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# A Global Survey of Governmental Institutions to Protect Civil and Political Rights

## Keywords

Civil Rights, Government, Human Rights Law, Remedies, Damages

# **A Global Survey of Governmental Institutions to Protect Civil and Political Rights**

**HECTOR FIX ZAMUDIO\***

## **INTRODUCTION**

This global survey was written to demonstrate the fact that within almost every country of the world with an organized government, there exists some means by which citizens may redress grievances of fundamental rights violations. The present emphasis in world affairs has been on organizing sanctions exterior to the governmental structures of nation-states through such august bodies as the United Nations and the Organization of American States. However, such sanctions do not effectively and efficiently aid those who require the greatest protection: the citizens of nation-states themselves.

This survey attempts to show the philosophic and functional similarity between various nations with diverse governmental organization and geographic location. It is divided into two major parts. The first part is an examination of legislative enactments, primarily constitutional provisions, for the protection of certain fundamental human rights and an examination of judicial bodies where citizens may bring such violations to the attention of the courts for their resolution. The second part examines the executive branch as a possible source of non-judicial redress, or alternatively, as a vehicle to prevent fundamental rights violations in a prophylactic capacity. This latter method is examined through the Ombudsman model which has been established in Scandinavia and utilized in various capacities throughout Europe and certain developing nations.

Part One of this survey, concerning legislative enactments and the judiciary, is divided into five sections: (1) conceptualization and classification of domestic instruments; (2) Anglo-American instruments for the enforcement of fundamental rights guarantees; (3) the special system in Latin America; (4) the system of continental Europe; and (5) the Procurator as the instrument of socialist legal systems. The latter half of the paper, concerning the ability of the executive to remedy fundamental rights violations, is examined from the institutional model of the Ombudsman.

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An Addendum is appended at the end of the article to note briefly the most recent developments in the myriad of laws mentioned in this survey.

## I. LEGISLATIVE ENACTMENTS AND JUDICIAL REMEDIES

### A. *Conceptualization and Classification of Domestic Remedies*

#### 1. *The Necessity of Exhausting Domestic Judicial Remedies Before Recourse to the International System*

The availability of international authorities and commissions such as the United Nations Commission on Human Rights, the Inter-American Commission and Court of Human Rights, and the European Commission and European Court of Human Rights to redress human rights violations is expanding. An essential pre-requisite for recourse to the international petition system is prior exhaustion of domestic remedies.<sup>1</sup> Therefore, a study of the means by which human rights can be protected through the domestic legal process is of great importance.

#### 2. *Classification of Legal Remedies*

##### a. *Statutory Remedies for the Protection of Fundamental Rights*

The first category refers to legal remedies that are directed to the protection of statutory rights, but which can be utilized indirectly for the protection of fundamental rights. Administrative justice and judicial actions, including civil and criminal actions, fall within this category. Though indirect, both legal forums can be used as direct means to protect basic human rights; for example, a judicial proceeding may assure the protection of fundamental rights such as due process, access to the court for redress of grievances, and the right to a fair trial. France provides an administrative remedy to protect the human rights of citizens through its Council of State.<sup>2</sup>

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1. The Optional Protocol to the Covenant on Civil and Political Rights of the United Nations states in article 2 as one condition for a complaint's admissibility, "that the individual has exhausted all available domestic remedies." Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1967). The European Convention on Human Rights and Fundamental Freedoms states in article 26 that "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law." European Convention on Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, *entered into force* Sept. 3, 1953, Europ. T.S. No. 5. The American Convention on Human Rights states in article 46, section 1(a) that a petition will be admitted to the Commission only if "the requirements under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." American Convention on Human Rights, *done* Nov. 22, 1969, *entered into force* July 18, 1978, O.A.S. T.S. No. 36 at 1.

2. The Council of State has jurisdiction over the activity of the executive branch in France, although it is an administrative tribunal within that branch and thus independent of it. Individuals can petition the Council to redress grievances caused by government actions and may be awarded damages or other remedies. For a complete description of the French judiciary, see R. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* (M. Kindred trans. 1972).

### b. *Complementary Remedies*

Complementary remedies are not created for the protection of the rights of man, but are used to compensate for the irreparable violations of fundamental rights when such violations have been committed. In this sense, they are equivalent to remedies that have been classified by one school of thought as restrictive. Two examples of complementary remedies are: (1) a judgment of a political nature about the accountability of high public officials when they have compromised the Constitution, and particularly the human rights guaranteed by it; and (2) the economic responsibility of the state when its activity has caused damage which has had a prejudicial effect on fundamental rights.

### c. *Specific Remedies*

Specific legal remedies are those that have gradually been shaped with the purpose of granting rapid and effective protection to fundamental rights, in an immediate and direct manner, generally with remedial effect. These instruments can be grouped, according to the approach of the Italian jurist Mauro Cappelletti, as "constitutional jurisdiction over liberty."<sup>3</sup>

In this category, we mention habeas corpus and judicial review of the constitutionality of laws and official acts from the Anglo-American system; the *acción, recurso* or *juicio de amparo* and the *mandado de segurança* in the Latin American legal system; and the *Verfassungsbeschwerde* (constitutional appeal) of some continental European countries. Other protective mechanisms that cannot be considered strictly as part of the legal process, but which can be used specifically as legal instruments for the protection of human rights in various other countries include the Procurator of the socialist legal system and the Scandinavian Ombudsman.

## B. ANGLO-AMERICAN INSTRUMENTS

### 1. *Habeas Corpus*

Habeas corpus apparently had its origin in Roman law, but gradually developed into British custom in the Middle Ages. It began as a judicial order for the appearance of persons before the court, and during the 14th and 15th centuries, in such laws as the *proceso foral aragonés de manifestacion de las personas* (Aragonese statute to produce the person), it assumed the fundamental purpose of examining the legality of the detention of persons.<sup>4</sup> Whereas the Aragonese statute was abolished in 1591,

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3. For an exposition of Cappelletti's views on the historical development of "constitutionalization," see M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971). See also M. CAPPELLETTI, *LA JURISDICCION CONSTITUCIONAL DE LA LIBERTAD* (H. Fix Zamudio trans. 1961).

4. See *LAW OF HABEAS CORPUS*, 1679, 31 CAR. II. CH. 2, as amended by 56 Geo.III ch.

on the occasion of the famous episode of Antonio Perez,<sup>5</sup> in England habeas corpus developed in an uninterrupted manner until it culminated in the Law of Habeas Corpus of 1679.<sup>6</sup>

a. *The Doctrine of Habeas Corpus in the United States*

In the United States, the writ of habeas corpus was applied in colonial times by virtue of the above-mentioned Law of 1679. Subsequently it became incorporated into some of the constitutions drawn up after the War of Independence, such as the Massachusetts Constitution of 1780, the New Hampshire Constitution of 1784, and the Federal Constitution of 1787.<sup>7</sup>

In federal law the writ of habeas corpus has had a very important evolution. The U.S. Supreme Court initially limited its scope to contesting acts of administrative authorities and, only in exceptional cases, to incompetent judicial decisions. Gradually, the possibility of challenging judicial decisions was recognized, especially when they were based on statutory provisions that were considered unconstitutional. Habeas corpus is now openly recognized as the means by which to appeal final decisions of local courts, based upon errors which have been committed that affect the constitutional rights of the accused.

In this regard, two opinions of the Warren Court are of particular note: *Escobedo v. Illinois* (1964)<sup>8</sup> and *Miranda v. Arizona* (1966),<sup>9</sup> both of which strengthened the exercise of the fifth amendment right against compulsory self-incrimination, as well as the right to counsel even during custodial investigation by the police.

Since 1969, the year in which Warren Burger became Chief Justice, the rights of accused persons have undergone significant changes. Specifically, the U.S. Supreme Court has restricted the scope of federal habeas corpus relief because of the growing number of petitions that have been brought before the federal courts challenging local decisions. However, these changes have not undermined the essential function of habeas corpus.

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100 (1893); W. Church, *A Treatise on the Writ of Habeas Corpus* §§ 23 (2nd ed. 1893). See also V. FAIREN GUILLÉN, *ANTECEDENTES AROGONESSES DE LOS JUICIOS DE AMPARO* (1971) (a study of the history of the evolution of *amparo*).

5. Antonio Perez was an extremely capable statesman and favorite in the Spanish court of Philip II, who was imprisoned for a murder in which the king allegedly had complicity. For a full treatment, see G. MARAÑÓN, *ANTONIO PEREZ: "SPANISH TRAITOR"* (C.D. Ley trans. 1954).

6. *Law of Habeas Corpus, 1679*, note 4 *supra*.

7. U.S. CONST. art. I, § 9, cl. 2; MASS. CONST. pt. 2, ch. 6, art. 7; N.H. CONST. pt. 2, art. 91.

8. 378 U.S. 478 (1964).

9. 384 U.S. 436 (1966).

b. *The Doctrine of Habeas Corpus in England*

In England, habeas corpus traditionally conformed to the law of 1679 and was utilized to defend individuals against detentions ordered by the administrative authorities subordinate to the Crown. It evolved to become the means by which the deprivation of liberty brought about by judicial order could be challenged. Because of its widespread application, with repeated and successful appeals before various judges, the Administration of Justice Act of 1960<sup>10</sup> now limits its use. The 1960 Act permits prison wardens, against whom habeas corpus petitions are directed, the possibility of appeal against the granting of habeas corpus protection. This is possible even when the appeal has a delaying effect prejudicial to the accused.

2. *Judicial Review*

The concept of judicial review that now exists in numerous countries of the world has its origin in the British Colonies. The control that the Private Council of the Crown exercised over decisions of the colonial courts was of particular influence in America. For example, the theory of the English Judge Edward Coke contained in the classic *Bonham's Case*<sup>11</sup> stated that there exists a superior right which cannot be contradicted by the Laws of Parliament. Paradoxically, at that time the courts of England did not have the power to pass judgment on the constitutionality of laws, due to the principle of parliamentary supremacy.

The concept of judicial review was incorporated into the U.S. Constitution and was defined by the U.S. Supreme Court, most notably in the case of *Marbury v. Madison*.<sup>12</sup> The case established that all legal decisions are subject to the principles of the Constitution, and in cases where Constitutional principles conflict, an individual may bring the question before local courts whose decisions are subject to appeal in the U.S. Supreme Court.

The principle of judicial review was introduced by almost all Latin American constitutions, as well as by the majority of countries that presently comprise the Commonwealth of Nations, with the exceptions of England, New Zealand, Israel and South Africa. The principle of judicial review has had an influence in various continental European countries, particularly Switzerland, and to some extent in Norway and Denmark.<sup>13</sup>

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10. 8 & 9 Eliz. 2, ch. 65, § 15.

11. 8 Co. Crep. 114a; 77 E.R. 646 (K.B. 1610).

12. 5 U.S. (1 Cranch) 137 (1803).

13. In addition, judicial review has influenced the legal systems of Rumania and the Weimar Republic in the first post-war period, as well as in the Italian Republic under its Constitution of 1948 and until the Constitutional Court began to function in 1956.

