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The Writ of Amparo in Latin America*

HECTOR FIX ZAMUDIO**

I. NEED FOR COMPARATIVE STUDY

This second part*** of a panoramic study of the Mexican writ of amparo deals with the spread of this legal institution to other areas of Latin America. Two historical developments make this type of comparative analysis of the amparo desirable: (a) judicial remedies similar to the Mexican institution have been established with the same name in numerous constitutional systems of Latin America; and (b) the essential principles of the Mexican amparo have been incorporated into various international legal instruments.¹

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*** The first part of this study, *A Brief Introduction to the Mexican Writ of Amparo*, was published in 9 CALIF. W. INT'L L.J. 306 (1979).

1. As a result of Mexican legal scholars concentrating on the development of their own national writ, few published studies in the field of international law have emerged from Mexico. However, for those studies particularly relating to Latin American legislation, see F. TENA RAMIREZ, *El Amparo Mexicano, Medio de Protección de los Derechos Humanos*, in *EL AMPARO MEXICANO Y LOS DERECHOS HUMANOS* 12 (Mexico 1975); Fix Zamudio, *Derecho, Comparado y Derecho de Amparo*, 8 *BOLETIN MEXICANO DE DERECHO COMPARADO* 327 (1970); F. TENA RAMIREZ, *El Aspecto Mundial del Amparo: Su Expansión Internacional*, in *MEXICO ANTE EL PENSAMIENTO JURIDICO SOCIAL DE OCCIDENTE* 129 (Mexico 1955); FERNANDEZ DEL CASTILLO, *La Declaración Americana de Derecho y Deberes del Hombre*, in *MEXICO EN LA IX CONFERENCIA INTERNACIONAL AMERICANA* 149 (Mexico 1949).

United States scholars have written more extensively on the Mexican amparo, and have produced some comparative studies on Latin America. These include the classic work by Eder, *Judicial Review in Latin America*, 21 *OHIO ST. L.J.* 570 (1960). An Anglo-American author writing in Spanish is J. GRANT, *EL CONTROL JURISDICCIONAL DE LA CONSTITUCIONALIDAD DE LAS LEYES* (Mexico 1963). See also K. KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* 607-75 (1966); K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 77-183 (1975); Biles, *The Position of the Judiciary in the Political Systems of Argentina and Mexico*, 8 *Law. Am.* 287 (1976); Clark, *Judicial Protection of the Constitution in Latin America*, 2 *HASTINGS CONST. L.Q.* 405 (1975); Rosenn, *Judicial Review in Latin America*, 35 *OHIO ST. L.J.* 785 (1974).

For studies emanating from Latin America see the bibliography in Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CALIF. W. INT'L L.J. 306 (1979). This writer's own work developing a panoramic view of Latin American legal instruments for protecting human rights, focusing on the writ of amparo, include: *La*

The Mexican amparo has influenced directly or indirectly the development of the writ of amparo in several Latin American nations. These include Argentina, Bolivia, Chile, Costa Rica, Ecuador (at least until the *coup d' état* of 1971), El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Venezuela. Another institution bearing the distinct imprint of the Mexican writ is the Brazilian *mandado de segurança* (writ of security).

protección procesal de las garantías individuales en America Latina, 3 *Revista Iberoamericana de Derecho Procesal* 9 (Spain 1967), reprinted in *BOLETIN DEL COLEGIO DE ABOGADOS DE GUATEMALA* 2, 2-22 (1968) and in English translations as *Latin American Procedures for the Protection of the Individual*, 9 *J. INT'L COMM'N JURISTS* 60, 77-86 (1968); *Diversos Significados Juridicos del 'Amparo' en el Derecho Iberoamericano*, 52 *BOLETIN DEL INSTITUTO DE DERECHO COMPARADO EN MEXICO* 119-52 (1965), as translated into Italian in [1967] *RIVISTA DI DIRITTO AGRARIO* 502-43 (Italy); and German by H. Dieter Nahme and H. Rudolph Horn, *Verfassungskontrolle in Lateinamerika*, in *JAHRBUCH DES OFFENTLICHEN RECHTS DER GEGENWART* 649-93 (Germany 1967). See also S. LINARES QUINTANA, *ACCION DE AMPARO: ESTUDIO COMPARADO CON EL JUICIO DE AMPARO DE MEXICO Y EL MANDADO DE SEGURIDAD DE BRASIL* (Argentina, 1960); A. BOREA ODRIA, *LA DEFENSA CONSTITUCIONAL: EL AMPARO* (Peru 1977); E. VESCOVI, *EL PROCESO DE INCONSTITUCIONALIDAD DE LA LEY* (Uruguay 1967).

Studies have also emanated from Europe. The great majority of Latin American studies by European scholars focus on the Mexican amparo. Those with a comparative framework, however, include the Spanish jurist González Pérez, *El Proceso de Amparo en Mexico y en Nicaragua*, [1954] *REVISTA DE ADMINISTRACIÓN PÚBLICA* 297 (Spain); and the German writer H. CHRISTOPH VON ROHR, *DER ARGENTINISCHE PROZESS UNTER BERÜCKSICHTIGUNG ÄHNLICHER VERFAHRENSARTEN IN BRASILIEN, MEXICO, UND PERU* (Germany 1969).

There are several detailed studies of specific national experiments with the amparo, the most outstanding being published in Argentina and Brazil. Because the Argentine amparo has been the subject of a substantial literature, only the most significant works will be noted. See R. BIELSA, *EL RECURSO DE AMPARO: ANALISIS DOCTRINAL JURISPRUDENCIA* (Argentina 1965); G. BIDART CAMPOS *REGIMEN LEGAL Y JURISPRUDENCIAL DEL AMPARO* (Argentina 1968); G. BIDART CAMPOS, *DERECHO DE AMPARO* (Argentina 1961); CARRIÓ *RECURSO DE AMPARO Y TÉCNICA JUDICIAL* (Argentina 1959); J. FAUSTINO, *D'HERS PRÁCTICA DE LA PETICIÓN DE AMPARO* (Argentina 1960); A. HOUSSAY, *AMPARO JUDICIAL: EL CASO KOT Y SU INFLUENCIA A LA JURISPRUDENCIA* (Argentina 1961); J. LIS LAZZARINI, *EL JUICIO DE AMPARO* (Argentina 1967); A. MARIO MORELLO, *RÉGIMEN PROCESAL DEL AMPARO EN LA PROVINCIA DE BUENOS AIRES* (Argentina 1966). A. ORGAS, *EL RECURSO DE AMPARO: COMENTARIO A LOS CASOS "SIRI" Y "KOT"* (Argentina 1961).

As with the Argentine amparo, the Brazilian writ of security has been analyzed extensively in literature. Monographs published in Brazil include: T. BRANDÃO CAVALCANTI, *DO MANDADO DE SEGURANÇA* (4th ed. Brazil 1957); T. GALVÃO FILHO, *DICIONÁRIO DE JURISPRUDÊNCIA NO MANDADO DE SEGURANÇA* (Brazil 1960); A. FLORENCIO GUIMARÃES, *O MINISTÉRIO PÚBLICO NO MANDADO DE SEGURANÇA* (Brazil 1959); H. LOPES MEIRELLES, *MANDADO DE SEGURANÇA E AÇÃO POPULAR* (2nd ed. Brazil 1969). J. CASTRO NUNES, *DO MANDADO DE SEGURANÇA E OUTROS MEIOS DE DEFESA CONTRA ATOS DO PODER PÚBLICO* (6th ed. Brazil 1961); J. OTHON SIDOU, *DO MANDADO DE SEGURANÇA* (3d ed. Brazil 1969); A. WALD, *DO MANDADO DE SEGURANÇA NA PRÁTICA JUDICIÁRIA* (3d ed. Brazil 1968).

At the initiative of Mexican delegates, the writ of amparo was elevated to the category of an international legal institution under various provisions of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights. This was first done in article 18 of the American Declaration of the Rights and Duties of Man, adopted in Bogota in May 1948,² followed by its incorporation into article 8 of the Universal Declaration of Human Rights, adopted in December 1948.³ Both of these provisions expressly urge the adoption of a simple and economical remedy to protect against abusive acts of any authority. Article 8 of the Universal Declaration of Human Rights was implemented through article 2 (3) of the international covenant on Civil and Political Rights as approved by the United Nations on December 16, 1966.⁴ Article 18 of the aforementioned American Declaration of Rights and Duties of Man was incorporated in article 25 of the American Convention on Human Rights at San Jose, Costa Rica concluded on November 22, 1969.⁵

2. This article states:

All persons can appear before the courts to petition for their rights. They also have the right to simple and brief proceedings, through which justice may be secured (*lo ampare*) against acts of any authority that violate, in injurious fashion, certain fundamental constitutional rights.

American Declaration of the Rights and Duties of Man, *reprinted in* L. SOHN & T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 187 (1973) [hereinafter cited as SOHN & BUERGENTHAL].

3. The article states:

All persons have a right to an effective remedy, before their proper national tribunals, which may protect (*ampare*) against acts violating their fundamental rights as recognized by the constitution of the law.

Id. at 30.

4. In its relevant part, the provision establishes:

Each one of the states in the present pact agrees to guarantee that

- (a) All persons who have suffered a violation of rights and liberties recognized in said Pact can bring suit for an effective remedy, even though such violation may have been committed by persons acting in their official capacities:
- (b) The competent authority, whether judicial, administrative, or legislative, or whatever other competent organ provided by the legal system of the State, will determine the rights of all persons bringing such actions, and to develop the alternative judicial remedies; and
- (c) The competent authorities will enforce all decisions granting relief.

Id. at 44.

5. Article 25 of that Convention provides:

1. All persons have a right to a simple and speedy remedy or other effective remedy before judges or competent courts, to protect them against acts violating their fundamental rights guaranteed by the Constitution, statute, or the present Convention, even though such violations may be committed by persons acting in their official capacities.

II. LEGAL MEANING OF THE TERM "AMPARO" IN LATIN AMERICAN STATUTES

A previous study showed that the origins of the Mexican writ of amparo lie in Hispanic law.⁶ The amparo remedies adopted by the other countries of Latin America have the same roots. A brief examination indicates three traditional bases or interpretations of the term "amparo," beginning with the law of colonial Spain and, later, the Latin American versions.

