Segunda parte, salas y tesis Comunes, p. 123. See the reference in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Edit. Porrúa, México, 2002, p.395.

569 Tesis 44 and 45. *Jurisprudencia de la Suprema Corte*, pp. 110, 113. See the referencie in Richard D. Baker, *Judicial Review in México. A study of the Amparo Suit*, University of Texas Press, Austin, 1971, p. 96, note 12.

570 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora nacional, Quito 2004, p.80.

ous actions had been taken or they will inevitably be consequence of past facts also proved⁵⁷¹. This distinguishes the imminent actions from those already existing or from those just to be occurring in the future. What is certain is that if the amparo action were only to be admitted against existing facts, the affected party, even though having complete knowledge of the near occurrence of a harm, in order to file the amparo action, would have to patiently wait for the act to be issued, with all its harming consequences.

But what is basically needed for the amparo against threats regarding constitutional rights is its imminent character. This rule has also been developed in the United States as an essential requirement for preventive injunctions, in the sense that courts will order them only when the threatened harm is imminent, in order to prohibit future conduct; and not when the harm is considered remote, potential or speculative. In *Reserve Mining Co. v. Environmental Protection Agency* 513 F.2d, 492 (8th Cir 1975), the Circuit Court did not grant the requested injunction ordering Reserve Mining Company to cease discharging wastes from its iron ore processing plant in Silver Bay, Minnesota, into the ambient air of Silver bay and the waters of lake Superior, because even though the plaintiff has established that the discharges give rise to a "potential threat to the public health...no harm to the public health has been shown to have occurred to this date and the danger to health is not imminent. The evidence calls for preventive and precautionary steps. No reason exists which requires that Reserve terminate its operations at once"⁵⁷². In other classically cited case, *Fletcher v. Bealey*, 28 Ch. 688 (1885), referred to waste deposits in the plaintiff land by the defendant, the judge ruled that being the action brought to prevent continuing damages, for a *quia timet* action, two ingredients are necessary:

"There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action"⁵⁷³.

As happens also regarding injunctions in the United States, the amparo in Latin American Countries cannot be granted "merely to allay the fears and apprehensions or to soothe the anxieties of individuals, since such fears and apprehensions may exist without substantial reasons and be absolutely groundless or speculative"⁵⁷⁴. The amparo, as the injunction, is an extraordinary remedy "designed to prevent serious harm, is not to be used to protect a person from mere inconvenience or speculative and insubstantial injury"⁵⁷⁵.

As mentioned, the imminence of the harm must be certain, so that for example, the Mexican courts have ruled that mere possibility for the authorities to exercise their powers of investigation and

571 Joaquin Brage Camazano, *La Jurisdicción Constitucional de la Libertad. Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*, Ed. Porrúa, México, 2005, pp. 171-173

572 See the comments in Owen M. Fiss and Doug Rendelman, *Injunctions*, The Foundation Press, Mineola New York, 1984, pp. 116 ff.

573 See the reference in Owen M. Fiss and Doug Rendelman, *Injunctions*, The Foundation Press, Mineola New York, 1984, pp. 110-111.

574 See Kevin Schroder, John Glenn and Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol. 43A, Thomson West, 2004, p. 57

575 Kevin Schroder, John Glenn and Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol. 43A, Thomson West, 2004, pp. 57-58.

control, cannot be sufficient for the filing of an amparo action⁵⁷⁶. In this same sense it is regulated, regarding the tutela action, in Article 3 of Decree 306-92 of Colombia”.

Article 3: *When it does not exist threat to a fundamental constitutional right:* It will be understood that a fundamental constitutional right will not be threatened by the only fact of the opening of an administrative enquiry by the competent authority, subjected to the procedure regulated by law.

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

“the opening of a disciplinary administrative inquiry is not enough to justify the protection of a party by means of the judicial remedy of amparo, moreover if the said proceeding, in which all needed defenses can be exercised, may conclude in a decision discarding the incriminations against the party with the definitive closing of the disciplinary process, without any sanction to the party”⁵⁷⁷.

On the other hand, the threats regarding which constitutional rights can be protected by the amparo suit must be proven by the claimant, as threats against his rights that are precisely made by the defendant. That is why, the Argentinean courts for instance, have rejected an amparo action against non proved threats, for instance, when a mother filed a complaint asking the police protection to avoid an order of seizure of a minor, issued by a foreign court, because the existence of the order was not proved, nor sufficient elements for judging the case were alleged in order to prove that the local authorities were going to fail to apply the legal dispositions that apply to the execution in the country of foreign judicial decisions, which prescribes enough guarantees for the defense of rights and to protect internal public order⁵⁷⁸.

The proof of the harm can also be based on previous acts or conducts of the defendant, or on his past pattern of conduct. One example, in the United States, as resumed by Tabb and Shoben, is the case *Galella v. Onassis* (S.D.N.Y. 1972) originated in the claim of the wife of J. F. Kennedy, the former President of the United States, seeking for an injunction against a professional free-lance photographer to restrain him from violating her rights of privacy. “The evidence showed that the photographer had repeatedly engaged in harassing behavior of the Onassis family in order to obtain pictures, but each time the invasive behavior was different. Based upon the pattern of past conduct, the court concluded that the photographer’s behavior would continue indefinitely in the future. The evidence on imminency was very strong because the photographer had even sent an advertisement to customers announcing future anticipated pictures of Onassis. Even though the pattern of behavior was varied in the types of invasive conduct, the overall nature of it was harassing. With sufficient evidence, even an unpredictable pattern can establish imminency”⁵⁷⁹.

The threat must also be attributed to the defendant; on the contrary, the amparo action must be rejected. It was the case of an amparo action brought before the former Venezuelan Supreme Court of

576 See *Semanario Judicial de la Federación*, Tomo I, Segunda parte-2, p. 697. See the reference in Joaquín Brage Camazano, *La Jurisdicción Constitucional de la Libertad. Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*, Ed. Porrúa, México 2005, p. 173, note 269

577 See decision of the Politico Administrative Chamber of October 26, 1989 (Case *Gisela Parra Mejía*). See the reference in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 191, 241,

578 See the references in Néstor Pedro Sagües, *Derecho Procesal Constitucional, Acción de Amparo*, Vol 3, Astrea, Buenos Aires, 1988, pp. 117; and in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 190 and 239.

579 See William M. Tabb and Eliane W. Shoben, *Remedies*, Thomson West, 2005, p. 29

Justice in 1999, against the President of the Republic, denouncing as injuring acts possible measures to be adopted by the National Constituent Assembly convened by the President, once it were installed. The Court rejected the action not only because “the reasons alleged by the plaintiff were of eventual and hypothetical nature, which contradicts the need of an objective and real harm or threat to constitutional rights or guarantees” in order for the amparo to be admissible; but said, regarding the alleged defendant in the case, the following:

“This court must say, that the action for constitutional amparo serves to give protection against situations that in a direct way could produce harms regarding the plaintiff’s constitutional rights or guarantees, seeking the restoration of its infringed juridical situation. In this case, the person identified as plaintiff (President of the Republic) could not be by himself the one to produce the eventual harm which would condition the voting rights of the plaintiff, and the fear that the organization of the constituted braches of government could be modified, would be attributed to the members of those that could be elected to the National Constituent Assembly not yet elected. Thus in the case there does not exist the immediate relation between the plaintiff and the defendants needed in he amparo suit”⁵⁸⁰.

Another aspect to be mentioned is the possibility to file an amparo action against the legislator based on the threat to constitutional rights provoked by statutes or legislative acts, which is related to the main subject of the amparo against laws. In this regard, the former Supreme Court of Justice of Venezuela, in a restrictive, has ruled that a statute or a legal norm, in itself, cannot originate a valid possible, imminent and feasible threat, to allow the filing of an amparo action. In a decision of May 24, 1993, the Politico-Administrative Chamber of the Supreme Court ruled:

It is indisputable that a legal norm violating the Constitution can also harm persons situated in the juridical situation it regulates, so in such case, the harm could be considered ‘possible’, according to Article 6,2 of the Amparo law.

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

The same occurs with the third condition set forth in the Law; the threat, that is, the probable and imminent harm, will never be feasible -that is, concreted- by the defendant. If it could be sustained that the amparo could be filed against a disposition the constitutionality of which is challenged, then it would be necessary to accept as defendant the legislative body or the public officer which had sanctioned it, being the latter the one that would act in court defending the act. It can be observed that in case the possible harm would effectively arrive to be materialized, it would not be the legislative body or the sate organ which issued it, the one that will execute it, but the public official for whom the application of the norm will be imposing in all the cases in which an individual would be in the factual situation established in the norm.

If it is understood that that the norm can be the object or an amparo action, the conclusion would be that the defendant (the public entity sanctioning the norm the unconstitutionality of which is

580 See decision of April 23, 1999 (Case: A. Alborno). See the reference in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 240.

alleged) could not be the one entity conducting the threat; but that the harm would be in the end concretized or provoked by a different entity (the one applying to the specific and concrete case the unconstitutional provision).

Thus the amparo against law and other normative acts must be discarded, not only because the Amparo law does not establish such possibility, but also because even though being possible to file the extraordinary action against a normative act of general effects, the court must declare its inadmissibility because the conditions set forth in Article 6,2 of the Amparo law are not covered⁵⁸¹.

Accordingly, the former Supreme Court rejected the possibility to fill amparo actions against laws, restricting the scope of the Amparo Law in our opinion without major basic arguments, and facing the possibility for the constitutional protection to be needed, ruled as follows:

"Nonetheless, this High Court considers necessary to point out that the previous conclusion does not signify the impossibility to prevent the concretion of the harm -objection that could be drawn from the thesis that the amparo can only proceed if the unconstitutional norm is applied-, due to the fact that the imminently aggrieved person, must not necessarily wait for the effective execution of the illegal norm, because since he faces the threat having the conditions established in the Law, he could seek for amparo for his constitutional rights. In such case, thou, the amparo would not be directed against the norm, but against the public officer that has to apply it. In effect, being imminent the application to an individual of a normative disposition contrary to any of the constitutional rights or guaranties, the potentially affected person could seek from the court a prohibition directed to the said public officer plaintiff, compelling not to apply the challenged norm, once evaluated by the court as being unconstitutional"⁵⁸².

VI. THE NON CONSENTED CHARACTER OF THE INJURY

The injury to a constitutional right or guarantee that can permit an individual to seek constitutional judicial protection by means of an amparo action, must not only be actual, possible, real and imminent, and not provoked by the plaintiff himself⁵⁸³, but must not be a consented harm or injury; that is, the complainant must not have expressly or tacitly consented to the challenged act or the harm caused to his right.

Regarding the express consent, it exists, as ruled in the Venezuelan Amparo Law, when there are "unequivocal signs of acceptance" (Art. 6,4)⁵⁸⁴ of the act, the facts or the omissions causing the injury, in which case the amparo action is inadmissible.

This case of inadmissibility of the amparo action is also expressly regulated in the Amparo Laws of México, against expressly consented acts or acts consented as consequence of "expression of will that implies such consent" (article 73, XI); in Nicaragua, against "acts that have been consented by the claimant in an express way" (Article 51,4); and in Costa Rica, "when the action or omission would be legitimately consented by the aggrieved person" (Article 30,ch).

In certain aspects, this inadmissibility clause for the amparo suit referred to the express consent of the plaintiff, has some equivalence with the equitable defense in the United States injunctions called

581 See decision of the Politico Administrative Chamber of May 25, 1993 in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 289-290

582 *Idem.*, p. 290.

583 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, p. 80.

584 The Venezuelan Law qualifies this express consent as "tacit".

estoppel, which refers to actions of the plaintiff prior to the filing of the suit, that are inconsistent with the rights it asserts in his claim.

The classic example of *estoppel*, as referred to by Tabb and Shoben, “is that a plaintiff cannot ask equity for an order to remove a neighbor’s fence built over the lot line if the plaintiff stood by and watched the fence construction in full knowledge of the location of the lot line. The plaintiff silence with knowledge of the facts is an action inconsistent with the right asserted in court”⁵⁸⁵.

The other clause of inadmissibility in the amparo suit refers to the tacit consent of the plaintiff regarding the act, fact or omission causing the injury to his rights, which happens when a precise delay of time has elapsed without the claim being brought before the courts.

This clause for the inadmissibility of the amparo suit is also equivalent to what in North American procedure for injunction is called laches, which as resumed by Tabb and Shoben, “bars a suitor in equity who has not acted promptly in bringing the action; it is reflected in the maxim: ‘Equity aids the vigilant, not those who slumber in their rights’”⁵⁸⁶.

As argued in *Lake Development Enterprises, Inc. v. Kojetinsky*, 410 S.W. 2d 361, 367-68 (Mo. App. 1966):

“‘Laches’ is the neglect, for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done. There is no fixed period within which a person must assert his claim or be barred by laches. The length of time depends upon the circumstances of the particular case. Mere delay in asserting a right does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the defendant. Laches is a question of fact to be determined from all the evidence and circumstances adduced at trial”⁵⁸⁷.

The difference between the doctrine of laches regarding injunctions and the Latin American concept of tacit consent referred to amparo suits, basically lays in the fact that the delay to file the action for amparo in Latin America, is in general expressly established in the Amparo Laws, so the exhaustion of the delay without the filing of the action, is what is considered to be a tacit consent regarding the act, the fact or the omission causing the injury.

In this regard, and only with few exceptions, as Ecuador⁵⁸⁸ and Colombia (where for instance, the tutela law establishes that the action for tutela can be filed in any moment, Art. 11), the Amparo Laws in Latin America set forth a delay, considering that it is tacitly understood that the injured party has consented the acts, when the recourses or actions are not filed within the delays set forth in the statutes. The established delay varies in the legislation in a number of days counted from the date of the challenged act or from the day the injured party has known about the violation: Argentina, 15 days (Art. 2,e); Brazil, 120 days (Art. 18); Guatemala, 30 days (Art. 20); Honduras, 2 months; México, 15 days as a general rule, but with many other delays with different length of time (Arts. 21, 22 and 73,XII); Nicaragua, 30 days (Art. 26; 51,4); Peru, 60 days (Arts. 5,10; 44); Uruguay, 30 days (Art 4); Venezuela, 6 months (Art. 6,4). In the cases of Dominican Republic and Chile, where the delay (15

585 See William M. Tabb and Eliane W. Shoben, *Remedies*, Thomson West, 2005, pp. 50-51

586 See William M. Tabb and Eliane W. Shoben, *Remedies*, Thomson West, 2005, p. 48.

587 See the reference Owen M. Fiss and Doug Rendelman, *Injunctions*, The Foundation Press, Mineola New York, 1984, pp. 102-103.

588 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito 2004, p. 81

days) has been regulated by Supreme Court, discussions have arisen regarding the constitutionality of such norms, due to the criteria that a delay of such type must be only established by the Legislator⁵⁸⁹

In Costa Rica, the Constitutional Jurisdiction Law establishes that the amparo recourse can be filed at any time while the violation, threat, injury or restriction endures, and up to 2 months after the direct effects regarding the injured party, have ceased (Arts. 35, 60). This delay can also be suspended if the interested party decides to file an administrative recourse against the particular act (Art. 31). Regarding this clause of inadmissibility of the amparo action, the former Supreme Court of Justice of Venezuela ruled in a decision of October 24, 1990, that:

“Being the amparo action a special, brief, summary and effective judicial remedy for the protection of constitutional rights...it is logic for the Legislator to prescribe a correct proportion of time between the moment in which the harm is produced and the moment the aggrieved party is to file the action. To let pass more that 6 months from the moment in which the injuring act is issued for the exercise of the action is the demonstration of the acceptance of the harm from the side of the aggrieved party; the indolence must be sanctioned, impeding the use of the judicial remedy that has its justification on the urgent need to reestablish a legal situation”⁵⁹⁰.

Of course, as a general rule in this matter, the exhaustion of the delay without filing the amparo action, although considered as a tacit consent regarding the injury, does not prevent the interested person from filing any other recourse or action against the act provoking the harm, as it is expressly regulated in the Costa Rican Law (Art. 36)⁵⁹¹.

A particular aspect can be mentioned, regarding the situation in cases of wrongs that are continuous in nature. In the United States, it is considered that laches cannot be urged as a defense to a suit to enjoin a wrong which is continuing in its nature (*Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65, 216 P. 2d 404, 1950; *Goldstein v. Beal*, 317 Mass. 750, 59 N.E. 2d 712, 1945)⁵⁹². A similar rule has been applied for instance, in Venezuela, where the First Court on Administrative Judicial review actions in a decision of October 22, 1990 (Case: *María Cambra de Pulgar*) in which when deciding on a defense on inadmissibility of an action, ruled:

“In spite that a number of the facts indicated had been produced more that 6 months ago, they have been described in order to reveal a supposed chain of events that, due to their constancy and re incidence, allows presuming that the plaintiff is threatened with those facts being repeated. This character of the threat is what the amparo intends to stop. According to what the plaintiff point out, no tacit consent can be produced from his part ... Consequently, there are no grounds for the application to any of the inadmissibility clauses set forth in the Amparo Law”⁵⁹³.

589 See Juan Manuel Errazuriz and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago 1989, p. 130; Miguel A. Valera Montero, *Hacia un nuevo concepto de Constitución*, Santo Domingo, 2006, p. 404.

590 See in *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 144.

591 See the comments in Ruben Hernández Valle, *Derecho procesal Constitucional*, Editorial Juricentro, 2001, pp. 226-229, 243.

592 See the references in Kevin Schroder, John Glenn and Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol. 43A, Thomson West, 2004, p. 329

593 See decision of October 22, 1990, in *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, pp. 143-144

VII. EXCEPTIONS TO THE TACIT CONSENT RULE

On the other hand, since there are constitutional question involved, the Laws establish various exceptions regarding the caducity or lapsing of the action. For instance, in Honduras, it is expressly regulated that the action can be filed after the exhaustion of the delay, when the impossibility to bring the action before the court is duly proved (Art. 46,3). In similar sense it is regulated in Article 4 of the Uruguayan Law when the plaintiff has been impeded by "just cause" to file the action.

In México, in particular, regarding the amparo against laws, the action can be filed not only against the statute, but also after the exhaustion of the delay, against the first concrete act that applies it; so the tacit consent rule applies in this case, only when the latter is not challenged in the delay set forth in the Amparo Law (Art. 73,XII)⁵⁹⁴. But additionally to this particular exception, Article 22 of the Amparo Law of Mexico establishes other general exception to the tacit consent rule, in cases of authority acts endangering the life, the personal freedom, deportation, any other acts prohibited in Article 22 of the Constitution, or the forced incorporation to the army⁵⁹⁵. In these cases the amparo action can be brought before the courts at any time. Also the amparo action can be filed at any time, in cases of the protection of peasants rights related to communal land (Art. 217).

In Costa Rica, Article 20 of the Constitutional Jurisdiction Law also establishes as an exception regarding the delay, in cases in which the amparo action is filed against the risk of an unconstitutional law or regulation to be applied in concrete cases, as well as in cases of a manifest possibility of acts harming the plaintiff rights could be issued or occur.

In Venezuela, the Amparo Law also provides a few exceptions regarding the tacit consent rule, when the amparo action is filed together or jointly with another nullity action, in which cases the general 6 month delay established for the filing of the action does not apply. This is the rule in cases of harms or threats originated in statutes or regulations, and in administrative acts or public administration omissions, when the amparo action is filed jointly with the popular action for judicial review of unconstitutionality of statutes, or with the judicial review action against administrative actions or omissions.

Regarding the judicial review popular action against statutes, it is conceived in the Organic Law of the Supreme Tribunal as an action that can be filed at any time, so if a petition for amparo is filed together with the popular action, no delay is applicable. This is why, no tacit consent can be understood when the harm is provoked by a statute.

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

Finally, mention must be done to the exception regarding the tacit consent rule regarding actions or omissions established in Article 6,4 of the Venezuelan Amparo Law, in cases when the violations of

594 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 391; Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Austin Press, Austin 1971, p172.

595 Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España*, Editorial Porrúa, México 2002, p. 331

constitutional rights infringes “public order and good conduct”, an exceptional situation that must derive from a rule of law⁵⁹⁶.

This concept of “public order” in the Venezuelan legal system refers to situations where the application of a state concerns the general and indispensable legal order for the existence of the community, which cannot be bequeathed; and it does not apply in cases that only concern the parties in a contractual or private controversy. As ruled by the Cassation Chamber of the Supreme Court in Venezuela, in a decision of April 3, 1985, “the concept of public order tend to make the general interest of the Society and of the State to win over the individual particular interest, in order to assure the enforcement and purpose of some institutions”⁵⁹⁷.

For instance, as a matter of general principle, public order provisions in public law are those establishing competencies or attributions to the public entities⁵⁹⁸, including the Judiciary, and those concerning the taxation powers of public entities. In private law, for instance, all the provisions referring to the status of persons (for instance: *patria potestas*, divorce, adoption) are norms in which public order and good customs are involved⁵⁹⁹.

But in many cases it is the lawmaker itself that has expressly declared in a particular statute that its provisions are of “public order” character, in the sense that its norms cannot be modified through contracts. That is the case for instance, of the 2004 Consumers and Users Protection Law⁶⁰⁰, where Article 2 sets forth that its provisions are of public order and may not be renounced by the parties.

Regarding the amparo action and the exception to the tacit consent rule, the First Court of Administrative Judicial Review, has ruled as follows:

“It is true that the tacit or express consent does not extinguish the action when the violation infringes the public order or the good customs, and that Article 14 of the Amparo Law qualifies the action, whether in its principal or incidental aspects up to the judicial decision execution, as “eminent public order”. A textual interpretation could lead to the absurd of considering that, because all matters of amparo are of public order, the express consent (configured by the delay exhaustion) does not extinguish the action; but such interpretation contradicts the logic of the system and the nature of amparo, which is a brief and speedy mean regarding actual harms. Thus, it must be interpreted that the extinction of the amparo action due to the elapse of the delay (express consent, according to the legislator), is produced in all cases, except when the way through which the harm has been produced, is of such gravity that it constitutes an injury to the juridical conscience. It would be the case, for instance, of flagrant violations to individual rights that cannot be de-

596 See decision of the Politico Administrative Chamber of March 22, 1988, in *Revista de Derecho Público*, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 114

597 See the reference in decisión of the Politico Administrative Chamber of February 1, 1990 (*Case Tuna Atlántica C.A.*) and of June 30, 1992, in *Revista de Derecho Público*, n° 60, Editorial Jurídica Venezolana, Caracas, 1992, p. 157

598 See for instante, decisión of the Constitucional Chamber of the Supreme Tribunal of March 1, 2001 (*Case: Alcalde del Municipio Baruta, Bingos*). See the reference in Rafael Chavero G., *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001, 187

599 Allan R. Brewer-Carías, *Contratos Administrativos*, Editorial Jurídica Venezolana, Caracas, 1992, pp. 265-268.

600 *Official Gazette*, n° 37.930, May 4th 2004

nounced by the affected party; deprivation of freedom; submission to physical or psychological torture; maltreatment; harms to human dignity and other extreme cases”⁶⁰¹.

Consequently not all violations of constitutional rights and guarantees are considered in their selves as having public order concern, but only those where the juridical or legal conscience of society is harmed, like when human dignity is injured in a flagrant and grave way, as happens with freedom deprivation and infringement of tortures. In such cases, no tacit consent can be admitted, and the amparo judicial protection must be admitted even tough the delay for filing the action would have been exhausted.

601 See the decision of the First Court on Judicial Review of Administrative Actions of October 13, 1988, in *Revista de Derecho Público*, n° 36, Editorial Jurídica Venezolana, Caracas, 1988, p. 95. This opinion was followed exactly by the Politico Administrative Chamber of the Supreme Court of Justice, decision of November 1, 1989, in *Revista de Derecho Público*, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 111; and by the Cassation Chamber of the same Supreme Court of Justice, in decision of June 28, 1995, (Exp. n°. 94-172). See the reference in Rafael Chavero G., *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas, 2001, p. 188, note 178. See other judicial decision on the matter in pp. 214 and 246.

CHAPTER XII

THE DAMAGING OR INJURER PARTY IN THE AMPARO SUIT, AND THE ACTS OR OMISSIONS CAUSING THE HARM OR THE THREATS TO CONSTITUTIONAL RIGHTS

The amparo suit is governed by the principle of bilateralism, in the sense that not only the procedure must be initiated by a plaintiff that must in principle be the party whose constitutional rights and guaranties have been injured or threatened, but in principle, it must also always exist a defendant party, that is, the party whose actions or omissions are those precisely causing the harm or threats. This means that the judicial decision the plaintiff is seeking through the amparo suit, must always be directed to somebody that must be individuated⁶⁰².

This is similar to what occurs in the United States, regarding injunctions, referring to its individuated character, which implies that in general terms the resulting judicial order must be “addressed to some clearly identified individual, not just the general citizenry”⁶⁰³

I. THE QUESTION OF THE INDIVIDUATION OF THE DEFENDANT

The general principle regarding amparo, then, is that in the complaint, the plaintiff must clearly identify the authority, public officer, person or entity against whom the action is filed, that is the defendant, as is set forth in the Amparo Laws (Argentina, Art. 6,b; Bolivia, 97,II; Colombia, Art. 14; Costa Rica, Art. 38; El Salvador, Art. 14,2; Guatemala Art. 21,d; Honduras, Art. 21; 49,4; México 116, III; 166,III; Nicaragua, Art. 27,2; Panama, Art. 2619,2; Paraguay, Art. 6,c; Peru, Art. 42,3; Venezuela Art. 18,3).

Nonetheless, some legislations although establishing that the need for the identification of the defendant, provide that this condition only applies “when it is possible” (Argentina, Art. 6,b; Colombia 14; Nicaragua, Art. 25; 55; Venezuela Art. 18, 3); and some Laws as the Paraguayan one, even establish that when the identification of the defendant is not possible, it is for the judge to provide the necessary measures in order to establish the procedural bilateral relation.

Thus, from the beginning of the procedure when the action is filed, or latter in the proceeding, the bilateral character of the amparo suit implies that in principle, a procedural relation must be established between the injured party and the injurer one, which must participate in the process. This implies the individuation character of the suit, equivalent to its personal character.

602 The only exception to the principle of bilateralism is the case of Chile, where the offender is not consider a defendant party but only a person whose activity is limited to inform the court and give it the documents it have. That is why in the Regulation set forth by the Supreme Court it is said that the affected state organ, person of public officer just “can” appear as party in the process. See Juan Manuel Errazuriz G. and Jorge Miguel Otero A, *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile 1989, p. 27.

603 See Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press, 1978, p. 12

In this regard, the former Supreme Court of Justice of Venezuela in a decision of December 15, 1992 pointed out that:

“The amparo action set forth in the Constitution, and regulated in the Organic Amparo law, has among its fundamental characteristic its basic personal or subjective character, which implies that a direct, specific and undutiful relation must exist between the person claiming for the protection of his rights, and the person purported to have originated the disturbance, who is to be the one with standing to act as defendant or the person against whom the action is filed. In other words, it is necessary, for granting an amparo, that the person signaled as the injurer be in the end, the one originating the harm”⁶⁰⁴.

But as mentioned, in some situations, it is not possible for the plaintiff or for the judge, to clearly identify the defendant. The important aspect to clearly determine is the fact or action causing the harm, in which case, even without the identification of the exact authority or public officer who had produced it, the constitutional protection must be given. In Argentina this question has been analyzed, and it has been considered as a general principle, that the individuation of the author of the challenged act or omission will only be requested, when possible, because “preferably the amparo tends to focus on the damaging act and only in an accessory way in its author”⁶⁰⁵. In other words, that once the injurer act has been proved, the sole fact that its author has not been determined, cannot impede the decision to repair the harm, “due to the fact that the amparo action tends to restore the aggrieved constitutional rights, more than to individualize its author”⁶⁰⁶.

That is why, in the *Angel Siri* Argentinean leading case, in which and without statutory regulations, the Supreme Court in Argentina admitted the amparo action, the Court protected the owner of a newspaper that was shoot down by the government, notwithstanding that in the files there was no clear evidence regarding the authority that closed it, nor the motives of the decision⁶⁰⁷.

Nonetheless, in case of absence of individuation of the author of the injuring action, the court must to adopt the necessary measures in order to determine it, and eventually, for the purpose of preserving the bilateral character of the process, designate a public defendant in the case. The Uruguayan Amparo law in this regard expressly provides the possibility to file the action in urgent cases even without knowing with precision about the person responsible for the harm fact, in which case, the court must publish public notices to identify it, and in case of the responsible not showing, the court must appoint an ex officio defendant (Art. 7).