### 3. *Extraordinary Writs*

The writs of injunction and mandamus, in addition to those of quo warranto, prohibition and certiorari, were established in traditional English law as a means of collateral challenge.<sup>14</sup> They have on occasion been utilized by individuals for the defense of specifically guaranteed rights under the law or by the Constitution, without losing their quality of being standard proceedings.

These methods of challenge have been transformed in some legal systems into specific instruments for the defense of fundamental rights.<sup>15</sup> In this same manner, some Argentinian provincial constitutions, such as those of Santiago del Estero (1939), Chaco, Chubut, Rio Negro and Formosa—all written in 1957—have adopted the writs of injunction and mandamus with the names of *mandamientos de prohibición y ejecución*, which can be issued by the courts at the request of those affected to restrict state authorities from fulfillment of an obligation established under law.<sup>16</sup>

#### C. THE SPECIAL SYSTEM IN LATIN AMERICA

The *acción, recurso* or *juicio de amparo* (injunction) is undoubtedly the prime instrument for the protection of human rights that has gained wide acceptance throughout Latin America. It was initially consecrated in the state constitution of Yucatan (Mexico) of 1841,<sup>17</sup> due to the ideas of Manuel Crescencio Rejón. It was then introduced into the federal sphere in Mexico by Mariano Otero under the "*Acta de Reformas*" of 1847<sup>18</sup> and culminated in articles 101 and 102 of the Federal Constitution of February 5, 1857.<sup>19</sup>

The Republic of El Salvador, in its Constitution of August 13, 1886,<sup>20</sup> was the first country to introduce the *amparo* subsequent to Mexico. Later, Honduras and Nicaragua introduced the *amparo* into their Consti-

14. In England, the writs were transformed into prerogative orders beginning in 1938.

15. See, e.g., CONSTITUTION OF INDIA arts. 32 & 246; and CONSTITUTION OF THE UNION OF UNION OF BURMA art. 25.

16. CONSTITUTION OF THE PROVINCE OF CHACO art. 22 (Argen.); CONSTITUTION OF THE PROVINCE OF CHUBUT arts. 35-36 (Argen.); CONSTITUTION OF THE PROVINCE OF FORMOSA Formosa art. 32 (Argen.); CONSTITUTION OF THE PROVINCE OF RIO NEGRO arts. 12-13 (Argen.); CONSTITUTION OF THE PROVINCE OF SANTIAGO DEL ESTERO art. 22 (Argen.).

17. POLITICAL CONSTITUTION OF THE FREE STATE OF YUCATAN, SANCTIONED BY ITS CONSTITUTIONAL CONGRESS ON MARCH 31, 1841. For the Mexican evolution of *amparo*, see H. CLAGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO 3861 (1973).

18. Constitutional Act of Reforms Sanctioned by the Extraordinary Constitutional Congress of the Mexican United States on May 18, 1847.

19. FEDERAL CONSTITUTION OF THE MEXICAN UNITED STATES SANCTIONED AND SWORN BY THE GENERAL CONSTITUTIVE CONGRESS ON FEBRUARY 5, 1857 arts. 101-102.

20. POLITICAL CONSTITUTION OF EL SALVADOR of 1886 art. 110.



tutions and Laws of Amparo, in 1894 and 1897, respectively.<sup>21</sup>

At the present time, there are thirteen Latin American countries with constitutional enactments that guarantee the right of *amparo*: Argentina, Bolivia, Costa Rica, Chile, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, El Salvador and Venezuela, in addition to the Brazilian writ of security (*mandado de segurança*), translated by some authors as a *mandamiento de amparo* because of its similarity to the *amparo*.

In order to compare the protective capacity of the right of *amparo*, it is necessary to classify this very complex material as follows:

1. One type of *amparo* is intended solely as an instrument equivalent to the habeas corpus and can be utilized only for the protection of individual freedom against illegal detention or with respect to irregularities in criminal proceedings.<sup>22</sup>

Some of the Argentine codes of criminal procedure refer indiscriminately to the writ of habeas corpus or to the *amparo* of personal liberty, and a similar provision appears in the Fifth Transitory Provision of the Venezuelan Constitution of 1961.

2. By way of contrast, in the laws of Argentina, Venezuela, and recently Peru, the *recurso* or *acción de amparo* has acquired significance as an instrument for the protection of fundamental constitutional rights other than personal liberty. Personal liberty, which is protected through the traditional writ of habeas corpus, constituting the first type of *amparo*, is an exception to the more general meaning and use of the second type of *amparo*.<sup>23</sup>

21. Guatemala introduced the *amparo* in the constitutional reform of March 11, 1921, and in Argentina it was introduced in the Constitution of the Province of Sante Fe, on August 13, 1921. Panama introduced it in its Constitution of January 2, 1941; Costa Rica in its Supreme Law of 1949; Venezuela in its Constitution of 1961; Bolivia, Paraguay, and Ecuador in their constitutions all promulgated the *amparo* in 1967 (although Ecuador has since abolished it), and finally Peru included it in its Constitution executed in July of 1979, which became effective July, 1980.

Also, the *amparo* was enacted in the two federal constitutions of Central America: the Political Constitution of the United States of Central America (Honduras, Nicaragua and El Salvador), promulgated in 1898; and the Charter of the Central American Republic (Guatemala, El Salvador, Honduras), of September 9, 1921.

It is appropriate to point out that the right of *amparo* has been reestablished in the Spanish Constitution that became effective on December 29, 1978. It was introduced previously in the Republican Charter, December 9, 1931, due to the teachings of the Mexican jurist, Rodolfo Reyes.

22. The *amparo* has been given this meaning in the Republic of Chile. The Political Constitution of the Republic of Chile of 1925 (at least prior to the military coups of 1973) provides for a habeas corpus type writ in its *amparo*.

23. The following countries' laws have also included *amparo* procedures for the protection of fundamental human rights: Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Paraguay and the Republic of Panama.

Bolivia:

The Constitution of Bolivia art. 19, promulgated Feb. 2, 1967, introduced the *recurso*

a. *Argentina*

The right of *amparo* in the Republic of Argentina has been the object of an expansion that we can characterize as explosive, even though it was introduced long ago in article 17 of the Constitution of the Province of Santa Fe of 1921. With regard to this Argentine instrument, we ought to distinguish two sectors: the provincial sphere, where the regulation of the legal process at the provincial level is in conformity with national requirements, and the national sphere, where the right of *amparo* has been somewhat limited.

I. At the provincial level, the *recurso o acción de amparo* created in article 17 of the Constitution of Santa Fe in 1921 was first regulated by Law Number 2994 of October 1, 1935. Subsequently, it was created in article 22 of the Constitution of Santiago de Estero of June 2, 1939, regulated by articles 673 to 655 of the Code of Civil Procedure of the same

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*de amparo*, as independent from habeas corpus, against the illegal acts or wrongful omissions of public officials or individuals that restrict, suppress, or threaten to restrict or suppress the rights and guarantees recognized by the Constitution. This instrument has been regulated by arts. 762-767 of the Code of Civil Procedure of Bolivia.

Costa Rica:

The Constitution of the Republic of Costa Rica art. 48(3) (1949) regulates the *recurso de amparo* to maintain or re-establish the rights guaranteed by this same Constitution, with the exception of personal liberty protected by habeas corpus. This provision is regulated by Law No. 1161 of June 2, 1980.

Ecuador:

The former Constitution of Ecuador, promulgated May 25, 1967, established the *amparo jurisdiccional* in art. 28, cl. 15, as protection against "any violation of constitutional guarantees." However, the *amparo jurisdiccional* has never been applied by virtue of the lack of a regulatory law, and also by the successive coup d'états of 1971 and 1972, which brought back the Constitutions of 1946 and 1945, respectively, both of which did not recognize the *amparo*. The current Constitution approved in the referendum of January 15, 1978 also does not contain the right of *amparo*.

El Salvador:

Art. 89, pt. I of the current Constitution of El Salvador of Jan. 8, 1962 (regulated by art. 12 *et seq* of the Law of Constitutional Procedures of Jan. 14, 1960) regulates the process of *amparo* for the protection of constitutionally guaranteed human rights in a manner independent of the writ of habeas corpus, which is limited to the protection of personal liberty.

Guatemala:

The Constitution of the Republic of Guatemala art. 80 (1965) and the first part of pt. I of the Law of *Amparo*, Habeas Corpus, and Constitutionality of April 20, 1966, establish that the fundamental purpose of *amparo* consists in maintaining or restoring the enjoyment of rights and guarantees provided by the Constitution with the exception of personal liberty.

Paraguay:

The Constitution of Paraguay art. 77 (1967) provides for the right of *amparo* in a form similar to the Constitution of Bolivia. Although a regulatory law has not been passed, some case law has directly supported the constitutional provision.

Republic of Panama:

The Constitution of the Republic of Panama art. 49 regulates the *recurso de amparo* of constitutional guarantees in a form independent from the writ of habeas corpus against the acts of authority that violate constitutional rights and guarantees. This precept is regulated by the Enabling Law of Constitutional Remedies and Guarantees (Law No. 46 of November 24, 1956).

province, issued in 1944 (and preserved in articles 818 to 829 of the new Civil and Commercial Procedural Code of November 14, 1969). After that, it appeared in article 33 of the Constitution of the Province of Mendoza, of May 31, 1949.

After the 1955 military overthrow of the first government of General Perón, the *recurso* or *accion de amparo* received a new impetus so that it was incorporated into the following provincial constitutions: Catamarca (1966); Corrientes (1960); Chubut (1957); Formosa (1957); Misiones (1958); La Pampa (1960); Rio Negro (1957); Santa Cruz (1957); and Santa Fe (1962).<sup>24</sup>

In addition to the above-mentioned local constitutional enactments, a number of regulatory laws were passed and, without intending to be exhaustive, we mention the following, all of them called the Law of *Accion de Amparo*: Buenos Aires (1965-66); Catamarca (1977); Cordoba (1967-74); Corrientes (1970); Entre Rios (1947-63); La Rioja (1960); Mendoza (1954-75); Misiones (1962-67); Salta (1977); San Luis (1958); Santa Cruz (1958-77/78); and Santa Fe (1935-69/73).

Thus, without even considering other local legislation which included the *amparo* (such as the Civil and Penal Codes of Santiago del Estero mentioned previously), we can affirm that practically all the provinces of Argentina have created the right of *amparo* in their constitutions, specific regulatory laws, or in their procedural codes.

II. Nationally, the *acción de amparo* first appeared in the Supreme Court of Justice through the cases of *Angel Siri* (December 27, 1957) and *Samuel Kot* (September 5, 1958).<sup>25</sup> It has been expanded considerably by virtue of the decisions of the federal courts that have admitted the right of *amparo*, not only in opposition to the acts of the authorities, but also with respect to some social pressure groups. The National Law on the *acción de amparo*<sup>26</sup> was subsequently passed, restricting the scope of this procedural instrument in various aspects and limiting it with respect to pressure groups. As a substitution, the so-called summary process, or *amparo* against the acts of individuals, was established.<sup>27</sup>

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24. CONSTITUTION OF THE PROVINCE OF CATAMARCA arts. 38-39 (Argen.); CONSTITUTION OF THE PROVINCE OF CORRIENTES art. 145(13) (Argen.); CONSTITUTION OF THE PROVINCE OF CHUBUT art. 34 (Argen.); CONSTITUTION OF THE PROVINCE OF FORMOSA art. 20 (Argen.); CONSTITUTION OF THE PROVINCE OF MISIONES arts. 16-18 (Argen.); CONSTITUTION OF THE PROVINCE OF PAMPA art. 16 (Argen.); CONSTITUTION OF THE PROVINCE OF RIO NEGRO art. 11 (Argen.); CONSTITUTION OF THE PROVINCE OF SANTA CRUZ art. 15 (Argen.); CONSTITUTION OF THE PROVINCE OF SANTA FE art. 17 (Argen.).