First, the term was used as a synonym for "remedy" or means of challenging (*recurso o medio de impugnación*) judicial decisions. It first appeared in the *Siete Partidas*, a compilation ordered by Alfonso the Wise (1221-1284), and greatly influenced law in the Spanish-American colonies. The introductory portion of title 23 of the third section employs the terms "amparo" and "*amparamiento*" (protection) to designate methods for challenging court judgments. These ancient origins help explain the frequency with which the Latin American legal language used the phrase "remedy of amparo."⁷

Second, the term "amparo" was utilized to designate a kind of injunction (*interdictos posesorios*), which in the majority of cases, according to Spanish law, would lie to protect real property rights. On occasion amparo was employed to safeguard personal rights as well. As discovered in the legislation and practice of the Spanish American colonies, the instruments used to protect real property rights came to be known as "royal amparos" (*amparos reales*) or "colonial amparos" (*amparos coloniales*). These were intended to protect the lands of Indian communities against confiscation by Spanish colonists, a protection entrusted by the Spanish King⁸ to the Viceroys, *Audiencias* (courts), and Captain-Generals.

2. The Party States agree:

- (a) to guarantee that the competent authority provided by the legal system of the State will determine the rights of all persons bringing actions for such a remedy;
- (b) to develop alternative judicial remedies; and
- (c) to guarantee the enforcement by the competent authorities of all decisions granting relief.

Id. at 209.

6. Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CALIF. W. INT'L L.J. 306 (1979).

7. See Fix Zamudio, *Diversos Significados Juridicos del 'Amparo' en el Derecho Iberoamericano*, 52 BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO EN MEXICO 123, n. 12 (1965).

8. See J. MARIÁ OTS CAPDEQUI, *ESPAÑA EN AMÉRICA: EL RÉGIMEN DE LAS TIERRAS EN LA ÉPOCA COLONIAL* 38 (Mexico 1959); A. LIRA GONZALEZ, *EL AMPARO COLONIAL Y EL JUICIO DE AMPARO*, 17-69 (Mexico 1972); J. FRANCISCO PEDRAZA, *AMPARO PRO-*

The term "*interdict amparo*" still remains to specify the instrument for maintaining possessory rights over urban or rural properties against dispossession efforts by other private interests. It has been codified in the civil procedure of Honduras,⁹ Nicaragua,¹⁰ El Salvador,¹¹ Costa Rica,¹² Guatemala,¹³ Bolivia,¹⁴ and Venezuela.¹⁵ The latter two countries permit the remedy to be sought from law enforcement authorities as well as from the courts. The proceeding is known as the "administrative amparo."¹⁶

The third meaning of the amparo relates to its role as a procedural instrument for securing the rights of the individual. Its central importance lies in its potential to enforce individual rights found in the national constitutions of Latin America. This function stems basically from the Aragonese complaint hearings, particularly that known as "the demonstration of persons" (*manifestación de las personas*). Prior to the royal absolutism of Phillip II at the end of the Sixteenth Century, this hearing achieved a wider scope of protection than did its contemporary, the British habeas corpus.¹⁷ The law of Aragon was

MOVIDO POR LOS NATURALES DE SANTA MARIA DEL RIO, S.L.P. 1683 (Mexico 1970); Coy, *Justice for the Indian in Eighteenth Century Mexico*, 18 AM. J. LEGAL HIST. 1, 44-48 (1968).

9. HONDURAS CODE OF CIV. AND CRIM. PROC., arts. 661-74 (Feb. 8, 1906).

10. NICARAGUA CODE OF CIV. PROC., arts. 1654-55 (Nov. 7, 1905).

11. SALVADOREAN CODE OF CIV. PROC., arts. 778, 781 (Dec. 31, 1881) R. PADILLA Y VALASCO, I APUNTES DE DERECHO PROCESAL CIVIL SALVADOREÑO: 68-75 (El Salvador 1948).

12. The "amparo of possession" is regulated by the COSTA RICAN CODE OF CIV. PROC., arts. 660-61 (Jan. 25, 1933 amended Dec. 23, 1937).

13. This injunctive remedy (*interdicto*) of the amparo of possession is governed by the GUATEMALA CODE OF CIV. AND MERCANTILE PROC., arts. 253-54 (Sept. 14, 1963).

14. See BOLIVIA CODE OF CIV. PROC. BOOK II, tit. 6 Chap. 3, arts. 542-51 (Nov. 14, 1832, revised 1857).

15. The controlling statute is the CIVIL CODE, art. 782, (July 13, 1942) as well as the CODE OF CIV. PROC. arts. 59-66, (July 4, 1916). See A. HERNÁNDEZ BRETON, CÓDIGO DE PROCEDIMIENTO CIVIL VENEZOLANO 330 (Venezuela 1963); A. HERNÁNDEZ BRETON, CÓDIGO CIVIL VENEZOLANO 123 (2d ed. Venezuela 1961); L. CERTAD LA PROTECCIÓN POSESORIA: TEORÍA GENERAL EN EL DERECHO VENEZOLANO 95 (Venezuela 1964); P. PINEDA LEON, III-IV LECCIONES ELEMENTALES DE DERECHO PROCESAL CIVIL 237-59 (2d. ed. Venezuela 1964); R. ANTONIO PARRA, ACCIONES POSESORIAS 151 (Venezuela 1956); LORETO, EL INTERDICTO DE AMPARO Y SU FUNCIÓN RECUPERATORIA, ESTUDIOS DE DERECHO PROCESAL CIVIL 322 (Venezuela 1956).

16. In Bolivia, this institution is governed by the LAW OF POLITICAL ORGANIZATION, art. 29 (I), (Dec. 3, 1888), and the DECREE of Jan. 10, 1903, art. 53 (II). Its protection corresponds also to the Prefects of the Departments, as extended to the rights of consessionaires of mining property, in the MINING CODE of May 7, 1965, arts. 92-93. The administrative amparo of Venezuela is regulated by the Provincial Police Codes, exemplified by arts. 212-13 of the POLICE CODE OF THE STATE OF CARABOBO and arts. 205-06 of POLICE CODE OF MERIDA STATE.

17. See FAIRÉN GUILLÉN, CONSIDERACIONES SOBRE EL PROCESO ARAGONÉS DE MANIFESTACIÓN DE LAS PERSONAS, EN RELACIÓN CON EL HABEAS CORPUS BRITANICO 9-47

not applied directly to the Spanish colonies even though the crowns of Castille and Aragon were united by the marriage of Isabel and Ferdinand in 1469. It was only through the Law of the Indies, created essentially under Castillian law, that the Aragonese practices were known to the colonial jurists and lawyers.¹⁸ By that time, those procedures had acquired a romantic prestige, especially in regard to the legendary role of the Justiciar (*Justicia Mayor*), a kind of royal ombudsman.¹⁹

III. THE DIVERSE PROTECTIVE SCOPE OF THE WRIT OF AMPARO

Because of the broad expansion of amparo in Latin America, care must be taken to delineate the widely varying applications of the writ. Despite this diversity, the one common purpose of the amparo is to protect, through judicial decision, all or part of human rights, whether in individual or group form. Latin American amparo falls into two basic categories. First, in the majority of Latin American jurisdictions, amparo is used to safeguard all human rights established in the national constitutions with the exception of personal liberty, which is protected by habeas corpus. In Guatemala and to a great extent, Honduras and Nicaragua, the amparo also may be employed to challenge the constitutionality of laws, but the effect of a declaration of unconstitutionality is limited to the litigants in that particular case.

The writ of amparo in Mexico, on the other hand, extends to the whole legal order in its constitutional as well as well as statutory and administrative dimensions, and covers five distinct functions: (1) as the "liberty amparo" (*amparo de la libertad*) protecting life and personal liberty in the manner of habeas corpus; (2) as the "amparo against the laws" (*amparo contra leyes*) challenging unconstitutional

(Spain 1963); SÁENZ-DE TEJEDA Y OLAZAGA, *EL DERECHO DE MANIFESTACIÓN ARAGONÉS Y EL HABEAS CORPUS INGLÉS* (Spain 1963).

18. The United States scholar Phanor Eder notes that the Indian law codes were structured fundamentally around the model of Castillian Law, and for this reason the statutory processes of Aragon were not grafted directly onto the Laws of the Indies. See EDER, *Habeas Corpus Disembodied: The Latin American Experience*, in *TWENTIETH CENTURY COMPARATIVE AND CONFLICTS OF LAW: ESSAYS IN HONOR OF HESSEL E. YNTEMA* 464 (Netherlands 1964).

19. There is substantial literature on the Justicia Mayor and legal processes of Aragón. Among the most significant works: by the Spanish historian and procedural scholar V. FAIRÉN GUILLÉN, *ANTECEDENTES ARAGONÉSES DE LOS JUICIOS DE AMPARO* (Mexico 1971); S. de Tejada y Olazaga, *supra* note 17; C. LOPEZ DE HARO, *LA CONSTITUCIÓN Y LIBERTADES DE ARAGÓN Y EL JUSTICIA MAYOR* (Spain 1926); LEZCANO DE PODETTI, *Justicia Mayor*, XVII *ENCICLOPEDIA JURIDICA OMEBA* 680 (Argentina 1963); Gomez, *El Justicia Mayor de Aragón y los Sistemas Modernos de Amparo Judicial*, [1940] *La Ley* 1 (Argentina).

laws; (3) as the "amparo-cassation" (*amparo-casación*) reviewing judicial decisions of any level; (4) as the "administrative amparo" (*amparo-administrativo*) checking the conduct of administrative authorities; and (5) as the "agrarian amparo" (*amparo en materia agraria, ejidal y comunal*) protecting the rights of farmers subject to the administration of agrarian reform laws in Mexico. Awareness of the various complex parts of the Mexican amparo²⁰ is essential to an understanding of the distinction between the Mexican version and the other Latin American versions.

IV. THE WRIT OF AMPARO IN CHILE, ARGENTINA, VENEZUELA AND PERU

A. Chile

Prior to the military takeover of 1973, the "remedy of amparo" in Chile primarily protected personal liberty along the lines of traditional habeas corpus.²¹ The Chilean amparo could only be brought by persons alleging illegal detention, or mistreatment while in a place of detention, or at trial before an unauthorized criminal judge.²²

The new Chilean Constitution, approved by referendum on September 11, 1980, replaces the old amparo remedy with two new proceedings. The first, found in article 20, is called the recourse of protection (*recurso de protección*) and lies against violations of all fundamental rights granted in the Constitution with the exception of personal liberty. The second, found in article 21, is similar to habeas corpus and protects personal liberties not protected by the recourse of protection. But emergency decrees (*estado de excepción*) and suspension of numerous constitutional provisions (particularly in the transitory articles following article 13) make any immediate application of these protective instruments doubtful.