Nonetheless, in other cases of absence of individuation of the injurer party, the claim has been rejected when it is determined that what the plaintiff pretends is to force the court to do the job. It was the case decided by the Argentinean Supreme Court rejecting an amparo actions filed by the former President of the Republic *Juan D. Perón* case, asking for the return of the body of his dead wife. In that case, the Supreme Court ruled about the need for a “minimal individuation of the author of the act originating the claim”, due to the fact that:

“the general principles of procedural law do not suffer any exception due to the exceptional character of the amparo, and must be respected, in order to eventually assure the exercise of the right

604 See decision of the Politico Administrative Chamber of the Supreme Court of Justice of December 16, 1992 (Caso *Haydée Casanova*), *Revista de Derecho Público*, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 139.

605 See Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea, Buenos Aires, 1987, p. 92

606 José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, p. 274.

607 See José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 275-276.

to defense, from which the counterpart must not be deprived... This is evident from the text of the suit in which it is affirmed that the act provoking the claim has been executed 'by disposition of the former Provisional Government' without adding any other reference or explanation regarding the pointed public officer or entity. It is evident that the minimal requirements of individuation of the defendant, referred above, have not been accomplished in the case. On the contrary what is revealed in the files of this case, is that in lieu of seeking protection to his constitutional guarantees harmed by a an illegal State act, the plaintiff has intended to use the amparo procedure with the purpose of obtaining from the judges the order to practice the necessary inquiries regarding the facts, which are not proved or specified with precision. And it is clear that the performance of the instruction phase can not be achieved by means of this amparo remedy, whose incorporation to Argentinean positive law has purposes different to the one pursued in this case"⁶⁰⁸.

Anyway, with the aforementioned exceptions, the principle of the individuation of the defendant rules in amparo matters. If the aggrieving party is a natural person (human being), whether a public officer or an individual, it must be identified in the usual way, being necessary in any case, to be the person originating the harm or threat to the plaintiff's rights. Being the aggrieving party an artificial person which needs to act through its representatives, whether it be a public entity or a corporation, the action for amparo must be filed against it, identifying with precision the entity and its representative, when possible. In the latter case, the action can be filed against the entity or corporation itself, or personally against the representative itself (public officer or manager), if the harm or threat has been personally provoked by the latter, independently of the artificial person or entity for which he is acting.

That is, as it has been decided by the Venezuelan courts, the aggrieving party must always be directly responsible for the conduct violating the constitutional rights and guaranties of the aggrieved party⁶⁰⁹; consequently, if a person is denounced as aggrieving without being so, the amparo action must be rejected⁶¹⁰ As decided by the First Court on Judicial review of Administrative Action in a decision of July 13, 1993:

"Among the basic characteristics of the amparo action, it is its subjective character, which requires for its admissibility that the threat of violation of a constitutional right be immediate, possible and realizable by the person identify as aggrieving, which means that in the case of a once materialized violation, it must be executed directly by the accused, that is, a direct relation must exist between the person asking for the protection to his rights and the person identified as aggrieving who will be the one with standing, and this being the person against whom the action is filed. This leads to affirm that for the admissibility of the amparo action, it is necessary that the person identified as aggrieving eventually be the one causing the purported harm and the one which would be obliged to follow the amparo order in case of the granting of the protection petition.

This essentially personal and subjective character of the amparo action results from the very reading of Article 18,3 of the Amparo Law which imposes on the plaintiff the burden of sufficiently identifying the aggrieving party, when possible. It is also evident from Article 32,a, where it is set forth the need for the decision to expressly mention "the authority, private body or person against

608 Fallos: 248-537, referred in José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, p.275

609 See decisions of the First Court on Judicial Review of Administrative Action of May 12, 1988, *Revista de Derecho Público*, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 113; and of June 16, 1988, *Revista de Derecho Público*, n° 35, Editorial Jurídica Venezolana, Caracas, 1988, p. 138.

610 See decision of the Politico Administrative Chamber of the Supreme Court of Justice of November 22, 1993, *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 487-489

whose acts or resolution the amparo is conceded; because on the contrary it could happen that processes could be filed against persons different to those that supposedly caused the harm, which will be contrary to the spirit, purpose and *raison d'être* of the Amparo Law. Anyway, the problem of the precise identification of the aggrieved party has been raised regarding amparo actions against Public Administration activities, in order to avoid that the amparo actions be unnecessarily filed against the Republic as a legal person. The necessary identity between the 'aggrieved party and the person accused as being the aggrieved -which must be the one provoking the constitutional harm- has been repeatedly ruled by this Chamber, particularly in order to avoid the filing of amparo processes against the Republic, and to encourage the filing against the specific public officer who produced the purported harm act, fact or omission. In this sense it was decided in ruling of August 1^o, 1991 (Case: *María Pérez, n^o 391*) where it was said that "the constitutional amparo action, because of its special nature, is an action directly filed against the administrative authority which harms or threatens to harm the constitutional right"⁶¹¹.

That is why Article 27 of the Venezuelan Amparo Law provides that in case of amparo against public officials, the court deciding on the merits must notify its decision to the competent authority "in order for it to decide the disciplinary sanctions against the public official responsible of the violation or the threat against a constitutional right or guarantee". This implies that in the filing of the action of amparo in cases of Public Administration activities, "the person acting on behalf of (or representing) the entity who caused the harm or threat to the rights or guarantees must be identified, which is, the signaled person who has the exact and direct knowledge of the facts"⁶¹².

But the requirement to identify the individual or natural person representative of the entity causing the harm, does not imply that the action must always be filed against such individual; it can be directly filed against the entity in itself. This has been for instance, the general trend in civil right injunctions in the United States, particularly when filed through class actions where the loss of individuation in the act and beneficiary has also provoked its address "to the office rather than the person"⁶¹³.

This is also the sense of aggrieved authority in the Mexican system where the responsible authority is conceived in institutional rather than personal terms, in the sense that the institution involved remains responsible regardless of the changes in personas⁶¹⁴. In this sense it has been decided by the Supreme Court of Mexico, ruling that the discharge, transfer, promotion, demotion, death, or other removal of the individual who has actually ordered or executed the act object of the complaint, or any transfer of jurisdiction over the matter in contest, is no bar to the suit⁶¹⁵.

Thus, the amparo suit against artificial persons can be filed against the organ or directly against the person in charge of it. In the former case, the person in charge can be changed, that is for instance the case of public entities, where the public official can be changed, but this circumstance does not

611 See decisión of the Politico-Administrative Chamber of the Supreme Court of Justice of December 15, 1992 (Caso *Haydee Casanova*), *Revista de Derecho Público*, n^o 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 139.

612 See decision of the First Court on Judicial Review of Administrative Action of June 16, 1988, *Revista de Derecho Público*, n^o 35, Editorial Jurídica Venezolana, Caracas, 1988, p. 138

613 See Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press 1978, p. 15

614 See Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin 1971, p. 209

615 Suprema Corte, *Jurisprudencia de la Suprema Corte*, Tesis 183, II, p. 365; also Suprema Corte, *Montufar Miguel*, 17 S.J. 798 (1925). See the references in Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin 1971, p. 208-109, note 36

change the bilateral relation between aggrieved and aggrieving parties. As it has been decided by the Venezuelan First Court on Judicial review of Administrative Action in a decision of September 28, 1993 regarding an amparo action filed against the dean of a Law Faculty, in which case the person in charge as Dean was changed:

“the heading of the position does not change its organic unity. If the dean of the Faculty changes, it will always be a subjective figure that substitutes the preceding one. That is why in a decision of September 11, 1990 this Court ruled that the circumstance of the head of an organ mentioned as aggrieving being changed does not alter the procedural relation originated with the amparo action. To the latter it must in this case be added that it would have no sense to rule that the procedural relation be continued with the person that doesn't occupy anymore the position, because in case the constitutional amparo is granted, then the ex public official would not be in a position to reestablish the factual infringed situation. As much, the former public officer could be liable for the damages caused, but as it is known, the amparo action has the only purpose of reestablishing the harmed legal situation, and that can only be assured by the current public official”⁶¹⁶.

Consequently, according to the Venezuelan judicial doctrine on the matter, in cases in which the aggrieved party identifies with precision as aggrieving the public official responsible for the harm, it is this one and only him who must act in the procedure, in which case no notice must be made to its superior or to the Attorney general⁶¹⁷. Conversely, if the action is for instance filed against a Ministerial entity as an organ of the Republic, the action must be understood to be filed against the latter, being in such cases the Attorney general the entity that must act as the judicial representative of it⁶¹⁸. On the contrary, if the amparo suit is exercised against a perfectly identified and individuated organ of Ministerial entity and not against the Republic, the judicial representative of the latter has no procedural role to play⁶¹⁹. That is, if the amparo action is directed against an individuated administrative authority, for instance, a Ministry, the representative of the Republic can not act on his behalf⁶²⁰. In such cases, it is the individuated person or public officer that must personally act as aggrieving party⁶²¹.

616 See decision of the First Court on Judicial Review of Administrative Action of September 28, 1993, *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 330

617 See decisions of the First Court on Judicial Review of Administrative Actions of May 12, 1988, *Revista de Derecho Público*, n° 34, Editorial Jurídica Venezolana, Caracas, 1988, p. 113; and of September 7, 1989, *Revista de Derecho Público*, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 107. Also decision of the Politico Administrative Chamber of the Supreme Court of Justice of March 16, 1989, *Revista de Derecho Público*, n° 38, Editorial Jurídica Venezolana, Caracas, 1989, p. 110;

618 See decision of the First Court on Judicial Review of Administrative Actions of September 7, 1989, *Revista de Derecho Público*, n° 40, Editorial Jurídica Venezolana, Caracas, 1989, p. 107

619 See decision of the First Court on Judicial Review of Administrative Actions of November 21, 1990, *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 148.

620 See decisions of the First Court on Judicial Review of Administrative Actions of October 10, 1990, *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 142; and of July 30, 1992, *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana, Caracas, 1992, p. 164; and decisions of the Politico Administrative Chamber of the Supreme Court of Justice of August 1, 1991, *Revista de Derecho Público*, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, p. 120, and of December 15, 1992, *Revista de Derecho Público*, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 139.

621 See decision of the Politico Administrative Chamber of the Supreme Court of Justice of March 8, 1990, *Revista de Derecho Público*, n° 42, Editorial Jurídica Venezolana, Caracas, 1990, p. 114; and of the First Court on Judicial Review of Administrative Actions of November 21, 1990, *Revista de Derecho Público*, n° 44, Editorial Jurídica Venezolana, Caracas, 1990, p. 148. Igualmente en FUNEDA, *15 años de Jurisprudencia*, cit., p. 164; and of July, 14, 1988, FUNEDA, *15 años de Jurisprudencia*, cit., p. 177.

II. THE DEFENDANT IN THE AMPARO SUIT: AUTHORITIES AND INDIVIDUALS

One of the most important aspects regarding the damaging, aggrieving or injurer party in the amparo suit, that is, the defendant, is related to whether the amparo can only be filed against public authorities or can it also be filed against particulars or individuals. That is, whether the specific judicial means of amparo is only established for the protection of constitutional rights and guaranties against public entities and authorities harms or threats, that is, in general terms, against the State, or it can also be used against private individuals' actions harming or threatening such rights.

The former position can be considered as the general trend in Latin America, following the historical fact that the amparo suit was originally created to protect individuals against the State. Nonetheless, nowadays, in the majority of the countries, this situation does not exclude the admission of the amparo suit for the protection of constitutional rights against individual's actions, as is the case in Argentina, Bolivia, Chile, Dominican Republic, Peru, Venezuela and Uruguay, as well as, although in a more restrictive way, in Colombia, Costa Rica Ecuador, and Guatemala.

III. THE AMPARO AGAINST PUBLIC AUTHORITIES: PUBLIC ENTITIES AND PUBLIC OFFICERS

In general terms, all Latin American countries establish that the amparo action shall be filed against public entities and public officials, following the original features of the amparo as a special judicial means for the protection of human rights, facing the State. But this situation, as mentioned before, has changed to the point that, nowadays, the countries that only admit the amparo suit against public entities or officers, excluding the suit against individuals or private persons, are the minority, as is the case in Brazil, El Salvador, Panama, Mexico and Nicaragua. In all the other Latin American countries, additionally to the amparo suit against public entities and officers, the action for constitutional protection can be filed against private parties.

Regarding civil rights injunctions, the United States can also be included in the former group. If it is true that in this country, injunctions, as general judicial means for rights' protection can be filed against any person as "higher public officials or private persons"⁶²² causing the harm to a right, in matters of constitutional or civil rights guaranties, it has been considered that it is only admissible regarding public entities. As explained by, M. Glenn Abernathy and Barbara A. Perry:

"Limited remedies for private interfere with free choice. Another problem in the citizen's search for freedom from restriction lies in that many types of interference stemming from private persons do not constitute actionable wrongs under the law. Private prejudice and private discrimination do not, in the absence of specific statutory provisions, offer grounds for judicial intervention on behalf of the sufferer. If one is denied admission to membership in a social club, for example, solely on the basis of his race or religion or political affiliation, he may understandably smart under the rejection, but the courts cannot help him (again assuming no statutory provision batting such distinctions). There are, then, many types of restraints on individual freedom of choice which are beyond the authority of courts to remove or ameliorate.

It should be noted that the guarantees of rights in the United States Constitution only protect against governmental action and do not apply to purely private encroachments, except for the

622 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, p. 8.

Thirteenth Amendment's prohibition of slavery. Remedies for private invasion must be found in statutes, the common law, or administrative agency regulations and adjudications"⁶²³.

In Latin America, as mentioned before, only Brazil, El Salvador, Panama, Mexico and Nicaragua leave the amparo action to be filed no more than against the State, that is, public entities and public officials. This was the situation at the origin of the amparo suit in Mexico, as it currently remains when Article 103 of the Constitution provides that the amparo shall be filed against infraction to constitutional guarantees committed by an "authority", in the sense that it must always be a responsible authority. Accordingly, Article 11 of the Amparo Law points out that "The authority responsible is the one who edicts, promulgates, orders, executes or tries to execute the statute or the claimed act". This article has been interpreted in the sense that authorities are not only those superior ones which order the acts, but also those subordinate ones that execute or try to execute them; the amparo being admitted against any of them"⁶²⁴.

This term "authority" could be interpreted in the wider sense of any public entity of public official regardless its powers of functions. This is the sense given, for instance, to the Amparo laws of Argentina, Peru or Venezuela. But in Argentina, the notion of "authority" regarding the amparo suit, even though apparently wider, has in fact a restrictive meaning, when it refers only to those public officers with power to decide. As was defined in the *case Campos Otero Julia* (1935), this term is understood as "an organ of the State legally vested with the powers of decision and command necessary for imposing upon individuals either its own determinations or those that emanate from some other State organs"⁶²⁵. This definition was expanded to include "all those persons who dispose of public power (*fuerza pública*) by virtue of either legal or *de facto* circumstances, and who, consequently find themselves in a position to perform acts of a public character, due to the fact that the power they have is public"⁶²⁶.

Three aspects must be emphasized regarding the judicial doctrine on the notion of "authority" in Mexico: First, the idea of the *de facto* public officer, in the sense that even if the offender is not the legitimate holder of the public office whose authority is exercised, the amparo must be admitted because the harm is caused by some one that pretends to be exercising public power, the citizens having the right to legitimate confidence in those who exercise public power.

Second, that because the definition of "authority" refers to those public entities that are in a position to make a decision and to impose or execute them by a coercive use of public power, in many cases, the courts had rejected the amparo suit against public entities considering that they do not have the power to decide, like those with purely staff or consultative nature⁶²⁷. According to this interpreta-

623 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, p. 6.

624 See "Autoridades para efectos del juicio de amparo" (*Apéndice al Semanario Judicial de la federación, 1917-1988, Segunda parte, tesis 300, p. 519*). See the reference in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México, 2002, p. 254.

625 See Suprema Corte, *Campos Otero Julia*, 45, S.J. 5033 (1935). See the reference in Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin, 1971, p.94

626 See "Autoridades para efectos del juicio de amparo" (*Apéndice al Semanario Judicial de la Federación, 1917-1988, Segunda parte, tesis 300, p. 519*). See the reference in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial porrúa, México 2002, p. 253. Also see Suprema Corte, *Jurisprudencia de la Suprema Corte*, thesis 179, II, 360. see the referente in Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin, 1971, p.94.

627 Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin, 1971, p.95.

tion, for instance, many decentralized public entities like *Petróleos Mexicanos*, the National Commission on Electricity, the Human Rights' Defendant of the UNAM and the Autonomous Universities were initially excluded from the category of "authorities"⁶²⁸. Nonetheless, progressively the amparo suit has been admitted against some of these entities based on the decision powers they have in concrete cases⁶²⁹.

Third, that from a procedural point of view, all the authorities materially involved in the aggrieving action must be identified by the plaintiff in his action and be notified by the court; not only those who ordered the action, but those who have decided it and that have to execute or apply it. As decided by the Supreme Court: if in the amparo claim it is only mentioned the responsible authority adopting the act –the authority who orders– and the suspension of the act is requested, this cannot be granted because the situation will be of acts consented; on the contrary, if there are only mentioned as responsible authorities those who have executed the act, then the suspension can be granted, but the case must be discontinued because the facts resulted from a consented act⁶³⁰.

In contrast with this restrictive interpretation on the concept of authority regarding the Mexican amparo suit, in Argentina, for instance, the amparo action can be filed against "any public authority act or omission" (Art. 1), being interpreted the term "public authority", in a wide sense including all sorts of public entity or officials of all branches of government. It must be said that the expression "public authority" in Article 1 of the the Amparo Law was incorporated because of the intention of the 1964 legislator to not regulate the amparo against individuals, which nonetheless was already admitted by the Supreme Court and later expressly regulated in the Civil Procedure Code. Even though the expression could also be interpreted in a restrictive way referring only to public officers with *imperium*, that is, those with power to command and to edict obligatory decisions and to require the use of public force to execute them, the general trend is to interpret it in a wide sense comprising any agent, employee, public official, magistrate of government agent acting in that condition, including individuals accomplishing public functions, like the public services concessionaries⁶³¹. In some cases it has even been considered that actions of a Provincial Constituent Assembly violating constitutional rights can be challenged via the amparo action⁶³²

In similarly wide sense, the term "public authorities" is also conceived for the purpose of the amparo protection, for instance, in Bolivia (Art. 94), Colombia (Art.1), El Salvador (Art. 12), Peru (Art. 2), Uruguay (Art. 2) and Venezuela (Art. 2). In Brazil, Article 1 of the statute regulating the *mandado de segurança* provides that this action can be filed against any violation provoked by "authorities, no matter its category and functions"; and in Nicaragua the expression refers to "any public official, au-

628 See the references to the judicial decisions in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México, 2002, pp, 255-256.

629 Se Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p, 257

630 See the Supreme Court jurisprudencia on "Actos Consumados. Suspensión "improcedente" y actos derivados de actos consentidos" en Apéndice al Semanario Judicial de la federación, 1917-1995, Primera sala, tesis 1090, p. 756; y Tribunal Pleno, Tesis 17, p. 12. See the references in in Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p, 255, notes 450 and 451.

631 See Néstor Pedro Sagüés, *Derecho procesal Constitucional, Vol 3, Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp.91-93; Joaquín Brague Camazano, *La Jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, México 2005, p. 97. José Luis Lazzarini, *El juicio de amparo*, Editorial La Ley, Buenos Aires 1987, pp. 208-209

632 See Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires, 1987, pp. 24-25.

thority of its agents" (Art. 3). Some legislations, in order to dissipate any doubts, are enumerative and include any act from any of the branches of government, including delegated, decentralized or autonomous entities, municipal corporations or those supported with public funds or that act by delegation of a State organ by means of a concession, contract or resolution (Guatemala Art. 9, Honduras Art. 41).

The only Latin American country where the amparo action regarding authorities is statutorily reduced expressly to those of the Executive branch of government is Ecuador, where Article 46 of the Amparo Law only admits the amparo against "public administration authorities" (Art. 46).

But besides this specific exception, in contrast, it can be said that in almost all other Latin American countries, the amparo action is established as a specific judicial means for the protection of constitutional rights and guarantees against any acts, facts or omissions of any public authority (public entities or public officials), which can be part of any of the branches of government, whether executive, legislative, judicial or control.

As set forth in the Guatemalan Amparo law, "*no sphere shall be excluded from amparo*" and the action will be admitted against acts, resolutions, dispositions and statutes of authority which could imply a threat, a restriction or a violation of the rights guaranteed in the Constitution and in statutes" (Art. 8).

It is also the case in Venezuela, where Article 2 of the Amparo law provides that the action can be filed against "any fact, act or omission of any of the National, States, of Municipal Public Powers (branches of government); which means that the constitutional protection can be filed against any public action, that is, any formal state act, any material action and any factual activity (*vía de hecho*) (Art. 5); as well as against any omission from public entities.

This universality of the amparo suit has been developed by judicial decisions doctrine. For instance, in the case *Aura Loreto Rangel*, the First Court on Judicial review of Administrative Action of November 11, 1993, it was ruled that:

"From what Article 2 of the Amparo law sets forth, it results that there is no conduct type, regardless of its nature or character, or from their authors, which can be excluded per se from the amparo judge revision in order to determine if it harms or not constitutional rights or guarantees"⁶³³.

The same criterion has been adopted by the Political Administrative Chamber of the Supreme Court of Justice in a decision of may 24, 1993 as follows:

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

633 See in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 284.

as a protective remedy regarding public freedoms whose purpose is to reestablish its enjoyment and exercise, when a natural or artificial person, or group or private organization, threaten to harm them or effectively harm them (See, regarding the extended scope of the protected rights, decision of December 4, 1990, Case *Mariela Morales de Jimenez*, n° 661)⁶³⁴.

In another decision dated February 13, 1992, the First Court ruled:

“This Court observes that the essential characteristic of the amparo regime, in its constitutional regulation as well as in its statutory development, is its universality.., so the protection it assures is extended to all subjects (physical or artificial persons), as well as regarding all constitutionally guaranteed rights, including those that without being expressly regulated in the Constitution, are inherent to human beings. This the departing point in order to understand the scope of the constitutional amparo... Regarding Public Administration, the amparo against it is so extended that it can be filed against all acts, omissions and factual actions, without any kind of exclusion regarding some matters that always related to the public order and social interest”⁶³⁵

Notwithstanding this general principle of the universality of the amparo, a series of exceptions can be identified in many legislations, regarding some particular and specific State activities that are expressly excluded. In this regard, we will analyze the situation regarding the amparo against legislative, executive and judicial acts as well as the particular exceptions established in the statutory regulations of the amparo suit.

1. The Amparo against legislative actions

Congress and parliamentary commissions are public authorities, and by means of its actions they can harm constitutional rights and guaranties; that is, legislative bodies, from national Congress down to municipal councils, can be a source of interference with personal freedom⁶³⁶. Against such legislative actions or omissions that injure constitutional rights or guarantees, amparo suits can be brought before the competent courts.

A. Amparo against parliamentary bodies' and their commissions' decisions

Regarding parliamentary bodies (Chambers) and its commissions, in Argentina, Costa Rica⁶³⁷ and Venezuela, for instance, the amparo action has been admitted against their acts when they harm constitutional rights.

In Argentina, it was the case of the parliamentary enquiries developed in 1984 regarding the facts occurred during the previous de facto government, in which the parliamentary commission ordered the breaking into law offices of various lawyers and the seizure of documents. In the court decisions, particularly in the Case *Klein* decided in 1984, without questioning the powers of the parliamentary commissions to make inquiries, it was ruled that they cannot, without formal statutory provisions, validly restrict individual rights, in particular, to break into the personal domicile of people and to seize their personal documents. It was thus decided that the order, could only be taken based on a

634 See in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 284-285.

635 See in *Revista de Derecho Público*, n° 49, Editorial Jurídica Venezolana, Caracas, 1992, pp. 120-121.

636 See *Stuab v. City of Baxley*, 355 U.S. 313 (1958). See the comments in M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, University of South Carolina Press, 1993, pp. 12-13.

637 See Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, pp. 211-214

statutory provision, not by the sole decision of the commissions, and eventually based in a judicial order⁶³⁸

In Venezuela, a similar situation can be identified regarding the privative attributions of legislative bodies. Although the 1961 Constitution (Art. 159) set forth that they were not to be reviewed by other branches of government, regarding the former Congress and their commissions, the Supreme Court admitted the amparo action against their acts, in a decision dated January 31, 1991 (Caso: *Anselmo Natale*), ruling as follows:

“The exclusion of judicial review regarding certain parliamentary acts -except in cases of extra limitation of powers- set forth in Article 159 of the Constitution, as a way to prevent, due to the rules of separation of powers, that the executive and judicial branches could invade or interfere in the orbit of the legislative body which is the trustee of the popular sovereignty, is restricted to determine the intrinsic regularity of such acts regarding the Constitution, in order to annul them, but it does not apply when it is a matter of obtaining the immediate reestablishment of the enjoyment and exercise of harmed rights and guarantees set forth in the Constitution”⁶³⁹.

Consequently, after ruling -as has been above mentioned- that “it cannot exist any State act excluded from revision by means of amparo, the purpose of which is not to annul State acts but to protect public freedoms and restore its enjoyment when violated or harmed”, the Supreme Court decided as follows:

The Chamber considers that the constitutional amparo, understood in this way, can be filed by any person, natural or artificial, even against acts excluded from judicial control as those set forth in Article 159 of the Constitution as established in that provision, alleging a harm or violation of constitutional rights or guarantees, or those that being inherent to human beings, are not listed expressly in it”⁶⁴⁰.

In the case of México, Article 73, VIII of the Amparo Law expressly excludes from the amparo suit, the resolutions and declarations of the Federal Congress and its Chambers, as well as of the State Legislative bodies and their Commissions, regarding the election, suspension or dismissal of public officers, in cases in which the corresponding Constitutions confer them the power to resolve the matter in a sovereign or discretionary way⁶⁴¹. There are also excluded from the amparo suit, the decisions adopted by the Representative Chamber of by the Senate in cases of impeachments, which Article 110 of the Constitution declares as non challenging ones⁶⁴².

638 See the comments on the First Instance decision of 1984 (1^a *InstCrimCorrFed*, Juzg n° 3, 10-9-84, ED 110-653) in Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp. 95-97; Joaquín Brague Camazano, *La Jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, México 2005, p. 98. José Luis Lazzarini, *El juicio de amparo*, Editorial La Ley, Buenos Aires 1987, pp. 216-216.

639 See in *Revista de Derecho Público*, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 118

640 See in *Revista de Derecho Público*, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 118. See also decision of the First Court on Judicial review of Administrative action of June 18, 1992 See in *Revista de Derecho Público*, n° 46, Editorial Jurídica Venezolana, Caracas, 1991, p. 125.

641 See Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin 1971, p. 98

642 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p. 378.

In the United States, the general rule is that injunctions may not be directed against Congress; and injunctions have been rejected for instance to suspend a congressional subpoena, where the complainant had an adequate remedy to protect his rights in connection with a hearing⁶⁴³.

B. Amparo against laws (statutes)

One of the most important issues regarding the Latin American amparo refers to the possibility of filing the amparo action against statutes, which if it is true that it is accepted in some countries like Mexico, Venezuela and Guatemala, is excluded –in some cases expressly- in others, like Argentina, Brazil, Colombia, Chile, Costa Rica, El Salvador, Panama, Peru and Uruguay. But regardless of the acceptance in some countries, the admissibility of the amparo action against laws has been progressively restricted, allowing in some countries its filing only against self-executing statutes (Mexico), or only regarding the acts which apply the particular statute, not being in general, admitted directly against the statute itself, except in Guatemala.

In effect, in Mexico, Article 1,I of the Amparo Law establishes that the amparo can be filed against statutes that violate the constitutional guarantees. In such cases, the amparo action can be filed directly against self executing or self applicable statutes (laws) when considered contrary to the Constitution, giving rise in such cases, to a judicial means of judicial review of constitutionality of the statutes. In these cases, the action can be filed directly against the statute, without any need for an administrative or judicial act of application of the statute, because the statute in itself is the one that causes direct harm to the constitutional guarantees of the plaintiff⁶⁴⁴. In these cases, the action has to be filed within 30 days following their enforcement. In such cases, the defendants are the supreme institutions of the State that had intervened in the drafting of the statute, that is, the Congress of the Union or the legislatures of the States that passed the statute, the President of the Republic or State Governors that ordered its execution and the Executive Secretariats that approved it and ordered its enactment.

Consequently, the amparo against laws in Mexico, is considered a judicial means for the direct control of the constitutionality of such statutes, even if it is not brought in an abstract manner, since the claimant must have been directly harmed by the legislation, without the need for another state act for the application of the statute. On the contrary, when the statute in itself does not cause direct and personal harm to the claimant, that is, the statute is not self executing, the amparo action is inadmissible, unless it is filed against the State acts that apply it to a specific person⁶⁴⁵. As it is expressly set forth in Article 73,VI, the amparo suit is inadmissible “against statutes, treaties or regulations that, by its sole passing, they do not cause harm to the plaintiff, but need a subsequent act of its application in order for the prejudice to initiate”. In these cases, of statutes that are not self-executing, the amparo action must be filed within 15 days following the issuing of the first act of its execution or application.