25. Much of the opinions in Siri and Kot have been translated into English in both K. KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* 652-58 (1966) and K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 161-65 (1975).

26. No. 16,986, Oct. 18, 1966.

27. CODE OF CIVIL AND COMMERCIAL PROCEDURES, art. 321 (Law No. 17,454 of Sept. 20, 1967).

b. *Venezuela*

The Venezuelan Constitution of January 26, 1961 enacted the *amparo* in its article 49. The *amparo* serves as an instrument for the protection of all fundamental constitutional rights, with the exception of personal liberty, which is protected by the rules of the Fifth Transitory Provision of the same constitution.<sup>28</sup> Article 49 has not been applied, however, because of the lack of a corresponding regulatory law. Although some judicial decisions began introducing this legal instrument into case law, this practice was curtailed with the resolutions of the *Sala Politico Administrativo* (Political Administrative Division) of the Supreme Court, declaring the *amparo* ineffective until passage of a corresponding regulatory law.<sup>29</sup>

c. *Peru*

The right of *amparo* was not introduced until very recently in Peru, in the new Constitution approved in July, 1979.<sup>30</sup> Only after a long evolution beginning with article 69 of the previous Constitution of 1933,<sup>31</sup> in which the *amparo* was confused with the writ of habeas corpus, did the new Constitution extend to protect all constitutionally guaranteed fundamental rights. The current Constitution, executed by the Constitutional Assembly, July 13, 1979 and which became effective in July, 1980, initiated the new constitutional government that replaced the military regime and provided for the *amparo* in article 295.

This provision clearly distinguishes the *amparo* from the writ of habeas corpus, so that the writ of habeas corpus is limited to its traditional role of protecting personal liberty, while the purpose of the *amparo* is "to be on guard for those other rights recognized by the Constitution, that are vulnerable or are threatened by an authority, official or person."<sup>32</sup>

3. There exists a third group of laws that gives the *amparo* a broader application than even the second group while retaining more precisely the direct influence of the Mexican *amparo*; for example, article 58 of the Constitution of the Republic of Honduras of June 3, 1965, regulated by the Law of *Amparo* of April 14, 1936; and the Nicaraguan Constitution of 1973, with its Law of *Amparo* of October 23, 1974. In these enactments, the *amparo* has assumed three purposes: (1) its own special protection of fundamental rights; (2) the protection of personal liberty for the purpose of habeas corpus; and (3) the very limited protection against

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28. CONSTITUTION OF THE REPUBLIC OF VENEZUELA art. 5 (transitory) (1961).

29. Agreement with Obligatory Force, Apr. 24, 1972. See H. FIX ZAMUDIO, LA PROTECCIÓN PROCESAL DE LOS DERECHOS HUMANOS ANTE LAS JURISDICCIONES NACIONALES (1982).

30. POLITICAL CONSTITUTION OF PERU art. 295, July 13, 1979, effective July, 1980.

31. POLITICAL CONSTITUTION OF PERU SANCTIONED BY THE CONSTITUTIONAL CONGRESS OF 1931, promulgated Apr. 9, 1933.

32. See note 30 *supra*.

statutory provisions that violate the Constitution. Accordingly, a protective judgment invalidates the challenged provision, but only with regard to the petitioner.

Because of the popular revolution that overthrew the prolonged dictatorship of the Somoza family in 1979, the Nicaraguan Constitution of 1973 was replaced by the Fundamental Statute, promulgated by the Government of National Reconstruction on July 20, 1979. This same government issued the Law of August 31, 1979 on the rights and guarantees of Nicaraguans, in which article 50 guarantees the *recurso de amparo* for the protection of the rights or liberties recognized by both statutes. Based upon article 50, two statutes were enacted: the first, enacted January 8, 1980, exclusively protects the personal liberty of habeas corpus,<sup>33</sup> and the second, enacted May 28, 1980, protects other human rights.<sup>34</sup>

4. The Mexican *amparo*<sup>35</sup> possesses a protective sphere much wider than any of the other previously mentioned institutions by the same name. It serves five functions: (1) as an instrument to protect personal liberty, similar to the writ of habeas corpus; (2) as the only means by which to challenge the constitutionality of laws, thus receiving the name *amparo contra leyes*; (3) as a means to challenge judicial decisions in all courts of the country, local as well as federal, thus having been called "*amparo judicial or casación*" (repeal) because of its similarity to the *recurso de casación*; (4) as an appellate instrument to challenge the decisions or acts of administrative authorities that cannot otherwise be challenged in an administrative court, thus functioning as a "*proceso contencioso administrativo*" (adversarial administrative proceeding); and (5) at the beginning of the reforms to the legislation of *amparo* in February 1963, special formalities were introduced to protect legally the *campesinos* subject to the agrarian reform, such as the *ejidatarios* and *comuneros*. This has received the doctrinal name of *amparo social agrario* (social agrarian *amparo*).<sup>36</sup>

The significance of the Mexican *amparo* can be distinguished from other Latin American legal systems which attribute these five functions to different procedural instruments. The Mexican *amparo* protects not only constitutional rights, but also rights established by legislation in a manner that constitutes an instrument to protect all laws—from the constitution to the most humble municipal ordinance.

33. Law of *Amparo* for Liberty and Personal Security, Jan. 8, 1980. This law specifically protects rights guaranteed under habeas corpus.

34. Law of *Amparo*, May 28, 1980. The fundamental rights other than those under habeas corpus are protected by this law.

35. POLITICAL CONSTITUTION OF THE MEXICAN UNITED STATES arts. 103 & 107 (1917); New Law of *Amparo* Pursuant to Articles 103 & 107 of the Federal Constitution, D.O., Jan. 10, 1936 (amended 1951, 1968 & 1976). For an English translation of the 1917 Constitution, see THE MEXICAN CONSTITUTION OF 1917 COMPARED WITH THE CONSTITUTION OF 1857 (H. Branch trans. & arranger, 1917).

36. FIX ZAMUDIO, BREVE INTRODUCCIÓN AL JUICIO DE AMPARO MEXICANO 152-67 (1977).

5. Upon examination of the European constitutional appeal, we will make a brief reference to that which is referred to as the *recurso de amparo*, established in the new Spanish Constitution of December 29, 1978.<sup>37</sup>

6. The *mandado de segurança*, which has been previously mentioned and which has been characterized by some writers as the *mandamiento de amparo*, was introduced by the Brazilian Federal Constitution of 1934.<sup>38</sup> The *mandado de segurança* proceeds specifically against unconstitutional or illegal acts of administrative authorities and, in general, against administrative acts of any authority that affect the rights of the governed. In exceptional cases it also governs judicial decisions. Theoretically, the writ cannot be brought against legislative enactments that are considered to be unconstitutional, but can only be used to challenge administrative acts or decisions that are based on unconstitutional laws.

7. Finally, a mechanism peculiar to Latin American law should be mentioned. It is the *acción popular de inconstitucionalidad* (popular act of unconstitutionality), by which every citizen has standing to go before his respective Supreme Court to challenge the constitutionality of a law. If this claim is considered well-founded, the high court will declare the law unconstitutional with general effects (*erga omnes*). The Organic Law of the Supreme Court of Justice of July 30, 1976 and article 188, part I of the Constitution of the Republic of Panama of 1972, and the Law on Constitutional Appeals and Guarantees of October 24, 1956 as well as article 96 of the Constitution of El Salvador of 1962, all require a general interest on the part of the claimant. This mechanism was provided for, at least in theory, in articles 150 to 173 of the Constitution of the Republic of Cuba of 1940, which was amended in 1959. Beginning in July 1973, various reforms were established in the Cuban judicial system in accordance with the Soviet model, all of which were reaffirmed in the Constitution of 1976.<sup>39</sup> Provision was expressly made for the type of constitutional control that predominates in the socialist legal systems and which will be examined later in this survey.

#### D. *The System of Continental Europe*

##### 1. *French Constitutional Analysis*

French constitutional analysis must be understood within the framework of its traditional opposition to judicial review of the constitutionality of the acts of authority. In the absence of a specific mechanism for the

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37. THE SPANISH CONSTITUTION art. 53, Dec. 29, 1978.

38. CONSTITUTION OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL art. 113, para. 33 (1934, as amended by art. 153, para. 21, Jan. 24, 1967).

39. CONSTITUTION OF THE REPUBLIC OF CUBA, arts. 121-33, Feb. 24, 1976. The details of the administration of the Cuban judiciary and its present form are found in the Law of Organization of the Judicial System, June, 1973.

protection of fundamental rights by courts of first impression, this protection has been entrusted in an indirect manner to two specialized organs: the Council of State and the Constitutional Council, a political body.

a. *French Council of State*

The French Council of State, as an organ of administrative justice, has acquired great prestige due to the notable work achieved by its court decisions favoring the protection of civil liberties and the protection of constitutionally guaranteed human rights. This Council takes its modern form, by virtue of laws 6 and 7-11 of October 1790,<sup>40</sup> issued by the Revolutionary French Assembly, which placed it within the administration's control, but from which it later gradually acquired its independence.

The law of May 24, 1872<sup>41</sup> should be noted as truly important in the evolution of this institution. It transformed the judicial function of the Council into a court of delegated jurisdiction with a certain degree of autonomy in making decisions. The Law of September 30, 1953<sup>42</sup> further reorganized the administrative justice system, establishing inferior administrative courts of original jurisdiction in such a manner that, at present, the Council of State operates, except for special cases, as a court of appeals.

Three types of claims can be asserted before the Council of State: (1) *quo warranto* (excess or abuse of power), which involves the nullification of an administrative determination made by an incompetent authority when procedural formalities have not been followed, or because of its fundamental illegality; (2) abuse of discretion (the most important jurisprudentially), which involves the examination of administrative acts and decisions made in the exercise of discretionary authority; and (3) general administrative jurisdiction, which examines public services contracts and the responsibility of public officials and the administration to the public for such contracts.

Although the methods of challenge are not structured as specific remedies for the procedural protection of fundamental rights, according to some the Council of State has indirectly been converted into a "constitutional judge." The Council looks to the preamble of the Constitution of 1958 as a source of fundamental "general principles of law." The Council then applies them to controversies within its jurisdiction, and by these principles has given the force of law to the Declaration of Rights of 1789,<sup>43</sup> completed by the Charter of 1946.<sup>44</sup>

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40. See Letourner, *El Consejo de Estado Francés*, REVISTA DE LA COMISIÓN INTERNACIONAL DE JURISTAS, Dec., 1967, at 96-100.