20. See Fix Zamudio, *supra* note 6, at 310.

21. The Chilean amparo was adopted as art. 16 of the 1925 CONSTITUTION, amended on several occasions. The Chilean statute governing the implementation of art. 16 is the CODE OF CRIMINAL PROCEDURE (Aug. 30, 1934), arts. 306-17; also authoritative is the Supreme Court decree of Dec. 19, 1932, handed down in response to an amparo petition. For scholarly comment, see 2 A. SILVA BASCUNÁN, *TRATADO DE DERECHO CONSTITUCIONAL* 324 (Chile 1963); 2 J. QUINZIO FIGUEROA, *MANUAL DE DERECHO CONSTITUCIONAL* 161 (3d ed. Chile 1958); Fix Zamudio, *Latin American Procedures for the Protection of the Individual*, 9 J. INT'L COMMISSION JURISTS 60, 68-78 (1968).

22. See C. ESTÉVAZ GASMURI, *ELEMENTOS DE DERECHO CONSTITUCIONAL* 143-44 (Chile 1949); E. CAFFARENA DE JILES, *EL RECURSO DE AMPARO FRENTE A LOS RÉGIMENES DE EMERGENCIA* 152-87 (Chile 1957).

B. Argentina

The Argentine amparo has undergone broader and more complete doctrinal, legislative and case law development than any other Latin American amparo with the exception of Mexico's.²³ Because of the general scope of this study, only two general directions in the Argentine evolution will be sketched.

First is the development of the Argentine amparo at the provincial level. Just as the Mexican amparo began in the State of Yucatán in 1841, the Argentine amparo appeared initially in article 17 of the Constitution of the Province of Santa Fe in 1921 and was implemented by the Law of Amparo of 1935 (No. 2994). Later the amparo appeared in article 22 of the Constitution of the Province of Santiago de Estero of 1939, as well as in articles 673 to 685 of the Code of Civil Procedure of 1944.²⁴ The Province of Mendoza also adopted the amparo in article 33 of its Constitution of 1949. After the military overthrow of the first government of General Perón in 1955, amparo spread throughout the Argentine provinces. It has been adopted in these provincial constitutions: article 145(13) of Corrientes of 1960; articles 38-39 of Catamarca of 1966; article 34 of Chubut of 1957; article 20 of Formosa of 1957; articles 16-18 of Misiones of 1958; article 16 of Pampa of 1960; article 11 of Rio Negro of 1957; article 15 of Santa Cruz of 1957; and article 17 of Santa Fe of 1962. These and other provinces have further refined and expanded the remedy in ordinary statutes.²⁵

In all of these provincial documents, amparo is set out as a simple and economical proceeding for the protection of individual rights guaranteed in the respective constitutions. The remedy lies against all officials. Moreover, the federal courts have extended such protection in some states to prisoner groups, although because of the availability of habeas corpus, the right of personal liberty is excluded from the amparo's reach. At least two provincial constitutions grant a protection scope to habeas corpus similar to the amparo itself.²⁶

23. See J. BARBERIS, *Verfassungsgerichtsbarkeit in Argentinien*, in VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 39-74 (Germany 1962); Eder, *supra* note 1, at 603-04; Fix Zamudio, *supra* note 21, at 79-81; von Rohr, *supra* note 1.

24. These articles have been retained as articles 818-29 in the new CIVIL AND COMMERCIAL PROCEDURE CODE OF NOV. 14, 1969.

25. See S. LINARES QUINTANA, *Derecho Constitucional de las Nuevas Provincias* (Argentina 1962); Fix Zamudio, *Introducción al Estudio Procesal Comparativo de la Protección Interna de los Derechos Humanos*, in VEINTE AÑOS DE EVOLUCIÓN DE LOS DERECHOS HUMANOS 205-07 (Mexico 1974); Fix Zamudio, *Latin American Procedures*, *supra* note 27, at 79-80; Romero, *Acción de Amparo de los Derechos y Garantías Constitucionales*, [1958] REVISTA JURIDICA DE BUENOS AIRES 79 (Argentina).

26. Article 16 of Chaco of 1957; Article 44 of Neuquen of 1957.

Most provincial legislatures have implemented these constitutional provisions through procedural statutes specifically designated as the Law of the Amparo Action (*Ley de Acción de Amparo*).²⁷ In addition, certain local statutes have incorporated amparo in other codes, such as the codes of Civil Procedure, and Civil and Commercial Procedure of Santiago del Estero. Thus, virtually all the Argentine provinces have affirmed the right of amparo through statutory and constitutional enactments.

The second aspect of the amparo evolution is its operation at the national level. Because of the Argentine federal system, the provinces and the federal government have their own systems of procedure.²⁸ At the federal level, amparo originated primarily through the case law of the federal courts, especially the Supreme Court of Justice of the Nation. Only recently has it been confirmed by legislative action.

The Argentine Supreme Court started to define the scope of amparo in 1957-58 in the cases of *Siri* and *Samuel Kot*.²⁹ In those cases, the Court rejected the traditional contention that it lacked jurisdiction to issue amparo protection in the absence of statutory authority. The justices reasoned that the Constitution charged the Court with the responsibility to provide immediate protection of fundamental human rights, except for the right of personal liberty already protected by habeas corpus.³⁰ The Court based its decisions on

27. These include that of Buenos Aires (1965-1966), Catamarca (1977), Cordoba (1967, 1974), Corrientes (1970), Entre Rios (1947, 1963), La Rioja (1960), Mendoza (1954, 1975), Misiones (1960, 1967), Salta (1977), San Luis (1958), Santa Cruz (1958, 1977, 1978), and Santa Fe (1935, 1969, 1973).

28. See 2 H. ALSINA, *TRATADO TEÓRICO-PRÁCTICO DE DERECHO PROCESAL CIVIL Y COMERCIAL* 43-49 (2d. ed. Argentina 1957); BIDART CAMPOS, *MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO* 419-25 (4th ed. Argentina 1975).

29. Numerous commentaries have attended the two court decisions, including monographic studies by CARRIÓ, *supra* note 1. HOUSSAY, *supra* note 11, and ORGAZ, *supra* note 1. See also Linares Quintana, *Modificación de la Jurisprudencia de la Corte Suprema Sobre el Amparo de la Libertad*, [1958] *LA LEY* 1 (Argentina); Respetto, *El Recurso de Amparo en la Nueva Interpetación de la Corte Suprema de la Nación*, [1958] *J.A.* 18 (Argentina); Tagle, *EL AMPARO JUDICIAL DE LOS DERECHOS FUNDAMENTALES*, [1958] *J.A.* 1 (Argentina). The essential parts of the two judicial opinions in *Siri* and *Kot* have been translated into English in both KARST, *supra* note 1, at 652-58, and KARST & ROSENN, *supra* note 1, at 161-65.

30. The pertinent paragraph of the Court's opinion in the *Angel Siri* Decision of Dec. 27, 1957 states:

This confirmation of the constitutional violation is sufficient reason for the judges to re-establish in its entirety the constitutional guarantee that is invoked, and it may not be alleged to the contrary that there is no law regulating the guarantee. Individual guarantees exist and protect individuals by virtue of the single fact that they are contained in the Constitution,

the concept of "implicit guarantees" inferred from article 33 of the Argentine Constitution,³¹ which parallels the Ninth Amendment of the United States Constitution.³²

These court decisions began the development of a very flexible amparo remedy. Slowly, but perceptibly, it was extended to all rights and against every abusive act of authority, including those of "decentralized public agencies." Although complaints against unlawful detention were excluded, the Court held in the *Samuel Kot* case that the amparo applied to mistreatment of groups of prisoners.³³

Judicial decisions amplifying amparo coverage prompted a series of legislative and executive initiatives. The 1957 Constitutional Con-

independently of regulatory laws. Constitutional precepts as well as the institutional experience of the country jointly demand the enjoyment and full exercise of individual guarantees for the effective maintenance of a rule of law, and impose the duty of ensuring them upon the country's judges.

See KARST, *supra* note 1, at 653; KARST & ROSENN, *supra* note 1, at 162.

31. That provision states:

The declarations, rights, and guarantees enumerated in this Constitution shall not be construed to deny other rights and guarantees not enumerated, but shall be regarded as stemming from the principle of popular sovereignty and from a republican form of government.

ARGENTINA CONST. art. 33.

32. That provision states:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend IX. This principle of implied rights or guarantees under the United States constitutional model has been incorporated in the following Latin American constitutions: Argentina (art. 83); Bolivia (art. 35); Brazil (art. 153 (36)); Dominican Republic (art. 10); Guatemala (art. 77); Honduras (arts. 52, 145); Paraguay (art. 80); Uruguay (art. 72); and Venezuela (art. 50); Although this provision of the United States Constitution has been emulated in several Latin American basic laws, the "model" country, the United States, has itself rarely followed or applied it. See *e.g.*, United States Senate, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1031 (Washington 1964). Notwithstanding its importance, this principle of implied rights has received scarce commentary by Argentine constitutional lawyers, who have referred almost exclusively to the introduction of the amparo action as an interesting jurisprudential institution. See *e.g.*, J. GONZÁLEZ, MANUAL DE LA CONSTITUCIÓN ARGENTINA 11-12 (1st ed. Argentina 1897; republished 1971), whose work was invoked in the *Angel Siri* case. A more recent authority is CAMPOS, *supra* note 28, at 273-74.