The main aspect to be stressed on the matter, of course, is the distinction between the self executing and not self executing laws. Following the doctrine established in the case of *Villera de Orellana María de los Angeles y coags.*, the former are those immediately obligatory, in which provisions the persons to whom are applicable are clearly and unmistakably identified, being *ipso jure* subjected to an

643 See U.S. –Mins et al. V. McCarty, 209 F. 2d 307 (D.C. Cir. 1953), in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 230.

644 See Garza Flores Hnos., Sucs., 28 S.J. 1208 (1930). See the reference in Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin 1971, p. 167

645 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p, 387

obligation which implies the accomplishment of acts not previously required, resulting a prejudicial modification of the person's rights⁶⁴⁶.

The Mexican solution is similar to the United States exceptions to the doctrine of non-interference, according to which injunctions, if not admitted in principle against legislative acts, are admitted against municipal ordinances and regulations, when by its mere passage they immediately produce some irreparable loss or injury to the plaintiff⁶⁴⁷.

According to the universality character of the system set forth in the Venezuelan Constitution regarding the acts that can be challenged by means of amparo, one of the most distinguishable innovations of the 1988 Amparo Law was the regulation of the amparo against statutes and other normative acts, complementing the general mixed system of judicial review⁶⁴⁸. In this regard, Article 3 of the Amparo law establishes the following:

Artículo 3° The amparo action is also admissible when the violation or the threats of violation derives from a norm contrary to the constitution. In this case, the resulting judicial decision resolving the filed action, must take notice of the inapplicability of the challenged norm and the court must inform its decision to the Supreme Court.

The action of amparo may also be brought together with the popular action of unconstitutionality of laws and other state normative acts, in which case, if it deems it necessary for the constitutional protection, the Supreme Court of Justice may suspend the application of the norm in respect of the specific juridical situation whose violation is alleged, whilst the suit for its annulment lasts.

This article sets forth two ways through which an amparo pretension can be filed before the competent court: in an autonomous way, or exercised together with the popular action of unconstitutionality of statutes. In the latter case, the amparo pretension is subordinated to the principal action for judicial review, producing only the possibility for the court to suspend the application of the statute pending the unconstitutionality suit. In this case, the situation is similar to the one of the popular action of unconstitutionality in the Dominican Republic when the amparo pretension is filed together with it⁶⁴⁹.

But in the former case, Article 3 of the Venezuelan Amparo Law sets forth a direct amparo action against statutes, different to the popular action of unconstitutionality whose nullity results have *erga omnes* effects, seeking only the inapplicability of the statute to a concrete case with *inter partes* effects⁶⁵⁰. But even thought the clear wording of the article, it can be said that the amparo action against laws has in fact been eliminated in Venezuela as a consequence of the interpretation made by the former Supreme Court of Justice, imposing the need of the action to be always and only directed against the State acts applying the statute and not directly against it. In a decision dated May 24, 1993, the

646 Suprema Corte de Justicia, 123 S.J. 783 (1955). See the comments in Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin, 1971, p. 168-173e

647 See. *Larkins v. City of Denison*, 683 S.W. 2d 754 (Tex. App. Dallas 1984). See the reference to this and other court decisions on the matter in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 257-260

648 See Allan R. Brewer-Carías, "Derecho y Acción de Amparo", Vol V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 227 ff.

649 See Eduardo Jorge Prats, *Derecho Constitucional*, Vol. II, *Gaceta Judicial*, Santo Domingo 2005, p.399.

650 See Allan R. Brewer-Carías, "Derecho y Acción de Amparo", Vol V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas 1998, pp. 224 ff; Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas, 2001, pp. 553 ff.

Politico Administrative Chamber of the Supreme Court issued a decision that has been the leading case on the matter, ruling that:

Thus, it seems that there is no doubt that Article 3 of the Amparo law does not set forth the possibility of filing an amparo action directly against a normative act, but against the act, fact or omission that has its origin in a normative provision which is considered by the claimant as contrary to the Constitution and for which, due to the presumption of legitimacy and constitutionality of the former, the court must previously resolve its inapplicability to the concrete case argued. It is obvious, thus, that such article of the Amparo law does not allow the possibility of filing this action for constitutional protection against a statute or other normative act, but against the act which applies or executes it, which is definitively the one that in the concrete case can cause a particular harm to the constitutional rights and guarantees of a precise person⁶⁵¹.

The Court, in its decision, admitted the distinction between the self-executing and not self-executing statutes, ruling that the former imposes an immediate obligation for the persons to whom it is issued, with its promulgation; and on the contrary, the latter requires an act for its later execution, in which case its sole promulgation cannot produce a constitutional violation⁶⁵². But even though it admits the distinction, the Supreme Court concluded its ruling declaring the impossibility for a real normative act to directly and by itself, harm the constitutional orbit of a concrete and particular situation of an individual.

But by rejecting the possibility of direct harms that a statute can cause to particular constitutional rights, the Court in principle admitted the possibility for the unconstitutional statute to cause threats to those same persons' rights, ruling that in such case the threats ought to be "imminent, possible and realizable" in order for an amparo action to be admitted. But in the same decision, such possibility was rejected with the following argument:

"In case of an amparo action against a norm, the concretion of the possible harm would not be 'immediate', because it will always be the need for a competent authority to execute or apply it in order for the statute to effectively harm the claimant. It must be concluded that the probable harm produced by the norm will always be a mediate and indirect one, due to the need for the statute to be applied to the concrete case. So that the harm will be caused by means of the act applying the illegal norm.

The same occurs with the third condition, in the sense that the probable and imminent threat will never be made by the possible defendant. If it would be possible to sustain that the amparo could be admissible against a statute whose constitutionality is challenged, it would be necessary to accept as aggrieved party the legislative body issuing it, being the party to participate in the process as defendant. But it must be highlighted that in the case in which the possible harm could be realized, it would not be the legislative body the one called to execute it, but rather the public officer that must apply the norm in all the cases in which an individual is located in the situation it regulates.

If it is understood that the object of the amparo action is the statute, then the conclusion would be that the possible defendant (the public entity enacting the norm whose unconstitutionality is alleged) could not be the one that could make the threat. The concrete harm would be definitively

651 See in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 287-288

652 See in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 285.

made by a different entity or person (the one applying the unconstitutional norm to a specific and concrete case)⁶⁵³.

From the above mentioned, the Venezuelan Supreme Court concluded rejecting the amparo action against statutes and normative acts, not only because it considered that the Amparo laws does not set forth such possibility -bypassing its text-, but because even being possible to bring the extraordinary action against a normative act, it would not comply with the imminent, possible and realizable conditions of the threats set forth in Article 6,2 of the Amparo Law.

In Guatemala the amparo against laws is established in a direct form, being the Constitutional Courts empowered to “declare in specific cases that a statute, a regulation, resolution or act of the authorities does not bind the claimant, since it contravenes or restricts any of the rights guaranteed by the Constitution or recognized by any Law (Article 10,b Guatemala Law). This same judicial power, but only regarding to executive regulations, is established in Honduras (Article 41,b Law). In both cases, the judicial decisions on amparo suspend the application of the statute, the executive regulation, resolution or challenged act in respect of the claimant, and if applicable, the re-establishment of the juridical situation affected or the cessation of the measure (Article 49,a Guatemala)⁶⁵⁴.

In other Latin American countries, the possibility of bringing an action of amparo against statutes is expressly excluded. This is the case of Costa Rica, where the Law on Constitutional Jurisdiction provides that the amparo action against statutes and other regulatory provisions is not admissible, except when challenged together with the acts individually applying it, or when dealing with automatically enforced regulations, in such a way that their prescriptions become automatically enforceable simply by their enactment, without the need for other regulations or acts that develop them or render them applicable to the claimant (Art 30,a Costa Rica Law). Nonetheless, in these cases, the amparo against the self executing statute is not directly decided by the Constitutional Chamber, and instead, it is converted into a direct action on judicial review of the constitutionality of the challenged statute⁶⁵⁵. In such cases, the President of the Constitutional Chamber must suspend the procedure and give the plaintiff 15 days in order for him to formalize a direct action on judicial review of constitutionality against the statute (Art. 48 Costa Rica Law). So, only after the statute is annulled by the Constitutional Chamber, the amparo action will be decided.

In Uruguay, in similar sense, the amparo against statutes is excluded regarding statutes and State acts of similar rank (Art. 1,c Law 16011), being the only means to challenge the constitutionality of a statute, the judicial action file to obtain a declaration of its unconstitutionality in a concrete case by the Supreme Court. In such cases, the amparo pretension can only have a suppressive effect regarding the application of the statute to the plaintiff pending the Supreme Court decision on the unconstitutionality of the statute⁶⁵⁶

In Argentina, even with its longstanding tradition on judicial review of legislation by means of the diffuse method of judicial review, the amparo against statutes is not admitted⁶⁵⁷. Nonetheless, if in an amparo action against State acts, the statute in which the challenged act is based is considered uncon-

653 See in *Revista de Derecho Público*, nº 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 288 a 290.

654 See Edmundo Orellana, *La justicia constitucional en Honduras*, Universidad Nacional Autónoma de Honduras, Tegucigalpa, 1993, p. 102, note 26.

655 See Rubén Hernández, *Derecho Procesal Constitucional*, Editorial Juricentro, San José, 2001, pp. 45, 208-209, 245, 223.

656 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, pp. 23,

657 See José Luis Lazzarini, *El juicio de amparo*, Editorial La Ley, Buenos Aires 1987, p. 214; Néstor Pedro Sa-güés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires 1988, p. 97.

stitutional, the amparo judge, by means of the diffuse method of judicial review can decide upon the inapplicability of the statute in the case. In this regard, Article 2,d of the Amparo Law when setting forth that the amparo action is not admissible “when for the purpose of determining the invalidity of the challenged act it is required the declaration of the unconstitutionality a the statute”, has been considered as not being in force because it contradicts Article 31 of the Constitution (supremacy clause)⁶⁵⁸. Additionally, Article 43 of the 1994 Constitution, now regulating the amparo action, has expressly solved the discussion by setting forth that “In the case, the judge can declare the unconstitutionality of the norm in which the act or omission is based”. After discussions based in previous legislation, regarding the admissibility in the judicial doctrine of the amparo against self executing statutes⁶⁵⁹, in similar sense to the Argentinean solution, the Peruvian Constitutional Procedure Code has established as follows: “When it is argued that the acts causing threats or violation are based in the application of a norm not compatible with the Constitution, the decision declaring the claim founded must additionally decide on the inapplicability of such norm” (Article 43). In this case, also, the court in order to decide must use its judicial review powers through the diffuse method.

In other countries, the amparo action against statutes is just declared as inadmissible in the legislation or considered as such by the courts: as is the case in Chile⁶⁶⁰, Uruguay (Art. 1,c Amparo Law), Panamá and El Salvador⁶⁶¹. In Brazil, the *mandado de segurança* is also excluded against laws or legal provisions when they have not been applied through an administrative act⁶⁶². In Colombia, the tutela action is also excluded regarding all “acts of a general, impersonal and abstract nature” (Art 6,5); and in Nicaragua, the amparo action is not admissible “against the process of drafting the statute, its promulgation or publication or any other legislative act or resolution” (Article 51, Law).

2. Amparo against executive and administrative acts and actions

The general terms, it can be said that the amparo action was born seeking the protection from executive authorities, in particular, against administrative acts issued by public officers or facts or omissions accomplished by them; that is, against acts, facts or omissions from the entities or bodies forming Public Administration at all its levels (national, state, municipal). These acts, facts or omissions are always considered as produced by public authorities, particularly from the executive branch of government and its decentralized or deconcentrated bodies.

In general terms it can be said that in all Latin American countries the amparo actions are admitted against executive and administrative acts causing harms or threats to constitutional rights and guarantees, including acts issued by the Head of the Executive, that is, the President of the Republic, in contrary sense to what happens in the United States where in principle, the coercive remedy of an injunction cannot be directed against the President⁶⁶³. The only express exceptions on this matters are

⁶⁵⁸ See Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp. 243-258

⁶⁵⁹ See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 352-374

⁶⁶⁰ Humberto Nogueira Alcalá, “El derecho de amparo o protección de los derechos humanos, fundamentales o esenciales en Chile: evolución y perspectivas”, in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*, Editorial Universidad de Talca, Talca 2000, p. 45.

⁶⁶¹ See Edmundo Orellana, *La Justicia Constitucional en Honduras*, Universidad Nacional Autónoma de Honduras, , Editorial Universitaria, Tegucigalpa 1993, p 102, note 26.

⁶⁶² See José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, pp. 213-214.

⁶⁶³ See Sloan v. Nixon, 60 F.R.D. 228 (S.D.N.Y. 1973), aff'd, 93 F.2d 1398 (2d Cir. 1974), judgment aff'd, 419 U.S. 958, 95 S. Ct. 218, 42 L. Ed. 2d 174 (1974). See the reference in John Bourdeau et al, “Injunctions” in

the Mexican amparo suit against executive acts of expulsion of foreigners from the territory (Art. 33)⁶⁶⁴, and in Uruguay, the amparo action against executive regulations⁶⁶⁵.

Regarding in particular the amparo against administrative acts, Article 5 of the Venezuelan Amparo Law⁶⁶⁶ provides that:

The action of amparo shall be admitted against any administrative act, material action, irreversible facts, abstentions or omissions that violate or threaten to violate a constitutional right or guarantee, when there is no brief, summary and efficient procedure available, in accordance with the constitutional protection.

When an action for amparo is brought against administrative acts of particular effects or against abstentions or denials of Public Administration, it can be filed before the Judicial review of administrative action jurisdiction, together with the judicial review recourse seeking the nullity of administrative acts or against the omission. In such cases, in a brief, summary and effective way, if it deems necessary for the constitutional protection, pending the suit, the court may suspend the effects of the challenged act, as guarantee of the violated constitutional right.

In such cases of exercising the amparo action together with the judicial review recourse against the administrative act based on violation of a constitutional right, there will be no delay for the exercise of the recourse, which can be brought even after those statutorily established lapses have elapsed, and it will not be necessary the exhaustion of the administrative recourses.

This regulation can be considered as one of the most comprehensive in all Latin American Amparo laws regarding amparo actions against administrative acts, regulating the possibility of exercising the amparo action in two ways: in an autonomous way or together with a nullity recourse for judicial review of the act. Regarding the latter, the former Supreme Court of Justice in the decision of July, 10, 1991 (Caso: *Tarjetas Banvenez*), clarified that in such case, the action is not a principal one, but subordinated and ancillary regarding the principal recourse to which it has been attached, and subjected

Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 229.

664 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p. 377.

665 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, pp. 99,

666 **Artículo 5. La acción de amparo contra actos administrativos, vías de y hecho y conductas omisivas de la Administración.** La acción de amparo procede contra todo acto administrativo, actuaciones materiales, vías de hecho, abstenciones u omisiones que violen o amenacen violar un derecho o una garantía constitucionales, cuando no exista un medio procesal breve, sumario y eficaz, acorde con la protección constitucional.

Cuando la acción de amparo se ejerza contra actos administrativos de efectos particulares o contra abstenciones o negativas de la Administración, podrá formularse ante el Juez Contencioso-Administrativo competente, si lo hubiere en la localidad, conjuntamente con el recurso contencioso administrativo de anulación de actos administrativos o contra las conductas omisivas, respectivamente, que se ejerza. En estos casos, el Juez, en forma breve, sumaria, efectiva y conforme a lo establecido en el artículo 22, si lo considera procedente para la protección constitucional, suspenderá los efectos del acto recurrido como garantía de dicho derecho constitucional violado, mientras dure el juicio.

Parágrafo Único. Cuando se ejerza la acción de amparo contra actos administrativos conjuntamente con el recurso contencioso-administrativo que se fundamente en la violación de un derecho constitucional, el ejercicio del recurso procederá en cualquier tiempo, aun después de transcurridos los lapsos de caducidad previstos en la Ley y no será necesario el agotamiento previo de la vía administrativa.

to the final nullifying decision that has to be issued in it⁶⁶⁷. That is why, in such cases, the amparo pretension that must be founded in a grave presumption of the violation of the constitutional right, has a preventive and temporal character, pending the final decision of the nullity suit, consisting in the suspension of the effects of the challenged administrative act. This provisional character of the amparo protection pending the suit, is thus subjected to the final decision to be issued in the nullity judicial review procedure against the challenged administrative act⁶⁶⁸.

The main difference between both procedures according to the Supreme Court doctrine is that:

In the first case of the autonomous amparo action against administrative acts, the plaintiff must allege a direct, immediate and flagrant violation to the constitutional right, which in its own demonstrates the need for the amparo order as a definitive means to restore the harmed juridical situation. In the second case, given the suspensive nature of the amparo order which only tends to provisionally stop the effects of the injuring act until the judicial review of administrative action confirming or nullifying it is decided, the alleged unconstitutional violations of constitutional provisions can be formulated together with violations of legal or statutory provisions developing the constitutional ones, because it is a judicial review action against administrative acts, seeking their nullity, they can also be founded on legal texts. What the court cannot do in these cases of filing together the actions, in order to suspend the effects of the challenged administrative act, is to found its decision only in the legal violations alleged, because that would mean to anticipate the final decision on the principal nullity judicial review recourse⁶⁶⁹.

The Supreme Court then concluded affirming that the final distinction between both lies, first, in their purpose: in the autonomous action of amparo against administrative acts it has a restorative character, and in the case of the amparo filed together with the judicial review action against the challenged act, it has a nullifying character. Second, in the first case the alleged and proved constitutional right violation must be a direct, immediate and flagrant one; in the second case, what has to be proved is the existence of a grave presumption of the constitutional violation. And third, in the first case, the judicial decision issued is a definitive constitutional protection one; in the second case, it has only preventive character of suspension of the effects of the challenged act pending the principal judicial review process⁶⁷⁰.

In some way similar to the Venezuelan solution, in Article 8 of the Colombian Tutela Law⁶⁷¹ it can also be found a regulation regarding the “tutela as a transitory mean” of protection, as follows:

667 See the text in *Revista de Derecho Público*, n° 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 169-174. See also the comments in *Revista de Derecho Público*, n° 50, Editorial Jurídica Venezolana, Caracas, 1992, pp. 183-184.

668 *Idem.* pp. 170-171.

669 *Idem.*, pp. 171-172.

670 *Idem.*, p. 172. See also regarding the nullity of article 22 of the Organic Amparo law the Supreme Court decision dated May 21, 1996, in Allan R. Brewer-Carías, *Acción y Derecho de Amparo*, Tomo V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1996, pp. 392 y ss.

671 **Artículo 8° La tutela como mecanismo transitorio.** Aún cuando el afectado disponga de otro medio de defensa judicial, la acción de tutela procederá cuando se utilice como mecanismo transitorio para evitar un perjuicio irremediable.

En el caso del inciso anterior, el juez señalará expresamente en la sentencia que su orden permanecerá vigente sólo durante el término que la autoridad judicial competente utilice para decidir de fondo sobre la acción instaurada por el afectado.

First, it is provided that even in case the injured party would have another judicial means of protection, the action for tutela will be admitted when used as a transitory means in order to prevent an irreparable damage. In such cases, the court will expressly rule in its decision that the protection [order] will be in force only during the term the competent judicial court will use in order to decide on the merits of the action brought by the injured party. In any case, the affected party must file such action in the maximum delay of 4 month from the tutela decision. In case that the action is not filed, the tutela decision will cease in its effects.

Second, in cases in which the tutela is used as a transitory means in order to prevent an irreparable injury, the action for tutela can also be filed together with the nullifying action before the judicial review of administrative action (contencioso-administrativo) jurisdiction. In these cases, if the court deems it justified, it could order, pending the process, the non application of the particular act regarding the concrete juridical situation whose protection is being demanded.

Finally, regarding executive and administrative acts and actions, mention must be made of the Argentinean restriction regarding the possible filing of the amparo action, in matters related to national defense and to public services (public utilities).

Article 2,b of the Amparo Law declares inadmissible the amparo action against "acts issued in express application of the Law 16.970", which is the so called Law of National Defense. For this exception to be applied, it has been considered that the challenged act must in a clear and exact way rely on the provisions of such law⁶⁷².

On the other hand, also in Argentina, the Amparo Law sets forth the inadmissibility of the amparo action in cases in which "the judicial intervention could directly or indirectly place in a compromising situation the regularity, continuity and efficacy of rendering a public service for the development of the essential activities of the State" (Article 2,c). Due to the general expressions used in the article (compromising, directly, indirectly, regularity, continuity, efficacy, rendering, public service), this provision has been highly criticized, being considered that with it "it is difficult to see an amparo against the State to be granted"⁶⁷³, particularly, due to the fact that any administrative activity of the State can always be related to a public service⁶⁷⁴. Nonetheless, the final decision corresponds to the court, and if it is true that in practice the exception has hardly been used⁶⁷⁵, in some important matters it was alleged. It happened for instance in the amparo actions filed in 1985 against the Central Bank of the Republic decision suspending for a few months delay the payments of the deposits in foreign cur-

En todo caso el afectado deberá ejercer dicha acción en un término máximo de cuatro (4) meses a partir del fallo de tutela.

Si no se instaura, cesarán los efectos de éste.

Cuando se utilice como mecanismo transitorio para evitar un daño irreparable, la acción de tutela también podrá ejercerse conjuntamente con la acción de nulidad y de las demás precedentes ante la jurisdicción de lo contencioso administrativo. En estos casos, el juez si lo estima procedente podrá ordenar que no se aplique el acto particular respecto de la situación jurídica concreta cuya protección se solicita, mientras dure el proceso.

672 See Case *Diario El Mundo c/ Gobierno nacional*, CNFed, Sala 1 ContAdm, 30/4/74, JA, 23-1974-195. See the comments in Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp. 212-214.

673 José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, p. 231.

674 Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp. 226 ff.

675 See José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, p. 233; Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires 1988, p. 228

rency. Even though some courts rejected amparo actions in the matter⁶⁷⁶, in the “Peso” Case the Federal National Chamber on judicial review of administrative actions of Buenos Aires decided to reject the arguments asking for the rejection of the amparo action based in the consideration of the matter as related to a “public service”, considering that the Central bank activities have not the elements to be considered as a public service in the sense of public utility⁶⁷⁷. A few years latter, regarding similar decisions of the Central Bank on the non payments of deposit in foreign currencies, in the cases referred to as the “Corralito”, there was no allegation whatsoever considering those Central Bank decisions, which were adopted on situation of state of economic emergency, as public service activities. In such cases, the amparo actions were admitted and granted, but with multiple judicial incidents⁶⁷⁸.

3. Amparo against judicial acts and decisions

There is a general acceptance of the amparo action as a specific judicial means for constitutional rights protection against administrative acts (including those administrative acts issued by courts and tribunals), but the same cannot be said regarding judicial decisions on jurisdictional matters. In some countries, their Amparo Laws expressly reject and consider inadmissible the filing of amparo actions against judicial decisions, issued applying jurisdictional power⁶⁷⁹. This is the case of Argentina (Art. 2,b)⁶⁸⁰, Bolivia (Art. 96,3), Costa Rica (Art. 30,b)⁶⁸¹, Chile⁶⁸², Dominican Republic⁶⁸³, Ecuador⁶⁸⁴, Nicaragua (Art. 51,b), Paraguay (Art. 2,a) and Uruguay (Art. 2,a)⁶⁸⁵. In El Salvador and Honduras, the exclusion is in particular referred to judicial acts issued “in judicial matters that are purely civil, commercial or labor-related, and in respect of definitive decisions in criminal matters” (El Salvador, Art. 13; Hon-

676 See Cfed BBlanca, 13/8/85, ED, 116-116. See the comments in Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea 1987, p. 51, note 59.

677 See CNFedConAdm, Sala IV, 13/6/85, ED, 114-231. See the comments in Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, 1987, p. 50, note 56

678 See for instance the *Smith* and the *San Luis* cases, 2002, in Antonio María Hernández, *Las emergencias y el orden constitucional*, Universidad Nacional Autónoma de México, México 2003, pp. 71 ff. And 119 ff. In Duch cases, the Laws and Decrees of Economic Emergency were declared unconstitutional.

679 Administrative acts issued by courts can be challenged by means of amparo. See for exaple, regarding Argentina, Néstor Pedro Sagüés, *Derecho procesal Constitucional, Vol 3, Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp.197 ff.

680 See Joaquin Bague Camazano, *La Jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, México 2005, p. 98. José Luis Lazzarini, *El juicio de amparo*, Editorial La Ley, Buenos Aires 1987, pp. 218-223; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea, Buenos Aires, 1987, p. 46.

681 See Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, pp. 45, 206, 223, 226.

682 See Juan Manuel Errazuriz G. and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago 1989, p. 103. Nonetheless, some authors considers that sthe recourse for protection is admisible against judicial decisions when issued in an arbitrary way and in violation of due process rights. See Humberto Nogueira Alcalá, “El derecho de amparo o protección de los derechos humanos, fundamentales o esenciales en Chile: evolución y perspectivas”, in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*”, Editorial Universidad de Talca, Talca 2000, p. 45

683 See Eduardo Jorge Prats, *Derecho Constitucional*, Vol. II, Gaceta Judicial, Santo Domingo 2005, p. 391.

684 Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora nacional, Quito 2004, p. 84.

685 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, pp. 50, 97.

duros Art. 45,6). In Brazil, the *mandado de segurança* Statute excludes it against judicial decisions when according to the procedure statutes it exists a judicial recourse against them, or when they can be modified by means of correction (Art. 5,II).

On the contrary, in other Latin American countries, the amparo action can be filed against judicial decisions, as is the case in Mexico, where the direct amparo suit finds its broadest application (amparo cassation)⁶⁸⁶, and is also the case in Guatemala (Art. 10,h), Honduras (Arts. 9,3 and,10,2,a), Panama (Art. 2615)⁶⁸⁷, Peru and Venezuela.

The general principle in this cases, as set forth in the Peruvian Code on Constitutional Procedures, is that the amparo is admitted against definitive judicial resolutions when “they manifestly impair the effective procedural protection, including access to justice and due process” (Art. 4)⁶⁸⁸. In the case of Venezuela, in a similar way to what it was established in the Peruvian legislation prior to the Code, Article 4 of the Amparo law provides that “the action of amparo shall also be admitted when a Tribunal of the Republic, acting outside its competence, pronounces a resolution or decision or orders an action that impairs a constitutional right”. Since no court has power to unlawfully cause harm to constitutional rights or guarantees, the amparo against judicial decisions is admitted when a court decision directly harms the constitutional rights of the plaintiff, normally related to the due process of law rights. As was decided by the Cassation Chamber of the former Supreme Court of Justice in a decision of December 5, 1990, the amparo against judicial decisions is admitted “when the decision in itself injures the juridical conscience, when harming in a flagrant way individual rights that cannot be renounced or when the decision violates the principle of juridical security (judicial stability), deciding against *res judicata*, or when issued in a process where the plaintiff’s right to defense has not been guaranteed, or in any way the due process guarantee has been violated”⁶⁸⁹.

In Colombia, Article 40 of the the Decree N° 2.591 of 1991, due to the fact that the Constitution did not exclude it, also established the possibility of bringing an action of amparo against judicial actions, when the impairment of the right is a direct consequence of them, adding that “when the right invoked is that of due process, the tutela shall be brought together with the appropriate recourse,” that is, together with the recourse of appeal”. Notwithstanding the statutory admissibility of tutela against judicial decisions, the Constitutional Court in ruling C-543 of October 1, 1992, declared the aforementioned Article 40 of Decree 2.591 unconstitutional, and hence null and void, considering it contrary to the principle of intangibility of the *res judicata*.⁶⁹⁰ Nonetheless, one year later, and after numerous judicial decisions on the matter, the same Constitutional Court admitted the tutela action against judicial decisions when they constitute a *vía de hecho* (voi de fait) or factual action⁶⁹¹, being considering as such:

686 See Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin 1971, p. 98.

687 With no suspensive effects. See Boris Barrios González, *Derecho Procesal Constitucional*, Editorial Portobelo, Panama 2002, p. 159

688 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, p. 326

689 *Case José Díaz Aquino*, also refered to in decisión dated December 14, 1994 of the same cassation Chamber. See the reference in Alan R. Brewer-Carías, “Derecho y Acción de Amparo”, *Instituciones Políticas y Constitucionales Vol V*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 261 ff; Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas, 2001, pp. 483 ff.

690 See in Manuel José Cepeda Espinosa, *Derecho Constitucional jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá 2001, pp. 1009 ff.

691 See decision S-231 dated May 13, 1994, in Manuel José Cepeda Espinosa, *Derecho Constitucional jurisprudencial. Las grandes decisiones de la Corte Constitucional*, Legis, Bogotá, 2001, pp. 1022 ff.

