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978-0-521-49202-7 — Constitutional Protection of Human Rights in Latin America
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INTRODUCTION

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

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

This amparo proceeding is one of the most important pieces of a comprehensive constitutional system the Latin American countries have been establishing for the protection of constitutional rights, taking statutory shape in parallel to a long and unfortunate history of their violations and disdain. This system can be identified through a few basic and important trends, the first being the long-standing tradition the countries have had of inserting in their constitutions very extensive declarations of human rights, comprising not only civil and political rights, but also social, cul-

[1] See Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Edit. Porrúa, México, 2006; Allan R. Brewer-Carías, *El amparo a los derechos y libertades constitucionales. Una aproximación comparativa*, Cuadernos de la Cátedra de Derecho Público, n° 1, Universidad Católica del Táchira, San Cristóbal, 1993, 138 pp.; also published by the Inter-American Institute on Human Rights, (Interdisciplinary Course), San José, 1993 (mimeo), 120 pp. and in *La protección jurídica del ciudadano. Estudios en Homenaje al Profesor Jesús González Pérez*, Tomo 3, Editorial Civitas, Madrid, 1993, pp. 2.695–2.740; and Allan R. Brewer-Carías, *Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano)*, Instituto Interamericano de Derechos Humanos, San José, 2005.

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tural, economic and environmental rights. This trend contrasts with the relatively reduced content of the U. S. Bill of Rights or inclusive with the content of the 1987 Philippines Constitution, which in Article 3, when referring to the Bill of Rights, basically enumerates only the civil rights.

This Latin American declarative trend began two hundred years ago with the adoption in 1811 of the "Declaration of Rights of the People" by the Supreme Congress of Venezuela, four days before the declaration of the Venezuelan Independence from Spain. That is why, in spite of being Spanish colonies for three centuries, no Spanish constitutional influence can be found at the beginning of the Latin American modern state, which was conceived following the American and the French eighteenth century constitutional revolutionary principles, later followed in Spain after the 1812 Cádiz Constitution was sanctioned.

Yet in parallel to this declarative tradition, the second trend of the Latin American constitutional system in the matter of human rights, has been the unfortunate process of their violations, which even today and in a more sophisticated way, continue to occur in some countries where authoritarian governments have been installed in defraudation of democracy and of the constitution.

The third trend of this Latin American system of constitutional protections of human rights is the continuous effort the countries have made to assure its constitutional guaranty, by progressively enlarging the declarations, adding economic, social, cultural, environmental and indigenous People's rights to the classical list of civil and political rights and liberties. In this sense, another important characteristic has been the progressive and continuous incorporation in the constitutions, of "open clauses" of rights, in the same sense of the Ninth Amendment (1791) to the U. S. Constitution that refers to the existence of other rights "retained by the people" that are not enumerated in the constitutional text. The fact is that a similar clause can be found in all Latin American constitutions, except in Cuba, Chile, Mexico and Panama, but referring in a wider sense to other rights inherent to the human person or to human dignity, or derived from the nature of the human person.

The fourth trend of the human rights constitutional regime in Latin America also related to the progressive expansion of the content of the constitutional declarations of rights is the express incorporation in the constitutions of the rights listed in international treaties and conventions. For such purpose, international treaties and covenants only have been given statutory rank, similar to the United States' constitutional solution on the matter, but in many cases, supralegal rank, constitutional rank and even supraconstitutional rank. In the latter case, inclusive, some consti-

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tutions grant preemptive status to international treaties on human rights regarding the constitution itself, whenever they provide for more favorable rules for the exercise. This is the case, for example, of the Venezuelan Constitution (Article 23).

However, regarding the hierarchy of international treaties on human rights, even in the absence of express constitutional regulations in some Latin American countries, through constitutional interpretation such treaties have also acquired constitutional value and rank, in particular when the constitutions themselves establish, for example, that on the matter of constitutional rights their interpretation must always be made according to what is set forth in international treaties on human rights. This is the case, for instance, of the Colombian Constitution (Article 93) and of the Peruvian Constitutional Procedural Code (Article V).