33. Regarding the jurisprudential development of the amparo action at the national level, beginning with the *Siri* and *Kot* cases, see Conesa, *La Demanda de Amparo en Jurisprudencia de la Corte Suprema Nacional, desde Siri y Kot Hasta el 25 de Octubre de 1969*. [1969] J.A. 1, 19-29 (Argentina; *Acción de Amparo: Condiciones de Admisibilidad (Actualización jurisprudencial, 1964-69)*, [1969] LA LEY 1, 3-10 (Argentina); Amadeo, *Interpretación jurisprudencial del Amparo y su Inclusión en las Constituciones Provinciales (Reseña jurisprudencial)*, [1961] J.A. 1 (Argentina). Some court decisions on this matter are included in the compilations KARST, *supra* note 1, at 658-73; KARST & ROSENN, *supra* note 7, at 165-83.

vention in the Province of Santa Fe produced several efforts to expand the amparo,³⁴ however those efforts were narrowly defeated. In July 1964, the National Executive proposed a new draft Law of Amparo that discarded the legal rationale for the Argentine writ in terms similar to the existing case law in the federal courts:

The action of amparo will be proper against all behavior of authority, functionary, or public employee, or acts of private persons, even when such acts are founded in law, where in real or imminent manner they injure, restrict, alter, or threaten with illegal or arbitrary action the rights or guarantees explicitly or implicitly recognized by the National Constitution. Such action of amparo will lie where there exists no other judicial or administrative remedies permitting complainants to obtain the same protection or, even if existing, they are manifestly unsuitable for the immediate protection of the constitutional right or guarantee.³⁵

The last of these statutes on the amparo proceeding actually restricted its protective reach established in prior judicial decisions. Law 16986, passed in October of 1966,³⁶ was widely criticized for excluding from amparo protection against certain acts of the government, most particularly those comprising the maintenance of public services or performed by national security agencies.³⁷ The 1966 amparo law, however, was complemented by the "summary writ" created by article 321 of the Code of Civil and Commercial Procedures,

34. See II DIARIO DE SESIONES DE LA CONVENCION NACIONAL CONSTITUYENTE 840, 851, 862, 891, 947, 969, 1010-20 (Argentina 1958); Romero, *supra* note 30, at 85-86.

35. Published in the daily newspaper, LA NACION (Buenos Aires), June 21, 1964. Article 1 of this draft legislation received ample comment, among the most noteworthy being Luis Lazzarini, *La Acción de Amparo y el Proyecto del Poder Ejecutivo Nacional*, 116 LA LEY 884 (1964 Argentina).

36. This national statute only applies to the area of the federal capital and territory of Tierra del Fuego, the Antarctic and Islands of the South Atlantic, and to federal judges of the provinces in cases where the challenged act emanates from a "national" authority (i.e., "federal," in United States and Mexican terminology). This limitation derives from the division of jurisdiction between federal and state courts and is expressly delineated in article 18 of the same law. See Bidart Campos, *supra* note 1, at 107-08; N. PEDRO SACÜÉS LEY DE AMPARO: COMENTADA, ANOTADA, Y CONCORDADA CON LAS NORMAS PROVINCIALES 409 (Argentina 1979).

37. See Bidart Campos, *La Nueva Ley de Amparo*, [1966] J.A. 1 124: 1361 (Argentina); Fiorini, *Acción de Amparo: Graves Limitaciones e Inconsecuencias que la Desnaturalizan*, 124 LA LEY 1361 124: 1404 (1966 Argentina); Montañó, *La Reglamentación Legal del Amparo Jurisdiccional de los Derechos y Garantías*, 124 LA LEY 124: 1291 1404 (1966 Argentina); Robredo, *La Acción de Amparo y la Reciente Ley 16,986*, 124 LA LEY 1291 (1966 Argentina). See also PEDRO SAGUES, *supra* note 36, at 39-408.

which safeguards fundamental rights threatened by private instead of government acts.³⁸

C. Venezuela

Venezuela's experience with the writ of amparo differs markedly from Argentina's at the national level. Although consecrated in article 49 of the 1961 Constitution, Venezuela has not succeeded in enacting the proceeding through legislation despite various attempts, and the courts have not yet accepted it.³⁹ On the other hand, article 5 authorizes the essential bases for the protection of personal liberty, specifically with the name of "liberty amparo" (*amparo de la libertad*), but this is nothing more than a writ of habeas corpus.⁴⁰

38. Article 321 is otherwise known as Law 17,454 of Sept. 20, 1967. It provides: Summary process. The proceeding as established by art. 498 shall be applicable as a speedy and concentrated remedy against acts or omissions by any private person which, in present or imminent fashion, injure, restrict, alter, or threaten arbitrarily or illegally some right or guarantee as implicitly or explicitly recognized by the National Constitution. The remedy requires urgent reparation of the harm and immediate cessation of the effects of the harmful act, and the issue may not be resolvable by any of the other processes established by this Code or other laws. . . .

See also BIDART CAMPOS, *supra* note 1, at 113-18.

39. The Courts will protect (*amparán*) every resident of the Republic in the enjoyment and exercise of the rights and guarantees which the Constitution establishes in conformity with the law (emphasis the author's). The proceeding will be brief and summary and the competent judge will have the power to take immediate jurisdiction over the legal situation affected. VENEZUELA CONST. of 1961, art 49. The most significant study of the origin and evolution of the Venezuelan amparo is the monograph by ESCOBAR SALOM, *supra* note 10, at 57-92. See also Fix Zamudio, *Algunos Aspectos Comparativos del Derecho de Amparo en Mexico y Venezuela*, II LIBRO-HOMENAJE A LA MEMORIA DE LORENZO HERRERA MENDOZA 33 (Venezuela 1970).

40. Article 5 (transitory) states:

Until a special law is legislated to regulate the writ in conformity with article 49 of the Constitution, the amparo of personal liberty will proceed in accord with the following rules:

—All persons who have been deprived of or restricted in their liberty in violation of their constitutional guarantees, have the right to appear before a Criminal Judge of First Instance with jurisdiction over the place where the act motivating the petition occurred or where the aggrieved person is located, and to have a writ of habeas corpus issued.

—The judge, having received the petition, which can be made by any person, shall immediately order the official having custody over the aggrieved person to inform the judge within 24 hours as to the reasons for the deprivation or restriction of liberty, and shall open a summary investigation.

—The judge shall decide in less than 96 hours after presentation of the petition whether the aggrieved person shall be set at immediate liberty or whether the restrictions imposed shall cease, if he finds that such deprivation or restrictions have not followed legal formalities.

Taken together, articles 5 and 49 have given rise to confusion. It has been heatedly debated whether the provisions establishing amparo for individual liberty from a broader mandate for a general writ of amparo. Criminal and civil judges have in fact given support to this thesis by considering both constitutional articles to grant amparo protection.⁴¹ On the other hand, appellate courts and the Supreme Court of Justice have doubted the constitutional validity of the general amparo. The Political-Administrative Chamber of the Supreme Court definitively rejected this lower court approach in a decision rendered on December 14, 1970 which was followed by the same court's precedent-setting *acuerdo* (*accord*) on April 24, 1972. Both decisions held that the criminal courts were not authorized to hear broadly-based amparo petitions because article 5 refers only to habeas corpus.⁴² Such decisions precluded the establishment of amparo via judicial decisions as had been done in Argentina prior to 1966.

The uncertainty of the amparo in constitutional doctrine and in the Venezuelan courts, makes necessary legislative action to implement article 49. Unfortunately, the only such effort until now has been a draft bill, The Habeas Corpus Act, proposed by the Justice Minister in 1965. That bill is still languishing in both houses of the Venezuelan Congress.⁴³

—If he considers it necessary, the judge may condition his decision on the posting of a bond or prohibiting the aggrieved party from leaving the country for a period not exceeding 30 days.

—The decision of the Judge of First Instance shall be forwarded to the notice of the Superior Court within the same day or the day after it is made. This consultation shall not prevent immediate execution of the decision. The Superior Court shall decide within 72 hours after receipt of the record.

See Francisco Brice, *Habeas Corpus y Derecho de Amparo*, [1959] REVISTA DE DERECHO Y LEGISLACIÓN 201 (Venezuela); de Miguel S., *Amparo y Habeas Corpus en la Constitución de 1961*, [1965] REVISTA DEL COLEGIO DE ABOGADOS DEL DISTRITO FEDERAL 41 (Venezuela).

41. See M. SIERRAALTA, LOS RECURSOS DE AMPARO Y HABEAS CORPUS EN EL DERECHO CONSTITUCIONAL VENEZOLANO (Venezuela 1961); R. EXCALA ZERPA, RECURSO DE AMPARO CONTRA ARBITRARIEDAD DE FUNCIONARIO PÚBLICO 25 (Venezuela 1968); Agudo Freytes, *Algunos Casos de Amparo y Habeas Corpus*, ANUARIO DEL COLEGIO DE ABOGADOS DEL ESTADO LARA 250-56 (1969 Venezuela); Gabriel Sarmiento Nuñez, *El Amparo de la Libertad y los Actos Judiciales*, [1968] ESTRADOS: REVISTA NACIONAL DE JURISPRUDENCIA 991-1022 (Venezuela 1968).

42. Some of the judicial decisions prior to this controlling opinion, which initiated a movement similar to the Argentine jurisprudence on amparo rights, can be found in ESCOVER SALOM, *supra* note 1, at 111-48.

43. See Ministerio de Justicia de la República de Venezuela, EXPOSICIÓN DE MOTIVOS DE LA LEY DE HABEAS CORPUS (Caracas 1965); E. AGUDO FREYTES, NOTAS SOBRE EL AMPARO PERSONAL Y SOBRE EL PROYECTO DE LEY, DE HABEAS CORPUS 31-35 (Venezuela 1970). A model Amparo Law has been drafted by the noted scholar P. Escovar Salom in EL AMPARO EN VENEZUELA, *supra* note 1, at 101-07.

D. Peru

The writ of amparo does not formally exist in Peru. In reality, Peru's writ of habeas corpus has been employed not only to test the detention of persons but also to safeguard all human rights set forth in article 69 of the 1933 Constitution.⁴⁴

The main theme throughout the development of the Peruvian habeas corpus has been the constant expansion of the writ's protection by the courts. This has occurred even though the Code of Criminal Procedure purports to restrict habeas corpus to personal liberty cases. Moreover, the government specifically has limited this protective instrument in countless states of emergency.⁴⁵ The limited recourse of amparo was established as a separate writ by the Decree-Law 20,554 of March 12, 1974. This remedy can be brought before the Agrarian Tribunal by landowners affected by decrees expropriating or extinguishing title. The petitioners, however, must allege that their lands are not within the scope or intent of the agrarian reform laws.

The scope of the amparo writ was expanded by article 295 of the Peruvian Constitution of 1979, which distinguishes clearly between habeas corpus and a new "action of amparo." The former was confirmed in its traditional dimension as protecting personal liberty, while the latter was characterized as safeguarding the remaining rights recognized by the Constitution which may be vulnerable or threatened by whatever authority, official or private.