The ostensible and grave violation of the rules governing the process in which the challenged decision was issued, up to the point that because the flagrant disregard of the due process and other constitutional, the plaintiff's constitutional rights had been directly violated by the challenged act.

This means that the *via de hecho* is in fact the arbitrary exercise of the judicial function, in such terms that the deciding court has decided not according to law –which thus has been violated– but only according to its personal will⁶⁹²

According to this doctrine, applicable to almost all the other cases in which the amparo action is admissible against judicial decisions, it can be said that for granting the amparo, the challenged judicial decision must have been issued in grave and flagrant violation of the due process of law guarantees, thus constituting not a lawful decision but an unlawful one or *vía de hecho*, that is, an action with no legal support whatsoever.

In a certain way regarding injunctions on judicial matters, it can be said that in the United States, injunction can also be granted when for instance, it clearly appears that the prosecution of law actions will result in fraud, gross wrong or oppression, and that justice clearly requires equitable interference. As has been decided by the courts:

“The power of a court of equity to interfere with the general right of a person to sue and to restrain the person from prosecuting the action will be exercised only where it appears clearly that the prosecution of the law action will result in a fraud, gross wrong, or oppression, and that conscience and justice clearly require equitable interference. Accordingly, an action at law may be restrained under these restrictive rules where a person is attempting to, or would, through the instrumentality of an action at law, obtain an unconscionable advantage of another”⁶⁹³

On the other hand, some restrictions have been established in the Amparo law admitting the amparo actions against judicial decisions. Besides the need to the exhaustion of the available ordinary judicial recourses against the challenged decision, the decisions of the Supreme Court (Mexico, Panama, Art 2.615; Venezuela, Art 6,6) or the Constitutional Tribunal (Peru) had been expressly excluded from the amparo action. In some cases, the judicial amparo decision itself cannot be the object of another amparo suit (Honduras, Art 45,2; Mexico, Art. 73,II⁶⁹⁴); in the same sense that in the United States, an injunction against an injunction, sometimes referred to as a counter injunction, should not be issued⁶⁹⁵. In other countries, on the contrary, the amparo actions are admitted even against amparo judicial decisions (Colombia⁶⁹⁶, Perú⁶⁹⁷, Venezuela⁶⁹⁸) because those decisions, in their selves, can also additionally violate constitutional rights, different to those claimed in the initial suit.

692 See SU-1218 decision of November 21, 2001. See in Juan Carlos Esguerra, *La protección constitucional del ciudadano*, Legis, Bogotá 2004, p. 164. See Eduardo Cifuentes Muñoz, “Tutela contra sentencias (El caso colombiano)”, in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*”, Editorial Universidad de Talca, Talca 2000, pp. 307 ff.

693 See *Miles v. Illinois Cent. R. Co.* 315 U.S. 698, 62 S. Ct. 827, 86 L. Ed. 1129, 146 A.L.R. 1104 (1942); *Langenau Mfg. Co. v. City of Cleveland*, 159 Ohio St. 525, 50 Ohio Op. 435, 112 N.E. 2d 658 (1953); *Kardy v. Shook*, 237 Md. 524, 207 A2d 83 (1965). See in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 114-115.

694 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p. 379

695 See *Sellers v. Valenzuela*, 249 Ala. 620, 32 So. 2d 520 (1947). See in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 87.

696 See Juan Carlos Esguerra, *La protección constitucional del ciudadano*, Legis, Bogotá 2004, p. 164

4. Amparo against acts of other constitutional entities

In contemporary Latin American constitutional law, additionally to the three classic branches of government, the separation of powers principle has given origin to other State organs, not dependent on the Legislative, Executive or Judicial branches, with certain types of autonomy and independence. It is the case, for instance of the Electoral bodies, in charge of governing the electoral processes, the Peoples' Defendant or Human Rights Defendants Office, the Public Prosecutor Offices, the General Audit entities (Contraloría General) and the Council of the Judiciary for the government and administration of courts and tribunals. Being State organs, their acts, facts and omissions can also be challenged by means of amparo actions when violating constitutional rights.

Nonetheless, regarding these State entities, some exceptions have been established regarding the justiciability of their actions by means of amparo actions. For instance, in Costa Rica (Art. 30,d)⁶⁹⁹, Mexico (Art. 73,VII)⁷⁰⁰, Nicaragua (Art. 51,5), Panamá (Art. 2.615)⁷⁰¹, Peru (Art. 5,8)⁷⁰² and Uruguay (Art. 1,b), the amparo suit is excluded regarding acts of the electoral bodies, in similar sense as the injunctions are excluded in the United States regarding actions of the election officers in the performance of their duties⁷⁰³.

On the other hand, regarding the Council of the Judiciary (Consejo de la Magistratura), the Peruvian Amparo Law excludes the acts of that entity from being challenged through the amparo action, when referred to the dismissal or ratification of judges, when the decisions are duly motivated and issued after the interested party being heard (Art. 5,7)⁷⁰⁴.

5. The amparo action and the political questions

It has been a traditional judicial doctrine in the United States to consider as non justifiable the so called "political questions" mainly related to the "separation of powers" and particularly with "the

697 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 327, 330

698 See Allan R. Brewer-Carías, "Derecho y Acción de Amparo", Vol. V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 263 ff.

699 See Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, pp. 228-229. Other matters decided by the Tribunal Supremo de Elecciones like citizenship, personal capacity or personal status matters, are justiciables by means of amparo. See José Miguel Villalobos, "El recurso de amparo en Costa Rica" in", in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*", Editorial Universidad de Talca, Talca 2000, pp 222-223.

700 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p. 378; See Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Texas University Press, Austin, 1971, pp. 98, 152.

701 See Boris Barrios González, *Derecho Procesal Constitucional*, Editorial Portobelo, Panama 2002, p. 161

702 Nonetheless, the amparo action can be admitted if the decision of the Jurado Nacional de Elecciones does not have jurisdiccional nature or if jurisdiccional, it violates the effective judicial protection (due process). See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 128, 421, 447.

703 See *Boyd v. Story*, 350 Ark. 56, 84 S.W.3d 444 (2002). See in in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 238-239.

704 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, p. 126.

relationship between the judiciary and the co-ordinate branches of the Federal Government.”⁷⁰⁵ It is considered that the preemptive political nature of these questions imposes their solution in the political branches of government rather than in the courts. That is why, the exemption not only applies to judicial review in general, but also to injunctions.

The main source of questions considered as political and thus non justiciable by the Supreme Court are related to foreign affairs which involves -as the Supreme Court stated in *Ware v. Hylton* (1796)- “considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice.”⁷⁰⁶ Decisions concerning foreign relations therefore, as stated by Justice Jackson in *Chicago and Southern Air Lines v. Waterman Steamship Co.* (1948):

Are wholly confined by our constitution to the political departments of the government. ... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.⁷⁰⁷

Even though developed mainly in the foreign affairs sphere, the Supreme Court has also considered certain matters relating to the government of internal affairs, a political question, and thus non justiciable; like the decision as to whether a state must have a republican form of government, which in *Luther v. Borden* (1849) was considered a “decision binding on every other department of the government, and could not be questioned in a judicial tribunal.”⁷⁰⁸

Any way and even though that through the decisions of the Supreme Court, a list of “political questions” that the Court has considered as non-justifiable can be elaborated, the ultimate responsibility in determining them corresponds to the Supreme Court.

As the Court said in *Baker v. Carr* (1962):

Deciding whether a matter has in any measure been committed by the constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, -said the Court- is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the constitution...⁷⁰⁹.

Following the United States tradition, in Argentina, the Supreme Court of Justice has developed the same exception to judicial review and to the amparo action, concerning political questions, even though the Constitution does not expressly establish anything on the matter. These political questions are related to the “acts of government” of “political acts” doctrine developed in continental European law, and within which it can be mentioned the following: the declaration of state of siege; the declaration of federal intervention in the provinces; the declaration of “public use” for means of expropriation; the declaration of war; the declaration of emergency to approve certain direct tax contributions; acts concerning foreign relations; the recognition of new foreign states or new foreign state govern-

705 *Baker v. Carr*, 369 U.S. 186 (1962). See in See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, pp. 6-7.

706 *Ware v. Hylton*, 3 Dallas, 199 (1796)

707 *Chicago and Southern Air Lines v. Waterman Steamship Co.*, 333 US 103 (1948) p. 111.

708 *Luther v. Borden* 48 U.S. (7 Howard), 1,(1849). See in See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, pp. 6-7

709 *Baker v. Carr*, 369 U.S. 186 (1962).

ments; the expulsion of aliens, etc.⁷¹⁰ In general, within these political questions there are acts exercised by the political powers of the state in accordance with powers exclusively and directly attributed to them in the constitution, which can be considered the key element for their identification.

Apart from Argentina, only in Peru the issue of the political questions as non justiciable matter by means of amparo has been considered by the Constitutional Tribunal⁷¹¹.

6. The amparo against executive and administrative omissions

In general terms, the amparo action can be filed in all Latin American countries, not only against positive acts or actions from public officers or authorities (and also from individuals) that cause harm or threat upon constitutional rights and guarantees, but also against the omissions of such entities or persons when they do not comply with their general obligations to decide petitions, which can also cause such harms or threats. In particular, the amparo action has been frequently used to challenge Public Administration omissions or abstentions to act; but in the countries where amparo is admissible against individual, it also can be filed against their omissions harming or threatening constitutional rights.

Regarding public officers omissions, the amparo action in Latin America is generally filed in order to obtain from the court an order directed against a public officer in order for him to act in a matter with respect to which he has authority or jurisdiction. The amparo action against omissions in these cases is similar to the North American mandamus or mandatory injunction⁷¹², defined as “a writ commanding a public officer to perform some duty which the laws require him to do but he refuses or neglects to perform”. Thus mandamus cannot be used if the public officer has any discretion in the matter; “but if the law is clear in requiring the performance of some ministerial (nondiscretionary) function, then mandamus may properly be sought to nudge the reluctant or negligent official along in the performance of his or her duties”⁷¹³. As it was decided by the Supreme Court in *Wilbur v. United States*, 281 U.S. 206, 218 (1930):

“Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary, But where the duty is not thus plainly prescribed but depends upon a statute the construction or ap-

710 See José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, p. 190 ff.; Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea, Buenos Aires, 1988, pp. 270 ff.; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Astrea, Buenos Aires, 1987, p. 23.

711 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 128 ff.

712 In the United States, it has been considered that while as a general rule courts will not compel by injunction the performance by public officers of their official duties (*Bellamy v. Gates*, 214 Va. 314, 200 S.E. 2d 533, (1973)), a court may compel public officers or boards to act in a matter with respect to which they have jurisdiction or authority (*Erie v. State By and Through State Highway Commission*, 154 Mont. 150, 461 P 2d 207 (1969)). See in), in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 221, 222, 244.

713 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, p. 8. One of the important features of the writ of mandamus in North America is that the writ does not issue to purely private persons, but can only be directed to public officials or persons performing some quasi-public functions. *Idem*, p. 8.

plication of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus”⁷¹⁴.

In Latin America, for an omission to be the object of an amparo action, it must produce a direct violation of a constitutional right of the plaintiff, who in cases of illegalities in some countries like Venezuela, will only be allowed to use other judicial remedies, as the judicial review of administrative omission action before the special courts of the matter (contencioso-administrativo).

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

“a) That the alleged omissive conduct be absolute, which means that Public Administration has not accomplished in any moment the due function; and b) that the omission be regarding a generic duty, that is, the duty a public officer has to act in compliance with the powers attributed to him, which is different to the specific duty that is the condition for the judicial review of administrative omissive action. Thus, only when it is a matter of a generic duty, of procedure, of providing in a matter which is inherent to the public officer position, he incurs in the omissive conduct regarding which the amparo action is admissible⁷¹⁵.

From this Venezuelan judicial doctrine results that the important condition for the admissibility of the amparo action against public officer omissions, is the one related to the nature of his duties, being only admissible when the matters refer to generic duties and not to specific ones. As defined by the same former Supreme Court in a decision dated February, 11, 1992:

“In cases of Public Administration abstentions or omissions a distinction can be observed regarding the constitutional provisions violated when they provide for generic or specific duties. In the first case, when a public entity does not comply with its generic obligation to respond [a petition] of continuing the procedure or recourse filed by an individual, it violates the constitutional right to obtain prompt answer [to petitions] set forth in Article 67 of the Constitution; whereas when the inactivity is produced regarding a specific duty imposed by a statute in a concrete and ineludible way, no direct constitutional violation occurs. Condition in the latter case that the Court has been imposing for the filing of the judicial review of administrative omissions recourse...

From the aforementioned reasons the Court deems conclusive that the inactivity of Public Administration to accomplish a specific legal duty precisely infringes in a direct and immediate way the legal (statutory) text regulating the matter, in which case the Constitution is only violated in a mediate and indirect way. For the amparo judge, in order to detect if an abstention of the aggrieved entity effectively harms a constitutional right or guarantee, it must first, rely himself on the supposedly unaccomplished statute in order to verify if the abstention is regarding an specific obligation. In which case it must deny the amparo action and give to the plaintiff another remedy, as the judicial review action against Public Administration omissions⁷¹⁶.

714 See the reference in See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, p. 8

715 “ See thye decisions of the former Supreme Court of Justice, Politico Adminsitrative Chamber, dated November 5, 1992 92 (Caso *Jorge E. Alvarado*), in *Revista de Derecho Público*, n° 52, Editorial Jurídica Venezolana, Caracas, 1992, p. 187; and November 18, 1993, in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 295

716 See in *Revista de Derecho Público*, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1993, pp. 272-273.

In these cases, the judicial order of mandamus eventually consists in commanding the public officer to perform the duty the Constitution requires him to do which he refuses or neglects to perform, that is, to promptly decide the petitions individuals had filed before him⁷¹⁷. In general terms, then, the court order cannot substitute the public officer decision⁷¹⁸; and only in cases when a specific statute provides what is called the “positive silence” (the presumption that after the exhaustion of a particular delay, it is considered that Public Administration has decided accordingly to what has been asked in the particular petition), then the judicial order impliedly gives positive effects to the official abstention or omission⁷¹⁹.

IV. THE AMPARO AGAINST INDIVIDUALS OR PRIVATE PERSONS

If it is true that the amparo action, as a specific means for the protection of constitutional rights and guarantees was originally conceived for the protection of individuals against the State and its public officials, it has been progressively admitted against private persons, corporations or institutions whose actions can also cause harm or threats regarding constitutional rights of others. As was ruled in the Argentinean *Samuel Kot Case*, in which the Supreme Court of the Nation began to admit the amparo against acts of individuals, by saying that:

“There is nothing in the letter and spirit of the Constitution that allows for the assertion that the protection of constitutional rights is circumscribed only to attacks of the State, since, sustained the High Court, what is to be kept in mind is not only the origin of the impairment of constitutional rights but the rights themselves, because the same attention is not paid to the aggressors as to the rights aggrieved”⁷²⁰.

Nonetheless, not in all Latin American countries amparo actions against individuals are admitted. In Mexico, for instance, the amparo suit is not admitted against violations caused by acts of private individuals, so the constitutional protection through the amparo suit is established exclusively against the authorities⁷²¹. Similarly, when regulating the *mandado de segurança*, the Constitution of Brazil provides for its admission to protect constitutional rights and freedoms “when the party responsible for the illegality or abuse of power is a public authority or an agent of a legal entity exercising attributions of the Authorities,” thus excluding this recourse of protection against the actions of private individuals⁷²². Similar provisions are set forth in the Amparo law regulations in Panamá (Art. 50 Constitution; Art 2608 Judicial Code), El Salvador (Art. 12) and Nicaragua (Art. 23).

717 See the former venezuelan Supreme Court decisión dated August 26, 1993 (*Caso Inversiones Klanki*), *Revista de Derecho Público*, nº 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 294.

718 See for instance in Argentina, Néstor Pedro Sagüés, *Derecho procesal Constitucional, Vol 3, Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp. 73 ff.

719 See the venezuelan former Supreme Court decision dated December 20, 1991 (*Caso BHO, C.A.*), en *Revista de Derecho Público*, nº 48, Editorial Jurídica Venezolana, Caracas, 1991, pp. 141-143

720 See José Luis Lazzarini, *El juicio de amparo*, La Ley, Buenos Aires, 1987, p. 228; Joaquín Brage Camazo, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de derechos humanos)*, Editorial Porrúa, México, 2005, p. 99; Néstor Pedro Sagüés, *Derecho procesal Constitucional, Vol 3, Acción de amparo*, Editorial Astrea Buenos Aires 1988, pp. 13, 512, 527 ff.

721 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, p. 251; Joaquín Brage Camazo, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de derechos humanos)*, Editorial Porrúa, México, 2005, 184.

722 See Celso Agrícola Barbi, *Do mandado de segurança*, Editora Forense, Rio de Janeiro 1993, p. 92.

As mentioned above, in other Latin American countries, after the Argentinean *Kot Case*, the amparo against individual's actions or omissions causing harm or threats to constitutional rights of other individuals has been admitted, although in some countries in a restrictive way. In general terms it is admitted in Argentina, even though the 1966 Law 16.986 only refers to the amparo action against the State, that is "against every act or omission of the authorities" (Article 1); the amparo against individuals being regulated in articles 321,2 and 498 of the Code of Civil and Commercial Procedure.

In Venezuela, the amparo action against acts of individuals, is expressly provided in the 1988 Organic Law of Amparo⁷²³, where Article 2 provides:.

[The amparo action] shall be admitted against any fact, act or omission originated by citizens, legal entities, private groups or organizations that have violated, violate or threaten to violate any of the guarantees or rights that are entitled to the amparo of this Law.

In a similar manner, Uruguay's 1988 Law 16.011 of Amparo admits, in general, the action of amparo "against any act, omission or fact of the state or public sector authorities, as well as individuals, that is deemed to currently or imminently, manifestly and unlawfully impair, restrict, alter or threaten any of the rights and freedoms expressly or implicitly recognized by the Constitution" (Art. 1)⁷²⁴. A similar provision is set forth in Article 2 of the Peruvian Code of Constitutional procedures⁷²⁵ and in the Bolivian Constitution (Art. 19).

Also in Chile, it has been interpreted that the action for protection of constitutional rights and freedoms against arbitrary or unlawful acts or omissions that perturb or threaten when legally exercised (Article 20), being established without making any distinction as to the origin of such acts or omissions, can also be brought against acts or omissions of individuals⁷²⁶. Similar interpretation was adopted by the Supreme Court of the Dominican Republic regarding the admissibility of the amparo against individuals⁷²⁷.

Other Latin American countries, such as Colombia, Costa Rica Ecuador and Guatemala admit the amparo action when filed against individuals, but in a restricted way, only regarding the individuals that are in a position of superiority regarding citizens or in some way exercises public functions or activities or are rendering public services or public utilities⁷²⁸. In this regard, the Costa Rican Law of Constitutional Jurisdiction restricts the amparo against individual⁷²⁹ as follows:

Article 57. The recourse of amparo shall also be admitted against actions or omissions of individual subjects of the law when they act or should act in exercise of public functions or authority, or

723 Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol V, *Derecho y Acción de Amparo*, Editorial Jurídica Venezolana, Caracas 1998, pp. 96, 128.

724 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, pp. 63, 157.

725 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 389 ff.

726 See Humberto Nogueira Alcalá, "El derecho de amparo o protección de los derechos humanos, fundamentales o esenciales en Chile: evolución y perspectivas", in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*", Editorial Universidad de Talca, Talca 2000, p. 41

727 See Eduardo Jorge Prats, *Derecho Constitucional*, Vol. II, Gaceta Judicial, Santo Domingo 2005, p. 390.

728 In a similar way to the injunctions admitted in the United States against public services corporations. See in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 182 ff.

729 See Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, pp. 275, 281 ff.

are by right or in fact in a position of power before which ordinary jurisdictional remedies are clearly insufficient or belated for guaranteeing the rights and freedoms referred to in Article 2,a of this Law.

In similar terms it is provided in the Guatemalan Law on Amparo (Art. 9) and in Colombia where the Constitution expressly refers to the law for the establishment of “the cases in which the action of tutela may be filed against private individuals entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest or in respect of whom the applicant may find himself/herself in a state of subordination or vulnerability” (Art. 86). Was in compliance with this constitutional mandating that the Decree 2.591 of 1991 (Article 42) establishes that the action of tutela shall be admitted against acts or omissions of private individuals⁷³⁰ in the following cases:

1. When the person against whom action is brought is in charge of the public service of education, in protection of the rights enshrined in Articles 13, 15, 16, 18, 19, 20, 23, 27, 29, 37 and 38 of the Constitution.
2. When the person against whom action is brought is in charge of rendering a public health service, to protect the rights to life, intimacy, equality and autonomy.
3. When the person against whom action is brought is in charge of rendering public services.
4. When the request is directed against a private organization, against who effectively controls such organization or is the real beneficiary of the situation that caused the action, provided the claimant is in a position of subordination or defenselessness before such organization.
5. When the person against whom action is brought violates or threatens to violate Article 17 of the Constitution.
6. When the private entity is the one against which the request for habeas data would have been brought, pursuant to Article 15 of the Constitution.
7. When requesting the rectification of incorrect or erroneous information. In this case it is necessary to attach the transcription of the information or copy of the publication and of the rectification requested that was not published in such a way that its effectiveness be assured.
8. When the individual acts or should act in exercise of his or her public functions, in which case the same régime that regulates public authorities shall be applied.

When the request is for the tutela of the life or safety of the person who is in a position of subordination or defenselessness with respect to the matter against which action was brought. The minor who brings an action of tutela shall be presumed defenseless.

Finally, also in Ecuador, the amparo actions is admitted against entities that though not public authorities, they render public services by delegation or concession and in general against individuals but only when their actions or omissions cause harm or threats to constitutional rights and affect in a grave and direct way common, collective or diffuse interests (Art. 95,3)⁷³¹. In this regard, for instance,

730 See Juan Carlos Esguerra, *La protección constitucional del ciudadano*, Legis, Bogotá 2004, p. 151.

731 Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, 2004, p. 77.

amparo actions can be filed against political parties or their officials when their conduct violates the rights of other persons, as it has also being admitted in the United States⁷³².

V. THE PARTICIPATION OF THIRD PARTIES FOR THE DEFENDANT IN THE AMPARO SUIT

In the amparo suit, the injurer or damaging parties are those authorities, public officials, private persons, entities or corporations duly individuated whose actions or omissions are those precisely causing the harm or threats to the constitutional rights and guaranties of the plaintiff. Nonetheless, third parties can also act in the process, defending the injurer party position. It happens with those persons that, for instance, are beneficiaries of the authority act challenge. In this sense the Mexican Amparo Law provides that besides the injured and the injurer, are also considered party in the amparo suit, the persons that have obtained challenged act in their favor or those that could have direct interest in the act's endurance (Art. 5, III, c)⁷³³. In similar sense in the Norte American procedure on injunctions, it is considered that all persons whose interest will necessarily be affected by the decree in a suit for injunction are properly joined as defendants⁷³⁴.

Due to the general bilateral procedural rule, the principle applies in all Latin American countries, except in Chile, where, as mentioned, the bilateralism of the procedure is not admitted⁷³⁵. In some cases even the need for the participation of third parties for the defendant is necessary, as is the case in Venezuela on the amparo actions against judicial decisions, in which the party beneficiary of the challenged ruling must obligatorily be notified to participate in the procedure as defendant of the challenged decision.⁷³⁶

732 *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970), in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 240.

733 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México 2002, pp. 249-250.

734 *Silva V. Romney*, 473 F. 2d 287 (1st Cir. 1973); *Greenhouse v. Greco*, 368 F. Supp. 736 (W.D. La. 1973). See the reference in), in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 332-333.

735 See. Juan Manuel Errazuriz G and Jorge Miguel Otero A, *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile 1989, p. 149.

736 See Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas 2001, pp. 489.

CHAPTER XIII

THE EXTRAORDINARY CHARACTER OF THE AMPARO ACTION AND THE GENERAL PROCEDURAL RULES OF THE SUIT

I. THE EXTRAORDINARY CHARACTER OF THE AMPARO

The most common characteristic of the Latin American amparo action, is its extraordinary character, in the sense that in general terms it is granted when there are no other adequate judicial means to obtain the immediate protection of the constitutional right that has been violated.

This characteristic also applies in the United States to the injunctions and to all other equitable remedies like the mandamus and prohibitions, in the sense that they are considered available only "after the applicant shows that the legal remedies are inadequate"⁷³⁷ since they are reserved for extraordinary cases⁷³⁸,

This main characteristic of the injunction as an extraordinary remedy has been established since the XIX Century in *In re Debs* 158 U.S. 564, 15 S.Ct 900, 39 L. Ed. 1092 (1895), in which, in words of Justice Brewer, who delivered the opinion of the court, it was decided that:

"As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter"⁷³⁹

In Latin America, even though the common law distinction between remedies at law and equitable remedies does not exist, regarding the amparo action, -which comprises in only one institution all the drastic remedies established in North American law (injunctions, mandamus and prohibitions), it has the same general characteristic of extraordinary remedy. This is provided not only in the Latin American sense that it is only established for the protection of constitutional rights and guaranties, but also in the sense that it is admissible only when there are no other adequate judicial means for obtaining the constitutional protection.

This extraordinary character of the Latin American amparo action, equivalent to the so called "subordinate" character of the North American injunction, implies then that the amparo is only ad-

737 See in Owen M. Fiss and Doug Rendleman, *Injunctions*, The Foundation Press, Mineola new Cork, 1984, p. 59.

738 *Exparte Collet*, 337 U.S. 55, 69 S. Ct 944, 93 L. Ed. 1207, 10 A.L.R. 2D 921 (1949). See in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 20.

739 See in Owen M. Fiss and Doug Rendleman, *Injunctions*, The Foundation Press, Mineola new Cork, 1984, p. 8.

missible when there are no other judicial means for granting the constitutional protection, or in case they exist, are not adequate means for the immediate protection of the harmed or threatened constitutional rights. The questions of the non availability and of the inadequacy are, thus, two key factors regarding the admissibility of the action.

Only in a very few Latin American countries, the filing of the amparo action requires the obligatory previous exhaustion of ordinary existing judicial means, as it is established in Spain regarding its amparo action.

1. The question of the previous exhaustion of the ordinary judicial means

Actually, the general principle in Spain is that since the protection of constitutional rights and liberties is a task attributed to the courts, the filing of an amparo action before the Constitutional Tribunal can only be admitted when the ordinary judicial means have been exhausted, so that the Tribunal can only be asked to decide an amparo action when filed against the final judicial decision. The amparo action in Spain can then be considered as *subsidiaria* ("ancillary") in the sense that it can only be filed after a prior judgment has been issued⁷⁴⁰.

In Latin America, this condition of the necessary prior exhaustion of the existing ordinary judicial or administrative means is only regulated in Mexico, Guatemala and Peru.

In Mexico, the condition of the previous exhaustion of the ordinary judicial means in order to file an amparo action, responds to the principle of the "definitive character of the challenged act" set forth in Article 103 of the Constitution and Article 73 of the Amparo Law, in the sense that when the amparo action is directed against a judicial act, it can only be filed against the definitive and final judicial rulings, regarding which there is no other judicial remedy available to obtain its modification or repeal (Art 73, XIII). The only exception to this condition is when the challenged act implies a danger of extinguishing life or deportation or any act forbidden in Article 20 of the Constitution. Regarding administrative acts the amparo action is inadmissible when they can be challenged by a recourse, suit or any other mean of defense, providing that the statutes allow for the suspension of the effects of the challenged acts without additional conditions to those set forth in the Amparo Law (Art. 73, XV). The general consequences of this "definitively" rule are the followings:

1. It is necessary that regarding the authority act challenged by means of amparo that all the recourses and means of defense that can modify or repeal it, be filled.

2. The above mentioned judicial means must be exhausted, which means that it is not sufficient for them to be filed, but they must be pursued up to the final stage obtaining the definitive decision of the authority⁷⁴¹.

A similar principle is followed by the Guatemalan Amparo Law, by setting forth that "in order to file an amparo, except in the cases specified in this statute, it is necessary that the ordinary judicial and administrative recourses by mean of which the matters can be adequately resolved according to the due process principle, be exhausted"(Art. 19)⁷⁴². It must be highlighted that in this case, the exhaustion

740 See Eduardo Ferrer Mac Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México, 2002, pp. 292 ff.

741 See Eduardo Ferrer Mac Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México, 2002, pp. 315, 392 ff.; Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Texas Press, Austin, 1971, p. 100

742 See the courts' decision in this sense in Jorge Mario García Laguardia, *Jurisprudencia constitucional. Guatemala., Honduras, México, Una Muestra*, Guatemala 1986, pp. 43, 45

rule refers not only to judicial recourses but also to administrative ones⁷⁴³. In the case of Brazil, Article 5,1 of the *mandado de segurança* Law also sets forth that it will not be admissible against acts against which administrative recourses with suppressive effects can be filed, independently of bail.