Within this process of internationalization of human rights, a particular international treaty on the matter, the 1969 American Convention on Human Rights, has had an exceptional importance in the continent, not only regarding the content of the declaration of rights, but also in relation to the development of the judicial protection of human rights, inclusive at the international level by the creation of the Inter-American Court of Human Rights whose jurisdiction has been recognized by the Member States. This Convention was signed in 1969 and was ratified by all Latin American countries except Cuba. The only American country that did not sign the Convention was Canada, and even though the United States of America signed the Convention in 1977, it has not yet ratified it. This has also been the case of many Caribbean states, in particular, Antigua and Barbuda, Bahamas, Belize, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines. Trinidad and Tobago ratified the Convention but in 1998 denounced it. Regarding Latin American countries, the American Convention has been a very effective instrument for the consolidation of a very rich minimal standard of regulation on civil and political rights, common to all countries.

In addition to all these trends that characterize the Latin American constitutional system of protection of human rights, as aforementioned, the other main feature of such a system is the express provision in the constitutions of the judicial guaranty of the rights, by regulating the specific judicial remedy for their protection called the amparo action, recourse, suit or proceeding, to which different procedural rules regarding those provided in the general procedural codes for the protection of personal or property rights, are applied.

This means that judicial protection of human rights can be achieved in two ways: First, by means of the general established ordinary or extraor-

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dinary suits, actions, recourses or writs prescribed in the general procedural codes; and second, in addition to those adjective means, through specific and separate judicial suits, actions or recourses particularly established for the protection of the constitutional rights and freedoms. As aforementioned, this last solution is the one adopted in Latin American countries, being considered one of their most important constitutional features regarding the protection of human rights. The provision of this remedy contrasts, for example, with the constitutional system of the United States, where the effective protection of human rights is effectively assured through the general judicial actions and equitable remedies, which are also used to protect any other kind of personal or property rights or interests. In Latin America, on the contrary, and in part due to the traditional deficiencies of the general judicial means for granting effective protection to constitutional rights, the amparo proceeding has been developed to assure such protection.

This remedy was first introduced in Mexico in 1857 as the *juicio de amparo*, which according to the unanimous opinion of all the Mexican scholars, had its origins in the American judicial review of constitutionality of statutes system, as was described by Alexis de Tocqueville (*Democracy in America*) a few years after *Malbury v. Madison* U.S. (1 Cranch), 137; 2 L. Ed. 60 (1803). Nonetheless, the fact is that contrary to that model, the amparo suit evolved into a unique and very complex institution, exclusively found in Mexico, which in addition to the protection of human rights (*amparo libertad*), also comprises a wide range of other protective judicial actions that can be filed against the state, which in all the other countries are always separate actions or recourses. It includes, the actions for judicial review of the constitutionality and legality of statutes (*amparo contra leyes*), the actions for judicial review of administrative actions (*amparo administrativo*), the actions for judicial review of judicial decisions (*amparo casación*), and the actions for protection of peasant's rights (*amparo agrario*). Even with this comprehensive and unique character, the Mexican amparo is the most commonly quoted "amparo" outside Latin America.

After its introduction in Mexico, and during the same nineteenth century, the amparo proceeding subsequently spread across all Latin America, giving rise in all the other countries to a very different specific judicial remedy established with the exclusive purpose of protecting human rights and freedoms, becoming in many cases more protective than the

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original Mexican institution.[2] In addition to the habeas corpus recourse, the amparo was introduced in the second half of the nineteenth century in the Constitutions of Guatemala (1879), El Salvador (1886) and Honduras (1894); and during the twentieth century, in the Constitutions of Nicaragua (1911), Brazil (*mandado de securança*, 1934), Panama (1941), Costa Rica (1946), Venezuela (1961), Bolivia, Paraguay, Ecuador (1967), Peru (1976), Chile (*recurso de protección*, 1976) and Colombia (*acción de tutela*, 1991). Since 1957, and through court decisions, the amparo action was admitted in Argentina, being regulated in a special statute in 1966, and subsequently included in the 1994 Constitution. In the Dominican Republic, since 2000, the Supreme Court also admitted the amparo action, which in 2006 was regulated in a special statute.