V. THE AMPARO IN CENTRAL AMERICA AND PANAMA

The Mexican writ of amparo directly influenced the establishment of amparo in Central America. El Salvador introduced amparo

44. All individual and social rights recognized by the Constitution may occasion the action of habeas corpus. PERU CONST. of 1933, art 69. See D. GARCÍA BELAUNDE, *EL HABEAS CORPUS INTERPETADO* (Peru 1971); D. GARCÍA BELAUNDE, *EL HABEAS CORPUS EN EL PERÚ* (Peru 1979); *Habeas Corpus y Acción Popular* [1961] REVISTA DEL FORO 8 (Peru); Garcia Belaunde, *Amparo Mexicano y Habeas Corpus Peruano*, 39 BOLETIN MEXICANO DE DERECHO COMPARADO 687 (1980); Garcia Belaunde, *Naturaliza Juridica del Habeas Corpus*, REVISTA DE DERECHO Y CIENCIAS POLITICAS 263 (Peru 1973); Bustamente Cisneros, *Constitucion y Habeas Corpus*, [1960] REVISTA DEL FORO 4 (Peru); Cooper, *Apuntes Criticos Sobre el Habeas Corpus en el Perú*, 28 ANUARIO DE LA PONTIFICIA UNIVERIDAD CATÓLICA DEL PERÚ 4-10 (Peru 1970); Fix Zamudio, *Influencia del Derecho Angloamericano en la Protección Procesal de los Derechos Humanos en América Latina*, [1971] Festschrift für Karl Loevenstein 496 (Germany).

45. Decree-Law No. 17,083 of October 24, 1968, passed by the military government, set out specific regulations for bringing the writ of habeas corpus. It specified its application to different acts affecting personal liberty pursuant to the existing Code of Criminal Procedure. See BOREA ODRIÁ, *supra* note 1.

in its Constitution of 1886 and promptly regulated it in the Law of Amparo of 1886, which bore great similarities to the Mexican amparo statute of 1882. Honduras and Nicaragua consecrated the amparo procedure in 1894; Guatemala in the constitutional revision of 1921; Panama in its 1941 Constitution; and finally, Costa Rica in its 1949 Constitution.⁴⁶ In addition, the two efforts at creating a Central American federation of nations, the 1898 and 1921 draft constitutions, embraced the amparo proceeding.⁴⁷

A. Guatemala

Guatemala's amparo proceeding is based upon article 84 of the 1965 Constitution and the Law of Amparo, Habeas Corpus, and Constitutionality of April 20, 1966. Amparo protects human rights under the Constitution, except personal liberty, which is safeguarded by the specially designated habeas corpus.⁴⁸ Amparo can also be used to challenge unconstitutional laws, a development that stems from the 1928 Law of Amparo. Judicial declarations of unconstitutionality, however, affect only the litigants of the immediate case reflecting the influence of Mexico's "Otero Formula."

Article 264 of the 1965 Constitution and articles 105 through 111 of the 1966 statute introduced a system of judicial review similar to Austria, Italy, and West Germany. Constitutional Courts may make general declarations of constitutionality. The Court includes twelve members, five of whom are the President and four magistrates of the national Supreme Court of Justice. Remaining members of the Constitutional Court are named by lottery from the judges of the Court of Appeals and Administrative Tribunal (*Tribunal de lo Contencioso Administrativo*). This Court convenes only upon petition for a declaration of unconstitutionality; standing to file such a petition is restricted to the national bar association (*Colegio de Abogados*), the

46. See H. FIX ZAMUDIO, *supra* note 25, at 204.

47. See Eder, *supra* note 1, at 602.

48. For the ordering of the amparo and habeas corpus under various constitutional jurisdictions and periods, see M. KESTLER FARNES, *INTRODUCCIÓN A LA TEORÍA CONSTITUCIONAL GUATEMALTECA* 2d ed. Guatemala 1964); and two theses. R. Auyón Barneod, *El Proccdimiento 272-74 de Amparo 88* (Guatemala 1955) and C. Humberto de León Rodas, *El Habeas Corpus, Garantía de Libertad en la Legislacion de Guatemala* (Guatemala 1960). For current legislation on these writs, see M. AGUIRRE CODOL, *supra* note 1, at 8-16, as well as the following law school theses: A. Rafael Calderón, *Fundamentación de los Derechos Humanos y su Protección en la Legislación Guatemalteca: Amparo y Habeas Corpus* (Guatemala 1970); G. Fuentes Charnaud, *El Amparo en la Legislación Guatemalteca* (Guatemala 1970). J. Gabriel Larios Ochaíta, *El Amparo en la Constitución y en la Ley* (Guatemala 1968).

Public Ministry, or anyone able to obtain the support of at least ten lawyers.

Decisions of the Constitutional Court invalidating a law have an *erga omnes* effect; i.e., once the judgment is published, the law declared unconstitutional cannot be applied or executed against anyone. In practice, however, the Court has rarely decided such cases, and the results of this innovation have been modest.

B. *El Salvador*

El Salvador's amparo protects human rights under the Constitution, with the typical exception of the right of individual liberty which can be protected only through habeas corpus. The Salvadoran amparo is based on article 89(I) of the Constitution of 1962 and the Law of Constitutional Procedures of January 14, 1960. An alternative to the amparo in El Salvador is the "popular action of unconstitutionality" (*acción popular de inconstitucionalidad*). This action can be brought by any person directly before the Supreme Court of Justice to challenge the constitutionality of any law on its face. Decisions of the Court in such cases have an *erga omnes* effect.⁴⁹

C. *Honduras*

The Honduran amparo is a broader remedy than that in other Central American countries. Article 58 of the 1965 Constitution and the Amparo Law of April 14, 1933 provide that the amparo incorporates, rather than excludes, habeas corpus, although the latter still is the remedy for personal liberty violations.⁵⁰ The amparo is also used to challenge unconstitutional laws. Like the Mexican model, however, the effects of declarations of unconstitutionality are *inter partes*; i.e., limited to the parties.

D. *Nicaragua*

Prior to the popular overthrow of the long dictatorship of the Somoza family in 1979, Nicaragua had come closest to a formal model

49. See Galindo, *La Protección Procesal de las Garantías Individuales en América Latina*, [1967] REVISTA IBEROAMERICANA DE DERECHO PROCESAL 496 (Spain).

50. Article 58 provides that the remedy of amparo can be exercised by all aggrieved persons or anyone else in their name:

(a) so that the enjoyment of their rights and guarantees established by the Constitution may be maintained or restored, and

(b) that the resolution or act of authority may not obligate the petitioner, as declared in concrete cases at law, to contravene or restrict any of his rights guaranteed by the Constitution.

HONDURAS CONST. of 1965, art. 58.

of the Mexican amparo. That development began with the first amparo statute of 1894. Even Nicaragua, however, excluded application of the amparo against judicial decisions (*en materia judicial*). Otherwise, according to the Spanish commentator Jesús González Pérez, the basic similarities remained intact through article 229(I) of the Constitution of 1950, the regulatory statute of the same date, and the Constitution of 1974 with its accompanying Law of Amparo.⁵¹ These provided amparo relief against all acts of authorities affecting fundamental rights of individuals. The right of personal liberty was included under the scope of amparo, and the writ of habeas corpus was incorporated into the section of the amparo law outlining modes of attacking unconstitutional statutes. Like Mexico, the effects of decisions declaring laws unconstitutional have only *inter partes* effects.

The final impact of the 1979 Revolution against the Somoza dynasty on the amparo procedure remains to be seen. The Government of National Reconstruction replaced the 1974 Constitution with the Fundamental Statute of July 20, 1979. The new regime also issued the Law of August 31, 1979, that guaranteed various rights and liberties of Nicaraguans. Article 50 of this statute provides in part: "All persons whose rights or liberties recognized in this Statute or in the Fundamental Statute of July 20, 1979 that may have been violated, are entitled to petition for the remedy of amparo in conformity with the law." Two subsequent statutes in support of article 50 have been enacted: (a) The Law of Amparo for Liberty and Personal Security, promulgated on January 4, 1980, specifically protecting rights guaranteed under habeas corpus, and (b) another Law of Amparo of May 28, 1980, protecting the remaining fundamental rights.

E. Costa Rica

In Costa Rica the amparo protects all human rights, individual as well as social, that are designated in the Constitution. Only guarantees of personal liberty are protected by habeas corpus. The amparo does not apply, however, to attacks on the facial constitutionality of laws, which are governed by the Code of Civil Procedure. These decisions declaring laws unconstitutional have *erga omnes* effects.⁵²

51. Pérez, *supra* note 1, at 297-321.

52. The amparo proceeding in Costa Rica was introduced in article 48 of the 1949 Constitution and regulated by Law No. 1161 of June 2, 1950, as revised in 1952 to include the protection of "social rights." Law No. 35 of November 24, 1932 provided for the protection of personal liberty via habeas corpus. For commentary on these provisions, see the thesis of R. Vinicio Alfaro Valverde, *El Recurso de Amparo*

F. Panama

Because of the influence of the constitutionalist José Dolores Moscote, the 1941 Constitution of Panama incorporated the amparo along with other proceedings classified as "guarantees", in order to remedy constitutional violations.⁵³ Both the 1946 Constitution and the current 1972 Constitution include habeas corpus in the traditional sense. The Enabling Law of Constitutional Remedies and Guarantees (Law No. 46 of November 24, 1956) also established the amparo as the protector of constitutionally guaranteed human rights. The "Popular Action" against unconstitutional laws, as in the case of El Salvador, also has *erga omnes* effects.⁵⁴

VI. THE AMPARO IN MORE RECENT LEGISLATION: BOLIVIA, PARAGUAY AND ECUADOR

A. Bolivia

After a careful analysis of the pre-1966 amparo decisions of the Argentine federal courts, Bolivia adopted amparo in its 1967 Constitution.⁵⁵ The Bolivian amparo is against all official, as well as private (social group), acts that impair the fundamental rights of the people, as specified in the Constitution. Pursuant to article 18 of the Constitution and the Code of Criminal Procedure, however, habeas corpus is the proper remedy when deprivations of personal liberties are claimed.

49 (Costa Rica 1959). See also Guier, *Sentencias de Amparo, 1950-1962*, REVISTA DEL COLEGIO DE ABOGADOS, July and Nov. 1969, dedicated entirely to the study of the legal and jurisprudential aspects of the amparo; I. VARGAS BONILLA, LECCIONES DE DERECHO CONSTITUCIONAL COSTARRICENSE 120-22 (Costa Rica 1955); E. ORTÍZ COSTA RICA: ESTADO SOCIAL DE DERECHO 92-93 (Costa Rica 1977); Donaldson, *The Costa Rican Amparo in the Period 1950-1962*, 8 LAW AM. 371 (1976).