It must be said also regarding injunctions against administrative acts in the United States that they can only be filed after the available administrative remedy has been exhausted (*Zipp v. Geske & Sons, Inc*, 103 F. 3d 1379 (7th Cir. 1997)); the rule is not applied when the exhaustion of the remedy will cause imminent and irreparable harm (*State ex rel. Sheehan v. District Court of Minn. In and For Hennepin County*, 253 Minn. 462, 93 N.W.2d 1 (1958))⁷⁴⁴.

In Peru, Articles 5 and 45 of the Constitutional Procedures Code also provide for the inadmissibility of the *amparo* action when the “previous means” were not exhausted beforehand; adding that in case of doubt regarding such exhaustion, the *amparo* will be preferred.

This “previous means” that must be exhausted are basically the administrative procedure challenging recourses, like the hierarchical one in order to obtain the decision of the peck of Public Administration hierarchy before filing the *amparo*. As was justified by the Constitutional Tribunal, “the need for the exhaustion of such [administrative] mean before filing the *amparo*, is founded in the need to give the Public Administration the possibility to review its own acts, in order to allow the possibility for the Administration to resolve the case, without the need to appear before the judicial organs”⁷⁴⁵.

This condition for the admissibility of the *amparo* action, considered as a Public Administration “privilege” that could in itself harm the constitutional right to obtain judicial remedy, has some exceptions provided in Article 45 of the same Constitutional Procedure Code, when establishing that the exhaustion of the previous means would not be required in the following cases:

- 1) If a resolution, even if its not the last in the administrative procedure, has been executed before the exhaustion of the delay established in order to be considered as consented; 2) If because of the exhaustion of the previous mean the aggression could become irreparable; 3) If the previous mean is not regulated or has been unnecessarily initiated by the injured party; or 4) If the previous mean is not resolved within the delays fixed for its resolution.

The Constitutional Tribunal has extensively elaborated all these exceptions: regarding the first exception, it has considered that the *amparo* action is admissible in all cases in which the challenged resolution has been immediately executed by the Public Administration before any possibility for the affected party to challenge it in the administrative procedure⁷⁴⁶. Regarding the irreparability of the damage exception, it has been considered that that situation occurs when the exhaustion of the administrative means would impede the harmed right to be restored to the position exiting before the harm was caused⁷⁴⁷. This is the case, for instance, when a Municipal administrative decision to demolish a building, would be executed during the exhaustion of the administrative recourse. Regarding the last

743 In Honduras, for instance, regarding the *habeas data* action, article 40 of the *Amparo* law set forth that in only can be filed when exhausted the corresponding administrative procedure (art. 40).

744 See the reference in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p.225.

745 See Exp 1042-AA-TC, decision of December 6, 2002, F.J. n° 2). See the reference in Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, p. 234

746 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 246-250.

747 Exp. n° 1266-2001-AA/TC, decisión of September 9, 2002, *El Peruano -Garantías Constitucionales-* April 4, 2003, p. 6081. See the reference in Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 251-255

exception, it tends to avoid the perpetuation of undefined situations due to the lack of decision regarding administrative petitions⁷⁴⁸.

Even though it is not expressly regulated, in cases of amparo actions filed against judicial decisions when the due process rights are being clearly and ostensibly harmed, the Constitutional Tribunal has also imposed the previous exhaustion of the ordinary judicial means in order to bring the amparo action before the competent court⁷⁴⁹; being consider the adequacy for the constitutional protection of the judicial ordinary means⁷⁵⁰.

As aforementioned, only in Mexico, Guatemala and Peru it is imposed as a general condition for the filing of the amparo action –although with important exceptions- the need to previously exhaust all the existing ordinary judicial and administrative means.

In the other Latin American countries such condition has not been imposed; and the admissibility condition discussion is referred to the effective existence of adequate means for the immediate protection of the harmed or threatened constitutional rights. In these cases, the questions to be discussed in order to determine the admission of the amparo action refer to the availability or non availability of judicial or administrative means for protection of the harmed right; and to the adequacy or inadequacy of the existing judicial means for such protection, rather than to their imposed exhaustion.

2. The question of the non availability of other adequate judicial or administrative means for protection

In this regard, the general principles referred to the admissibility of the amparo action are very similar to the same question referred to the admission of the injunction remedy in North America, where one of its traditional and fundamental bases is the inadequacy of the existing legal remedies as the main prerequisite to granting an injunction (*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3L.Ed. 2d 988, 2 Fed. R. Serv. 2d 650 (1959))⁷⁵¹. The North American judicial doctrine on the matter has been summarized as follows:

“An injunction, like any other equitable remedy, will only be issued where there is no adequate remedy at law. Accordingly, except where the rule is changed by statute, an injunction ordinarily will not be granted where there is an adequate remedy at law for the injury complained of, which is full and complete. Conversely, a court of equitable jurisdiction may grant an injunction where an adequate and complete remedy cannot be had in the courts of law, despite the petitioner’s efforts. Moreover, a court will not deny access to injunctive relief when procedures cannot effectively, conveniently and directly determine whether the petitioner is entitled to the relief claimed”⁷⁵².

748 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 258-260

749 Exp. n° 1821-98, decision June 25, 1999, El peruano -Jurisprudencia-, November 7, 2001, p. 4501. See the reference in Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, p. 242.

750 See Luis R. Sáenz Dávalos, “Las innovaciones del Código Procesal Constitucional en el recurso constitucional de amparo”, in Susana Castañeda O et al, Introducción a los procesos constitucionales. Comentarios al Código Procesal Constitucional, Jurista Editores, Lima 2005, p. 135.of

751 See in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 89

752 See in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 89-90; 119 ff.; 224 ff.

This condition regarding injunctions has been also referred in the United States as to the “availability” or the “sufficiency” rule⁷⁵³, and also to the “irreparable injury” rule, implying the admission of the injunction only when the harm “cannot be adequately repaired by the remedies available in the common law courts if the threatened harm is one that can be rectified by a legal remedy, then the judge will refuse to enjoin”.⁷⁵⁴

This situation, as pointed out by Owen M. Fiss “makes the issuance of an injunction conditional upon a showing that the plaintiff has no alternative remedy that will adequately repair the injury. Operationally this means that as general proposition the plaintiff is remitted to some remedy other than an injunction unless he can show that his noninjunctive remedies are inadequate”⁷⁵⁵.

This term “inadequacy”, according to Tabb and Shoben, “has a specific meaning in the law of equity because it is a shorthand expression for the policy that equitable remedies are subordinate to legal ones. They are subordinate in the sense that the damage remedy is preferred in any individual case if it is adequate”⁷⁵⁶. But in particular, regarding constitutional claims involving constitutional rights such as those for school desegregation, it has been considered that their protection precisely requires of the extraordinary protection that can be obtained by equitable intervention, as was decided by the Supreme Court regarding school desegregation in its second opinion in *Brown v. Board of Education* (S. Ct. 1955) and regarding the unconstitutional cruel and unusual punishment in the prison system in *Hutto v. Finney* (S.Ct. 1978)⁷⁵⁷.

The same general principle of the availability and adequacy, even though with any relation whatsoever to the distinction between law and equitable remedies, is applied in some Latin American countries like Argentina, Uruguay, Colombia, Venezuela, Chile and Dominican Republic, where in general terms, the amparo action cannot be admissible if there exists another adequate judicial or administrative means for the immediate protection of the constitutional right.

This is the case of Argentina, where the amparo action is also considered as an extraordinary and residual judicial remedy reserved for the “delicate and extreme situations in which, because of the lack of other legal means, the safeguard of fundamental rights is in danger”⁷⁵⁸. The same expression regarding the “extraordinary or residual” character of the amparo action is used by the Uruguayan courts⁷⁵⁹.

That is why, in Argentina, Article 43 of the Constitution provides that the amparo action is admissible “as long as it does not exist another more adequate judicial mean”; and Article 2,a of the Amparo Law provides that the amparo is inadmissible “when there exist other juridical or administrative recourses or remedies which allow to obtain the protection of the constitutional right or guaranty”. Because in Argentina the amparo action is not admitted against judicial decisions, regarding the amparo

753 See in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 119 ff.

754 See Owen M. Fiss and Doug Rendleman, *Injunctions*, The Foundation Press, Mineola new Cork, 1984, p. 59.

755 Owen Fiss, *The Civil Rights Injunction*, Indiana University Press, 1978, p. 38.

756 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West 2005, p. 15

757 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West 2005, pp. 25-26

758 CSJN, 7/3/85, LL, 1985-C-140; íd., Fallos, 303”422; 306; 1253. See in Néstor Pedro Sagüés, *Derecho procesal Constitucional, Vol 3, Acción de amparo*, Editorial Astrea Buenos Aires 1988, p. 166

759 J.L. Cont. Adm. 2º S. 194 del 9/9/92; tAC 7º S. 171 del 25/9/92; TAC 7º S. 27 del 28/2/90; J.L. Cont. Adm, 2º res. Del 10/10/91. See in Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, pp.145, 148, 149.

against administrative acts, this article refers first, to the availability of judicial and administrative means for the protection, the latter (administrative recourses) to be exercised before the superior organs of Public Administration; and second, to the adequacy of those means, in the sense that they must be adequate, sufficient and effective in order to protect the plaintiff. Therefore, even when other remedies exist, the amparo action is admissible when their use could provoke grave and irreparable harm or they cannot be adequate for the immediate protection required for the harmed or threatened constitutional right⁷⁶⁰. Being a condition of admissibility, it is for the plaintiff to allege and prove that there are no other adequate means for the protection of his rights⁷⁶¹. As was decided by the Supreme Court:

“It is indispensable for the admission of the exceptional remedy of amparo that those claimant judicial protection to prove, in due form, the inexistence of other legal means for the protection of the harmed right or that the use of the existing could provoke an ulterior irreparable harm”⁷⁶².

In Uruguay, in a more or less similar way, Article 2 of the Amparo law also provides that “the amparo action will only be admissible when no other judicial or administrative means exist permitting to obtain the same result established in Article 9,B (the precise determination of what must or not must be done) or when if in existence, because of the circumstances they were ineffective for the protection to the right”. Is his admissibility condition what gives the amparo action in Uruguay its “extraordinary, exceptional, residual character, in the sense that it is admissible when the normal means for protections will be powerless”.⁷⁶³

Also in Colombia, Article 86 of the Constitution provides that the amparo action can only be filed when the affected party does not have another judicial mean available for his protection; and Article 6,1 of the Tutela Law prescribes that the amparo action is inadmissible “when other judicial recourses or means of defense exists, unless when they are used as a transitory mechanism to prevent irreparable harms”. In the later case, the question of the efficacy of the existing judicial means must be judged in concrete, according to the circumstances of the plaintiff” (Art, 6, 1).

It must be highlighted that the residual character of the Colombian tutela only refers to the existence of other judicial means, and not to administrative means or recourses considered in Colombia as optional for the plaintiff (Art. 9 Tutela law). Also in Costa Rica it is expressly provided in the Amparo Law that it is not necessary to file any administrative recourse prior to the filling of the amparo action (Art. 31)⁷⁶⁴.

The other judicial means of protection that in Colombia instead of the tutela action are considered as serving for effective protection of fundamental rights, are the public action of unconstitutionality, the exception of unconstitutionality, the habeas corpus action, the action for compliance, the popular actions, the judicial review of administrative acts actions, the exception of illegality and the provisional suspension of the effects of administrative acts⁷⁶⁵. In any case, it is for the tutela judge to deter-

760 See José Luis Iazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires 1987, p. 94.95, 122 ff., 139; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires, 1987, pp. 31 ff.

761 See Néstor Pedro Sagüés, *Derecho Procesal Constitucional*, Vol 3, *Acción de Amparo*, Editorial Astrea, Buenos Aires, 1988, p. 170

762 Case *Carlos Alfredo Villar v. Banco de la República Argentina*. See the reference in Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, pp. 223-224.

763 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, p. 20. See the court decisions reference regarding the “residually” rule in pp. 57, 131 ff; 154 ff.; and 158 ff.

764 See Rubén Hernández, *Derecho Procesal Constitucional*, Editorial Juricentro, San José, 2001, p. 242

765 See Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá, 2004 p. 125.

mine if there are other judicial means for protection, as it has been ruled by the Constitutional Court, when deciding that:

“When the tutela judge finds that other judicial defense mechanisms exists are applicable to the case, he must evaluate if according to the facts expressed in the claim and the scope of the harmed or threatened fundamental right, the available remedies include all the relevant aspects for the immediate, complete and efficient protection of the violated rights, in matters of proof and of the alternate defense decision mechanism”⁷⁶⁶.

As mentioned, the only exception to the rule imposing the need to file the other judicial existing means for protection before bringing a tutela action, is the possibility to use the tutela as a transitory protective mean in order to avoid harms considered irreparable (Art. 8), that is, harms that because of their imminence and gravity impose the immediate adoption of protection⁷⁶⁷.

The same principle also applies in Venezuela, event without an express legal provision as those existing in the Argentinean, Colombian and Uruguayan laws. As it has been decided by the former Supreme Court of Justice in a decision dated March 8, 1990,

“the amparo is admissible even in cases where although ordinary means exist for the protection of the infringed juridical situation, they would not be suitable, adequate or effective for the immediate restoration of the said situation”⁷⁶⁸.

In similar sense, the Supreme Court in a decision dated December 11, 1990, ruled that:

“The criteria of this High Court as well as the authors opinions, has been reiterative in the sense that the amparo action is an extraordinary or special judicial remedy that is only admissible when the other procedural means that could repair the harm, are exhausted, do not exist or would be inoperative. Additionally, Article 5 of the Amparo Law provides that the amparo action is only admissible when no brief, summary and effective procedural means exist in accordance with the constitutional protection”.

This objective procedural condition for the admissibility of the action, turns the amparo into a judicial mean that can only be admissible by the court once it has verified that the other ordinary means are not effective or adequate in order to restore the infringed juridical situation. If other means exist, the court must not admit the proposed amparo action⁷⁶⁹.

The Supreme Court in another decision dated June 12, 1990, decided that the amparo action is admissible:

“when there are no other means for the adequate and effective reestablishment of the infringed juridical situation. Consequently, one of the conditions for the admissibility of the amparo action is the non existence of other more effective means for the reestablishment of the harmed rights. If such means are adequate to resolve the situation, there is no need to file the special amparo action.

766 See decisión &-100/94, march 9, 1994. See the reference in Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, p. 229.

767 See Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá 2004 p. 127.

768 See in *Revista de Derecho Público*, n° 42, Editorial Jurídica Venezolana, Caracas, 1990, pp. 107-108. See also decision of First Court on Judicial Review of Administrative Actions dated September 5, 1991 in FUNEDA, *15 años de Jurisprudencia*, op. cit., p. 130.

769 See in en *Revista de Derecho Público*, n° 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 112

But even if such means exists, if they are inadequate for the immediate reestablishment of the constitutional guaranty, it is also justifiable to use the constitutional protection mean of amparo⁷⁷⁰.

Of course, the question of the availability and of the adequacy of the existing judicial means for the admissibility or not of the amparo action, in the end is a matter of judicial interpretation and adjudication, decided always in the concrete case decision, when evaluating the adequacy question. For instance, in a decision of the First Court on administrative jurisdiction dated May 20, 1994 (case *Federación Venezolana de Deportes Equestres*) it was ruled that the judicial review of administrative acts actions were not adequate for the protection requested in the case, that seeks the participation of the Venezuelan Federation of Equestrian Sports in an international competition. The case required immediate decision, so the court ruled as follows:

It is the opinion of this court that when the action was brought before it, the only mean that the claimant had in order to obtain the reestablishment of the infringed juridical situation was the amparo action, due to the fact that by means of the judicial review of administrative acts recourse seeking its nullity, they could never be able to obtain the said reestablishment of the infringed juridical situation that was to assist to the 1990 the international competitions⁷⁷¹

In contrary sense and after having established for years a judicial doctrine admitting the autonomous amparo action against administrative acts, in recent years, the Supreme Tribunal of Justice of Venezuela has been progressively imposing a restrictive interpretation on the matter, ruling on the adequacy of the judicial review action seeking the annulment of such acts before the Administrative Jurisdiction. This can be realized from the decision taken in a recent and polemic case referred to the expropriation of some premises of a corn agro-industry complex, which developed as follows:

In August 2005, officers from the Ministry of Agriculture and Land and military officers and soldiers from the Army and the National Guard, surrounded the installation of the company *Refinadora de Maíz Venezolana, C.A. (Remavenca)*, and announces were publicly made regarding the appointment of an Administrator Commission that would taking over the industry. These actions where challenged by the company as a de facto action alleging the violation of the company rights to equality, due process and defense, economic freedom, property rights and to the non confiscation guaranty of property. A few days latter, the Governor of the State of *Barinas* where the industry is located, issued a Decree ordering the expropriation of the premises, and consequently the Supreme Tribunal declared the inadmissibility of the amparo action that was filed, basing its ruling on the following arguments:

The criteria established up to now by this Tribunal, by which it has concluded on the inadmissibility of the autonomous amparo action against administrative acts has been that the judicial review of administrative act actions –among which the recourse for nullity, the actions against the administrative abstentions and recourse filed by public servants- are the adequate means, that is, the brief, prompt and efficient means in order to obtain the reestablishment of the infringed juridical situation, in addition to the wide powers that are attributed to the administrative jurisdiction courts in Article 29 of the Constitution.

Accordingly, the recourse for nullity or the expropriation suit, are the adequate means to resolve the claims referred to supposed controversies in the expropriation procedure; those are the preex-

770 See decision of the Politico Administrative Chamber of the Supreme Court of Justice of June 12, 1990, *Revista de Derecho Público* n° 43, Editorial Jurídica Venezolana, Caracas, 1990, p. 78. See also in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 311-313.

771 See the reference in Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, p. 354.

isting judicial means in order to judicially decide conflicts in which previous legality studies are required, and which the constitutional judge cannot consider.

Thus, the Chamber considers that the claimants, if they think that the alleged claim persists, they can obtain the reestablishment of their allegedly infringed juridical situation, by means of the ordinary actions and to obtain satisfaction to their claims. So existing adequate means for the resolution of the controversy argued by the plaintiff, it is compulsory for the Chamber to declare the inadmissibility of the amparo action, according to what is set forth in Article 6,5 of the Organic Law⁷⁷².

Also even without statutory regulation, the same rule of admissibility has been adopted in Chile⁷⁷³ and in Dominican Republic. In the latter country, the Supreme Court has ruled as follows:

“According to the Dominican legal doctrine, as well as to the international doctrine and jurisprudence, the amparo action has a subordinate character, which implies that it can only be filed when the interested person does not have any other mean to claim for the protection of the harmed or threatened right; the principle supposes that the amparo action cannot be filed when other procedures exists in parallel, in which the injured party has the possibility to claim for the protection of the same fundamental rights⁷⁷⁴.

3. The question of the previous election of other remedies that are pending of decision, including amparo suits

The extraordinary character of the amparo suit not only implies that it can only be filed when the affected party does not have any other available ordinary judicial to obtain adequate protection for his harmed or threatened constitutional rights, but that the affected party in seeking protection when bringing an amparo suit, must not have a pending action or recourse brought before a court for the same purpose. This can be considered also as a general rule on the matter, similar to what is called in North American law, the “doctrine of the election of remedies” regarding the equitable defenses in the suit for injunctions. As Tabb and Shoben have pointed out: “The doctrine of elections of remedies provides that when an injured party has two available but inconsistent remedies to redress a harm, the act of choosing one constitutes a binding election that forecloses the other”⁷⁷⁵.

In similar sense, the general rule in Latin America, as it is set forth in Article 73, XIV of the Mexican Amparo Law, is that the amparo suit is inadmissible when the claimant has brought before an

772 See decision of the Constitutional Chamber of the Supreme Tribunal of Justice n° 3375 of November 4, 2005, Case: *Refinadora de Maíz Venezolana, C.A. (Remavenca)*, y *Procesadora Venezolana de Cereales, S.A. (Provencesa) vs. Ministro de Agricultura y Tierras y efectivos de los componentes Ejército y Guardia Nacional de la Fuerza Armada Nacional*.

773 See Humberto Nogueira Alcalá, “El derecho de amparo o protección de los derechos humanos, fundamentales o esenciales en Chile: evolución y perspectivas”, in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*, Editorial Universidad de Talca, Talca 2000, p. 27. In contrary sense, see Emilio Pfeffer Urquiaga, “Naturaleza, características y fines del recurso de protección”, in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*, Editorial Universidad de Talca, Talca 2000, p. 153.

774 Manuel A. Valera Montero, *Hacia un nuevo concepto de Constitución. Selección y clasificación de decisiones de la Suprema Corte de Justicia de la República Dominicana en materia constitucional 1910-2004*, Santo Domingo, 2006, pp. 374-375.

775 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West 2005, p. 56.

ordinary court any recourse or legal defense seeking to modify, repeal or nullify the challenged act". So pending the decision on a judicial process in which the claimant has asked the same protective remedies, the amparo suit cannot be admissible⁷⁷⁶. The Peruvian Code on Constitutional procedures also establishes that the amparo action is inadmissible "when the aggrieved party has previously chosen other judicial processes seeking protection of his constitutional right" (Art 5, 3). The same has been decided by the Chilean courts regarding the action for protection.⁷⁷⁷

In Venezuela, Article 6,5 of the Amparo Law also provides that the suit is inadmissible "when the injured party has chosen other ordinary judicial means or has used other preexisting judicial means". In such cases, when the violation or threat of constitutional rights and guarantees has been alleged, the court must follow the procedure set forth in the Amparo Law (Arts. 23, 24 and 25), in order to provisionally suspend the effects of the challenged act.

This inadmissibility clause is only applicable when in the other judicial action or recourse the constitutional violation has been alleged; so that the constitutional protection can be obtained. Thus, it is possible to obtain in an immediate way the effective protection of the constitutional rights, this justifies in such cases, the inadmissibility of the amparo action.

This inadmissibility clause has been applied in cases of the exercise of judicial review against administrative acts actions, when a protection of constitutional rights has been conjunctly requested, seeking the suspension of the effects of the challenged administrative acts. In these cases, the First Court on Administrative Jurisdiction in a decision dated May 11, 1992 (Case *Venalum*), ruled as follows:

"It has been the criteria of this court that Article 6,5 of the Amparo law imposes the inadmissibility of the amparo action when the aggrieved party has chosen for the ordinary judicial means or has used the preexistent judicial means. The court has considered in previous cases that when the plaintiff is asking for the suspension of the challenged administrative act according to Article 136 of the Supreme Court Organic Law, that means the use of a parallel mean for protection that turns in inadmissible the amparo action, because such petition for a provisional remedy requested conjunctly with the nullity action, is in itself a cause of inadmissibility⁷⁷⁸.

On the other hand, it must be highlighted that the inadmissibility clause only applies when the plaintiff has used other judicial means for protection exercised before the courts; so if only administra-

776 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México, 2002, pp. 393.; Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Texas Press, Austin, 1971, p. 100

777 See Juan Manuel Errazuriz G. and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago, 1989, p. 114.

778 See en *Revista de Derecho Público*, n° 50, Editorial Jurídica Venezolana, Caracas, 1992, pp. 187-188. See also the decisions of the First Court of February 21, 1991, *Revista de Derecho Público*, n° 45, Editorial Jurídica Venezolana, Caracas, p. 146, and of September 24, 1991, en FUNEDA, *15 años de Jurisprudencia... cit.*, p. 105; of December 5, 1991 and April 1, 1993 in *Revista de Derecho Público*, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1994, p. 263. See also decisión of the Politico Administrative Chambero of the Supreme Court of July 13, 1992 (Case *Municipio Almirante Padilla*), *Revista de Derecho Público*, n° 51, Editorial Jurídica Venezolana; Caracas, 1992, pp. 215-216; and decisión of November 11, 1993, Caso UNET, in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, p. 489.

tive recourses have been used, the inadmissible clause is not applied, because the administrative recourses are not judicial ordinary means that can impede the filing of the amparo action⁷⁷⁹.

Nonetheless, in Argentina, even though the same general rule of inadmissibility has been developed through judicial interpretation, it has also comprised the cases in which the injured party has chosen to use administrative means for defense. As was decided in the *Hughes Tool Company SA* case, "the sole fact that the plaintiff has chosen to file a petition or recourse before the Administration, provokes the inadmissibility of the amparo action, because a claim of this nature cannot be used to take the case from the authority intervening in the case because so asked by the same plaintiff"⁷⁸⁰. In other cases, the decision has been that "it is not legal nor logic for a plaintiff in parallel and simultaneously to use two means of different procedural nature, one ordinary and the other extraordinary because it would be incompatible and it would place the claimant in a position of privileged or advantage contrary to the principle of equality in the exercise of procedural rules"⁷⁸¹.

Finally, in order to assure the effective protection of rights, the courts in Argentina have developed the doctrine that even in cases in which the interested party has chosen to use other judicial means for the protection of the harmed constitutional rights other than the amparo action, a subsequent amparo action could be admissible when there is an excessive delay in the resolution of the previous procedure to be issued; delay that can provoke the grave and irreparable harm that can justify the filing on the amparo action in order to obtain the immediate protection needed⁷⁸².

On the other hand, in the legislation of Bolivia, Ecuador, Mexico and Venezuela the inadmissibility of the amparo action is specifically regulated in cases in which a previous amparo action has been previously filed. In this regard, in Bolivia the Amparo Law provides that the amparo action is inadmissible when a previous constitutional amparo action has been filed with identity on the person, the object and the cause (Art. 96, 2); and in Ecuador, the Amparo Law forbids the filing of more than one amparo action regarding the same matter and with the same object, before more than one court. That is why, those filing an amparo action must declare under oath in the written request that he has not filed before other courts another amparo action with the same matter and object (Art 57).

In Mexico, Article 73, III of the amparo law also provides the inadmissibility of the amparo action against statutes and acts that are the object of another amparo suit pending of resolution, filed by the same aggrieved party, against the same authorities and regarding the same challenged act, even if the constitutional violations are different.

779 See the decisión of the First Court on administrative jurisdiction has decided on a decision dated march 8, 1993 (Case: Federico Domingo) in *Revista de Derecho Público*, n° 53-54, Editorial Jurídica Venezolana, Caracas, 1994, p. 261. See also decision dated May 6, 1994 (Caso *Universidad Occidental Lisandro Alvarado*), en *Revista de Derecho Público*, n° 57-58, Editorial Jurídica Venezolana, Caracas, 1994. See Rafael Chavero G. *El nuevo amparo constitucional en venezuela*, Ed. Sherwood, Caracas 2001, pp. 250 ff.

780 See in Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires 1987, pp. 33

781 See ST La Rioja, 27/1/71, J.A., 10-1971-782. See the reference in Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea, Buenos Aires 1988, p. 187

782 See Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires 1987, p. 34; José Luis Iazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires 1987, p. 143.

Also in Venezuela, Article 6,8 of the Amparo law provides the inadmissibility of the action for amparo when a decision regarding another amparo suit has been brought before the courts regarding the same facts and is pending of decision⁷⁸³.

II. THE CHARACTER OF THE AMPARO SUIT PROCEDURE

1. The brief character of the procedure

Being the amparo suit an extraordinary remedy for the immediate protection of constitutional rights, its main feature is the brief character of the procedure, which is justified because its purpose is to protect a person in cases of irreparable injuries or threats to his constitutional rights. Thus, this irreparable character of the harm or threat and the immediate need for protection are the key elements that conform the procedural rules of the amparo suit.

In this regard, the same principle applies to the North American injunctions, regarding which the judicial doctrine on the matter has established the following principles:

“An injunction is granted only when required to avoid immediate and irreparable damage to a legally recognized rights, such as property rights, constitutional rights or contract rights. There must be some vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy. This requirement cannot be met where there is no showing of any real or immediate threat that the petitioner will be wronged again. Except as is otherwise provided by statute, to warrant an injunction it ordinarily must be clearly shown that some act has been done, or is threatened, which will produce irreparable injury to the party asking for the injunction, regardless of whether the party may additionally prove that the activity sought to be enjoined is illegal per se...

The very function of an injunction is to furnish preventive relief against irreparable mischief or injury, and the remedy will not be awarded where it appears to the satisfaction of the court that the injury complained of is not such a character. More specifically, a permanent, mandatory injunction, a preliminary, interlocutory or temporary injunction, a preliminary mandatory injunction, or a preliminary, interlocutory or temporary restraining order, will not, as a general rule, be granted where it is not shown that an irreparable injury is immediate impending and will be inflicted on the petitioner before the case can be brought to a final hearing, no matter how likely it may be that the moving party will prevail on the merits”⁷⁸⁴.

In general terms, these same principles applies to the amparo suit, but with the particular feature that in Latin America they have given shape to specific and particular procedural rules that govern the judicial procedure of the amparo suit, characterized by being a brief judicial process that is justified because of its protective objective regarding constitutional rights against violations, that requires immediate protection.