The consequence of this constitutional process is that in all the Latin American countries, with the exception of Cuba, the habeas corpus and amparo actions are regulated as specific judicial means exclusively designed for the protection of constitutional rights. In all the countries, except the Dominican Republic, the provisions for the action are expressly set forth in the constitutions[3]; and in all of them, except in Chile, the proceeding has been the object of statutory regulation.[4] These statutes

[2]See Joaquín Brague Camazano, *La Jurisdicción constitucional de la libertad. Teoría general, Argentina, México, Corte Interamericana de Derechos Humanos*, Editorial Porrúa, México, 2005, pp. 156 ff.

[3]Argentina. Constitución Nacional de la República Argentina, 1994; Bolivia. Constitución Política de la República de Bolivia, 1967 (Last reform, 2005); Brazil. Constituçao da República Federativa do Brasil, 1988 (Last reform, 2005); Colombia. Constitución Política de la República de Colombia, 1991 (Last reform 2005); Costa Rica. Constitución Política de la República de Costa Rica, 1949 (Last reform 2003); Cuba. Constitución Política de la República de Cuba, 1976 (Last reform, 2002); Chile. Constitución Política de la República de Chile, 1980 (Last reform, 2005); Dominican Republic. Constitución Política de la República Dominicana, 2002; Ecuador. Constitución Política de la República de Ecuador, 1998; El Salvador. Constitución Política de la República de El Salvador, 1983 (Last reform, 2003); Guatemala. Constitución Política de la República de Guatemala, 1989 (Last reform 1993); Honduras. Constitución Política de la República de Honduras, 1982 (Last reform, 2005); Mexico. Constitución Política de los Estados Unidos Mexicanos, 1917 (Last reform, 2004); Nicaragua. Constitución Política de la República de Nicaragua, 1987 (Last reform 2005); Panama. Constitución Política de la República de Panamá, 1972 (Last Reform, 1994); Paraguay. Constitución Política de la República de Paraguay, 1992; Peuú. Constitución Política del Peru, 1993 (Last reform, 2005); Uruguay. Constitución Política de la República Oriental del Uruguay, 1967 (Last reform, 2004); Venezuela. Constitución de la República Bolivariana de Venezuela, 1999.

[4]Argentina. Ley Nº 16.986. Acción de Amparo, 1966; Bolivia. Ley Nº 1836. Ley del Tribunal Constitucional, 1998; Brazil. Lei Nº 1.533. Mandado de Segurança, 1951; Colombia. Decretos Ley N° 2591, 306 y 1382. Acción de Tutela, 2000; Costa Rica. Ley Nº

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are, in general, special ones passed for the specific purpose of providing for the amparo proceedings. In some countries this special legislation also contains regulations regarding the other judicial means for the protection of the Constitution like the judicial review methods, and the petitions for habeas corpus and habeas data, as is the case in Bolivia, Guatemala, Peru, Costa Rica, Ecuador, El Salvador and Honduras. Only in Panama and Paraguay the amparo proceeding is regulated in a specific Chapter of the General Procedural Judicial Code.

In some constitutions, like the Guatemalan, Mexican and Venezuelan ones, the amparo action is conceived to protect all constitutional rights and freedoms, including the protection of personal liberty, in which case, the habeas corpus is considered as a type of amparo, named for instance, recourse for personal exhibition (Guatemala) or amparo for the protection of personal freedom (Venezuela). However, in general, in all the other Latin American countries (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Peru and Uruguay), in addition to the amparo action, a different recourse of habeas corpus has always been expressly established in the constitutions for the specific protection of personal freedom and integrity. In recent times, in some countries (Argentina, Ecuador, Paraguay, Peru and Venezuela), in addition to the amparo and habeas corpus recourses, the constitutions have also provided for a separate recourse called habeas data, by which any person can file a suit in order to ask for information regarding the content of the data referred to himself, contained in public or private registries or data banks, and in case of false, inaccurate or discriminatory information, to seek for its suppression, rectification, confidentiality and updating.