53. See J. MOSCOTE, EL DERECHO CONSTITUCIONAL PANAMEÑO (Panama 1943); C. BOLIVAR PEDRESCHI, EL PENSAMIENTO CONSTITUCIONAL DEL DR. MOSCOTE 170 (Panama 1959).

54. Regarding the amparo and the "popular action" of unconstitutionality, see J. MOSCOTE, *supra* note 53, at 451-55; V. GOYTIA, LAS CONSTITUCIONES DE PANAMA 762 (Spain 1954); C. BOLIVAR PEDRESCHI, EL CONTROL DE LA CONSTITUCIONALIDAD DE PANAMA 178 (Spain 1965); C. BOLIVAR PEDRESCHI, JURISPRUDENCIA CONSTITUCIONAL 17 (Panama 1967); J. FABREGA P., EL DOCTOR EUSEBIO MORALES Y EL CONTROL DE LA CONSTITUCIONALIDAD 8-10 (Panama 1965); *Sección de Investigación Jurídica de la Universidad de Panamá*, I JURISPRUDENCIA CONSTITUCIONAL 15 (Panama 1967).

55. That article provides:

In addition to the habeas corpus to which the previous article refers, a recourse of amparo is established against illegal acts or improper omissions on the part of official functionaries or private persons which restrict, suppress or threaten the rights and guarantees recognized by this Constitution and the laws. . . .

BOLIVIA CONST. of 1967, art. 19.

The Bolivian courts have processed a number of amparo petitions, even though long periods of political disruption and states of emergency have prevented statutory implementation of the constitutional provisions on amparo. Fortunately, those provisions are sufficiently detailed both in matters of substance and procedure to guide courts in disposing of cases.⁵⁶ Additional regulation of the amparo proceeding has subsequently been provided for in articles 762 through 767 of the Code of Civil Procedure.

B. *Paraguay*

Paraguay's 1967 Constitution closely follows the procedures of the Bolivian amparo.⁵⁷ The Argentine influence is apparent; amparo may be brought against official as well as private group abuses (but not against private individuals). Violations of personal liberty may only be remedied through use of the independently regulated habeas corpus.⁵⁸

C. *Ecuador*

Ecuador adopted the amparo in article 28(15) of its 1967 Constitution, but the lack of a regulating statute made its application impossible.⁵⁹ The amparo effectively disappeared with two successive

56. See OBLITAS POBLETE, *supra* note 1, at 27.

57. Article 77 provides:

All persons who believe they are injured or are in imminent danger of being injured by an illegal act or omission of an authority or private person involving a grave threat to a right or guarantee protected by this Constitution or by law, and because of the urgency of the case cannot secure protection through ordinary procedures, may petition any Judge of the First Instance for an Amparo writ. The procedure will be brief, summary, free, and a public action, and the judge shall have the power to safeguard the right or guarantee, or to restore the juridical status infringed. A statute shall regulate the procedure.

PARAGUAY CONST. of 1967, art. 77.

58. Although the corresponding statute on amparo has not yet been passed, various bills have been introduced in the legislature. See, e.g., J. Ascencio Aponte, *Proyecto de Ley que Establece Normas Procesales de la Acción de Amparo*, presented to the Senate (Asunción, 1968); E. Sosa, *Anteproyecto de la Ley de Amparo y Estudio sobre el Juicio de Amparo* (Asunción, 1968: doctoral thesis).

59. Article 28(15) provides:

Without prejudice to other rights derived from the nature of the person, the State guarantees . . . 15. The right to petition for jurisdictional amparo against any violation of constitutional guarantees, without prejudice, the duty owed by the Public Power to observe the Constitution and the laws.

ECUADOR CONST. of 1967, art. 28(15).

coups, the first by President Velasco Ibarra in 1971 suspending the 1967 Constitution and reinstating that of 1946, and the second declaring the reinstatement of the 1945 Constitution. In neither of the resurrected constitutions was the amparo ever mentioned. Amparo may soon return to Ecuador, for one of the constitutional drafts submitted to referendum at the end of 1978 provides for renewal of the amparo protections.⁶⁰

VII. THE BRAZILIAN WRIT OF SECURITY (MANDADO DE SEGURANÇA)

Brazil has introduced an institution similar to amparo called the writ of security (*mandado de segurança*). Several commentators, however, have seen the striking parallels with the main protective instrument of other Latin American nations and have referred to the Brazilian writ of security as the "mandate of amparo" (*mandamiento de amparo*).⁶¹

Several Brazilian scholars have expressly recognized the influence of the Mexican amparo on the Brazilian writ of security. Such recognition does not mean, of course, that the latter is a simple copy, for there are significant differences between the two proceedings.⁶²

The Brazilian writ of security was first introduced in article 113(33) of the 1934 Constitution. Its present form is regulated by article 153(21) of the 1967 Constitution (as revised on October 17, 1969), which provides:

60. The Constitution approved by referendum on Jan. 15, 1978, in art. 19 (16j), establishes habeas corpus as the exclusive means of protecting personal liberty. Article 19(20) of the losing alternative in the election proposed an implicit reform of the 1945 Constitution by the following language: "The State guarantees. . . [t]he right of petitioning jurisdictional amparo against any violation of constitutional guarantees." See Tribunal Supremo del Referendum, *Proyecto de Constitución Política* 80 (Ecuador 1977).

61. The Spanish writer Manuel Fraga Iribarne translates *mandado de seguridad* as "mandate of amparo" (*mandamiento de amparo*) in his Spanish version of the 1946 Constitution, found in T. B. CAVALCANTI, *LAS CONSTITUCIONES DEL BRASIL* 685-86 (Spain 1958). Argentine jurists also refer to this Brazilian proceeding as amparo. See, e.g., L. LAZZARINI, *supra* note 1, at 53-64; S. VIAMONTE, *supra* note 1, at 43-47.

62. Comparative studies of these institutions in Mexico and Brazil include: A. RIÓS ESPINOZA & N. ALCALA-ZAMORA Y CASTILLO, *TRES ESTUDIOS SOBRE EL MANDATO DE SEGURIDAD BRASILEÑO* (Mexico 1963); J. OTHON SIDOU, *O JUICIO DE AMPARO* (Brazil 1968); Buzaid, *Juicio de Amparo e Mandado de Segurança*, 37-40 *REVISTA DE LA FACULTAD DE DERECHO DE MEXICO* 107 (1960); Fix Zamudio, *Mandato de Seguridad y Juicio de Amparo*, 46 *BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO* 3 (1963); Riós Espinoza, *Mandamiento de Seguridad*, 53 *REVISTA DE LA FACULTAD DE DERECHO DE MEXICO* 77 (1964).

The writ of security shall lie to protect a clear and certain right unprotected by habeas corpus, irrespective of the authority responsible for the illegality or abuse of power.⁶³

The writ of security operates mainly against administrative officials or acts. Judicial decisions have held that the writ may be used to challenge legislative or judicial dispositions only in rare circumstances.⁶⁴ The majority view holds that the writ cannot be used to challenge laws on their face; it will lie only against applications of laws by administrative agencies. Nor can legislatures be enjoined as creators of legal rules. Such bodies can be checked only when acting in a strictly administrative matter (i.e., when self-executing statutes are directed at particular persons or groups).⁶⁵ Rigid application of this principle, however, may soon be relaxed. Various bills for reforming the regulative legislation contain proposals permitting the challenging of laws in the abstract; i.e., statutes that may be applied concretely in ways that can demonstrably produce serious, or possibly, irreparable damages.⁶⁶

The writ of security functions very effectively as a procedural device to protect the constitutional rights of citizens. Even though a literal interpretation of the regulating statute suggests that the writ only protects individuals against illegality and the abuse of official discretion, the doctrine and judicial decisions imply that protection of

63. Law 1533 of December 31, 1951, as amended. See also C. AGRICOLA BARBI, *DO MANDADO DE SEGURANÇA* (Brazil 1977); M. FLANKS, *MANDADO DE SEGURANÇA: PRESSUPOSTOS DE IMPETRAÇÃO* (Brazil 1980); OTHON SIDOU, *AS GARANTIAS ATIVAS DOS DIREITOS COLETIVOS: HABEAS CORPUS, AÇÃO POPULAR, MANDADO DE SEGURANÇA* 229-418 (Brazil 1977); Marques, *O Artigo 141, Parágrafo 4 da Constituição Federal* (de 1946), [1960] *REVISTA DE DIREITO PROCESSUAL CIVIL* 13 (Brazil); Othon Sidou, *Lei 1533 de 31 de Dezembro de 1951, que Disciplina o Mandado de Segurança con as Alterações em Vigor*, [1967] *BOLETIM INSTITUTO DOS ADVOGADOS DE PARÁ* 33 (Brazil); Othon Sidou, *Para Protoger Direito Líquido e Certo*, [1960] *REVISTA DE DIREITO PROCESSUAL CIVIL* 94 (Brazil).

64. Regarding the admissibility of the writ of security against judicial decisions in exceptional cases, see Estelita, *Mandado de Segurança contra Ato Jurisdiccional*, *ATTI DEL CONGRESSO INTERNAZIONALE DI DIRITTO PROCESSUALE CIVILE* 2237 (Italy, 1953); CASA DE RUI BARBOSA, *I O MANDADO DE SEGURANÇA E SUA JURISPRUDÊNCIA* 278 (Brazil 1961); GALVÃO FILHO, *supra* note 1, at 28; Buzaid, *supra* note 62, at 145.

65. See CASTRO NUNES, *supra* note 1, at 117; BRANDÃO CAVALCANTI, *supra* note 1, at 136; Buzaid, *supra* note 62, at 145. The dominant jurisprudential doctrine of the Federal Supreme Court follows the same orientation. See GALVÃO FILHO, *supra* note 1, at 156.