Those rules are characterized by a few particular trends, mainly referred to the general brief configuration of the procedure and, in particular, to the rules governing the complaint to be filed; the

783 See for instance decision of the Politico Administrative Chamber of the Supreme Court of Justice of October 13, 1993, in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 348-349

784 See in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 76-78.

proof activity of the parties; the defendant report needed because of the bilateral character of the process and the hearing of the case.

That is, even being the nature of the amparo suit procedure a brief and prompt one, the bilateral character of the procedure imposes the respect of the due process rules and the need to guarantee the right to self defense of the defendant. That is why no definitive amparo adjudication can be given without the participation of the defendant. That is why only in a very exceptional way, some legislation as the Colombian one, admits the possibility of granting the constitutional protection (*tutela in limine litis*, that is, "without any formal consideration and without previous enquiry, if the decision is founded in an evidence that shows the grave and imminent violation of harm to the right" (Art. 18). In the Venezuelan Amparo Law, from which such provision was taken, also provided for the possibility for the amparo judge "to immediately restore the infringed juridical situation, without considerations of mere form and without any kind of brief enquiry", being required in such cases, that "the amparo protection be founded in an evidence which constitute a grave presumption of the violation of harm of violation" (Art. 22).

Nonetheless, this article of the Venezuelan Amparo Law was annulled by the former Supreme Court of Justice⁷⁸⁵, considering that it violated in a flagrant way the constitutional right to defense, and denying to establish its constitutional interpretation as just as a provision which only established -although with incorrect wording- a provisional and not definitive judicial measure of protection⁷⁸⁶.

2. The brief and prompt nature of the procedure

The Latin American statutes regulating the amparo suit not only provide for a specific judicial mean for the protection of constitutional rights, but also for specific rules of procedure particularly referred to the amparo suit, which differ from the general rules that govern the ordinary judicial procedure. These specific rules are conditioned by the brief and promptness nature of the amparo procedure, which is imposed by the need for the immediate protection of constitutional rights.

As it is provided in Article 27 of the Venezuelan Constitution: the procedure of the constitutional amparo action must be oral, public, brief, free of charge and not subject to formality". Regarding some of these principles, the First Court on Judicial review of administrative actions even before the enactment of the Amparo law in 1988 ruled that because of the brief character of the procedure, it must be understood as having "the condition of being urgent, thus it must be followed promptly and decided in the shorter possible time"; and additionally it must be summary, in the sense that "the procedure must be simple, uncomplicated, without incidences and complex formalities". In this sense, the procedure must not be converted in a procedural complex and confused situation, limited in time to resolve the multiple" and various challenges and questions opposed as previous stage"⁷⁸⁷. According to these principles, the Amparo Law of 1988 provided for the brief, prompt and summary procedure that governed the amparo suit up to the enactment of the 1999 Constitution, when the Constitutional Chamber

785 Decision dated May 21, 1996. See in *Gaceta Oficial Extra* n° 5071 May 29, 1996. See the comments in Allan R. Brewer-Carías, "Derecho y Acción de Amparo", Vol. V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica venezolana, Caracas, 1998, pp. 388-396; Rafael Chavero Gazdik, *El nuevo régimen del amparo constitucional en Venezuela*, Edit. Sherwood, Caracas 2001, pp. 212, 266 ff., 410 ff.

786 See the comments in Allan R. Brewer-Carías, "Derecho y Acción de Amparo", *Instituciones Políticas y Constitucionales*, Vol V, Editorial Jurídica venezolana, Caracas 1998, pp. 398.

787 See decision of January 17, 1985, in *Revista de Derecho Publico*, n° 21, Editorial Jurídica Venezolana, Caracas, 1985, p. 140

interpreted the Statute provision according to the new Constitution having re-written its regulations by constitutional interpretation⁷⁸⁸.

III. THE PRINCIPLES GOVERNING THE PREFERRED CHARACTER OF THE PROCEDURE

The general principles governing these specific rules are often expressly enumerated in the Amparo Laws, as guidelines for their general judicial interpretation. For instance, in Colombia, these are “the principles of publicity, prevalence of substantial law, economy, promptness and efficacy” (Art 3); in Ecuador, “the principles of procedural promptness and immediate [response]” (*inmediatez*) (Art 59); in Honduras, the “principles of independence, morality of the debate, informality, publicity, prevalence of substantial law, free of charge, promptness, procedural economy, effectiveness, and due process” (Art. 45); in Peru, “the principles of judicial direction of the process, free of charge regarding the plaintiff acts, procedural economy, immediate and socialization” (Art. III).

In particular, as a key principle for interpretation of procedural rules, it must be highlighted the one provided in the Honduras Law regarding the need for the prevalence of substantial rules over formal provisions, in the sense that because in the procedure “the merits on the matter must prevail”, the “procedural defects must not prevent the quick development of the procedure”. Consequently, it is provided that “the parties can correct their own mistakes, if remediable” being the courts also authorized to ex officio correct them (Honduras, Art. 4,5; Guatemala, Art. 6; Paraguay, Art. 20; El Salvador, Art. 80). That is why the Peruvian Code specifies that “the judge and the Constitutional Tribunal must adjust the formalities set forth in this Code, to the attainment of the purposes of the constitutional processes” (Art. III) which is the immediate protection of constitutional rights.

For such purposes, in the Venezuelan Constitution is provided that “any time will be workable time and the courts will give preference to the amparo regarding any other matter” (Art. 27). These principles are set forth in almost all the Amparo Laws in Latin America, by expressly providing that the amparo action can be filed at any time (Colombia, Arts. 1 and 15; Honduras, Art. 16; Guatemala, Art. 5), even on holidays and out of labor hours (Costa Rica Art. 5; Ecuador, Art. 47; El Salvador Art. 79; Paraguay, Art.19).

One of the abovementioned procedural principles is the preferred character of the amparo in the sense that the procedure must be followed **with** preference, which implies that when an amparo is filed, the courts must postpone all other matters of different nature (Guatemala, Art. 5; Honduras, Arts. 4,3; Peru; Venezuela, Art. 13), except the cases of habeas corpus” (Colombia, Art. 15; Brazil, Art. 17; Costa Rica, Art. 39; Honduras, Art 511).

The Amparo Laws also assigns the courts the task of directing the procedure, empowering them to act ex officio (El Salvador, Art. 5; Guatemala, Art. 6; Honduras, Art. 4,4; Peru, Art. III) even in matter of evidence; the inertia of the parties not being valid to justify any delay (Costa Rica, Art. 8; El Salvador, Art. 5). Additionally, the notifications made by the court can be done by any mean including technical, electronic or magnetic ones (El Salvador. Art. 79).

788 See the decisión of the Constitucional Chamber of the Supreme Tribunal of Justice n° 7 dated February 1, 2000 (Case *José Amando Mejía*), in *Revista de Derecho Público*, n° 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 245 ff. See the comments in Allan R. Brewer-Carías, *El sistema de justicia constitucional en la constitución de 1999 (Comentarios sobre su desarrollo jurisprudencial y su explicación, a veces errada, en la Exposición de Motivos)*, Editorial Jurídica Venezolana, Caracas, 2000 and in Rafael Chavero Gazdik, *El nuevo régimen del amparo constitucional en Venezuela*, Edit. Sherwood, Caracas, 2001, pp. 203 ff.

In the amparo procedure, as a general rule, the procedural terms cannot be extended, nor suspended nor interrupted, except in cases expressly set forth in the statute (Costa Rica, Arts. 8 and 39; El Salvador, Art. 5; Honduras 4; Peru, Art 33,8; Paraguay Art. 19). Any delay in the procedure is the responsibility of the courts (Costa Rica, Art. 8; Honduras, Art. 4,8; Peru, Art. 13).

Another general rule regarding the amparo suit procedure is that no incidents are allowed in it (Honduras, Art. 70; Uruguay, Art. 12; Panamá, Art. 2610; Paraguay, Art. 20; Uruguay, Art. 12); thus, neither excuse or recuse of judges are admitted or they are restricted (Argentina, Art.16; Colombia, Art. 39; Ecuador Art. 47, and 59; Honduras, Art. 18; Panamá, Art. 2610; Paraguay, Art. 20; Peru Art. 33, 1 and 2; Venezuela, Art. 11). Nonetheless, the Amparo law in some countries provides for specific and prompt procedure rules regarding the cases of impeding situations of the competent judges to resolve the case (Costa Rica, Art. 6; Guatemala, Arts. 17, 111; Mexico, Art. 66; Panama, Art. 2610; Peru, Art. 52; Venezuela, Art. 11).

1. General provisions regarding the filing of the petition

The general principle on judicial procedure in Latin America, is that the petitions that are to be brought before the courts must always be filed in writing. That is why, all the Amparo Laws specify with detail the necessary content of the petition in matters of amparo.

Nonetheless, some exceptions have been established allowing the oral presentation of the amparo in cases of urgency (Venezuela, Arts. 16, 18; Colombia, Art. 14; Honduras, Art. 16; Peru, Art. 27), danger to life, deprivation of liberty without judicial process, deportation or exile (Mexico, Art. 117) or if the plaintiff is short of funds (Guatemala, Art. 26 Honduras, Art. 22 -habeas corpus-). Nonetheless, in such cases, the petitions must be subsequently ratified in writing.

In other cases, it is allowed for the plaintiff to bring the petition before the court by telegram or radiogram (Brazil, Art. 4; Costa Rica, Art. 38) or by electronic means (Peru, Art. 27).

Since the normal way to bring the amparo action before the competent court is through a written text -as it is also required for the petition for injunction in North America⁷⁸⁹, the petitioner must express in it, in a clear and precise manner, all the necessary elements regarding the alleged right to relief and on the arguments for the admissibility of the action. Thus, according to what is established in the Amparo Laws in Latin America, in general terms, the petition or complaint must comprise the following:

1) The complete identification and information regarding the plaintiff (Argentina, Art 6,a; Bolivia, Art. 97,I; Colombia, Art. 14; El Salvador, Art. 14; Mexico, 116,1 and 166, 1; Nicaragua, Art. 27,1; Peru, Art, 42,2; Paraguay, Art.; 6,a; Venezuela, Art. 18, 1 and 2). If someone is acting on behalf of the plaintiff, also his identification; and if the plaintiff is an artificial person, its identification as well as the representative's complete identification (El Salvador, Art. 14,1; Guatemala Arts. 21,b and c; Honduras, Art. 49,2)

2) The individuation of the injurer party (Argentina, Art 6,b; Bolivia, Art. 97, II; Honduras, Art. 49, 2; Paraguay, Art. 6,b; Venezuela, Art. 18,2), and regarding public entities, the harming public authority, and if possible, the organ provoking the harm or threat (Colombia, Art. 14; Costa Rica, Art. 38; El Salvador, Art. 14; Guatemala, Art. 21,d; panama, Art. 2619,2; México, Arts. 116,III and 166,III; Nicaragua, Art. 27,2 and 55).

789 See in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp.346 ff.

3) The detailed narration of the circumstances in which the harm or the threat has been caused (Argentina, Art., 6,c; Bolivia, Art. 97,III; Colombia, Art. 14; Costa Rica, Art. 38; El Salvador, Art. 14,5; Guatemala, Art. 21,e; Panama, Art. 2619,3; Paraguay, Art. 6,d; Honduras, Art. 49,5; Nicaragua, Art. 55; Peru, Art. 42,4; Venezuela, Art. 18,5), and in particular, the act, action, omission or fact causing the harm or threat (El Salvador, Art. 14,3; Honduras, Art. 49,3; Nicaragua, Art. 27,3; Peru, Art. 42,5; Mexico Arts. 116, IV and 166,IV).

4) The constitutional right or guaranty that has been violated, harmed or threatened (Bolivia, Art. 97,IV; Colombia, Art. 14; El Salvador, Art. 14,4; Panamá, Art. 2619,V; Honduras, Art. 49,6; Venezuela, Art. 18,4), with the precise indication of the articles of the Constitution containing the rights or guarantees (Guatemala, Art. 21,f; Mexico, Arts. 116, V and 166,VI; Nicaragua, Art. 27,4). The Tutela Law in Colombia exempts the need of identifying the article of the constitution providing that the harmed or threatened right is identified with precision (Art. 14). A similar provision is set forth in the Costa Rican Constitutional Jurisdiction Law (Art. 38).

5) The plaintiff must specify the concrete petition for the judicial order to be issue in protection of his rights that is requested from the court (Argentina, Art. 6,d; Bolivia, Art. 97,VI; Honduras, Art. 49,7; Peru, Art. 42,6; Paraguay, Art 6,d).

6) Finally, the plaintiff must base the conditions for the admissibility of the action, in particular, regarding the inadequacy of the other possible judicial remedies and the irreparable injury the plaintiff will suffer without the amparo suit protection⁷⁹⁰.

In order to soften the consequences of not mentioning correctly all the abovementioned requirements that have to be complied with in the presentation of the petition, almost all the Latin American Amparo Laws, in protection of the injured party right to sue, provides that the courts are obliged to return to the plaintiff the petition that does not conform with those requirements in order for him to make the necessary corrections. That is to say, the petition will not be considered inadmissible because of the non compliance with the requirements of the Laws, and in order to have them corrected or mended the court must return it to the petitioner for him to correct it in a brief delay. And only if the petitioner does not make the corrections then the complaint will be rejected (Colombia, Art. 17; Costa Rica, Art. 42; El Salvador, Art. 18; Guatemala, Art. 22; Honduras, Art. 50; Mexico, Art. 146; Nicaragua, Art. 28; Peru, Art. 48; Paraguay, Art. 7; Venezuela, Art. 19).

2. General principles regarding evidence and burden of proof

As has been studied in previous chapters, the amparo suit is a specific judicial mean regulated in Latin America in order to obtain the immediate protection of constitutional rights and guaranties, when the aggrieved or injured parties have no other adequate judicial means for such purpose.

In any case, the violation of a constitutional right that can found an amparo action, in general terms must be a flagrant, vulgar, direct and immediate, caused by a perfectly determined act or omission, and the harm or injury caused to the constitutional rights must be manifestly arbitrary, illegal or illegitimate, consequence of a violation of the Constitution; all of which, in principle must be clear and ostensible from what the plaintiff argues before the court in his petition.

790 In similar way as in the injunction petition in the United States. See in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 346, 352.

This conditions, similar to what is established in the United States regarding the injunctions⁷⁹¹, imposes to the plaintiff the burden to prove the existence of the right, the alleged violations of threat, and the illegitimate character of the action causing it, with clear and convincing evidence. That is why, for instance, all the Amparo Laws in Latin America require that all the circumstances of the case must be explained in the text of the petition, with all the evidences supporting it. Also some statutes impose the need for the petition to be filed attaching all the documentary evidence (Argentina, Art. 7; Bolivia, Art. 97,V; Guatemala, Art. 21,g; Panama, Art. 2619; Uruguay, Art. 5), and specifying all the other evidences to be presented (Argentina, Art. 7; Uruguay, Art. 5). In México the evidences must be shown in the hearing, except the documentary evidence that can be filed before (Art. 151).

In any case, the amparo suit is a brief and prompt procedure for the immediate protection of constitutional rights based in sufficient evidence, which cannot be involved in complex evidence activity. If the latter situation is the case, the Argentinean Amparo Law provides for the inadmissibility of the amparo action, by establishing it in cases “where in order to determine the invalidity of the [challenged] act, a mayor scope of debate or proof is required” (Art., 2d).

Accordingly, the courts have rejected amparo actions in complex cases where a mayor debate is needed, and in cases in which the evidences are difficult to be provided⁷⁹², which is considered incompatible with the brief and prompt character of the amparo suit that requires that the alleged violation be “manifestly” illegitimate and harming. Even though without the clear provision on the matter of the Argentinean Law, this same principle has been considered as applicable regarding the *mandado de seguridad* in Brazil, Uruguay⁷⁹³ and Venezuela⁷⁹⁴

On the other hand, regarding the “evidence phase” in the process in the amparo suit, regulated in some Laws (El Salvador, Art. 29; Guatemala, Art. 35); some legislations, as is the case of Peru, discard its existence, providing that the evidences must be presented with the petition, and that they will be accepted if they do not require further procedural developments (Art. 9). The courts also have among their *ex officio* powers, the competence to obtain evidences (Costa Rica, Art. 47; Guatemala, Art. 36; Paraguay, Art. 11) if it does not cause an irreparable prejudice to the plaintiff (Venezuela Art. 17), or to do whatever they consider necessary without affecting the length of the procedure. In the latter case no previous notification to the parties is required (Peru, Art 9).

In principle, all evidences are admitted in the amparo suit, so the court can found its decision to grant or not the required protection in any evidence (Colombia, Art. 21). Nonetheless, some legislations forbid some evidences in the amparo suit, as is the case of confession (Argentina Art. 7; El Salvador, Arts. 29; Mexico, Art. 150; Paraguay, Art 12), and those considered contrary to morality or good costumes (México, Art. 150).

3. The decision regarding the admissibility of the petition

It can be considered as a general feature of the procedure of the amparo suit, the power of the competent court to decide at the beginning of the procedure upon the admission of the petition, when

791 See Kevin Schroder, John Glenn and Maureen Placilla (Editors), *Corpus Juris Secundum*, Vol. 43A, Thomson West, 2004, p 54.

792 See José Luis Lazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires 1987, p. 94-95, 173 ff.; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires, 1987, pp. 52; Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea, Buenos Aires, 1988, pp. 231-239.

793 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo 1993, p. 17.

794 See Rafael Chavero G., *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 340.

it accomplishes with all the admissibility conditions set forth in the Amparo Laws. Consequently, the courts are empowered to decide *in limine litis* about the inadmissibility of the action when the petition does not accomplish in a manifest way with the conditions determined in the statute (Argentina, Art. 3; Bolivia, Art. 98; Costa Rica, Art. 9; Mexico, Art. 145; Peru, Art. 47; Uruguay, Art. 2).

4. The defendant (the injurer or aggrieving party) pleading or answer

In almost all the Latin American Laws regulating the amparo suit, after the decision of the court to admit the action, one of the main phases of the procedure refers to the need for the court to notify the aggrieving party in order to request it, a formal answer regarding the alleged violations of constitutional rights of the plaintiff. Due to the bilateral character of the procedure, as happens in the injunctive relief procedure in the United States, an amparo ruling must not be issued until the pleadings by the defendant have been joined⁷⁹⁵. In the cases of Bolivia and Ecuador, the Amparo Laws do not require the filing of an answer, which can be nonetheless be presented before the court in the hearing of the case (Bolivia, Art. 100; Ecuador, Art. 49).

Thus, after admitting the claim, the first procedural step the court must take is the request from the defendant and the formal answer of the petition formulated by the injured party, in which, in addition the defendant must put forward his counter evidences. This is what was established in the Venezuelan Amparo Law (Art. 24); which nonetheless has been eliminated by the Constitutional Chamber in its decision of 2000, interpreting the Amparo law according to the new 1999 Constitution, reshaping the amparo suit procedure⁷⁹⁶.

In the other Latin American countries, the defendant's answer or pleading regarding the harm or threat alleged by the plaintiff to be sent to the court, must be sent in a very brief term (Argentina, Art. 8; Bolivia, Art. 100; Panama, Art. 2591) of hours (24h: El Salvador, Art. 21; 48h: Venezuela, Art. 23) or three days (Colombia, Art. 19; Costa Rica, Arts. 19, 43, 61; Paraguay, Art. 9), five days (Honduras, Arts. 26, 52; Mexico, Art. 147, 149; Peru, Art. 53) of ten days (Nicaragua, Art. 37). The omission by the court to request the defendant's answer produces the nullity of the process (Argentina, Art. 8).

The omission of the defendant to send his pleading answer to the court, implies that the facts alleged by the injured party facts and acts causing the harm or threat must be considered as certain (Colombia, Art. 19; Costa Rica, Art. 45⁷⁹⁷; El Salvador, Art. 22; Honduras (habeas corpus), Art. 26; Mexico, Art 149; Nicaragua, Art. 39); or that the constitutional right or guarantee that is allegedly be violated, must in fact be considered violated (Honduras, Art. 53) or that the plaintiff alleged facts must be considered as accepted by the defendant (Venezuela, Art. 23). In those cases, the consequence of the omission by the defendant to send his answer to the court is that the amparo should be granted (Argentina, Art. 20; Costa Rica, Art. 45; Honduras, Art. 53). In some cases, the effect of such omission is to grant a preliminary relief, suspending the effects of the challenged act (Guatemala, Art. 33);

Notwithstanding, in certain cases, the court can insist on the remittance of the answer or ask for new information (Argentina, Arts. 20, 21; Colombia, Art. 21; Costa Rica, Art. 45; Peru, Art. 53)

795 See in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp.357 ff.

796 See Rafael Chavero G., *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, pp.264 ff.

797 In cases of habeas corpus article 23 of the Costa Rican Law set forth that the facts could be considered as certain.

5. The hearing in the amparo suit

In all the Latin American Amparo Laws, one of the most important steps on the procedure is the hearing that the court must convene, also in a very prompt term of days, with the participation of the parties (Argentina, Art. 9; Bolivia, Art. 100; Ecuador, Art. 49; Uruguay, Art. 6; Paraguay, Art. 10; Venezuela, Art. 26) The absence of the defendant in general terms does not produce the suspension of the hearing (Bolivia, Art. 100).

According to some Amparo laws, if the plaintiff does not assist to the hearing it is understood that he desisted his action, with payment of the costs (Argentina, Art. 10; Ecuador, Art. 50); and if it is the defendant the one who does not assist, the hearing is not suspended (Ecuador, Art. 5), and the evidences presented by the plaintiff will be accepted and the court then must proceed to decide (Art. 10).

In some Latin American Laws, it is set forth that the court must take its decision in the same hearing or trial (Bolivia Art. 100; Uruguay, Art. 6; Venezuela, or in the following days (Venezuela, Art. 24).

CHAPTER XIV

JUDICIAL ADJUDICATIONS IN THE "AMPARO" SUIT: PRELIMINARY MEASURES AND DEFINITIVE RULINGS: PREVENTIVE AND RESTORATIVE DECISIONS

The final purpose of filing an amparo action is for the plaintiff to obtain a judicial adjudication from the competent court, seeking for the immediate protection of his harmed or threatened constitutional right or guarantee, which in general terms, using the same wording used for the North American injunctions, can consist on:

"Restrain action or interference of some kind; to furnish preventive relief against irreparable mischief or injury; or to preserve the status quo. It is a remedy designed to prevent irreparable injury by prohibiting or commanding certain acts. The function of injunctive relief is to restrain motion and to enforce inaction. An injunction is designed to prevent harm, not redress harm; it is not compensatory. The remedy grants prospective, as opposed to retrospective, relief; it is preventative, protective or restorative, but not addressed to past wrongs"⁷⁹⁸.

Thus, if it is true that the general purpose of both institutions can be considered the same, and that both have an extraordinary character in procedural law, there is a basic distinction between them, regarding their protective object: the North American injunction is a judicial equity remedy that can serve for the protection of any kind of personal or property right that in a particular circumstance cannot be adequately protected by remedies at law. In contrast, the Latin American Amparo is conceived as a specific judicial means for the exclusive protection of constitutional rights and guarantees. That is why the general rules governing the injunctions in North America are set forth in the general procedural statutes. Instead, in Latin America, the general rules for the amparo suit are set forth in the Constitutions.

As in the injunctive procedure, two general sort of judicial adjudications can also be issued in the amparo suit for the protection of the claimed constitutional rights or guaranties: preliminary measures that can be issued since the beginning of the procedure and that are in general subject to the final court ruling; and definitive preventive or restorative adjudications ending the process.

798 See the reference to the corresponding judicial decisions in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thompson West, 2004, p. 20.

I. PRELIMINARY MEASURES IN THE AMPARO SUIT

The preliminary, interlocutory and temporal judicial measures that a Latin American court can adopt in any judicial process before full trial on the merits, generally regulated in the Procedural Codes and applicable to the amparo processes are what in Spanish are called “*medidas preventivas*” or “*medidas cautelares*” issued in an interlocutory way, the expressions “*preventiva*” or “*cautelar*” being used in to describe “preliminary” procedural decisions in contrast to definitive or final adjudications. Thus, the Spanish expression “*preventiva*”, is not used exclusively in the English sense of “preventive” as to prevent or to avoiding harm. In the North American system, the “preventive injunction” is a definitive injunction and not a “preliminary” one. In other words, as explained by Tabb and Shoben:

“The classic form of injunctions in private litigation is the preventive injunction. By definition, a preventive injunction is a court order designed to avoid future harm to a party by prohibiting or mandating certain behavior by another party. The injunction is “preventive” in the sense of avoiding harm. The wording may be either prohibitory (“Do not trespass”) or mandatory (“Remove the obstruction”)⁷⁹⁹.

The preliminary judicial measures, of course, can also have “preventive” effects in the sense of preserving the *status quo*, but only in a temporary or preliminary basis, pending the procedure. As the same authors Tabb and Shoben have said:

“Upon a compelling showing by the plaintiff, the court may issue a coercive order even before full trial on the merits. A preliminary injunction gives the plaintiff temporary relief pending trial on the merit. A temporary restraining order affords immediate relief pending the hearing on the preliminary injunction. Both of these types of interlocutory relief are designed to preserve the status quo to prevent irreparable harm before a court can decide the substantive merits of the dispute. Such orders are available only upon a strong showing of the necessity for such relief and may be conditioned upon the claimant posting a bond or sufficient security to protect the interests of the defendant in the event that the injunction is later determined to have been wrongfully issued”⁸⁰⁰.

So, in order to avoid confusions, we are going to use the English expression “preliminary” measures to identify what in Spanish is called “*medidas preventivas o cautelares*” as interlocutory and temporal judicial protective measures that are issued pending the suit, which are similar to the North American “preliminary injunctions” also issued as interlocutory and temporal relief pending the trial. In both cases, the preliminary measures are different from the final judicial protective (permanent injunction) decisions consisting in preventive or restorative adjudication⁸⁰¹.

That is why, in general terms, the amparo suit in Latin America does not have a “cautelar” in the sense of preliminary nature, but tends to protect in a definitive way the constitutional right or guarantee alleged as harmed or threatened. Nonetheless, some terminological confusion can be identified in some countries in which it has been given to the amparo action a “cautelar” nature, based on the distinction between “cautelar” measures and “cautelar actions”. Nonetheless, in those cases, the leveling of the amparo action as “cautelar” is not in the sense of just having a “preliminary” nature, but in the sense of deciding only about the immediate protection of a constitutional right without resolving the

799 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, p. 22

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

801 See John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thompson West, 2004, pp. 24 ff.

other matters of a controversy. This can be seen in Ecuador and Chile, where the amparo suit has been considered to have “cautelar” nature, but in a sense not equivalent to a “preliminary” nature. The Constitutional Court of Ecuador, for instance, has decided as followed:

“That the amparo action set forth in Article 95 of the Constitution is in essence, preliminary (*cautelar*) regarding the constitutional rights, not allowing [the court] to decide on the merits or to substitute the proceedings set forth in the legal order for the resolution of a controversy, but only to suspend the effects of an authority act which harms those rights; and the decisions issued in the amparo suit do not produce *res judicata*, so the authority, once corrected the incurred defects, may go back to the matter and issue a new act, providing it is adjusted to the constitutional and legal provisions”⁸⁰²

In similar way, in Chile the action for protection has been considered to have a “cautelar” nature, not in the sense of “preliminary” measures, but as tending to obtain a definitive protective adjudication regarding constitutional rights⁸⁰³.

But putting aside these terminological clarifications, in the amparo procedure, preliminary measures can be adopted by the courts pending the final adjudication, in order to preserve the *status quo*, avoiding harms or restoring the plaintiff situation to the original situation, during the development of the procedure. The Latin American Laws vary in the regulatory scope of the preliminary measures, in the sense that in some cases they are enumerated in a restrictive way, and in others, the range of power for preliminary protective measures is unlimited.

1. The suspension of the effects of the challenged act

The preliminary judicial measures can consist in the suspension of the effects of the challenged acts. This is considered to be the most traditional preliminary measure, having its origin in the traditional conception of the amparo as a judicial mean for the protection of constitutional rights against State acts.

Two legal regulations can be distinguished in this matter of the suspension of the effects of the challenged acts, regarding the automatic suspension or the need for a court decision on the matter.

In the specific case of Costa Rica, the suspension of the effect of the challenged act can be considered an automatic preliminary effect of the filing of the amparo action, but in the other cases, it is properly a preliminary protective decision that the court must take.