As a result of this human rights protective process, currently, the constitutional regulations regarding the protection of constitutional rights in Latin America are established in three different ways: First, by providing

7135. Ley de la Jurisdicción Constitucional, 1989; Dominican Republic. Ley Nº 437-06 que establece el Recurso de Amparo, 2006; Ecuador. Ley Nº 000. RO/99. Ley de Control Constitucional, 1997; El Salvador. Ley de Procedimientos Constitucionales, 1960; Guatemala. Decreto Nº 1-86. Ley de Amparo. Exhibición personal y Constitucionalidad, 1986; Honduras. Ley sobre Justicia Constitucional, 2004; Mexico. Ley de Amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política, 1936; Nicaragua. Ley Nº 49. Amparo, 1988; Panama. Código Judicial, Libro Cuarto: Instituciones de Garantía, 1999; Paraguay. Ley Nº 1.337/88. Código Procesal Civil, Titulo II. El Juicio de Amparo, 1988; Peru. Ley Nº 28.237. Código Procesal Constitucional, 2005; Uruguay. Ley Nº 16.011. Acción de Amparo, 1988; Venezuela. Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales, 1988.

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for three different remedies: the amparo, the habeas corpus and habeas data, as is the case in Argentina, Brazil, Ecuador, Paraguay and Peru; second, by establishing two remedies: the amparo and the habeas corpus, as is the case in Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, El Salvador, Honduras, Nicaragua, Panama and Uruguay, or the amparo and the habeas data as is the case in Venezuela; and third, by just establishing one general amparo action comprising the protection of personal freedom as is the case in Guatemala and Mexico.

In general terms, the rights to be protected by means of the amparo proceedings are all those declared in the Constitution or those considered as having constitutional rank. Some exceptions exist when constitutions reduce the protective scope of the amparo protection to only some constitutional guaranties or fundamental rights as is the case in Colombia, Chile and Mexico. This is the trend that was also followed in Germany and Spain with the individual recourse for the protection or the amparo recourse, and more recently in Philippines, with the writ of amparo only directed to protect the right to life, liberty and security.

Yet as aforementioned, the amparo action in Latin America is not only a national constitutional law remedy, but also an international law institution, which has been incorporated in the provisions of the American Convention on Human Rights (1969) as a "right to judicial protection," that is, the right of everyone to have "a simple and prompt recourse, or any other effective recourse, before a competent court or tribunal for protection (*que la ampare*) against acts that violate his fundamental rights recognized by the Constitution or laws of the State or by this Convention" (Article 25). In order to guaranty such right, the Convention imposes on the Member States the duty "to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state"; to develop "the possibilities of judicial remedy"; and "to ensure that the competent authorities shall enforce such remedies when granted."

In the words of the Inter-American Court on Human Rights, this Article of the American Convention is a "general provision that gives expression to the procedural institution known as amparo, which is a simple and prompt remedy designated for the protection of all of the rights recognized in the Constitution and laws of the Member States and by the Convention."[5] The American Convention also provides for the recourse of

[5]See *Advisory Opinion OC-8/87, of January 30, 1987, Habeas corpus in emergency situations*, Paragraph 32. See in Sergio García Ramírez (Coord.), *La Jurisprudencia de la*

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habeas corpus for the protection of the right to personal freedom and security, established in favor of anyone deprived of his liberty in cases of lawful arrests or detentions (Article 7). Examining both the habeas corpus and the amparo recourses, the Inter-American Court on Human Rights has declared that the "'amparo' comprises a whole series of remedies and that habeas corpus is but one of its components," so that in some instances "habeas corpus is viewed either as the 'amparo' of freedom or as an integral part of 'amparo.'" [6]