66. Consult the draft legislative statute formulated under the auspices of the Institute of Brazilian Lawyers and by the Federal Council of the Brazilian Bar Association, *Ante-Projeto de Ley do Mandado de Segurança* (Brazil 1960), in particular the introduction by Otto Gil and the report of Celestino Sá Freire Basílio. See also OTHON SIDOU, *supra* note 63, at 337-61.

constitutional rights against unconstitutional laws and acts can be accomplished through the writ of security. The one major exception is the right to personal liberty, which is protected solely by habeas corpus.⁶⁷

VIII. THE AMPARO AGAINST ACTS OF SOCIAL GROUPS

The increasing power of economic, social, professional, and political groups in the pluralist societies of the West can be observed in recent years. The only exception is Cuba, which has joined the Socialist camp. Such groups can affect, on occasion with considerable impact, the human rights of their own members, as well as persons outside of the organization.⁶⁸ No nation is immune from this phenomenon, including the Socialist countries, which pride themselves on having passed to a homogeneous and egalitarian society.⁶⁹

Legal commentators are, therefore, increasingly concerned that human rights can be infringed not only by public authorities, the traditional target of constitutional rights remedies, but also by diverse social groups.⁷⁰ International scholars have begun an intense look at this problem, as demonstrated by the colloquium meeting in the city of Strasbourg, France, in November 1969. That conference was convened to create the International Institute of the Rights of Man (the René Cassin Foundation), which refers expressly to the theme of protecting human rights within private-sector relationships and interactions. More recently, the Ninth International Colloquium of Comparative Law, organized in Ottawa, Canada in October 1977 by the Canadian Center for Comparative Law, took up issues relative to

67. In this respect the writ of security must be considered as a "constitutional guarantee," following the expression of some Brazilian scholars and federal judicial decisions. See CASTRO NUNES, *supra* note 1, at 17-174. Materials translated into English should also be consulted regarding the doctrine and case law of Brazilian courts, such as KARST, *supra* note 1, at 646-51; KARST & ROSENN, *supra* note 1, 99-125.

68. See Fix Zamudio, *Algunos Aspectos de la Protección de los Derechos Humanos en las Relaciones entre Particulares en México y Latinoamérica*, [1970] REVISTA JURIDICA VERACRUZANA 5-47 (Mexico), translated to French as *Quelques Aspects de la Protection des Droits de l'Homme Dans Les Rapports entre Personnel Privées au Mexique et en Amérique Latine*, II RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER 279-310 (France 1971).

69. See, *inter alia*, the brilliant study of García Pelayo, *Introducción al Estudio de los Sistemas Políticos Constitucionales de los Países Socialistas*. [1954] REVISTA DE LA FACULTAD DE DERECHO 91-130.

70. See Fix Zamudio, *supra* note 68; Rivero, *La Protection des Droits de l'Homme dans les Rapports entre Personnes Privées*, III RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER 311 (France 1971).

safeguarding the individual not only against the public bureaucracy, but also against the great corporations and labor unions.⁷¹

Various Latin American jurisdictions employ the writ of amparo, among other juridical instruments, as a simple and rapid procedure to secure constitutional rights in the face of violations by powerful social groups. From the very beginning, Argentine federal court decisions permitted the amparo action to remedy acts of private (understood to be "pressure groups" in legal commentary⁷²) as well as public persons that violated human rights. The *Samuel Kot* decision of September 5, 1958 held that the rights of the individual, guaranteed explicitly or implicitly by the National Constitution, ought to be respected not only by authorities, but by private citizens. Noting that such protection has been granted, in particular against infractions by labor unions, the Court applied the same constitutional principle to the facts of the *Kot* case.⁷³ Other groups subject to amparo litigation include professional associations, school organizations, and sports agencies.

Although in 1966 the Argentine military government restricted the reach of amparo to governmental acts,⁷⁴ less than a year later it developed a parallel procedural instrument called a "summary writ" (*juicio sumarísimo*) to defend individual rights against violations by social groups.⁷⁵ The summary writ possesses the same general charac-

71. The three themes pervading this meeting referred specifically to the protection of the individual against governments, great mercantile enterprises, and labor unions. The papers and conclusions were published in the edited volume by the Centre Canadien de Droit Comparé, *Travaux du dixième Coloquio Internacional de Droit Comparé: Proceedings of the Tenth International Symposium on Comparative Law* (Canada 1973).

72. See S. Linares Quintana, *La Doctrina de la Corte Suprema sobre Amparo de la Libertad y los Grupos de Interés y de Presión*, [1958] J.A. 1 (Argentina).

73. The facts alleged in the amparo action involved the illegal occupation of a factory of a group of workers charging labor law violations. In the relevant portion of the judgment, the Court affirmed:

There is nothing in the letter nor in the spirit of the (Argentine) Constitution which limits protection of so-called "human rights"—as essential rights of persons—against attacks emanating solely from governmental authority. Neither is there anything which authorizes an illegitimate, grave, or manifest attack against any of the rights constituting liberty, *latu sensu*; these rights have adequate constitutional protection, through *habeas corpus* and the amparo recourse, and not exclusively through ordinary remedies or those of interdicts, transmittals, briefs, offers of proof, etc. Such constitutional protection applies even though the attacks may come from other private or organized groups of individuals

Besides those works mentioned in *supra* note 32, see R. Olcese, *Procedencia del Amparo contra Actos de Particulares*, [1970] J.A. 10 (Argentina).

74. Law 16,986 of Oct. 18, 1966, art. 1.

75. NAT'L CODE OF CIVIL AND CRIMINAL PROCEDURE of Sept. 20, 1967, art. 231.

teristics of the amparo: simplicity, brevity, and remediability, and was specifically designed to correct private abuses of personal constitutional rights, particularly those committed by "social pressure groups."

The essential principles established by the Argentine federal courts prior to the restrictive national law of 1966 decisively influenced the promulgation of the amparo in the constitutional orders of Bolivia and Paraguay. The Bolivian and Paraguayan Constitutions (in articles 19 and 17 respectively) left the amparo free to reach acts of pressure groups (also known as "private persons" (*particulares*)) violative of the human rights of citizens in those countries.

In Brazil, Law 1533 of 1951 extended the concept of the target or respondent authority of the writ of security to include administrators and representatives of independent state agencies as well as private persons with functions authorized by the government. On the other hand, Brazilian court decisions have established that the writ of amparo can be utilized against violative acts of professional associations, labor groups, and public education institutions.⁷⁶

Articles 8 and 9 of the Guatemalan Law of Amparo, Habeas Corpus, and Constitutionality opened the amparo system for challenging not only acts of authorities, strictly defined, but also acts by managers, bureau chiefs, and presidents of semi-independent or independent government agencies. These remedies may apply also to directive bodies of professional associations and other private entities, such as boards of directors, councils, and governing boards.

Finally, the capacity of the amparo to remedy acts of social pressure groups is implicit in article 25 of the Inter-American Convention on Human Rights, concluded in San José, Costa Rica in November 1969. This article grants a right of judicial protection for human rights violations even though such violations may have been committed by persons acting in exercise of official functions. Latin American governments adopted this principle at San José, thus recognizing the protection of amparo regarding actions by social, economic, and political groups that threaten constitutionally guaranteed human rights.⁷⁷

76. See CASA DE RUI BARBOSA, *supra* note 64, at 89; GALVÃO FILHO, *supra* note 1, at 100; WALD, *supra* note 1, at 162-66.

77. See H. RICORD, *LOS DERECHOS HUMANOS Y LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS* 110-11 (Mexico, 1970).

IX. THE AMPARO DURING STATES OF EMERGENCY

Latin American constitutions, with the exception of Brazil's, make no express reference to the propriety of judicial review over acts of authorities which affect individual rights in emergency situations. These constitutions limit the general powers exercised by governments, particularly the executive branch, where grave conflicts may jeopardize the substantive public rights of the governed. The right to personal liberty is most frequently threatened under the justification of "internal" or "external" dangers. It is, therefore, not surprising that ordinary statutes, and, increasingly, those dealing with emergency situations, have restricted the exercise of specific instruments for protecting human rights. The writs of habeas corpus and amparo are the most common targets of such restrictions. Except for these statutory proscriptions, there would be no constitutional grounds for limiting abuses of power by the legislature and, with greater frequency, the executive. The latter all too often can efficiently exploit its extraordinary powers to legislate in the face of severe social and political conflicts.⁷⁸ Some recent examples suffice as illustrations.

The Guatemalan Law of Public Order of November 30, 1966, provides the remedy of habeas corpus for persons detained for reasons of security outlined in article 95 of the statute, but only to prevent maltreatment at the place of detention. It cannot be used to free the prisoner. The prisoner may be secured only after an investigation, but this is not a responsibility of the courts. Also, there is no maximum time limit on conducting the investigation. The previous maximum was 30 days, until amendments of November 13, 1970. Article 62 of the same Law of Public Order provides that acts derived from its application cannot be impugned by writ of amparo until the declaration of emergency authorized by the statute has expired.⁷⁹

Article 2(b) of the Argentine statute of 1966, which regulates the federal amparo, prohibits amparo against acts which expressly apply the National Defense Law (Law 16,970 of 1966). This implies a severe restriction on the efficacy of the writ and has resulted in a substantial increase in the frequency of constitutional rights violations.⁸⁰

78. See H. Fix Zamudio, *La Protección Procesal de los Derechos Humanos en America Latina y Las Situaciones de Emergencia* [1973] EL FORO 63-75. This was translated into French by Monique Lions Signoret, in Centre Canadien de Droit Comparé, *supra* note 71, at 67-100.

79. ACURRE GODOY, *supra* note 1, at 23-24.

80. Fiorini, *supra* note 37, at 1-3.

The situation was aggravated during the second constitutional government of General Juan Perón (1973-76), and again by the new military *coup* against the presidency of Isabel Perón, his widow, which has resulted in the return to a state of siege.⁸¹

Article 181 of the Brazilian Constitution of 1969 excluded from judicial review all acts committed by the Supreme Command of the Revolution since the *coup* of March 1964 and validated other federal acts authorized by the various Institutional Acts. Article 181 expressly left in effect Institutional Act No. 5 of December 14, 1968, which had suspended the habeas corpus for political crimes and acts committed against "national security," "social and economic order," and "the popular economy," and prohibited judicial intervention against actions taken to enforce this law.⁸² The Act also authorized the President to dissolve the Federal Congress, to intervene in the provinces and cities, to suspend the political rights of citizens, and take other repressive measures.⁸³

Fortunately, this provision was repealed by Constitutional Amendment No. 11, which took effect on January 1, 1979. The amendment finally appeared to recognize, if not resolve, the inherent conflict between article 159 of the Federal Constitution of 1969 which it reaffirmed, and article 181. The final wording almost literally followed the terms of article 215 of the democratic Constitution of 1946 by providing that "the non-observance of whatever provisions, relative to the state of siege, determines the illegality of the proceeding (*coacción*) and authorizes those affected to resort to the judicial branch."⁸⁴

This constitutional reform of 1979 came at least partially as a response to the strong protest registered by the only legal opposition party, the Democratic Brazilian Movement (MDB),⁸⁵ which challenged against a new law of judicial organization introduced by the Government in April 1977. MDB leaders refused to approve the bill until the Government authorized habeas corpus against detentions for

81. This military *coup* brought with it a new constitutional statute, the ACT FOR THE NATIONAL REORGANIZATION PROCESS (18 June 1976).