41. Under the law of May 24, 1872, "executory force was given to the judgments of the Conseil d'Etat." See C. HAMSON, EXECUTIVE DISCRETION AND JUDICIAL CONTROL 82 (1954).

42. H. Fix Zamudio, *supra* note 29, at 151.

43. Declaration of the Rights of Man and the Citizen, Aug. 26, 1789. For an English translation of the Declaration, see J. BRISSAUD, A HISTORY OF FRENCH PUBLIC LAW 543-45 (J.

### b. *Constitutional Council*

The current Constitution of 1958<sup>45</sup> provided for the Constitutional Council, with antecedents in the Constitutional Committee of the 1946 Charter.<sup>46</sup> In accordance with articles 56 to 63, the Constitutional Council must decide on the constitutionality of organic laws and rules of the Assembly before they are promulgated. At the request of either the President of the Republic, the Prime Minister, or a President of any of the two legislative houses (the National Assembly or the Senate), any other law can be submitted to the review of the Council. As a result, if the Council decides that a law or rule is unconstitutional, it cannot be promulgated.

This Council played a very modest role in the constitutional control of laws until 1971, when the Council came forth with a classic resolution on the protection of freedom of association. The number of members of the Council who were legal scholars increased and in 1974 amendments to article 61 of the Constitution and article 18 of the Organic Law of the Constitutional Council of November 7, 1958 created a new complaint (*saisine*) by which members of parliament could raise the issue of constitutionality of a law as a preventive measure.<sup>47</sup>

This reform has stimulated a transformation of the activities of the Constitutional Council. It has been converted into an effective organ for the protection of fundamental rights by way of its prior review of numerous legislative enactments. This is essentially due to the high number of petitions from parliamentary groups. Doctrinally, the Council has come to be considered as having truly constitutional jurisdiction.<sup>48</sup>

## 2. *Continental Constitutional Courts*

Constitutional courts have been established in accordance with the model initiated by the Austrian Constitution of 1920-29, with the support of ideas from the well-known Hans Kelsen on the necessity of establishing a true, specialized constitutional jurisdiction.<sup>49</sup> It has become known as the "Austrian" system of constitutional control, which is to be distinguished from the "American" system of constitutional control.

In very broad terms, it can be stated that there are two ways in

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Garner trans. 1915).

44. Letourner, *supra* note 40, at 114-15.

45. CONSTITUTION OF FRANCE arts. 56-63 (1958).

46. FUNDAMENTAL LAW OF OCTOBER 13, 1946, arts. 19 *et seq.*

47. H. Fix Zamudio, *supra* note 29, at 164.

48. Favoreu, 1977, *Année Charnière: le Développement de la saisine parlementaire et de la jurisprudence relative aux libertés et droits fondamentaux*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER, May-June 1978.

49. The AUSTRIAN FEDERAL CONSTITUTION of 1920-29 was re-established in 1945 and is regulated by the Law on the Constitutional Court of 1953 in accordance with the Constitutional Court (*Verfassungsgerichtshof*). See H. Kelsen, *La garantía jurisdiccional de la Constitución*, I [1974] ANUARIO JURÍDICO 471.



which constitutional courts can protect fundamental rights: first, through the control of the constitutionality of law, that is to say, annulment with effects *erga omnes* of legislation that is considered contrary to the fundamental rights guaranteed by the constitution; and second, by challenging the constitutionality of acts by any authority, especially those of an administrative nature that affect fundamental rights. Such legal challenges can be made through such mechanisms as the constitutional appeal under German law,<sup>50</sup> and recently by means of the *recurso de amparo* provided for by the Spanish Constitution of 1978.<sup>51</sup>

a. Articles 139 and 140 of the Austrian Federal Constitution of 1920-29 provide for review of the constitutionality of legislation, local or federal, on petitions from the federal government or governments of the federated states, respectively. Where some doubt exists as to the constitutionality of a law applicable in an actual case, jurisdiction has been given to the Supreme Court for Civil and Criminal Affairs (*Oberster Gerichtshof*), and to the Supreme Administrative Court (*Verwaltungsgerichtshof*) to suspend the proceedings and request that the fundamental rights issue be resolved by the Constitutional Court.

b. The most elaborate system of this type is that established by articles 93 and 94 of the 1949 Basic Law for the Federal Republic of Germany,<sup>52</sup> which was inspired by the Austrian system and which provides for a Constitutional Court (*Bundesverfassungsgericht*).

This Federal Constitutional Court recognizes claims made by federal or state governments, challenging the constitutionality of state and federal laws respectively (*abstrakte Normenkontrolle*). In addition, it acts to review issues raised by the courts when doubt exists as to the constitutionality of laws applicable in cases being heard (*Richterklage*).

It ought to be noted that in the majority of West German states with courts functioning at the local level and in the same manner as this Federal Court, there are various constitutional courts which carry out the same functions, but which do not inhibit questions relating to the Federal Constitution from reaching the Federal Constitutional Court.<sup>53</sup>

c. The Constitution of the Italian Republic, which became effective January 1, 1948, provided in articles 134 to 137 for a Constitutional Court, which, for political reasons, could not function until 1956.<sup>54</sup> In ac-

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50. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (*Grundgesetz*, cited GG), art. 93, § 4a, May 23, 1949 (as amended by the Federal Law of Jan. 29, 1969).

51. THE SPANISH CONSTITUTION, Title IX, arts. 159-65, Dec. 29, 1978.

52. THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (*Grundgesetz*, cited GG), May 23, 1949, inspired by the Austrian system, provides for a Constitutional Court (*Bundesverfassungsgericht*), and is regulated by its Organic Law of March 12, 1951 (as amended).

53. H. Fix Zamudio, *supra* note 29, at 180.

54. "Largely because of the difficulty of selecting judges in a turbulent political climate, the Court was not instituted until 1956." M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, *THE ITALIAN LEGAL SYSTEM* 77 (1967).

cordance with the Austrian model, this constitutional court takes jurisdiction of claims made directly by the national government or by autonomous regions regarding adherence to the Constitution of local or national laws. It differs from the Austrian model because the issue of constitutionality can be brought by the courts. When the question of constitutionality arises in an actual case, before a judge of a lower court can consider the issue to be justiciable, he must suspend the proceedings until the issue is resolved by the appropriate constitutional court.<sup>55</sup>

d. Title IX, articles 159 to 165 of the Spanish Constitution, which became effective December 29, 1978, provides for the structure and jurisdiction of the Constitutional Court, which very closely follows the examples of Austria and the Federal Republic of Germany. The Court's organic law was promulgated October 3, 1979.<sup>56</sup> The above provisions establish the constitutional appeal as the means by which the following people or bodies can bring a claim of the unconstitutionality of national laws, provisions having the force of law and provisions of the Autonomous Committees before the Constitutional Court: the president of the government, the public defender (Ombudsman), fifty deputies, fifty senators, or the executive bodies of the Autonomous Communities. As in Italy, under article 163, judges in Spain also have access to this court if the issue is raised in an actual case.<sup>57</sup>

e. A similar although unique system has been created by the Constitution of the Portuguese Republic of April 25, 1976. Articles 280 to 282 regulate the jurisdiction and function of an organ of constitutional control called the Council of the Revolution. The Council, which is predominantly comprised of the military, is competent to declare laws unconstitutional at the request of the President of the Republic, the President of the Assembly, the Prime Minister, the Promoter of Justice (Ombudsman), the Attorney General of the Republic or the Assembly of Autonomous Regions. The Council of the Revolution is also competent to declare a legislative rule unconstitutional with general, binding effect when the Constitutional Commission, its administrative body, finds it to be contrary to the Constitution as applied in three actual cases, or in only one case, if it is found *prima facie* unconstitutional.<sup>58</sup>

f. A Supreme Constitutional Court was introduced in articles 133 to 151 of the Constitution of the Republic of Cyprus, promulgated August

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55. "The competence of, and procedures before, the Court, as well as the necessary suspension of civil proceedings, are governed by the Constitution [arts. 127 & 13437], constitutional laws [Constitutional Laws of Feb. 9, 1948, no. 1 and Mar. 11, 1953, no. 87] and ordinary legislation [Law of Mar. 11, 1953, no. 87 and Law of Mar. 18, 1958, no. 265]." *Id.* at 117.

56. Organic Law of the Constitutional Court, Oct. 3, 1979.

57. "When a court of law considers a legal norm determinative of a case, but of doubtful constitutional validity, it will submit the matter to the Constitutional Court in such cases . . ." G. Glos, *The New Spanish Constitution, Comments and Full Text*, 7 *HASTINGS CONST. L.Q.* 127 (1980).

58. CONSTITUTION OF THE PORTUGUESE REPUBLIC arts. 277-78 & 280-82, Apr. 25, 1976.

16, 1960. The Court had extremely disparate and complicated powers, but had the fundamental purpose of achieving an equilibrium between the Greek and Turkish communities in accordance with the principles of the Constitution. This Court and the Court of Appeals were abolished in June 1964 in favor of a Supreme Court that combines the functions of both.<sup>59</sup>

g. In articles 145 to 152 of the Constitution of the Republic of Turkey, promulgated July 9, 1961, a constitutional court was established and expressly modeled after those of Italy and the Federal Republic of Germany.<sup>60</sup>

h. A Constitutional Court was created by the Greek Constitution of 1968.<sup>61</sup> Drafted according to the Austrian model and with some influence from the German system, it existed, however, only theoretically by virtue of the authoritarian Government of the Colonels. The Constitution of June 9, 1975 abolished this court. Article 100 of the 1975 Constitution created a special court with jurisdiction over questions of the fundamental constitutionality or constitutional interpretations of laws when contradictory decisions have been made by the Council of State, the Court of Appeal, or the Exchequer.

i. In some socialist countries, the door has been opened to the influence of the Austrian system. It was effectively introduced into the Constitution of the Federative People's Republic of Yugoslavia,<sup>62</sup> which abandoned the Soviet system of constitutional control in order to follow the example of the Federal Republic of Germany. In articles 241 and 251 of the Constitution of April 7, 1963, as well as in the constitutions of all six republics that comprise the Federative People's Republic (promulgated the same year), the federal constitutional court and local constitutional courts, respectively, were established. In the two Federated Republics that comprise the Czechoslovak Socialist Republic, a Federal Constitutional Court, as well as local constitutional courts, exist by virtue of the Constitutional Amendment of October 27, 1968,<sup>63</sup> lacking only the necessary regulatory laws.

### 3. *Austrian Influence On Latin American Constitutional Courts*

With regard to Latin America, there have been various laws which

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59. Administration of Justice Law, Miscellaneous Provisions, July 9, 1964.

60. The Law on a Constituent Assembly was promulgated on June 29, 1981, forming a Constituent Assembly to draft a constitution on political parties and an electoral law. It is not known whether the new constitution will provide for a constitutional court.

61. CONSTITUTION OF GREECE arts. 95 *et seq.*, Sept. 29, 1968.

62. These Republics are the People's Republic of Serbia, the People's Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia and Herzegovina, the People's Republic of Macedonia and the People's Republic of Montenegro.