All these provisions of the American Convention can also be considered as the conclusion of the process of internationalization of the protection of human rights, in particular regarding the provision for the specific judicial mean for their protection, considered by the Inter-American Court of Human Rights as "one of the basic pillars not only of the American Convention, but of the rule of Law in a democratic society."[7]

Through a comparative constitutional law approach, this book is intended to highlight the most recent trends in the constitutional and legal regulations on this amparo proceeding in all Latin American countries, and in the Philippines, identifying the character of this extraordinary judicial remedy, also established in some cases as a constitutional right (*derecho de amparo*); the competent courts to grant the protection; the general rules of procedural to file the action for protection; the constitutional rights that can be protected; the individuals or legal entities that are entitled to the extraordinary protection (the aggrieved, affected or injured party; the standing requirements to file the action; the defendant parties' perpetrator of the nuisance, whether a State body, a public officer, individuals or private entities; the particular types of public or private actions or omissions violating constitutional rights that can be challenged through the amparo action; and finally, the sort of judicial adjudication that can be awarded and the means for its enforcement.

Even considering that in general terms the most important duty of any judicial branch of government is to decide and resolve in specific cases,

Corte Interamericana de Derechos Humanos, Universidad Nacional Autónoma de México, Corte Interamericana de Derechos Humanos, México, 2001, pp. 1.008 ff.

[6] *Idem*, Paragraph 34.

[7] See *Castillo Páez* case, (Peru) 1997, Paragraph 83; *Suárez Roseo* case (Ecuador) 1997, Paragraph 65 and *Blake* case (Guatemala) 1998, Paragraph 102, *Idem.* pp. 273 ff., 406 ff. and 372 ff. See also the *Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situation*, Paragraph 42; and the *Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guaranties in Status of Emergency*, Paragraph 33, *Idem*, pp. 1.008 ff. and pp. 1.019 ff.

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questions or controversies regarding individual rights and interests, this comparative law study tries to explain why Latin American countries have established this special and extraordinary judicial mean for the protection of human rights; that is, why the common and general judicial means established in the civil codes and civil procedure codes are not the only ones devoted to guarantying their effective protection.

For this comparative constitutional law approach, we have divided the book into the following five parts and twenty-two chapters:

Part One refers to *the constitutional and international declaration of rights and its judicial guaranties*, analyzing the constitutional declaration of human rights in Latin America and its internationalization (**One**), and the *judicial guaranties of the declarations of human rights* (**Two**).

Part Two refers to *the amparo proceeding as a constitutional and international Latin American institution*, analyzing the amparo within the judicial review systems (**Three**), the constitutional amparo in countries with only the diffuse system of judicial review legislation (**Four**) or with the concentrated systems of judicial review legislation (**Five**); as a constitutional right (**Six**) and as a constitutional guaranty in countries with mixed systems of judicial review of legislation (**Seven**); and the amparo within the American Convention on Human Rights (**Eight**).

Part Three refers to *the injured party and the constitutional protected rights through the amparo proceeding*, by analyzing the injured party and the general standing conditions (**Nine**), the justiciable constitutional rights by the amparo and habeas corpus actions (**Ten**); and in particular, the question of the justiciability of social constitutional rights (**Eleven**).

Part Four refers to *the injury, the injuring party and the injuring acts in the amparo proceeding*, studying the general conditions of the harms and threats (**Twelve**), the reparable character of the harms (**Thirteen**); the imminent character of the threats (**Fourteen**); the injuring party (**Fifteen**); and the injuring acts or omissions of public authorities causing the harm or the threats to constitutional rights (**Sixteen**).

Part Five refers to *the extraordinary character of the amparo proceeding*, studying the relation between the amparo proceeding and the ordinary judicial means (**Seventeen**); the main principles of the procedure in the amparo proceeding (**Eighteen**); its specific procedural phases (**Nineteen**); the adjudications in the amparo proceeding and the preliminary amparo decisions (**Twenty**); the definitive rulings: preventive and restorative decisions and their effects (**Twenty-One**); and the revision of the amparo decisions by the Constitutional Courts or the Supreme Courts (**Twenty-Two**).

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