82. See Fix Zamudio, *supra* note 78, at 34-35. KARST & ROSENN, *supra* note 1, at 206-219, cite various paragraphs from the INSTITUTIONAL ACTS OF BRAZIL and some specific judicial decisions during periods of emergency.

83. 2 L. PINTO FERREIRA, CURSO DE DIREITO CONSTITUCIONAL 660-63 (3d ed. Brazil 1974).

84. Regarding this provision of the 1946 Constitution, see 6 PONTES DE MIRANDA, COMENTÁRIOS A CONSTITUIÇÃO DE 1946 446-67 (3d ed. Brazil 1960).

85. See PINTO FERREIRA, *supra* note 83, at 556-59.

political reasons. With this solid opposition as a catalyst, the President of the Republic, General Geisel, invoked Institutional Act No. 5 to decree suspension of the Congress and to assume "emergency legislative powers." These actions indicate an initial hard-line reaction against accepting judicial instruments protecting human rights such as the writ of security and habeas corpus, and were typical of the response of Latin American military governments to crises so frequently afflicting their respective political systems.

Constitutional Amendment No. 11 makes Brazil unique among these military regimes by upgrading formal access to judicial remedies when individuals are aggrieved by constitutional rights violations. This exception is noteworthy and compels further scrutiny as to whether it will be executed in practice, as well as followed by other military governments in the region.

The Brazilian development notwithstanding, Latin American courts have been insecure, vacillating, and timid in the discharge of their constitutional duty to protect human rights during states of emergency. A Chilean scholar, Professor Elena Caffarena de Jiles, wrote that the courts of her country had shown great timidity when asked to challenge exercises of executive emergency powers. She published her book in 1957,⁸⁶ a period when the Chilean military's political role was certainly less dramatic than at the present.⁸⁷ Such abuses of constitutional governments pale into insignificance when compared with the lack of defense of individuals faced with violations of their rights by the military government that assumed power in September 1973. That power is effectively absolute, because the courts do not dare examine, much less resolve, petitions for amparo brought to defend those detained for political reasons, even though these abuses have been challenged repeatedly by various institutions and associations. Furthermore, the situation has been well documented by the impressive report issued by the United Nations Commission on Human Rights specifically denouncing the constant violations by the Chilean military regime.⁸⁸

Both habeas corpus and the newly adopted "action of amparo" in the Peruvian Constitution of 1979 protect against all forms of human rights violations, as discussed above. Professor Domingo García Belaúnde has detailed the historical erosion of habeas corpus through

86. CAFARENA DE JILES, *supra* note 22.

87. Professor Cafarena de Jiles noted only a few exceptions to this general pattern of excessive self-restraint practiced by the courts. *Id.* at 21-30.

88. U.N. Doc. E/CN.4/1221 (1977), especially at 221-24, regarding the lack of independence in the ordinary court system.

frequent declarations of emergency. During the 1932-45 period alone, only twelve petitions were filed for habeas corpus relief, compared to a total of 182 between 1932 and 1970.⁸⁹

With the advent of military government during the 1968-80 period, the same suspicions of inefficacy linger. Hopefully, re-establishment of an elected civilian government will prompt the current Congress and President to expedite a law regulating the amparo action firmly recognized in article 295 of the new Constitution of 1979.

The Argentine courts have deeply probed the problem of protection during states of emergency in a nation which has great experience in such situations, but the decisions of the federal courts reflect vacillation and uncertainty. The Supreme Court, for example, formulated the thesis that the state of siege as outlined in article 23 of the Constitution constitutes a political act not susceptible to judicial review.⁹⁰ On the other hand, this tenet has not been absolute and slowly the courts have created the concept of "reasonability" to evaluate powers of emergency established during the state of siege. Theoretically, this permits the courts to decide if the government's acts or dispositions affecting human rights during exceptional circumstances may be exercised within the limits established by the National Constitution. Such requests may come before the courts through the traditional instruments specified for such purposes, particularly the writ of amparo and habeas corpus.⁹¹ According to the distinguished Argentine scholar German J. Bidart Campos, the state of siege does not imply the lack of judicial competence both to entertain and to decide amparo cases that involve legal restrictions having nothing whatever to do with the reasons for the emergency.⁹²

In sum, it can be generally established that the writ of amparo, as consecrated in several Latin American constitutions, is diminished in practice because of constant declarations of emergency. When issued by military governments, these declarations substantially aggravate abuses of individual rights occurring under their authority. Unfortunately, military rule is on the rise in Latin America. This

89. GARCÍA BELAUNDE, *supra* note 44, at 14-22.

90. See Linares Quintana, *Control Judicial de los Gobiernos de Facto*, Festschrift für Karl Loewenstein 312 (Germany 1971).

91. See the meticulous jurisprudential review of Vocos Consesa, *El Estado de Sitio en la Jurisprudencia de la Corte Suprema Nacional, desde 1863 hasta el 30 Junio de 1970*, [1970] J.A. 57 (Argentina). KARST & ROSEN, *supra* note 1, at 224-35.

92. BIDART CAMPOS, *supra* note 1, at 276-77.

underscores the need to restore the protective arm of the amparo for the effective vindication of individual constitutional rights.

Only if the amparo is admissible under emergency situations can one speak of true procedural safeguards for human rights in Latin America. At the Seminar on Amparo, Habeas Corpus, and other Similar Remedies sponsored by the United Nations in Mexico City in August 1961, the majority of delegates, predominately Latin Americans, agreed that the courts should have the power to decide as to the legality of measures adopted by the authorities during declarations of emergency.⁹³

X. THE LATIN AMERICAN AMPARO

The amparo proceeding can be established throughout Latin America as evidenced by its adoption, at least formally, in several Latin American countries. Hopefully, it will not only be extended to others not yet embracing it, but will also become effective in those countries which have. There are several reasons why this possibility seems viable.

In the first place, the American Declaration and the Convention on Human Rights (in articles 18 and 25 respectively) obligate the signatory nations to perfect or introduce legislatively the writ of amparo as the protective instrument on behalf of constitutionally defined human rights.⁹⁴ A number of different doctrinal efforts have been initiated to fix the bases or common principles which can be used to harmonize Latin American statutory provisions regulating the amparo proceeding.

In the meetings on Comparative Argentine and Uruguayan Law, convening in Montevideo during August 15-17, 1962, participants elaborated common bases for the execution of the action of amparo in Argentina and Uruguay. Drafters of the proposal were aware that Uruguay had not introduced this protective institution, despite several efforts to do so. This possibility now seems all the more difficult with the authoritarian rule of the armed forces in this small country, once the model of constitutional government.⁹⁵

93. See U.N. Doc. ST-TAO-HR-12 (New York, 1962), at 26 and 97-108 for a review of the discussions.

94. See Trejos, *Organos y Procedimientos de Protección de los Derechos Humanos en la Convención Americana*, [1977] *LA TUTELA DE LOS DERECHOS HUMANOS* 61 (Costa Rica).

95. The conclusions of these conferences can be found in Ramón Real, *La Acción de Amparo en la Jurisprudencia Argentina y ante el Derecho Uruguayo*, [1963] *REVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES* 146 (Uruguay).

Delegates to the Second International Congress and Third Latin American Meeting on Procedural Law of São Paulo in September 1962, proposed that the Mexican amparo and the Brazilian Writ of Security provide the basis for a unitary system of protecting human rights.⁹⁶ A broader support base for creating effective protection, as founded in "those common elements already in existence,"⁹⁷ was recommended by the Fourth Latin American Meeting in Procedural Law at Caracas and Valencia, Venezuela in March and April of 1967.

Various Latin American scholars have formulated regulative models of an instrument that can serve for all nations in the Continent. The Argentine commentator, Carlos Sánchez Viamonte, proposed that the protective scope of habeas corpus, already established in the majority of Latin American states, be extended to include all human constitutional rights. It would appear in the form of the amparo and not exclude personal liberty from its reach.⁹⁸

The Brazilian commentator, J.M. Othon Sidou, presented to the aforementioned Third Meeting of Procedural Law in São Paulo a proposal specifying uniform elements in a procedural instrument to safeguard constitutional rights in Latin America. He invoked no less authority than the American and Universal Declarations of the Rights of Man, as well as doctrinal essays, court decisions, and legislative enactments up to that date (1962).⁹⁹

Finally, this author proposed a uniform code for adopting a Latin American Writ of Amparo in his keynote address before the Fourth Latin American Meeting on Procedural Law in 1967.¹⁰⁰

The foregoing exposition supports the conclusion that despite the darkness falling on Latin American human rights in the wake of numerous military dictatorships, there is some hope that these obsta-

96. See Gil, *Introdução a Coletanea de Estudos sobre o Mandado de Segurança*, [1963] ESTUDOS SOBRE O MANDADO DE SEGURANÇA 24 (Brazil). It would be helpful to transcribe Point Three of the recommendations:

The Congress stresses the suitability of developing studies under Institutes of Procedural Law of Latin America directed toward drafting a legal model that will establish a system of rules capable of sustaining the man against the arbitrariness of the agents of governmental power.

97. The pertinent conclusions were published in [1967] REVISTA IBEROAMERICANA DE DERECHO PROCESAL 323 (Spain).

98. C SÁNCHEZ VIAMONTE, *EL HABEAS CORPUS: GARANTIA DE LIBERTAD* (2d ed. Argentina 1956); Faustino d' Hers, *Visión Integral del Amparo en el Habeas Corpus de Sánchez*, [1966] LA LEY 1 (Argentina).

99. For an outline of this model, see Gil, *supra* note 96, at 12-156.

100. See Fix Zamudio, *La Protección Procesal de las Garantías Individuales en América Latina*, [1967] REVISTA IBEROAMERICANA DE DERECHO PROCESAL 460-64 (Spain).

cles will be overcome. We may then be able to speak of true Latin American amparo. At that time the century-old experience of the Mexican amparo can serve to guide legislation that has or will yet introduce this noble institution for protecting the personal dignity and liberty of Latin Americans.