63. Constitutional Law No. 143/1968 of Oct. 27 set up the Czechoslovak Socialist Republic as a federative state of two equal fraternal nations: the Czech Socialist Republic and the Slovak Socialist Republic.

have introduced specialized constitutional courts according to the Austrian model.

a. The Court of Constitutionality established in the Guatemalan Constitution<sup>64</sup> is regulated by articles 105 to 111 of the Law of *Amparo*, Habeas Corpus and Constitutionality of April 20, 1966.

b. The Constitutional Court of Chile<sup>65</sup> functioned actively from 1971 until 1973, when it was abolished by the military junta that came to power in September of that year.

c. The Court of Constitutional Guarantees established by the Ecuadorean Constitution of January 15, 1978 does not have decisional powers equal to those of the National House of Representatives. However, when the House is not in session, the Court can formulate observations on the conformity of legislation to the Constitution.<sup>66</sup>

d. The Peruvian Constitution of 1979 established a Court of Constitutional Guarantees similar to the Austrian model, wherein it empowered the court to declare, with general effect, the total or partial constitutionality of legislation. The court can be petitioned by the following: the President of the Republic, the Supreme Court of Justice, the Attorney General, sixty deputies, twenty senators, or 50,000 citizens with signatures verified by the National Panel of Elections.<sup>67</sup>

e. Finally, the evolution of Colombian constitutional law, referred to previously as the *acción popular de inconstitucionalidad*, is highlighted in the amendments to the Constitution of 1968. A constitutional division was established at the headquarters of the Supreme Court of Justice to advise and formulate opinions as to the constitutionality of laws before such questions would be decided by the full court.<sup>68</sup> Through the recent reforms of December 7, 1979, autonomy was given to this court to decide most questions of constitutionality in such a manner that, although it still forms a part of the Supreme Court, it in fact has been converted into a truly specialized constitutional court.<sup>69</sup>

#### 4. *Direct Constitutional Claims*

Another way exists by which constitutional courts can protect human rights, aside from a general declaration of the constitutionality of a law or

64. CONSTITUTION OF THE REPUBLIC OF GUATEMALA arts. 262-65, Sept. 15, 1965.

65. The Court was established in a Jan. 21, 1970 amendment to the Constitution of the Republic of Chile of 1925.

66. CONSTITUTION OF ECUADOR arts. 140-41, Jan. 15, 1978. The Court of Constitutional Guarantees does not have decisional powers equal to that of the National House of Representatives or to plenary sessions of legislative committees. However, when they are not in session, the Court can formulate observations on the conformity of legislation to the Constitution.

67. POLITICAL CONSTITUTION OF PERU arts. 298 & 299, July 12, 1979, *effective* July, 1980.

68. Decree No. 432 of 1969.

69. THE CONSTITUTION OF COLOMBIA art. 214 (*as amended* Dec. 4, 1979).

by constitutional appeal. This remedy exists when a specialized constitutional court of the Supreme Court accepts claims from persons whose fundamental rights have allegedly been infringed by some official act, particularly an administrative one.

The countries which merit special attention for providing this procedure for constitutional protection of fundamental rights are Austria, the Federal Republic of Germany, Switzerland, and recently Spain, which calls the remedy "*recurso de amparo*" as a result of Mexican influence.

a. In the Austrian system, the *Beschwerde*, or complaint, emerged during the previous century in the Constitutional Law of the Superior Court of the Empire (*Reichsgericht*) on December 21, 1897 and was perfected by article 144 of the Constitution of 1920-29, which was re-established in 1945.<sup>70</sup>

b. The specific instrument for protecting human rights in the Federal Republic of Germany is called the *Verfassungsbeschwerde*, or constitutional complaint. Similar institutions existed in the provincial constitutions of Bavaria of 1919 and 1946, but were not provided for in the original text of the Constitution of 1949. It was later introduced in articles 90 to 96 of the Law on the Federal Constitutional Court of 1951,<sup>71</sup> and was subsequently elevated to constitutional status through the amendment of January 29, 1969.<sup>72</sup>

This petition of appeal can be presented to the Federal Constitutional Court or to the state constitutional courts by any individual or group whose fundamental constitutional rights have been affected.

Considering that the *Verfassungsbeschwerde* has been the method by which more than ninety-five percent of all constitutional questions have been brought before the Federal Constitutional Court, it is apparent that it has assumed great importance in German constitutional law.

c. Although a specialized constitutional court has not been created in Switzerland, article 113, paragraph 3 of the Federal Constitution of May 29, 1874 provides for an appeal of public right (*Staatsrechtliche Beschwerde*) by which any citizen can have recourse to the Federal Court. Complaints are limited to the challenge of administrative, legislative and judicial acts by the canton authorities when such acts infringe the fundamental rights recognized by the Federal Constitution or the Constitutions of each canton.

d. The Spanish Constitution, which became effective on December 29, 1978, re-establishes the remedy of *amparo* that had appeared in the Republican Constitution of 1931. This remedy is a final appeal to the Constitutional Court available to any citizen, the Public Defender, or the

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70. The *Beschwerde* is regulated by Arts. 82-88 of the Law on the Constitutional Court (*Verfassungsgerichtshofgesetz*) of 1953 and its effectiveness has been amplified by the recent federal law which became effective July 1, 1976.

71. Organic Law of Mar. 12, 1951 (as amended).

72. BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY art. 93, § I, 4.2, Jan. 29, 1969.

Attorney General.<sup>73</sup>

The Organic Law of the Court, as well as the Constitution, recognizes that there is no law specifically creating the action of *amparo* in the lower courts. The laws require that resort be made to the *amparo* only after the regular administrative adversarial process or the protective proceeding described in the Organic Act has taken place.<sup>74</sup>

#### E. *The Instrument of Socialist Legal Systems: The Procurator*

##### 1. *Historical Background*

The Procurator is not the sole agency that can be used for the protection of fundamental rights provided by the socialist constitutions. There exists a definite remedy, such as in article 58 of the Constitution of the U.S.S.R. of October 7, 1977, which provides that citizens whose constitutional rights have been infringed may obtain judicial review.<sup>75</sup> The Procurator has been the major source for strengthening protection of socialist legality, including what we call human rights. The Procurator has its origin in the office known as the *Procurador*, utilized during Czarist times. In 1918, Lenin introduced the Procurator in its present form to serve as an organ of control and defense of the socialist legality in the nascent Soviet state, while the primary organic law was enacted in 1922.<sup>76</sup> In examining the structure and function of the Procurator in the Soviet Union, one is able to view the institution as it exists in the Communist bloc nations.

##### a. *Structure*

In the Soviet Union, the Procurator is a very complex body, organized in a hierarchical form and headed by the Procurator General of the U.S.S.R., who has been appointed by the Supreme Soviet of the Union for a period of five years (seven years in the Constitution of 1936). The Procurator is responsible only to the Supreme Soviet or, during the time between its sessions, to the Presidium.<sup>77</sup> The Procurator General directs the

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73. THE SPANISH CONSTITUTION art. 162, §1(b), Dec. 29, 1978. For a translation of the Constitution, see Glos, note 57 *supra*.

74. H. Fix Zamudio, *supra* note 29, at 201.

75. Article 58, as translated in THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS (F.J.M. Feldbrugge ed. 1979), essentially provides that citizens of the U.S.S.R. have the right to address complaints against the actions of officials and of state organizations. The complaints can be brought to a court, in the manner established by law, against actions which violate the law or exceed the authority of an official, and which infringe the citizen's rights. There is also a right to compensation for damages inflicted by unlawful actions of the state agencies or officials in the course of performing their official duties.

76. See G. SMITH, THE SOVIET PROCURACY AND THE SUPERVISION OF ADMINISTRATION 46 (1978).

77. CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS arts. 165-68, Oct. 7, 1977; Organic Law of the Procurator of Nov. 30, 1979 (U.S.S.R.), arts. 6

central organ, located in Moscow, which is divided into various secretariats and departments for carrying out its numerous functions, including those of the Chief Military Procuracy and the Transportation Procuracy.<sup>78</sup>

There are three lower levels subordinate to the Procurator General, the first of which is comprised of the Procurators of the Union Republics and of the Autonomous Republics. Next are the Procurators of the territories, provinces, and autonomous regions, all of which are directly appointed by the Procurator General. The lowest level is comprised of the Procurators of the autonomous areas, districts, and cities, named by the Procurators of the Union Republics and confirmed by the Procurator General. All of these Procurators serve for five years.<sup>79</sup>

#### b. *Functions*

It is difficult to classify the function of the Soviet Procurator. He is neither a judge nor an administrative official nor in a strict sense a public official, but he has aspects of all of these since he gives direction to and supervises socialist policy.<sup>80</sup>

The Procurator has two principal functions: that of a public official, because the Procurator has charge of criminal prosecutions as well as the authority to impose disciplinary and administrative sanctions against officials and citizens who contravene the law,<sup>81</sup> and that of supervising the prisons, with the power to order the immediate release of all persons illegally detained or held without legal basis.<sup>82</sup>

Second, according to articles 22 to 25 of the Regulatory law, the Procurator carries out what is considered the most important of its functions: the supervision and enforcement of socialist policy with regard to a great portion of public officials, social and economic organizations, and citizens. Excluded from the Procurator's control are the highest organs of the state, such as the Supreme Soviet of the U.S.S.R. and those of the Union and Autonomous Republics. The Council of Ministers in the local and federal sphere (certainly with respect to individual officials), as well

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& 8.

78. Organic Law of the Procurator of Nov. 30, 1979 (U.S.S.R.), art. 14.

79. CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS arts. 16667; Organic Law of the Procurator of Nov. 30, 1979 (U.S.S.R.), arts. 7, 15 & 16.

80. Art. 164 of the FEDERAL CONSTITUTION of 1977 provides that:

The supreme supervision of the exact and uniform execution of the laws by all the ministries, state committees, and departments, enterprises, institutions and organizations, executive and administrative organs of the local Soviet of People's Deputies; the *koljoses* (collective farms); cooperatives and other social organizations, and public officials as well as citizens, is to be undertaken by the Procurator General of the USSR and the Procurators that are subordinate to him.

81. Regulatory Law of 1979, art. 15.

82. *Id.* at art. 34.

as the Communist Party which exercises control over the activities of Procurators, are also exempt from the scrutiny of the Procurator.