In effect, in Costa Rica, when the amparo action is filed against a statute or other normative act, the application of them to the plaintiff is automatically suspended. In concrete challenged acts, their effects are also automatically suspended (Art. 41). The court can also adopt any other adequate conservatory or security measure in order to prevent material risks or avoid the production of other harms consequence of the facts occurred, (Art. 41). Being the suspension of the challenged act an automatic consequence of the filing of the amparo petition, it is for Public Administration to ask the court to order the execution of the challenged act. For such purpose, the same Article 41 of the Amparo Law provides that in grave exceptional cases the court can order the execution or the continua-

802 See the text and comments in Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, 2004, p. 78.

803 See Eduardo Soto Kloss, *El recurso de protección. Orígenes, doctrina y jurisprudencia*, Editorial Jurídica de Chile, Santiago 1982, p. 248; Juan Manuel Errazuriz and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago, 1989, pp. 34-38.

tion of the execution of the challenged act, at the request of Public Administration. This power that can be exercised *ex officio*, in cases when the suspension of the effects of the act may cause or threaten to cause effective and imminent damages and prejudices to the public interest, bigger than those that could be caused to the aggrieved party. The court can issue the preliminary measures that it considers adequate for the protection of rights and liberties of the aggrieved party and to prevent that the effects of an eventual resolution granting the amparo in his favor become illusory (Art. 41)⁸⁰⁴.

Except in this exceptional case, the suspension of the effects of the challenged act is set forth as a preliminary protective measure that the competent court can issue.

The initial regulations on the matter began with the amparo suit Laws in Mexico, where the suspension of the challenged act is the classic preliminary measure on matters of amparo, which can be decided *ex officio* or at the request of the party (Art. 122). The decision to suspend the effect of the challenged act can be granted when it means a danger of deprivation of life, deportation, expulsion or other conducts prohibited in Article 22 of the Constitutions; or an act that if executed would make physically impossible for the plaintiff to enjoy the individual guarantee claimed. The suspension will consist 1) In ordering the end of the acts that are endangering the life, or that allows the deportation or the expulsion of the plaintiff, or the execution of any of those forbidden in Article 22 of the Constitution; or 2) in ordering that things be maintained in the stage they are, the court having to adopt the adequate measures in order to avoid the consummation of the challenged acts (Art. 123).

Additionally, the suspension can only be decided, when requested by the party; when the harm caused to the aggrieved would be difficult to repair if the act is executed; or when because of the suspension no prejudice is provoked to the social interest, nor the public order norms are contravened. It is understood that the latter is produced when the suspension for instance, implies the continuation of vicious or criminal activities or related to drug production or trafficking, alcoholism or that prevent the adoption of measures to fight grave diseases (Arts. 124, 130)⁸⁰⁵.

In a more precise way, the suspension of the effects of the challenged act has been regulated as a preliminary measure in Articles 31 ff. of the Nicaraguan Amparo Law, as follows:

1) Three days after the filing of the petition, the court *ex officio* or at the party's request can suspend the effects of the challenged act (Art. 31).

2) The suspension will be *ex officio* decided when the challenged act if executed would make physically impossible to restore the plaintiff in the enjoyment of his right, or when a notorious lack of jurisdiction of the authority or public officer against the action is filed, or when the challenged act is one of those that no authority can legally execute (Art. 32).

3) If the suspension is requested by the party, it will be granted when the following circumstances concur: a) That the suspension not cause harm to the general interests nor be contrary to public order provisions; b) That the damages and prejudices that could be caused to the aggrieved party with the execution of the act be deemed by the court as difficult to repair; c) That the petitioner post sufficient bond or guarantee in order to repair the damages or compensate the prejudices that the suspension could cause to third parties, in case the amparo action is rejected (Art. 33).

804 See Rubén Hernández Valle, *Derecho Procesal Constitucional*, Editorial Juricentro, San José 2001, pp. 248-254.

805 See Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Texas Press, Austin 1971, p. 233 ff.; Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de derechos humanos)*, Editorial Porrúa, México 2005, p. 197.

4) Once the suspension order is issued, the court must establish the situation according to which things must remain, and adopt the adequate measures for the conservation up to the end of the procedure, of the matter object of the amparo, (Art. 34).

5) The suspension will lose its effects if a third interested party gives sufficient bond in order to restore things to the stage it was before the challenged act and to pay the damages and prejudices that occur to the plaintiff in case the amparo is granted (Art. 35).

In similar sense to the Nicaraguan regulations, the Guatemalan Amparo Law also sets forth the provisions for what is called the “provisional amparo” decision, consisting in the suspension of the challenged acts (Art. 23 ff). The same principles can be found in the Honduran Amparo Law (arts. 57 ff).

In other Amparo Laws such as in El Salvador, the general provision is the possibility for the court to decide on “the immediate provisional suspension of the challenged act when its execution could cause irreparable harm or damages of difficult reparation by the definitive ruling” (Art. 20). The Law also sets forth that the provisional suspension can only refer to acts with positive effects (Art. 19), thus no suspension is admitted regarding acts with negative effects, that is, for instance, acts denying a petition, because the suspension would be equivalent to provisionally granting the original petition.

Also in Brazil, in the *mandado de segurança* regulations it is set forth as a provisional measure the possibility for the court to suspend the challenged act when from the evidences filed it could result the inefficacy of the definitive measure in case it is granted (Art. 7,2)⁸⁰⁶.

In Colombia, Article 7 of the Tutela Law provides for the “provisional measures for the protection of a right”, as follows:

Art. 7. From the filing of the petition, when the court considers it expressly necessary and urgent for the protection of a right, it will suspend the application of the concrete act that threatens or harms it.

Nonetheless, at party’s request or *ex officio*, the execution or the continuation of the execution can be decided in order to avoid certain and imminent prejudices to public interest. In any case, the court must order what it considers necessary to protect the rights and to prevent that the effects of an eventual decision in favor of the plaintiff become illusory” ..

The court, *ex officio* and at the request of a party, according to the circumstances of the case, can also issue any conservatory or security measure tending to protect the right or to avoid further damages produced by the facts.

In Venezuela, when the amparo action is filed jointly with the judicial review popular action for nullity against statutes or with the judicial review of administrative actions recourse, the amparo petition has always a preliminary (*cautelar*) character, and consequently, the decision granting the amparo pending the principal suit is always of a preliminary character of suspension of the effects of the challenged act. Thus, in the case of statutes it is the Constitutional Chamber the competent one for deciding the suspension of the application of the statute, in such cases, with *erga omnes* effects⁸⁰⁷; and regarding administrative acts, the courts of the Administrative Jurisdiction are the ones that can decide

806 See José Luis Lazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires 1987, p. 319

807 See Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 468 ff. 327 ff.; Allan R. Brewer-Carías, “Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica venezolana, Caracas, 1998, pp. 277 ff.

the matter of suspension of the effects of the administrative challenged act pending the judicial review suit⁸⁰⁸.

2. The order not to adopt innovative actions

In Argentina Amparo law refers to the preliminary measures in an indirect way in Article 15, referring to non innovative measures and to the suspension of the effects of the challenged act; the former tending to the maintenance of the *status quo*, thus, paralyzing the facts that even with the filing of the action, pending the brief procedure of the amparo action, could continue to prejudice the integral repairing of the harmed constitutional right. The measure, as all the preliminary measures, tends to assure the result of the definitive decision ending the amparo suit, and to ensure that it will have the same efficacy as if it would have been issued at the moment of the filing of the action⁸⁰⁹.

In similar way the Amparo Law of Paraguay also authorizes the competent court, ex officio or at the party's request, to order non innovation orders at any moment, in case that the execution has begin or of imminent grave harm. In such cases, when the violation of the rights and guarantees appears in an evident way and the harm could result irreparable, the court must order the suspension of the challenged act, order the accomplishment of the omitted act, or order the preliminary convenient measures (Art. 8).

3. The other preliminary protective measures

In other Latin American countries, the preliminary measures that the court can issue in the amparo suit, are referred in a wider sense, in that the judge can order at any moment the "preliminary measures" for the protection of the rights (Costa Rica, Art. 21⁸¹⁰; Uruguay, Art. 7⁸¹¹); as is the case in the Bolivian Law, which authorizes the court to issue "the necessary preliminary decisions" in order to avoid the completion of the threat, to restrict or suspend a constitutional right or guarantee in which the petition is founded and that at the court's criteria could create an irreparable situation by means of the amparo" (Art. 99).

4. The conditions for the issuing of preliminary protective measures

In the Peruvian Code on Constitutional Procedures, which is the most recent of all the Latin American legislation referred to the amparo suit, the preliminary protective measures have found a precise regulation, particularly regarding the conditions that need to be accomplished for its issuing, as follows:

Article 15. Preliminary measures. In the constitutional processes, preliminary measures can be adopted as well as the suspension of the harming act. In order for it issuance, the appearance of good right, the danger in the delay and the adequacy of the petition to guarantee the efficacy of

808 See Allan R. Brewer-Carías, "Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales* Editorial Jurídica venezolana, Caracas, 1998, pp. 281 ff.

809 See José Luis Lazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires 1987, pp. 314-315; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires 1987, pp. 109; Néstor Pedro Sagüés, *Derecho procesal Constitucional, Vol 3, Acción de amparo*, Editorial Astrea Buenos Aires 1988, p. 460.

810 See Rubén Hernández, *Derecho Procesal Constitucional*, Editorial Juricentro, San José, 2001, pp. 248, 252

811 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo, 1993, pp. 41, 206.

the claim, must be required. They can be issued without the knowledge of the other party and the appeal is only granted without suspensive effects. Its justification, formality and execution will depend on the content of the constitutional claim and the final decision securing..."

This article is the only one that can be found in the Latin Amparo Laws expressly establishing the conditions for the issuance of preliminary measures, which in the other countries have been constructed through judicial doctrine⁸¹². The main conditions refer, first, to what is called the *fumus boni juris* or the need for the petitioner to prove the existence of his right or guarantee set forth in the Constitution that can be violated or threatened. And second, to what is called the *periculum in mora* or the need to prove that the delay in granting the preliminary protection will make the harm irreparable. Additionally it also exists a condition called *periculum in dammi*, referred to the need to prove the imminence of the harm that can be caused; and the need to balance the collective and particular interest involved in the case⁸¹³.

As was ruled by the Supreme Tribunal of Justice of Venezuela, in a decision n° 488 dated March 3, 2000:

"In order for an anticipated protective measure to be granted it is necessary to examine the existence of three essential elements due to its preliminary content, and always balancing the collective or individual interest; such conditions are:

1. *Fumus Boni Iuris*, that is, the reasonable appearance of the existence of good right in hands of the petitioner alleging its violation, appearance that must derive from the documents attached to the petition.
2. *Periculum in mora*, that is, the danger that the definitive ruling could result illusory, due to the necessary delay in resolving the incident of the suspension.
3. *Periculum in Dammi*, that is, the imminence of the harm caused by the presumptive violation of the fundamental rights of the petitioner and its irreparability. These elements are those that basically allow seeking for the necessary anticipatory protection of the constitutional rights and guarantees".⁸¹⁴

In general terms, these conditions for the issuance of the preliminary protective measures in the amparo suit are the same as those expected to be tested when issuing the preliminary injunctions in the United States. As has been summarized by Tabb and Shoben:

"Most circuits follow the traditional test for a preliminary injunction. That test has four prerequisites for the issuance of a preliminary injunction. They are: 1) a probability of prevailing on the merits; 2) an irreparable injury if the relief is delayed; 3) a balance of hardship favoring the plaintiff;

812 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, pp. 491, 422 ff. 501 ff.

813 As for instante has been decided by the Venezuelan First Court on Administrative Jurisdiction, Case: *Video & Juegos Costa Verde, C.A. vs. Prefecto del Municipio Maracaibo del Estado Zulia*, in *Revista de Derecho Público*, n° 85-98, Editorial Jurídica Venezolana, Caracas 2001, p. 291

814 Case *Constructora Pedeca, C.A. vs. Gobernación del Estado Anzoátegui*, in *Revista de Derecho Público*, n° 81, Editorial Jurídica Venezolana, Caracas, 2000, p. 459.

4) a showing that the injunction would not adverse to the public interest. The burden of proof on each of these four elements rests with the movant⁸¹⁵.

5. The *inaudita pars* issuing of the preliminary protective measures

Due to the extraordinary character of the amparo action, the preliminary protective measures requested by the plaintiff, if the abovementioned prerequisites are fulfilled, can be decided and issued by the court in an immediate way, without a previous hearing of the potential defendants, that is, *inadi alteram parte* or *inaudita pars*, as it is expressly provided in the Peruvian Constitutional Procedures Code (Art. 15)⁸¹⁶. Nonetheless, many Amparo laws provide for the need of an immediate notification of the corresponding authority when the suspension of effects of his acts is decided as a preliminary protective measure (Colombia, Art. 7; Mexico, Art. 123,II; El Salvador, Art. 24; Honduras, Art. 60).

In a similar sense, in the United States, the preliminary injunctions and restraining orders can be issued in cases of great urgency and when an immediate threat of irreparable injury exists which forecloses the opportunity to give reasonable notice to the plaintiff, in which the court must balance the harm sought to be preserved against the rights of notice and hearing.⁸¹⁷

Due to this character of being decided without previous hearing the potential defendant, the preliminary decision is adopted at the responsibility and risk of the plaintiff, as is provided in the Honduras Law (Art. 58); the court being empowered to ask for the posting of a bond in order to guarantee the damages that can be caused by the measure, in particular, regarding third parties (Mexico, Art. 124 ff.; Honduras, Art. 58; Paraguay, Art. 8).

The preliminary measures in the amparo process, as happens with the injunctions⁸¹⁸, are essentially modifiable or revocable by the court, particularly at the request of the defendant or of third parties (Colombia, Art. 7; Honduras, Art. 61; Guatemala, Art. 30). In Mexico, even third parties can place a bond requesting the revocation of the preliminary measure of suspension of challenged acts effects, in order to restore things to how they were before the guarantee was violated and to pay the damages and prejudices that could be caused to the petitioner, in case the amparo is granted (Art. 126).

II. THE DEFINITIVE JUDICIAL ADJUDICATION IN THE AMPARO SUIT

The purpose of the amparo suit is for the injured or aggrieved party (the plaintiff), to obtain a judicial protection (*amparo, tutela, protección*) of his constitutional rights or guarantees that have been harmed or threatened by an aggrieving or injurer party (the defendant). The final result of the process, characterized by its bilateral frame which imposes the need for the defendants to have the right to participate and to be heard⁸¹⁹, is thus a formal judicial decision or order issued by the court in order to protect threatened rights or to restore the harmed one. This order, like the North American injunction:

815 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, p. 63.

816 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, pp. 508.

817 See the reference to the corresponding judicial decisions in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 339 ff.

818 See the reference to the corresponding judicial decisions in John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 406 ff; 421.

819 Similarly, regarding definitive injunctions, they only can be granted if process issues and service is made on the defendant. See the reference to the corresponding judicial decisions in John Bourdeau et al, "Injunc-

“Is a court order commanding or preventing virtually any type of action, or commanding someone to undo some wrong or injury. It is a judicial order requiring a person to do or refrain from doing certain acts, for any period of time, no matter its purpose. This is to say, an injunction is a writ framed according to the circumstances or the case commanding an act which the court regards as essential in justice, or restraining an act which it deems contrary to equity and good conscience”⁸²⁰.

In similar sense, the function of the amparo court’s decision is, on the one hand, to prevent the defendant from inflicting further injury on the plaintiff, similarly the “preventive injunction” in the United States, that can be prohibitory or mandatory; or on the other hand, to correct the present by undoing the effects of a past wrong, similarly the “restorative or reparative injunction” in the United States⁸²¹.

But the amparo judicial order in Latin America, where the distinction between equitable and law extraordinary remedies does not exist, is not only similar in its purposes and effects to the North American injunction, but also to the other non equitable extraordinary remedies, like the mandamus and prohibition legal remedies. That is, the amparo order can not only be prohibitory, that is, issued to restrain an action or that certain acts be forbidden (to command a person to refrain from doing a specific act), but also mandatory, that is, to compel an action; that is, like the writ of mandamus, it can compel the execution of some act (command a person to do a specific act), and likewise, the mandatory injunction can also require undoing an act, restoring the statu quo. The amparo judicial order can also be similar to the writ of prohibition, when the order is directed to a court, what normally happens in the cases of amparo actions filed against judicial decisions⁸²².

Regarding for instance the Venezuelan amparo process, where the courts have very extensive powers that allow them, in similar way to the North American and British judges⁸²³, to provide for remedies in order to effectively protect constitutional rights, in that they can issue orders to do, to refrain from doing, or to undo; or prohibitions⁸²⁴.

tions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 339.

820 See the reference to the corresponding judicial decisions in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 19.

821 See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp. 86-89; John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 28 ff.

822 See for the reference to the North American remedies, William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp. 86 ff; and in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thompson West, 2004, pp. 21 ff.; 28 ff.

823 Véase F. H. Lawson, *Remedies of English Law*, Londres, 1980, p. 175; B. Schwartz y H.W. R. Wade, *Legal control of government*, Oxford, 1978, p. 205.

824 See Allan R. Brewer-Carías, “Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales* Editorial Jurídica Venezolana, Caracas 1998, pp. 143 ff.

1. The preventive and restorative nature of the amparo

The contents of the final adjudication in the amparo suit is a very extensive one, and in general consists, as is set forth in Article 86 of the Colombian Constitution, in an order directed to the person or persons “against whom the tutela is filed, in order to act or to refrain from act”; or as it is set forth in a more generic way in the Amparo Law, the decision must establish “the order and precise definition of the conduct to be accomplished in order to make effective the tutela” (Colombia, Art. 29,⁸²⁵); the “precise conduct to be accomplished” (Argentina, Art. 12,⁸²⁶; Honduras, Art. 63,⁸²⁷; Mexico, Art. 77,III; Nicaragua, Art. 45; Paraguay, Art. 16,b; Peru, Art. 17,5; Uruguay, Art. 9,b⁸²⁸; Venezuela, Art. 32,b⁸²⁹). That is why in general terms the Honduran Law states that the court, when issuing its decision, must always bear in mind that its “purpose is to guarantee the aggrieved party the complete enjoyment of his fundamental rights and to return things, when possible, to the stage they had previous to the violation” (Art. 63).

That is, the order can be of a restorative nature, consisting in seeking for the reestablishment of the juridical situation of the plaintiff to the stage it had before the violation or to the most similar one; and can be of a preventive nature, compelling the defendant to do or refrain from doing acts in order to maintain the plaintiff in the situation of enjoyments of is rights. As it is expressly provided in Article 80 of the Mexican Amparo Law:

Article 80. When the claimed act is of a positive character, the decision granting the amparo will have the purpose to restore the aggrieved party in the complete enjoyment of the harmed constitutional guarantee, reestablishing things to the stage they had before the violation; when the claimed act is of negative character, the effect of the amparo will be to compel the responsible authority to act in the sense to respect the guarantee and to accomplish what the same guarantee implies.

The same provision is set forth in Article 49 of the Costa Rican Constitutional Jurisdiction Law; as well as in Article 46 of the Nicaraguan Amparo Law. Its content has been explained by Baker as follows:

“When the act complained of is of a positive character, the writ of amparo has the form of a prohibitory injunction plus whatever additional elements that may be necessary to repair damages already inflicted. The latter is to be accomplished by reproducing the situation that existed before the Constitution was violated. When the act is negative in character, the writ takes the form of an order directing the responsible authority to actively comply with the provisions of the violated constitutional guarantee. In both cases, the purpose of the judgment is to restore to the complaint

825 Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá, 2004 p. 153

826 See Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires, 1988, p. 434; Alí Joaquín Salgado, *Juicio de amparo y acción de inconstitucionalidad*, Editorial Astrea, Buenos Aires, 1987, p. 100; José Luis Iazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires, 1987, pp. 345, 359.

827 Edmundo Orellana, *La justicia constitucional en Honduras*, Universidad Nacional Autónoma de Honduras, Tegucigalpa, 1993, pp. 181, 208, 216.

828 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo, 1993, p. 52, 207 ff.

829 Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 185 ff., 327 ff.; Allan R. Brewer-Carías, “Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales* Editorial Jurídica Venezolana, Caracas, 1998, pp. 399 ff.

the full and unimpaired enjoyment of his constitutional rights. Consistent with this purpose, monetary damages are not appropriate remedies in amparo⁸³⁰.

Accordingly, it can be said that one of the main characteristic of the amparo in all Latin American countries is its restorative or reestablishing purpose. In this regard, for example, the Colombian Tutela Law provided that “when the claim is directed against an authority action, the tutela decision has the purpose of guaranteeing the aggrieved party the complete enjoyment of his right and when possible, to return the situation to the stage previous to the violation” (Art. 23). A similar provision is established in El Salvador (Art. 35), Costa Rica (Art. 49) and in Peru (Art. 1), where Article 55,3 of the Constitutional Procedures Code provides as one of the contents of the amparo decision “the restitution or reestablishment of the aggrieved party in the complete enjoyment of his constitutional rights ordering that things will revert to the stage they had before the violation”, as well as the order for the conduct to be accomplished for the effective compliance with the decision (Art. 55,4).

In other perspective, in Guatemala, the Amparo law regarding the effects of the amparo decision states that it will suspend, regarding the claimant, the application of the challenged statute, regulation, resolution or act, and being the case, the reestablishment of the affected juridical situation or the ending of the measure” (Art. 49,a; Ecuador, Art. 51). Also in Colombia, according to Article 29,6 of the Tutela Law, “when the violation or threat of harming derives from the application of a norm incompatible with the fundamental rights, the resulting judicial decision resolving the action must also order the inapplicability of the challenged norm in the concrete case”. In a similar sense it is stated in the Honduran Constitutional Justice Law (Art. 63,2)

But the amparo decision also can have protective character when issued against omissions or actions. In cases in which the harm to the constitutional right is caused by a negative of action or an omission from a public authority, in which cases, as set forth in the Colombian Tutela Law, “the decision will order the issuance of the act or the accomplishment of the adequate actions, for which purpose it must establish a prompt delay” (Art. 23). A similar provision is established in the El Salvador Amparo Law (Art. 35) and in the Ecuadorian Amparo law (Art. 51). Also, the Guatemalan Amparo Law sets forth that in such cases the amparo decision will establish a term for the delay to be ended, if the case is only a matter of delay in resolving” (Art. 49,b; Costa Rica, Art 49); and in cases where the amparo is filed against an omission of the authority to issue a regulation of a statute, the court will decide determining the basis and elements to be apply in the case according to the general principles of law (Art. 49,c). Additionally, in Costa Rica, in such cases, the judicial order must establish a term of two months for the authority to issue the regulation (Art. 49)

In cases referred to mere conduct or material activity or threats, according to the Costa Rican Constitutional Jurisdiction Law (Art. 49) and Colombian Tutela Law (Art. 23), the amparo or tutela decision will “order its immediate ending, as well as measures to prevent any new violation or threat, disturbance or restriction”. Also, in cases where if by the moment where the tutela protection is granted, the challenged act has ceased in its effects or has produced them, making impossible to restore the plaintiff in the enjoyment of his rights, the court will warn the public authority not to cause again in any way, the actions or omissions which originated the tutela suit (Colombia, Art. 24). In a similar way it is stated in the Peruvian Constitutional Procedures Code (Art. 1).

830 See Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Texas Press, Austin, 1971, p. 238.

2. The question of the annulling content of the amparo decision

In general terms it can be said that the amparo suit in Latin America does not have annulling purposes regarding the State acts that can cause or provoke the harm or threats to constitutional rights, corresponding the decisions to annul statutes to the Constitutional Jurisdiction and to the Administrative Jurisdictions when administrative acts are targeted.

In effect, if the amparo action is filed directly against statutes, as in some countries it is possible in cases of self executing laws (Mexico⁸³¹, Guatemala⁸³², Honduras⁸³³), the amparo judge, when granting the amparo has no power to annul the statute, and in order to protect the harmed or threatened right it only declares its inapplicability to the plaintiff, as is also the case in Venezuela⁸³⁴. In countries where the concentrated method of judicial review exists, the annulment of statutes with general or *erga omnes* effects, is a judicial power reserved to the Constitutional Jurisdictions (Constitutional Courts or Tribunal); and in countries with the diffuse method of judicial review, if it is true that there is not such judicial power to annul statutes, the courts are only empowered to declare their unconstitutionality regarding the concrete case. Thus, in countries with the diffuse method of judicial review, in general terms when the competent courts in an amparo suit grants the constitutional protection, they have the power to declare the unconstitutionality of the applicable statute in the concrete case.

Nonetheless, the case of Costa Rica must be mentioned because the Constitutional Chamber of the Supreme Court is the competent court to decide the amparo suits and the nullity actions against statutes, Article 48 of the Constitutional Jurisdiction Law provides that when the amparo is filed against a statute norm or when the Constitutional Chambers determines that the challenged acts are founded in a statute, it will decide to suspend the procedure and ask for the petitioner to file a petition in a term of 15 days, for judicial review of the unconstitutionality of the statute (Art. 48).

In Venezuela, regarding the possibility for the Chambers of the Supreme Tribunal to exercise the diffuse control of the constitutionality of legislation when deciding in a concrete case, the Law regulating the Tribunal provides that the other Chambers must notify the Constitucional Chamber for it to proceed to examine in an abstract way the constitutionality of the statute and eventually declare its nullity (Articles 5, 1,22; and 5,5)⁸³⁵.

In cases where the amparo action is filed against administrative acts, again, in general terms the amparo decision cannot annul the corresponding administrative act, but only suspend its application to the plaintiff, corresponding to the Administrative Jurisdiction the exclusive power to annul such acts, as is the case in Venezuela⁸³⁶. In this regard, the case of Peru must be highlighted because its Constitutional Procedures Code expressly provides that the amparo decision must contain "the decla-

831 See Eduardo Ferrer Mac-Gregor, *La acción constitucional de amparo en México y España. Estudio de derecho comparado*, Editorial Porrúa, México, 2002, pp. 262-263; Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, University of Texas Press, Austin, 1971, p. 270

832 See in Jorge Mario García Laguardia, *Jurisprudencia constitucional. Guatemala., Honduras. México, Una Muestra*, Guatemala, 1986, pp. 23, 24, 92, 93.

833 See Edmundo Orellana, *La justicia constitucional en Honduras*, Universidad Nacional Autónoma de Honduras, Tegucigalpa, 1993, pp. 208, 221.

834 Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 468 ff.

835 See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas, 2004, p. 40.

836 Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 358 ff.; Allan R. Brewer-Carías, "Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 144; 400.

ration of the nullity of the decision, act or resolution that has impeded the complete exercise of the constitutional rights protected with the ruling, and in the case, the extension of its effects" (Art. 55)⁸³⁷. Also in Costa Rica, according to Article 49 of the Constitutional Jurisdiction Law, it is considered that in case of amparo actions against administrative acts, the granting of the amparo implies the annulling effects of the decision.

Finally, regarding the amparo action when filed against judicial decisions, the effects of the ruling granting the amparo protection are also the annulment of the challenged judicial act or decision, as happens in Venezuela⁸³⁸.

3. The non compensatory character of the amparo decision

Similarly to the North American injunction⁸³⁹, in general terms, the Latin American amparo suit and decision have not a compensatory character in the sense that the function of the courts in such suit is not to condemn the defendant to pay the plaintiff any sort of compensation for damages caused. For instance in the case of an illegitimate administrative order to demolish a building issued by a municipal authority, if executed, even if it violates the constitutional right to property, it cannot be the object of an amparo action due to the irreparable character of the harm. Consequently, the amparo judge is not competent to condemn the public entity to pay damages. The amparo judge, in such cases, could only have the possibility to prevent the harm, for instance by suspending the demolition before its execution, but never to condemn the entity to the payment of compensation. The amparo suit, as mentioned, is in general terms a preventive and restorative process, but not a compensatory one⁸⁴⁰.

Nonetheless, if it is true that this is the general principle, some Latin American Amparo Laws give compensatory character to the amparo suit. This is the case of Bolivia, Colombia and Costa Rica.

In Bolivia, Article 102,II of the Law, regarding the content of the amparo decision, states that when granting the amparo the court will determine the existence of civil and criminal liability, fixing the amount of the damages and prejudices to be paid. Also, in Guatemala, Article 59 of the Law refers to the damages and prejudices, stating that when the court in its decision condemns to the payment of damages and prejudices, it must fix its amount or at least establish the basis for its determination (Art. 59).

Bolivia and Guatemala are the only Latin American Amparo Laws that provide for a direct compensatory character of the amparo decision. In other legislations, such as Colombia and Costa Rica the compensation in the amparo decision is only established in an abstract way.

In effect, in Costa Rica, Article 51 of the Constitutional Jurisdiction Law provides that "always when an amparo is granted the court, in abstract, will condemn for the compensation of damages and

837 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, p. 186

838 See Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 511; Allan R. Brewer-Carías, "Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales* Editorial Jurídica Venezolana, Caracas, 1998, p. 297.