The procedures by which the Procurator General and the remaining Procurators at various levels exercise supervision of socialist policy can be classified in two categories. The first is the "protest," which can be defined as a complaint made by a Procurator in order that an official or his immediate superior may correct a violation or remedy an error or deficiency in order to enforce socialist policy. The protest can also be brought to the courts as a means of challenging allegedly illegal decisions.<sup>83</sup> Second, Procurators, at their respective levels, can present a proposal or recommendation before the organs of state, public officials, or social organizations, with the purpose of putting an end to violations of the law and the causes which make such violations possible. The necessary measures to eliminate such violations and underlying causes are taken within a period of one month.<sup>84</sup> This activity can be compared to that of the Ombudsman in Scandinavia (examined *infra*). As was previously mentioned, the Procurator system has penetrated all of the socialist legal systems inspired by the Soviet model and has been regulated in a manner similar to that which has just been described.<sup>85</sup>

## 2. *Procurator General of the Republic*

We refer briefly to the office of the *Fiscalia General* (Prosecutor General of the Republic) provided for in the Cuban Socialist Constitution of February 24, 1976.<sup>86</sup> This institution, clearly inspired by the Soviet Procurator and socialist laws, was first introduced in the 1973 amendments to the previous Constitution of 1959.<sup>87</sup> In accordance with the Soviet model, these constitutional provisions provide that the office of Prosecutor General include the prosecutors (*fiscalias*) of the provinces, municipalities, and the military, with the highest officials appointed by the General Assembly of Popular Power; the next level by the Council of State; and the lowest level by the same Prosecutor General, all for a period of five years with possible reappointment by the appointing organs.<sup>88</sup>

83. *Id.* at arts. 29 & 30.

84. *Id.* at art. 28.

85. CONSTITUTION OF ALBANIA arts. 84-88 (1946); CONSTITUTION OF THE GERMAN DEMOCRATIC REPUBLIC arts. 97-98 (1967) (*as amended* 1974); CONSTITUTION OF BULGARIA art. 97, para. 1 (1960) (*as amended* 1968); CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA art. 43 (1978); CONSTITUTION OF HUNGARY arts. 42-44 (1954); CONSTITUTION OF POLAND arts. 45-46 (1952); and CONSTITUTION OF RUMANIA arts. 105-08 (1965).

86. CONSTITUTION OF THE REPUBLIC OF CUBA art. 130, Feb. 24, 1976.

87. FUNDAMENTAL LAW OF THE REPUBLIC OF 1959 (1973).

88. Law of Court Organization, arts. 106-42, Aug. 10, 1977. Authors Harold J. Bermand and Van R. Whiting in *Impressions of Cuban Law*, 29 AM. J. COMP. L. 475, 480 (1980) note:

[t]he Cuban *Fiscalia General* must investigate and answer any complaint whether from an individual or a government agency, within 20 days; if the *Fiscalia* finds that there has been an administrative violation or deficiency, the officials charged must correct it within 20 days or the *Fiscalia* will protest their



## II. THE EXECUTIVE SOLUTION: THE OMBUDSMAN

### A. Overview and Background

The Ombudsman has a clearly Scandinavian origin. Its name comes from a Swedish word that signifies representative, delegate or agent. It usually refers to one or more officials who have been appointed, in accordance with the original model, by the parliament, although there is a growing tendency for the Ombudsman to be named by the executive branch. The Ombudsman's principal functions are to investigate violations of fundamental rights of individuals by administrative authorities and to propose, although without binding effect, the most effective solutions to avoid or remedy these violations.

The Ombudsman emerged in the *Regerisform* (the Swedish constitutional law on the form of government) of June 6, 1809. With antecedents in the Chancellor of Justice, an Ombudsman was created by the Crown in the 18th century as a representative of the king for the supervision of administrative officials.<sup>89</sup> At first, the Swedish Ombudsman was chosen by the Parliament (*Riksdag*) for the purpose of supervising the function of the courts, from which it has derived its present name, *Justitieombudsman*. Slowly, its supervision was extended to administrative authorities and thus it remained until 1915, when an Ombudsman for military affairs, or *Militieombudsman* was established.<sup>90</sup> Thereafter, the institution experienced a slow but gradual evolution so that at present it has acquired a very complex structure.

In effect, in accordance with chapter 12, article 6 of the constitutional document called the Instrument of Government,<sup>91</sup> there exist four Ombudsmen (*Justitieombudsmen*). They deal with separate matters (including military subjects, as the Military Ombudsman was eliminated in 1967), and one of the four serves as President.<sup>92</sup>

In Sweden there also exist two other officials, as well as a representa-

failure to do so to their superiors. The *Fiscalia* cannot compel an agency or organization to change its practice; however, the authors were told that the possibility of protest to superiors alone is usually sufficient to induce the official to accept the *Fiscalia*'s warning or recommendation.

Presently, the *Fiscalia* is regulated by Articles 130-33 of the Constitution of February 24, 1976, which provides for "a fundamental purpose, the control of the socialist legality by supervising the organs of the state, social and economic entities, and the citizens to ensure their strict compliance with the law and other legal requirements."

89. See A. LEGRAND, *L'OMBUDSMAN SCANDINAVE; ETUDES COMPARÉES SUR LE CONTRÔLE DE L'ADMINISTRATION* 15-26 (1970).

90. See Kenkow, *El Ombudsman de Asuntos Militares*, in D. ROWAT, *EL OMBUDSMAN: EL DEFENSOR DEL CIUDADANO* 89-97 (E. Suárez trans. 1973).

91. Law of Court Organization, arts. 106-42, Aug. 10, 1977.

92. The article *Ombudsman and Other Complaint-Handling Systems Survey* in 9 INTERNATIONAL OMBUDSMAN INSTITUTE (1979-80) states that "[e]ach (of the four) Ombudsman has a field of supervision." Briefly, their activities are divided into criminal justice, the military, social welfare, and general government administration.

tive of press organizations, who have received the name of Ombudsman because of the similarity of their powers to those possessed by the authentic Parliamentary Commissioners. The first, the Ombudsman for Protection of the Freedom of Trade, initiated its activities in 1954, for the purpose of protecting against restrictive trade practices.<sup>93</sup> The Consumer Ombudsman emerged in 1971 with the purpose of ensuring that such laws as the Marketing Act, the Unfair Contract Terms Act and the Consumer Credit Act are observed.<sup>94</sup> Both of these officials are appointed by the King for the Council of Ministers. Since 1959, the Ombudsman for the press has been chosen by the journalists' organizations and has remained independent and autonomous in carrying out its oversight of professional ethics and the protection of individuals from invasion of privacy.<sup>95</sup> An Equality Ombudsman has also been created to prohibit discrimination based on sex. In certain circumstances, he will be able to take a case to court on behalf of an individual.<sup>96</sup>

### B. *Diffusion of the Ombudsman*

In the years following World War I and more extensively after World War II, the Ombudsman system was implemented in other Scandinavian countries and subsequently in various Western legal systems. It has been said that there is a true need for the establishment of the Ombudsman in even the most diverse systems. The French writer, Andre Legrand, has classified it as a "universal institution."<sup>97</sup>

A simple description of the accelerated development of the institution of the Ombudsman would be difficult. Solely for the purposes of this survey, the following division of the material will be made: the remaining Scandinavian countries; the countries of the Commonwealth; the United States; the laws of Continental Europe; the possibility of its establishment in Latin America; and finally, its emergence in developing countries.

#### 1. *Other Scandinavian Countries*

In the first group of those which have been heavily influenced by the Swedish model, the Scandinavian countries, the following is noted:

a. Finland, in obtaining its independence from Russia and in writing the Constitution of July 17, 1979, introduced the Ombudsman in article 49, which follows the Swedish model very closely. The Ombudsman's activities have been regulated by the law of January 10, 1920, with subsequent modifications.

b. By reason of the amendment to the Constitution of Denmark in

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93. H. Fix Zamudio, *supra* note 29, at 287.

94. See Stemberg, *L'Ombudsman Suédas pour les Consommateurs*, REVUE INTERNATIONALE DE DROIT COMPARÉ 577-81 (1974).

95. Fix Zamudio, *supra* note 29, at 287.

96. Law of Dec. 13, 1979.

97. Legrand, *supra* note 89, at 3.

1953, the figure of the Parliamentary Commissioner was created in article 55,<sup>98</sup> which establishes the organization and functions of the *Ombudsman des Foketing* along the lines of the Swedish model and Finnish precedent.

c. In Norway, two Parliamentary Commissioners were established with diverse responsibilities. The first was created to receive complaints regarding the military (*Ombudsman for Forsvaret*).<sup>99</sup> Another Ombudsman was established to deal with civil administrative matters (*Sivil Ombudsman for Forvaltningen*).<sup>100</sup> In addition, in 1973 a consumer Ombudsman, to be appointed by the government, was created according to the Swedish example.<sup>101</sup>

Generally, in the Scandinavian countries, Ombudsmen are selected by the Parliament (with some exceptions in Sweden and Norway), but retain a certain autonomy. Citizens have direct access to the Ombudsmen, and the Ombudsmen have complete authority to accept or reject petitions and the full power to carry out all types of investigations. They can formulate recommendations that are non-binding, but that are accepted in the majority of cases by the respective officials. They must also submit annual reports to the Parliament and, when necessary, certain special reports.<sup>102</sup>

## 2. *The British Commonwealth*

The Ombudsman has been established in the legal systems of the British Commonwealth. Within this second group, the laws of the United Kingdom, Canada, Australia, and India have the greatest importance.

### a. *New Zealand*

The first common-law country to establish a Parliamentary Commissioner following the Scandinavian model was New Zealand, whose institution has had a considerable influence in other countries of the British Commonwealth. The institution was introduced in legislation called the Parliamentary Commissioner Ombudsman Act of 1962,<sup>103</sup> culminating in the Ombudsman Act of June 26, 1975, which entered into effect the beginning of April 1976. The new law of 1975 established a collegial system of three Ombudsmen, each with a defined territorial scope (Wellington, Christ Church and Auckland). They are appointed by the Governor General at the proposal of the New Zealand Parliament for a period of three years (which equals the term of that legislative body). They also may be

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98. Ombudsman Act of Sept. 11, 1954 (amended 1959 and 1961).

99. Law of April 21, 1952 (as amended).

100. Law of June 22, 1962 (amended Mar. 22, 1968, 1980); Regulation of June 8, 1969.

101. H. Fix Zamudio, *supra* note 29, at 292.

102. Rowat, *supra* note 90, at 39.

103. This act was modified in 1968, 1969, and in 1970. It later culminated in the Ombudsman Act of June 26, 1975, effective April 1976.

reappointed.<sup>104</sup>

b. *Great Britain*

The office of Ombudsman was introduced in Great Britain under a law called The Parliamentary Commissioner for Administration Act that became effective April 1, 1967 for England, Wales and Scotland.<sup>105</sup> This Commissioner possesses special powers by virtue of being appointed by the Crown. At the request of the two houses of Parliament, the Ombudsman is elected for an indefinite term. However, he must retire at age 65. He is not subject, even indirectly, to the duration of a Parliamentary appointment. In addition, what is most important is that, unlike the Scandinavian model, this Commissioner cannot act on behalf of, nor directly receive complaints from, citizens who have been affected by the administrative authorities. Instead, a citizen must present his or her claim to a member of the House of Commons, who in turn reviews it and sends it on to the Commissioner. The Commissioner then undertakes an investigation and formulates the pertinent recommendations which are communicated to the member who solicited such intervention.<sup>106</sup>

Notwithstanding these limitations, the Commissioner has played an important part in the solution of problems emanating from government administration. Through the National Health Services (Scotland) Act, passed in 1972,<sup>107</sup> and the National Health Services Act of 1973,<sup>108</sup> a Parliamentary Commissioner for Health was established with jurisdiction in England, Scotland and Wales. This Ombudsman function is carried out as an additional activity of the Commissioner for Administration. Those affected by the activities of public institutions, such as medical social security, can go directly to the Commissioner of Health after having gone to their respective government agencies.<sup>109</sup>

The evolution of the British Ombudsman culminated in the establishment of the Commissioners for Local Administration, in accordance with the Local Government Act of 1974.<sup>110</sup> At the present time, five commissioners have been designated, three for England, and the other two for Wales and Scotland. Their functions are similar to those of the Parliamentary Commissioner for Administration, except that they deal with problems arising in local government administration. A further difference is that if citizens have first gone to their local government representative (such as a city council member) who is obligated to receive complaints, and the complaint is not sent on to the Commissioner, the complaining citizen may go directly to the Commissioner to request an investigation

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104. H. Fix Zamudio, *supra* note 29, at 298.

105. Parliamentary Commissioner Act, 1967, ch. 13.

106. *Id.* §§ 1, 6, 7 & 10(1).

107. National Health Service (Scotland) Act, 1972, ch. 58.

108. National Health Service Reorganization Act, 1973, ch. 32.

109. *Id.* Pt. III, § 35.

110. Local Government Act, 1974, ch. 7.

and to make recommendations to the appropriate authorities.<sup>111</sup>

c. *Northern Ireland*

With regard to Northern Ireland (which is legislatively autonomous from Great Britain) two parliamentary commissioners' positions were created. The first, the Northern Ireland Parliamentary Commissioner for Administration, is similar in organization and function to the Commissioner in Great Britain. He can be directly approached only by members of the Irish Parliament.<sup>112</sup>

The second, the Northern Ireland Commissioner for Complaints, was created for complaints against local authorities, and provides for the possibility of immediate access by those who have been injured.<sup>113</sup> In accordance with legislation passed in 1969, these two functions are carried out by the same person, which is similar to the British model.<sup>114</sup>

d. *Australia*

The Australian legal system, a federal system, has been influenced by the New Zealand Commissioner (which is closer to the Scandinavian model than to the British model) and has followed its essential features with some variations. The office has been gradually established in the Australian states as well as in the Northern Territory.<sup>115</sup>

A federal law, the Ombudsman Act of 1976, introduced the commissioner at a national level and the first Commonwealth Ombudsman initiated activities upon being appointed in March 1977. The Commonwealth Ombudsman had two assistants, one of them having jurisdiction in the Federal Capital of Canberra, and the other in the Northern Territory until 1978.<sup>116</sup> In 1978 Australia granted legislative autonomy to the Northern Territory, at which time the law establishing its own Ombudsman came into effect.<sup>117</sup>

e. *Canada*

Canada has experienced an evolution of this institution similar to

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111. *Id.* Pt. III, § 26.

112. Parliamentary Commissioner Act, 1969 (Northern Ireland). See H. Fix Zamudio, *supra* note 29, at 297.

113. Parliamentary Commissioner Act, 1969 (Northern Ireland).

114. *Id.*

115. The Ombudsman was first established in West Australia through the Parliamentary Commissioner Act of 1971, in Southern Australia by the Ombudsman Act of 1972 (amended 1974), in Victoria by the Ombudsman Act of 1973, in Queensland by the Parliamentary Commissioner Act of 1974, in New South Wales by the Ombudsman Act of 1974 (amended 1976), and in the Northern Territory by the Northern Territory Ombudsman Ordinance of 1978 (effective Jan. 31, 1979).

116. Ombudsman Act, 1976, art. 14.

117. Ombudsman (Northern Territory) Ordinance, 1977.

that of Australia. Due to its federal structure, the office was first established in the provinces, beginning in New Brunswick and Alberta in 1967. Quebec followed in 1968 with the creation of the *Protecteur du Citoyen*. Nova Scotia and Manitoba established the office in 1969, and Ontario and Newfoundland did so in 1975, the latter designating an Ombudsman in accordance with a law first approved in 1970 but amended in 1975. Finally, British Columbia created the office by law, effective September 1, 1977.<sup>118</sup>

At the national level, various proposals have been presented for the creation of a national Ombudsman. There has been success only in the establishment of two officials with very specialized responsibility: the Commissioner of Official Languages, who investigates complaints of the failure to fulfill official requirements for the use of English and French in public agencies;<sup>119</sup> and the Correctional Investigator, who receives complaints from those detained by the federal penitentiary authorities.<sup>120</sup>

#### f. *Israel*

Israel's legal system has been greatly influenced by Anglo-American law, and a discussion of Israeli Ombudsmen seems appropriate in this section. In Israel the Ombudsman was established in 1971 as Controller General, a special position within the state controller's office.<sup>121</sup> Since this controller is appointed by the Israeli Parliament (*Knesset*), the Ombudsman ought to be considered as a Parliamentary Commissioner. The Controller General operates as commissioner for complaints from the public and is assisted by a special unit whose director is appointed by a *Knesset* committee upon recommendation of the Controller. In order to facilitate access by citizens, who are permitted to make complaints directly to the Controller General, offices have been established in the cities of Haifa, Jerusalem and Tel Aviv.<sup>122</sup> A Soldier's Complaint Commissioner was also appointed under the Military Justice Law of 1972 to receive complaints from armed forces personnel. This Commissioner is appointed by the Minister of Defense in consultation with the Minister of Justice and with the approval of the Foreign Affairs and Security Committees of the Parliament.<sup>123</sup>

#### g. *India*

The Republic of India, with its federal structure, does not have the designation of a national Parliamentary Commissioner. The institution, with the name of *Lokayuta* or *Upa Lokayuta*, has been introduced in

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118. H. Fix Zamudio, *supra* note 29, at 31516.

119. Official Languages Act, CAN. REV. STAT. ch. O-2 (1970).

120. Penitentiary Act, CAN. REV. STAT. ch. P-6, § 12 (1970).

121. H. Fix Zamudio, *supra* note 29, at 304.

122. *Id.* at 30405.

123. *Id.* at 305.

various states, such as Bihar (1973), Maharashtra (1971), Rajasthan (1973) and Uttar Pradesh (1975).<sup>124</sup>

### 3. *The United States*

The Ombudsman has emerged in diverse forms in the United States due to the country's federal structure. Many of these agencies and their officials have only a superficial similarity to either the basic Scandinavian model or to one of its varieties.

In the United States, as in Canada, various proposals have been presented to Congress to create a federal agency to function as an Ombudsman, but as of this date, these efforts have not been successful. In contrast, the states have been active in this area, and two types of offices can be classified as Ombudsmen. The first contains the features of the Parliamentary Commissioner of the Scandinavian model; the other, which has proliferated at the local as well as at the state level, can be characterized as an executive Ombudsman, i.e., appointed by the executive and not the legislative branch. This procedure can be explained by considering the character of the system that exists in the United States.

The states that have introduced the institution in accordance with the Scandinavian model are Hawaii (1967); Nebraska (1969); Iowa (1972); New Jersey (1974); and Alaska (1975).<sup>125</sup> In all of them the official is appointed by and dependent upon the local legislature, although he retains a certain autonomy. The office in these five jurisdictions is given the power to receive complaints directly from citizens regarding the acts of administrative authorities, and to investigate and formulate proposals or recommendations, which have no binding effect. In addition, it must send an annual report to the state legislature. Puerto Rico has also enacted an Ombudsman Act (1977).<sup>126</sup>

The second type of Ombudsman, which is appointed by the Executive, is being created at various governmental levels throughout the United States. A few examples are the Department of Neighborhood Complaints in Chicago; the Office of Information and Complaints in Honolulu; the Little City Hall Program in Boston, the Ombudsman of Nassau County in New York City; the Lieutenant Governor's office in some states; the Office of the State Citizen's Aid of Iowa; and the Ombudsman of Oregon, which has officially been given the classic title.

### 4. *Continental Europe*

In Continental Europe, the Ombudsman has been established with

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124. F. STACY, *OMBUDSMEN COMPARED* 231 (1978).

125. ALASKA STAT. tit. 24, ch. 55 (1978); HAWAII REV. STAT. tit. 8, ch. 96 (1976); IOWA CODE ANN. ch. 601G (1934); NEB. REV. STAT. §§ 818, 240 (1976); N.J. STAT. ANN. §§ 52-57G (West Supp. 1982-83).

126. P.R. LAWS ANN. tit. 3, ch. 24, § 531 (1978).

some variations. The Federal Republic of Germany has a national Ombudsman for Military Matters, and in the German state of Rhineland-Palatinate, there is an Ombudsman for Administrative Matters. In other European nations the office carries various titles; for example, in France, the *Mediateur*; in Switzerland, the Ombudsman in the Canton and city of Zurich; the Promoter of Justice in Portugal; and the Public Defender in Spain. This position arguably exists as well in the local laws of Catalan and the Basque Region.

a. *Federal Republic of Germany*

The first country of Continental Europe to introduce the Ombudsman according to the Scandinavian example was the Federal Republic of Germany, although this position dealt exclusively with military affairs.<sup>127</sup>

The Parliamentary Commissioner of the Legislature of the Province of Rhineland-Palatinate (*Bürgerbeauftragte des Landestages Rheinland Pfalz*) was established by the law of May 31, 1974 for the purpose of investigating either complaints made directly to it, or those that had been presented to the Provincial Parliamentary Petitions Commission from citizens of this state about local administrative authorities.

b. *France*

An Ombudsman of major importance in the development of this institution in Continental Europe is the French *Mediateur*. The special characteristics of this office are partly a result of the semi-presidential structure of the French Constitution of October 1958. The *Mediateur* is appointed by the Executive for one term of six years under a decree issued by the Council of Ministers, yet at the same time retains certain autonomy from the government, since he cannot be dismissed except by impeachment proceedings by the Council of State.<sup>128</sup>

The French have also followed the British system by declining to permit direct claims by citizens to the *Mediateur*. Instead, such claims must be made first to a member of the National Assembly or the Senate and, if considered appropriate, will be sent to the *Mediateur* to carry out an investigation and formulate the recommendations considered necessary to resolve the issue. The *Mediateur* can also present general observations on administrative procedures in his annual report, including suggestions to reform specific legislation.<sup>129</sup>

Although the *Mediateur* has been received with skepticism doctri-

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127. BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY art. 45 (amended Mar. 19, 1956). This amendment introduced the Parliamentary Commissioner of Defense (*Wehrbeauftragte des Bundestages*), who is regulated by the Federal Law of June 26, 1957.