839 See John Bourdeau et al, "Injunctions" in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 20

840 See José Luis Iazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires 1987, pp. 346-347; Néstor Pedro Sa-güés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires, 1988, p. 437; Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas 2001, pp. 185, 242, 262, 326, 328; Allan R. Brewer-Carías, "Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica Venezolana, Caracas, 1998, p. 143.

prejudices”, and the settlement belongs in the stage of the execution of the decision. When the amparo action is filed against authorities, the condemnation will be issued against the State or against the entity where the defendant works, and jointly with the latter if he has acted with *dolus* or guilt, without excluding all other administrative, civil or criminal liabilities. Also, in case when the amparo process is pending and the challenged State act is revoked, stopped or suspended, the amparo will be granted only to the effects of the corresponding decision awarding compensation (Art. 52). In these cases the settlement will be made by the Administrative Jurisdiction courts⁸⁴¹.

In cases where the amparo action is filed against individuals, Article 53 of the same Law provides that when granting the amparo, the court must also condemn the person or responsible entity to compensate for the damages and prejudices, the settlement of which will be made in the civil judicial execution of the decision mean.

Also in Colombia, Article 25 of the Tutela Law provides that when the affected party has not other means, and the violation of his rights is manifest and a clear and indisputable consequence of an arbitrariness, in the decision granting the tutela the court can, *ex officio*, order in an abstract way the compensation of the damages caused, provided it is needed in order to assure the effective enjoyment for the right. Similarly to what is provided in the Costa Rican Law, Article 23 of the Colombian Law establishes that the condemn will be issued against the entity where the defendant works, and jointly with the latter if he has acted with *dolus* or guilt, without excluding all other administrative, civil or criminal liabilities. The settlement of the compensation corresponds to the Administrative Jurisdiction courts in an incidental procedure that must take place within the following six months⁸⁴².

Also, in case where the tutela process is pending and the challenged State act is revoked, stopped or suspended, the tutela will be granted only to the effects of the corresponding decision awarding the compensation (Art. 26).

Except in these cases of Bolivia, Colombia and Costa Rica, in all other Latin American countries, the judicial actions tending to seek for compensation from the defendant, because of its liability as a consequence of the constitutional right harm or threat, must be filed before the civil or administrative judicial jurisdiction by means of the ordinary judicial remedies established for that purpose. This is provided in some Latin American Amparo Laws (El Salvador, Art. 35; Panama, Art. 2627). The Venezuelan Amparo Law also expressly provides that in cases of granting an amparo, the court must send copy of the decision to the competent authority where the public officer causing the harm works, in order to impose the corresponding disciplinary measures (Art. 27).

Finally, regarding the economic consequences of the amparo suit, in general terms in the Latin American Laws it is provided that the party against whom the decision is directed is due to pay the costs of the process (Argentina, Art. 14; Bolivia, Art. 102,III; Colombia, Art. 25; Costa Rica, Arts. 51, 53; El Salvador, Art. 35; Guatemala, Arts. 44, 45, 100; Honduras, Art. 105; Paraguay, Art. 22; Peru, Art. 56). Only in Venezuela the order to pay the costs is provided regarding the amparo suits only against individuals and not against public authorities (Art. 33).

841 See Rubén Hernández, *Derecho Procesal Constitucional*, Editorial Juricentro, San José, 2001, p. 268; José Luis Villalobos, *El recurso de amparo en Costa Rica*, in Humberto Nogueira Alcalá (Editor), *Acciones constitucionales de amparo y protección: realidad y perspectivas en Chile y América Latina*, Editorial Universidad de Talca, Talca, 2000, p. 229.

842 See Juan Carlos Esguerra Portocarrero, *La protección constitucional del ciudadano*, Legis, Bogotá, 2004, p. 155

4. The effects of the definitive judicial ruling on the amparo suit

The question of the effects of the amparo ruling refers to various aspects: first, to the scope of the effects of the judicial decision granting the amparo, whether *inter partes* or general effects; second, to the *res judicata* effects of the decision; and finally, to the extent of the compulsory effects of the ruling, regarding the consequences of the disobedience of the judicial orders.

A. The *inter partes* effects and its exceptions

The general rule regarding the amparo judicial decisions effects, is that it only has *inter partes* effects, that is, between the parties that have been involved in the suit, that is, the plaintiff or plaintiffs, the defendant or defendants and the third parties that have participated in the process on the side or any the aforementioned.. As it is established in the Mexican Amparo Law: “the decisions in the amparo suits only refers to the individuals or corporations, private or public which filed the actions, limiting their scope to protect them in the case, without making general declarations regarding the statute or act causing the suit” (Art. 76). In the same sense it is set forth in Article 44 of the Nicaraguan Law.

Thus, and as in the case of the injunctions in North America⁸⁴³, the decision rendered binds only the parties to the suit, and only regarding the controversy. This is the most important consequence of the personal character of the amparo, which is an action mainly devoted for the protection of personal constitutional rights or guarantees. Other aspects refer to the general content of the ruling on constitutional questions, which in North America implies that in cases decided by the United States Supreme Court, because of the doctrine of precedent (*stare decisis*), all courts are obliged to apply the same constitutional rule in cases with a similar controversy⁸⁴⁴. The same rule exists in Latin America, in cases where the Supreme Courts or Constitutional Courts rulings, regarding the constitutional interpretation, have been entrusted with obligatory general effects, as is the case in Venezuela with the Constitutional Chamber rulings (Art. 336 of the Constitution) and of Peru, with the Constitutional Tribunal decisions (precedents, Art. VII of the Code on Constitutional procedures).

Thus, as a general rule, regarding the particular ruling in the amparo suit, the decision is only binding on the parties to the suit, including third parties. Those are the beneficiaries and the obliged parties.

But of course, progressively, the amparo suit in many cases has acquired a collective nature, for instance, in cases of violation of environmental rights and other diffuse and collective rights⁸⁴⁵, in which cases, as happens in the class actions in the United States⁸⁴⁶, the definitive ruling can benefit other persons different to those that have actively participated in the procedure as plaintiff.

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

843 See the reference to the corresponding judicial decisions in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 414; 417.

844 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, University of South Carolina Press, 1993, p. 5.

845 See Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, pp. 333 ff.

846 See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, University of South Carolina Press, 1993, p. 6

firstly to “the individual directly affected by the infringement of constitutional rights and guarantees.”⁸⁴⁷

Nonetheless, by virtue of the constitutional acknowledgment of the legal protection of diffuse or collective interests, the Constitutional Chamber of the Supreme Tribunal has also admitted the possibility of employing the action of *amparo* to assure the enforcement of those collective interests, including for instance, that of voters in their political rights. In such cases, the Chamber has granted precautionary measures with *erga omnes* effects “for both individuals and corporations who have instituted an action for constitutional protection and to all voters as a group.”⁸⁴⁸

The Constitutional Chamber, has decided that “any individual is entitled to bring suit based on diffuse or collective interests” and has extended “standing to companies, corporations, foundations, chambers, unions and other collective entities, whose object is the defense of society, as long as they act within the boundaries of their corporate objects, aimed at protecting the interests of their members regarding those objects.”⁸⁴⁹

In addition, the Peoples’ Defendant 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 281,2 of the Constitution); consequently, the Constitutional Chamber has admitted the standing of the Peoples’ Defendant to bring to suit in an action of *amparo* on behalf of the citizens as a whole (class). 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.⁸⁵⁰ In all those cases, consequently, the judicial ruling benefits all the persons enjoying the collective rights or interest involved.

B. The question of the scope of the *res judicata* effects

As all definitive judicial decisions, the *amparo* decision in Latin America has in general *res judicata* effects, which provides stability, and is binding not only for the parties in the suit or its beneficiaries, but regarding the court itself which cannot modify its ruling (immutability). *Res judicata* implies then, the impossibility for a new suit to take place regarding the same matter already decided, or that a decision be taken in different sense than the one already decided in a previous process.

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

848 Decision of the Constitutional Chamber n° 483 of 05-29-2000 (Case: “*Queremos Elegir*” y otros), *Revista de Derecho Público*, n° 82, Editorial Jurídica Venezolana, 2000, pp 489-491. In the same sense, decision of the same Chamber n° 714 of 13-07-2000 (Case: *APRUM*).

849 See decision of the Constitutional Chamber n° 656 of 06-05-2001 (Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*).

850 Decision of the Constitutional Chamber n° 656 of 06-05-2001, (Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*).

In contrast, as a general rule, the injunction ruling in North America does not have, in general, this *res judicata* effect since the injunction orders can be modified by the court. As it has been summarized regarding the judicial doctrine on the matter:

“Injunctions are different from other judgments in the context of *res judicata* because the parties are often subject to the court’s continuing jurisdiction, and the court must strike a balance between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances”⁸⁵¹.

But in Latin America, although the *res judicata* effects have been admitted regarding the amparo decisions, discussions have developed in many countries following a traditional distinction established between the “material” and the “formal” *res judicata*, in order to determine which one applies to the amparo ruling.

In general terms, the concept of “formal *res judicata*” applies to judicial decisions that even when enforced, they do not impede for a new process between the same parties to be developed, due to the fact that in such cases the matter has not been decided on the merits and on the defenses; while “material *res judicata*” exists when the judicial decision has decided on the merits, not being allowed for other processes to develop regarding the same matter.

The matter in the amparo suit is the illegitimate and manifest harm or threat caused by an identified aggrieving party to the constitutional right or guarantees of the plaintiff; matter that is to be resolved in a brief and prompt procedure. Thus, the merits on the matters are reduced to determining the existence of such illegitimate and manifest violation of the right, regardless of other matters that can be resolved or in some cases must be resolved between the parties in other processes.

As it is set forth in the Argentina Amparo Law:

Article 13. The definitive decision declaring the existence or nonexistence of an arbitrary or manifestly illegal harm, restriction, alteration or threat regarding a constitutional right and guarantee, produces *res judicata* regarding the amparo, and the exercise of the actions or recourses that could correspond to the parties subsist, in spite of the amparo.

A similar provision is set forth in Article 17 of the Paraguayan Law; and in Article 11 of the Uruguayan Law⁸⁵².

This provision, regarding the effects of the *res judicata*, has been considered interpreted in two ways: On the one hand, Lazzarini has considered it establishes the “material *res judicata*” effects regarding the protective amparo decision, arguing that the allusion the article makes regarding other actions or recourses, are referred to criminal actions tending to punish the offenses causing the harm, or to civil actions tending to obtain compensation, but not to other actions in which the amparo could be again reargued⁸⁵³. On the other hand, Sagües has considered that even being the amparo suit a bilateral process, due to its brief and prompt character with the consequent restrictions regarding proofs and formalities, there can not be a decision on the merits of the matter, so no material *res judicata* can

851 See the reference to the corresponding judicial decisions in John Bourdeau et al, “Injunctions” in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 416. See also Owen M. Fiss and Doug Rendleman, *Injunctions*, The Foundation Press, 1984, pp. 497-498, 526

852 See Luis Alberto Viera, *Ley de Amparo*, Ediciones Idea, Montevideo, 1993, p. 40

853 See José Luis Lazzarini, *El juicio de amparo*, Ed. La Ley, Buenos Aires, 1987, pp. 356 ff.

be produced, but only a formal one, being possible for the merits to be resolved through the ordinary judicial means, only if the parties allege a violation to their due process rights occurred (for instance, regarding evidences) in the amparo process⁸⁵⁴.

In the Venezuelan Amparo Law, in a similar way to the Argentinean provision, and with the same different approach regarding the material or formal *res judicata* effects⁸⁵⁵, Article 36 establishes:

Article 36. The definitive amparo decision will produce legal effects regarding the right or guarantee that has been the object of the process, without prejudice of the actions or recourses that legally correspond to the parties.

In this regard, the First Court on Administrative Jurisdiction, in a decision dated October 16, 1986 (*Case Pedro J. Montilva*), decided that if in a case “the action of amparo is filed with the same object, denouncing the same violations, based on the same motives and with identical object as the previous one and directed against the same person, then it is evident that in such case, the *res judicata* force applies in order to avoid the rearguing of the case, due to the fact that the controversy to be resolved has the same subjective and objective identity than the one already decided”⁸⁵⁶.

According to this doctrine, and according to Article 36 of the Law, the *res judicata* in the amparo suit only refers to what has been argued and decided in the case regarding the violation of harm produced to a constitutional right or guarantee. Thus, the amparo decision in general terms does not resolve all the possible merits of the matter but only the aspect of the violation or harm of the rights or guarantees, which is the only aspect regarding which the decision can produce *res judicata* effects. That is why the decision only has restorative effects, due to the fact that by means of the amparo suit, as it has been resolved by the Supreme Court of Venezuela, “non of the three types of judicial declarative, constitutive or to condemn decision can be obtained, nor, of course, the interpretative decision”⁸⁵⁷. For example, if an amparo decision is issued against an administrative act because it causes harm to constitutional rights, it only has restorative or reestablishing effects suspending the application of the challenged act, but it does not have annulling effects. Consequently, the amparo decision in such cases, does not have *res judicata* effects regarding the judicial review action that can be filed against the administrative act before the Administrative Jurisdiction courts.⁸⁵⁸

That is, in matters of amparo suit, in many cases the amparo decision regarding the violation of the right by the illegitimate action of omissions, resolves definitively the matter, not being necessary to discuss any other legal matter through any other process. In such cases, it can be said that the amparo ruling has material *res judicata* effects. But in other cases, after the amparo decision has been issued, other legal questions can remain pending to be resolved in other processes, and that is why the amparo decision is issued “without prejudice of the actions or recourses that could legally correspond to

854 See Néstor Pedro Sagüés, *Derecho procesal Constitucional*, Vol 3, *Acción de amparo*, Editorial Astrea Buenos Aires, 1988, pp. 449 ff.

855 See Rafael Chavero G. *El nuevo amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, pp. 338 ff.; Gustavo Linares Benzo, *El proceso de amparo en Venezuela*, Caracas, 1999, p. 121 f.

856 See in *Revista de Derecho Público*, n° 28, EJV, Caracas, 1986, p. 106

857 See decisión of the Politico-Administrative Chamber of July 15, 1992, in *Revista de Derecho Público*, n° 51, EJV, Caracas, 1992, p. 171.

858 See Allan R. Brewer-Carías, “Derecho y Acción de Amparo, Vol V, *Instituciones Políticas y Constitucionales* Editorial Jurídica Venezolana, Caracas, 1998, pp. 346 ff.

the parties". It has been said that the amparo decision has formal *res judicata* effects, which do not refer to the matter of the right's violation ruling.⁸⁵⁹

These effects of the amparo decision also exist regarding the amparo suit against individuals, and a case can illustrate the matter: in 1987 a controversy arose in a private Caracas University (Santa María), regarding the position for the Head of the institution (Rector), a position that was disputed by two professors that argued they were appointed by the University bodies. The First Court on Administrative Jurisdiction in a decision dated December 17, 1987, issued an amparo decision on the matter filed by one of the *Rectores* in order to assure legal security to the university community, due to the fact that the matter regarding who was the Head of the University could not remain indefinitely unresolved, ruled considering legitimate the designation of one of the *Rectores*, "until the controversy regarding the legitimacy of the bodies that made the appointments be resolved by the judicial competent court"⁸⁶⁰. According to this decision, a civil action was needed to be resolved in order to resolve the merits.

The different approaches to the *res judicata* regarding amparo decisions have been expressly resolved, for instance, in the El Salvador Amparo Law, which prescribes the following:

Article 81. The definitive amparo decision produces *res judicata* effects against any person of public officer, had he intervened or not in the process, only regarding the matter of the challenged act being or not constitutional or contrary to the constitutional provisions. With all, the content of the decision does not constitute in itself a declaration, recognition or constitution of private rights of individuals or of the state; consequently the decision can not be opposed as a *res judicata* defense regarding any action that could be afterward filed before the courts of the Republic".

In similar terms it is set forth in the Honduran Law (Art. 72), and in the Guatemalan Law, which provides that "the decisions issued in the amparo suits have declarative effects and do not originate the *res judicata* defense, without prejudice of the provisions derived from the *jurisprudencia* on the matter (Art. 190).

Finally, in Peru, the Code of Constitutional Procedures does not resolve the discussion, just declaring that "In the constitutional processes, only the final decision deciding the merits acquire the *res judicata* authority" (Art. 6)⁸⁶¹. But the Peruvian Code is one of the few that expressly regulates the effects of the *res judicata* authority regarding the preliminary orders or measures issued during the procedure, in the sense that they will be automatically extinguished. Nonetheless, if the final decision grants the amparo, the effects of the preliminary measures will be kept being converted if definitive (Art. 16).

III. THE OBLIGATORY CHARACTER OF THE AMPARO RULINGS AND THE PUNISHMENT FOR CONTEMPT

The amparo ruling, as all judicial decisions, is binding upon the parties and all other public officers that must apply them, and the defendant must immediately obey by it as it is expressed in the Amparo Laws (Bolivia, Art. 102; Colombia, Arts. 27, 30; Costa Rica, Art. 53; Ecuador, Art. 58; Honduras, Art. 65; Nicaragua, Art. 48; Peru, Arts. 22, 24; Venezuela, Arts. 29, 30).

859 See in this respect, Juan Manuel Errazuriz and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile, Santiago 1989, pp. 195 ff, 202.

860 See in *El Universal*, Caracas, December 27, 1987, p. 2-5.

861 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima 2004, pp. 194 ff.

In order to execute the decision, the courts, *ex officio* or at the party's request, must adopt all the measures directed to its accomplishment, being empowered in the Guatemalan Law to issue orders and mandamus to the authorities and public officers of Public Administration or obligated persons (Art. 55). The amparo courts are also empowered to use public enforcement units to assure the accomplishment of its decisions (Guatemala, Art. 105; Ecuador, Art. 61; El Salvador, Art. 61; Nicaragua, Art. 77).

But the amparo judges in Latin America do not have direct power to punish for disobedience, in other words, they do not have contempt power, which in contrast is one of the most important features of the injunctive relief system in the United States. This is particularly important regarding criminal contempt, which was established since the *In Re Debs* case (158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895)), where according to Justice Brewer who delivered the court's opinion, it was ruled:

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its order it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceedings of half its efficiency... In *Watson v. Williams*, 36 Miss. 331, 341, it was said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as the necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recalcitrant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it".⁸⁶²

These contempt powers are precisely what gave to the injunction in the United States its effectiveness regarding any disobedience, being empowered the same court to vindicate their own power by imposing criminal or economic sanctions by means of imprisonment and fines. The Latin American courts, in contrast do not have such powers, or they are very weak.

In effect, even though the disobedience of the amparo ruling is punishable in the Amparo Latin American Laws, it is not the power of the same amparo court to apply the sanctions. In general terms, the sanctioning powers are attributed to Public Administration or to criminal court. So, in case of disobedience, the court must seek for the initiation of an administrative disciplinary procedure against the disobedient public officer that must be developed by the corresponding superior organ in Public Administration (Colombia, Art. 27; Peru, Art. 59; Nicaragua, Art. 48). Regarding the application of criminal sanctions, the amparo court in cases of disobedience, must seek for the initiation of a criminal procedure against the disobedient to be brought before the competent criminal courts (Bolivia, Art. 104; Colombia, Arts. 27, 52, 53; Costa Rica, Art. 71; Ecuador, Art. 58; El Salvador, Art. 37, 61; Guatemala, Arts. 32, 54, 92; Honduras, Art. 62; Panama, Art. 2632; Mexico, Arts. 202, 209; Nicaragua, Art. 77; Venezuela, Art. 31). Therefore, the amparo judge in Latin America does not have the power to impose directly to those that disobey their orders, disciplinary or criminal sanctions, and only in some countries there have been improvements in the legislations, granting the same amparo courts the powers to impose successive fines (*astreintes*) up to the accomplishing of the order to those disobeying them (Co-

862 See Owen M. Fiss and Doug Rendleman, "Injunctions", The Foundation Press, 1984, p. 13. See also William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp. 72 ff.

lombia, Art. 27; Guatemala, Art. 53; Nicaragua, Art. 66; Peru, Art. 22⁸⁶³) and in some cases, to impose administrative arrests (Colombia, Art. 27).

IV. THE REVISION OF THE AMPARO DECISIONS BY A CONSTITUTIONAL COURT OR THE SUPREME COURT

The amparo decisions, except in the cases where the competent court that issued them is the highest court in the country, as happens in Costa Rica (Constitutional Chamber of the Supreme Court of Justice), Nicaragua (Constitutional Chamber of the Supreme Court of Justice) and El Salvador (Constitutional Chamber of the Supreme Court of Justice), can be appealed according the general rules established in the procedural codes. Due to the general rule of double instance, the decisions cannot normally arrive to their revision by the Supreme Court of the Constitutional Court, except when an extraordinary means for revision is established, in some cases similar to the writ for certiorari in the United States.

In effects, whether or not they involve constitutional issues, the United States Supreme Court is authorized to review all the decisions of the federal courts of appeals, and of the specialized federal courts, and all the decisions of the supreme courts of the states involving issues of federal law, but on a discretionary basis, when considering a petition for a writ of certiorari.

In effect, in all such cases where there is no right of appeal established and where the mandatory appellate jurisdiction of the Supreme Court is not established, they can reach the Supreme Court as petitions for certiorari, where a litigant who has lost in a lower court, petitions a review in the Supreme Court, setting out the reasons why review should be granted.⁸⁶⁴ This method of seeking review by the Supreme Court is expressly established in the cases set forth in the 28 US Code, according to the Supreme Court's Rule No. 17,1 establishing that the rules governing review on certiorari are, "not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore".

According to this Rule, consequently, in order to promote uniformity and consistency in federal law, the following factors might prompt the Supreme Court to grant certiorari: 1. Important questions of federal law on which the court has not previously ruled; 2. Conflicting interpretations of federal law by lower courts; 3. Lower courts decisions that conflict with previous Supreme Court decisions; and 4. Lower court departures from the accepted and usual course of judicial proceedings.⁸⁶⁵

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

Although in different ways in Argentina, Bolivia, Brazil, Colombia, Honduras, Mexico and Venezuela, the Constitutional Courts, the Constitutional Chambers of the Supreme Courts or the latter, can finally review the amparo decisions.

In effect, in Argentina, even though the actions of amparo are in general exercised before the judges of first instance, the cases can reach the Supreme Court of the Nation, by means of an extraordinary recourse when in the judicial decision a matter of judicial review of constitutionality is re-

863 See Samuel B. Abad Yupanqui, *El proceso constitucional de amparo*, Gaceta Jurídica, Lima, 2004, p. 136.

864 See L. Baum, *The Supreme Court*, Washington, 1981, p. 81.

865 See. R.A. Rossum and G.A. Tarr, *American Constitutional Law*, New York, 1983, p. 28.

solved⁸⁶⁶. This is, undoubtedly, the judicial mean through which the Supreme Court normally decides upon the final interpretation of the Constitution when reviewing the constitutionality of state acts, and consequently it is the most important mean for judicial review.

But of course, the “extraordinary recourse” is quite different to the American request for writ of *certiorari*, in the sense that the Supreme Court of the Nation does not have discretionary powers in accepting extraordinary recourses. On the contrary, in such cases it is a mandatory jurisdiction, exercised as a consequence of a right the parties have to introduce the extraordinary recourse. In these cases the Supreme Court does not act as a mere third instance court, particularly because the Court does not review the motives of the judicial decision under consideration, regarding the facts. Its power of review is concentrated only in aspects of law regarding constitutional questions.

In Brazil there also exists an extraordinary recourse of constitutionality that can be filed before the Federal Supreme Tribunal, which is the most important court on matters of judicial review⁸⁶⁷, against the judicial decision issued on matters of protection of constitutional rights by the Superior Federal Court or by the Regional Federal Courts, when it is considered that the courts have made the decisions in a way inconsistent with the Constitution, or in which the court has denied the validity of a treaty or federal statute, or when the decisions has declared the unconstitutionality of a treaty or of a Federal Law; and when they deem a local government law or act that has been challenged as unconstitutional or contrary to a valid federal law (Art. 199,III,b,c) .

The general judicial procedural system in Venezuela is also governed by the by-instance principle, so that judicial decisions resolving cases on judicial review are subject to the ordinary appeal. The cases could only reach the Cassation Chambers of the Supreme Tribunal through cassation recourses (Art. 312 and ff. CCP). Because this situation could lead to possible dispersion of the judicial decision on constitutional matters, the 1999 Constitution, also provided a corrective procedure by granting the Constitutional Chamber of the Supreme Tribunal of Justice, the power to:

“Review final judicial decisions issued by the courts of the Republic on amparo suits and when deciding judicial review of statutes, in the terms established by the respective organic law.” (Art. 336,10 C)

Regarding this provision, it must be pointed out that it is neither an appeal nor a general second or third procedural instance. It is an exceptional faculty of the Constitutional Chamber to review, upon its judgment and discretion, through an extraordinary recourse (in similar sense as the *writ of certiorary*) exercised against *last instance* decisions in which constitutional issues are decided by means of judicial review or in *amparo* suits.

866 See Elias Guastavino, *Recurso extraordinario de inconstitucionalidad*, Ed. La Roca, Buenos Aires, Argentina, 1992.

867 See in general Mantel Goncalves Ferreira Filho, “O sistema constitucional brasileiro e as recentes inovações no controle de constitucionalidade” in *Anuario Iberoamericano de Justicia Constitucional*, nº 5, 2001, Centro de Estudios Políticos y Constitucionales, Madrid, España, 2001; José Carlos Barbosa Moreira, “El control judicial de la constitucionalidad de las leyes en el Brasil: un bosquejo”, in *Desafíos del control de constitucionalidad*, Ediciones Ciudad Argentina, Buenos Aires, Argentina, 1996; Paulo Bonavides, “Jurisdicção constitucional e legitimidade (algumas observações sobre o Brasil)” en *Anuario Iberoamericano de Justicia Constitucional* nº 7, Centro de Estudios Políticos y Constitucionales, Madrid, 2003; Enrique Ricardo Lewandowski, “Notas sobre o controle da constitucionalidade no Brasil”, en Corzo Sosa, Edgar y otros, *Justicia Constitucional Comparada*, Ed. Universidad Nacional Autónoma de México, México D.F. 1993; Zeno Veloso, *Controle jurisdicional de constitucionalidade*, Ed. Cejup, Belém, Brasil, 1999.

It is a reviewing non obligatory power that can be exercised in an optional way⁸⁶⁸. The Chamber has the power to choose the cases in which it considers convenient to decide because of the constitutional relevance of the matter.

In Colombia, the creation of the Constitutional Court as the ultimate guardian of the Constitution originated the attribution of the Court to review all the judicial decisions resolving actions for tutela. As opposed to the Venezuelan or Argentinean cases, in Colombia there is not a specific recourse for revision, but an attribution that must be automatically accomplished in a discretionary way. In effect, the Decree regulating the procedure sets forth that when a tutela decision is not appealed, it must be automatically sent for revision to the Constitutional Court (Article 31). In cases where the decisions are appealed, the superior court's decision, whether confirming or revoking the appealed decision, must also be automatically sent to the Constitutional Court for its revision (Article 32).

In Bolivia, according to the Constitution (Article 120,7), and to the Law of the Constitutional Tribunal (Articles 7,8; 93; 102,V), all judicial decisions issued on amparo or habeas corpus suits must be sent ex officio to the Constitutional Tribunal in order to be reviewed. The revision, in the case of Bolivia, is also different to the Argentinean, Brazilian, and Venezuelan extraordinary recourses for revision, and more similar to the situation in Colombia where it is not a recourse, but an obligatory revision that the Constitutional Tribunal must do, to which the decisions must be sent by the courts.

In Honduras, a procedure of two instances is also established and in all cases an obligatory consultation of the amparo decisions is provided. Regarding the decisions issued by the department courts, they must be sent in consultation before the Appellate Courts; and regarding these decision issued by the Appellate Courts, they can be subject to review by the Constitutional Chamber of the Supreme Court by means of the parties' request for study.

In such cases the Constitutional Chamber has also discretionary power to resolve the admissibility of the request (Article 68). Regarding the decisions adopted in first instance by the Appeals Courts in questions of amparo, they must also be sent for consultation before the Constitutional Chamber of the Supreme Court (Article 69).

Finally, the case of Mexico must be also mentioned. Through the constitutional reform of 1983, the Supreme Court was vested with a discretionary competency to select to decide, requesting them from the Circuit courts, ex officio or at the request of the General Prosecutor of the Republic, the cases of amparo of constitutional relevance; Later, by means of another constitutional reform in 1988, power was attributed to the Supreme Court to decide in last instance all cases of amparo suits where the constitutionality of a statute is at stake. Both attributions allow the Supreme Court to give final interpretation of the Constitution in a uniform way⁸⁶⁹.

868 See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, op. cit. p. 141; See the comments of Jesús María Casal, *Constitución y Justicia Constitucional*, Caracas 2003, p. 92

869 See Joaquín Brage Camazano, *La jurisdicción constitucional de la libertad (Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos)*, Editorial Porrúa, Instituto Mexicano de Derecho Procesal Constitucional, México 2005, pp. 153-155.