128. Law No. 736, June 3, 1973, art. 2.

129. *Id.* arts. 6 & 14.



nally, as well as by administrative officials, including members of the Council of State,<sup>130</sup> the office has been very useful as an aid in the resolution of administrative problems and as a promoter of reforms in the provision of public services.

c. *Switzerland*

In Switzerland, Administrative Commissioners have been established in the City as well as in the Canton of Zurich. The City's Commissioner of Complaints, with the name of *Beauftragte in Beschwerdensachen der Stadt Zürich*, has been in existence since 1971 and is local in nature. He is elected by the Municipal Council for a period of four years with the possibility of re-election, but is autonomous from the Council as well as from the City Government.<sup>131</sup> The cantonal legislature of Zurich on September 25, 1977 passed a law establishing a Parliamentary Commissioner, who began functioning on June 5, 1978.<sup>132</sup>

d. *Austria*

The Austrian National Assembly approved a law creating the *Volksanwaltschaft* (People's Advocate) which became effective July 1, 1977. The *Volksanwaltschaft* is an autonomous organization comprised of three persons and selected by the National Assembly for a period of six years to receive complaints directly from citizens about the activities of federal administrative authorities.<sup>133</sup>

e. *Italy*

In Italy, there have been several proposals to create national and regional "Civil Defenders" similar to the Scandinavian Ombudsman. Such plans have been approved in the regions of Tuscany and Liguria<sup>134</sup> as well as in Campania,<sup>135</sup> Lazio,<sup>136</sup> Lombardi<sup>137</sup> and Umbria.<sup>138</sup>

These regional Civil Defenders are appointed by decree of the Regional Council for a term of five years, with the possibility of re-election. They have jurisdiction over complaints presented by citizens who have come before regional administrative agencies when the agency has not responded to the citizen within twenty days, or where an unsatisfactory response has been given.<sup>139</sup>

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130. H. Fix Zamudio, *supra* note 29, at 309.

131. *Id.* at 313.

132. *Id.*

133. *Id.* at 312-13.

134. Laws of Jan. 21 and June 6, 1974.

135. Law of Aug. 11, 1978.

136. Law of Feb. 28, 1980.

137. Law of Jan. 18, 1980.

138. Law of Aug. 22, 1979.

139. H. Fix Zamudio, *supra* note 29, at 314.

f. *Portugal*

The first Ombudsman introduced in the Iberian peninsula was the Portuguese Promoter of Justice under the Organic Law Decree of April 21, 1975, issued by the provisional government. Article 24 of the Constitution of 1976 transformed the Promoter into a Parliamentary Commissioner. In accordance with the Scandinavian model, the Commissioner is elected by the National Assembly and citizens can present their complaints directly about acts or omissions of public officials. The Commissioner does not have the power to make any binding decisions, but can make recommendations to competent bodies on how to remedy and prevent further injustices.<sup>140</sup>

g. *Spain*

The Spanish Democratic Constitution of December 29, 1978 followed the example of Portuguese legislation and incorporated the figure of the Public Defender in article 54. The Public Defender is a high commissioner appointed by and accountable to the *Cortes* (legislative body), to "protect the fundamental rights contained in Title I of the Constitution, by supervising the functioning of the public administration." On April 6, 1981 an organic law for the actual creation of a Public Defender was approved by the *Cortes*.<sup>141</sup> In addition, the possibility of establishing Regional Defenders exists by virtue of the autonomy laws of the Basque region and Catalonia, approved through simultaneous referendums carried out October 25, 1979 and the autonomy law of Galicia, passed December 21, 1980.<sup>142</sup>

h. *Centrality*

Finally, it should be noted that there is some hope for the establishment of a European Ombudsman. The Parliamentary Assembly of the Community is to be chosen by direct, popular election.<sup>143</sup> A large number of member countries have already established the institution at a national level. Recommendations to promote an international Ombudsman on a community level were approved on November 29, 1974 by all the Ombudsmen and Parliamentary Commissioners of member states of the Council of Europe, together with experts and observers and by the Legal Commission of the Council of Europe.<sup>144</sup>

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140. The Organic Law Decree of 1975 was repealed and replaced by the Laws of November 22, 1977 and March 2, 1978.

141. H. Fix Zamudio, *supra* note 29, at 331.

142. *Id.* at 335-46.

143. *Id.* at 323.

144. Official Recommendation No. 757 of January 29, 1975 of the Parliamentary Assembly of the Council of Europe proposed to the Committee of Ministers that they invite the governments of member states that have not adopted the institution to study the possibility of appointing, at a national level, persons who have assumed the function of

### 5. *Latin America*

Within Latin America, the prevailing attitude has been that an Ombudsman, either executive or parliamentary, is an institution far removed from the Latin American jurisprudential tradition, even though the Constitutions of Portugal and Spain both provide for such an office. It is foreseeable that a greater interest will awaken among Latin American jurists to study this means of protecting the rights of the governed.

It is notable that the figure of the Parliamentary Commissioner has at least appeared in Colombian law recently, although in an indirect form. After various projects for the creation of the classic Ombudsman with such names as Overseer of the Administration, Parliamentary Attorney or Defender of Human Rights were proposed, amendments to articles 142 and 143 of the Constitution by the Constitutional Reform of December 4, 1979 gave the Attorney General new power rather than creating a new office. He is appointed for a period of four years by the House of Representatives from among three names that are sent to that body by the President of the Republic. Like the Scandinavian Ombudsman, he can receive direct complaints from citizens regarding violations by officials and public employees of human rights and social guarantees. The Attorney General can carry out necessary investigations and present an annual report to the Colombian Congress on the exercise of these functions.

An evolution has begun, however weak, to create Ombudsmen to protect the consumer. Although their activity is limited to investigating the conduct of business and industry regarding complaints from injured consumers, they may lead to the creation of more comprehensive institutions of the sort described earlier in this study.<sup>145</sup>

### 6. *Developing Nations*

Finally, the Ombudsman has been introduced into the legal systems of various developing countries because of its effectiveness. A few examples include Jamaica (The Ombudsman Act, November 13, 1977), Mauritius (Constitution of 1968 and Ombudsman Act of 1969), Papua New Guinea (Ombudsman Commission, Constitution of 1979), Tanzania (a permanent Commission of Investigations established in the Provisional Constitution of 1965, and the Law of 1966, amended in 1975), Trinidad and Tobago (Ombudsman regulated by articles 91 to 98 of the Constitution of March 1976) and Zambia (Commission for Investigation, Constitution of 1973).

## CONCLUSION

In every country examined, no matter what political philosophy gov-

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Ombudsman or Parliamentary Commissioner at a regional or local level.

145. Several countries have enacted laws to protect and defend the consumer: Venezuela (Aug. 5, 1974), Costa Rica (Feb. 28, 1975) and Mexico (Dec. 19, 1976).

erns, there is some provision, usually constitutional, that provides for the protection of certain fundamental human rights. These constitutional provisions range from the Constitution of the United States and its Bill of Rights to the *amparo* provided in Latin American constitutions to the French Constitution and the Council of State and to the Procurator of the Soviet bloc nations. A range of variations exists but no matter what the system, there is some provision, organized by legislation, for the protection of the fundamental rights of citizens.

In turn, we have seen that each system provides a judiciary branch to hear and decide cases of fundamental rights violations and the constitutionality of laws. Furthermore, we have seen that each system has similar instrumentalities, such as the writ of habeas corpus, by which to petition the government and address the judiciary for redress of grievances of fundamental rights violations.

Finally, in addition to legislative and judicial sanctions, we are witnessing an increasing role on the part of the executive branch in numerous governments. This role has been most often patterned after the Ombudsman of Scandinavia, although used in various capacities and under a variety of guises. The Ombudsman model seems to be one that is readily adaptable to diverse situations, political orientations and multifarious tasks of government in pursuit of the protection of fundamental human rights. The role of the Ombudsman has proven adaptable to diverse tasks and governmental functions from Scandinavia to Tanzania. The fact that so many developing countries are using the Ombudsman model clearly demonstrates its remarkable flexibility. As a result of this global survey, we may obtain a better perspective of the most effective and expedient means for the protection and resolution of fundamental rights violations, namely the pursuit of domestic remedies rather than the more idealistic and cumbersome methods of external world pressure currently advocated.

#### ADDENDUM

Since the time when this paper was first submitted, several modifications and amendments of the laws mentioned within have occurred, which is to be expected with a subject as dynamic as governmental institutions for the protection of human rights. Briefly, we shall point out just the most important reforms.

##### A. In relation to the special system in Latin America:

1. Two new laws of *amparo* have been passed: a Nicaraguan law, enacted May 28, 1980 and the Peruvian Law of Habeas Corpus and *Amparo*, promulgated Dec. 7, 1982 and published the following day in *El Peruano*.

In spite of the new Constitution of Honduras, enacted by Decree Number 131 of January 11, 1982, the Law of *Amparo* of April 14, 1933 is still in force, although amended in January, 1982, because the new constitution regulates the *amparo* in the same manner as the former

constitutions.

2. The Chilean military government established an instrument for the protection of fundamental human rights, called *recurso de protección*, which is regulated by the Constitution of 1925. The new *recurso de protección* was enacted by Institutional Act Number 3, published September 13, 1976, and is regulated by the Supreme Court of Justice judicial proceeding (*Auto Acordado*), published April 12, 1977; this remedy was incorporated into article 20 of the Constitution, passed by the plebiscite on September 11, 1980 and enacted on October 21, 1980. A full treatment of this topic may be found in the interesting book of the Chilean jurist Eduardo Soto Kloss, *EL RECURSO DE PROTECCIÓN, ORÍGENES, DOCTRINA Y JURISPRUDENCIA* (Santiago 1982).

B. There has been an important development in the continental European system of constitutional courts as embodied in the Latin American constitutional courts:

1. The Constitutional Court established in the Republic of Chile by the 1970 amendment to the Constitution of 1925 was abolished by the military coup of September, 1973; however, it was restored with similar characteristics by articles 81 to 83 of the Constitution passed by the plebiscite on September 11, 1980. Although the legislative body has remained suspended by the Transitory Arrangements of the same Constitution, the Court has been established according to its Organic Law enacted by the Governmental Junta on May 12, 1981, published May 19, 1981 in the *Diario Oficial*.

2. The Court of Constitutional Guarantees, established by articles 296 and 297 of the Peruvian Constitution of 1979, was created by its Organic Law, enacted by the Congress of the Republic on May 19, 1982 and published the following day in *El Peruano*.

3. The Ecuadorean Court of Constitutional Guarantees was also reformed through the constitutional amendments published on September 1, 1983, which, inter alia, added article 141 of the Constitution of January, 1978 in order to encourage the functioning of the Court. Article 141 treats as an offense any contempt of the Court's unconstitutional law declarations and any violation of human rights. These amendments will be in force beginning August 10, 1984.

4. There have also been important reforms in the Portuguese system of constitutional justice through the constitutional amendments enacted September 24, 1982 and published September 30, 1982 in the *Diario República*. These amendments abolished the Council of the Revolution, which had a military character, and its advisory body, the Constitutional Commission. The new articles 284 and 285 established a Constitutional Court, comprised of thirteen justices, ten of whom are to be chosen by the Assembly of the Republic and the remaining three to be appointed by the Court itself. The Constitutional Court is empowered with the function of constitutional control, which formerly belonged to the abolished bodies.

5. Changes have also occurred within the socialist countries. Following the example of the specialized courts of Yugoslavia (which are actually functioning) and of Czechoslovakia (which were established by the constitutional amendment of 1968, but which are still lacking the necessary organic law), the People's Republic of Poland established a Constitutional Court by the constitutional amendment of March 26, 1982, which reformed articles 30 and 33 and added articles 33a and 33b. The essential function of the Court is to make binding decisions regarding the compatibility between laws and the general decrees of the Constitution. As in Czechoslovakia, however, the necessary organic law for this judicial body has not yet been passed.