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International Law, National Tribunals and the Rights of Aliens: The Latin American Experience

Frank Griffith Dawson*

I. INTRODUCTION

The treatment nations accord aliens within their borders is largely determined by historical precedent.¹ The Latin American experience with aliens, differing radically from European and African experiences, has fostered development of a unique body of law, clustered around the Calvo Doctrine and the principle of national or equal treatment, which clashes directly with the presumptions underlying the so-called international standard of justice.²

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1. See Head, *A Fresh Look at the Local Remedies Rule*, 1967 CAN. YB. INT'L L. 142, 145 *et. seq.* for a brief, but extremely articulate, general summary of the treatment of aliens in Europe. The laws of Venezuela, Colombia and the Caribbean nations, as they apply to the scope of this article, will be more fully explored in a forthcoming study.

2. No essay on Latin American law can avoid considering the legal norms under discussion in their proper context—that is, against the geographical, historical and cultural milieu within which they are expected to function. The advisability of such an approach to comparative legal studies is recognized in J. W. Wagner's study of Cornell University's Project on General Principles of Law Recognized by Civilized Nations, *International Team Work on the Common Care of Legal Systems*, 8 ASS'N AM. L. SCHOOL'S FOREIGN EXCHANGE BULL. 3 (1966). See also Stone, *The End to be Served by Comparative Law*, 25 TUL. L. REV. 325, 332 (1951). Unfortunately, limitations of space do not permit complete exposition of the more salient factors which shape the Latin American legal environment. I would, however, suggest the following observations as relevant: (a) "Latin America" does not exist as an entity. We are dealing with twenty different countries which, despite certain similarities, differ greatly from each other due to a variety of geographical, cultural, racial and political factors which may also divide them internally into non-national states; (b) both colonial and post-independence experiences have left a residue of disrespect for, and distrust of, centralized government and the law in general, which, paradoxically, co-exists with a tendency to relegate to government the most important role in the ordering of society; (c) the law in general has never been considered an instrument of social change, as a source of individual rights, or as embodying constitutional limitations on the actions of the sovereign; and (d) politically, the years since independence have been characterized by a futile search for a symbol of legitimate authority to replace the Crown. A partial list of sources which amplify the above might include T. FILLOL, *SOCIAL FACTORS IN ECONOMIC DEVELOPMENT: THE ARGENTINE CASE* 5-39 (1961); P. JAMES, *LATIN AMERICA* 3-51 (3rd ed. 1959); T. MCGANN, *ARGENTINA: THE DIVIDED LAND* 9-38 (1966); J. PARRY, *THE SPANISH SEABORNE EMPIRE* 361-81 (1966); F. TANENBAUM, *TEN KEYS TO LATIN AMERICA* 3-172 (1962); H. DE VRIES & J. RODRIGUEZ-

During the colonial period non-Iberian aliens were generally excluded by law from the Spanish and Portuguese possessions in the New World.³ Therefore they either conducted clandestine trading and smuggling activities or actively raided Spanish shipping and Latin American port cities.⁴ After independence, however, non-Iberian aliens began arriving in Latin America in increasing numbers, to be confronted with sovereign nations and independent cultures by then too well-established to be directly subdued or subverted.

Nonetheless, unlike the general European experience, the alien often came from a nation much more powerful and more stable than his host state, facts which, while in themselves insufficient to enable him to undermine totally local laws to which he had technically submitted himself, led ultimately to demands for special treatment.⁵

Latin America is today undergoing a profound technological revolution for which the United States is largely responsible, and which is transforming the continent in a manner and at a pace never envisioned by nineteenth century alien entrepreneurs.⁶ Communication and transportation media developed within the last fifty years have created new demands for, and dependencies upon, the commercial products and luxuries of the mechanized world⁷ and have precipitated demands

NOVAS, *THE LAW OF THE AMERICAS* 161-73 (1965); see also JOSE MATA-GAVIDIA, *ANOTACIONES DE HISTORIA PATRIA CENTROAMERICANA* (1953); SALOME GIL (Jose Milla) *HISTORIA DE AMÉRICA CENTRAL* (1937); and Dawson, *Labor Legislation and Social Integration in Guatemala: 1871-1944*, 14 AM. J. COMP. L. 124 (1965).

3. Attempts at overt conquest by non-Iberian nations persisted even after the Spanish colonies attained their independence, as in the United States-Mexican War of 1846-48; the William Walker expeditions in the 1850's to Nicaragua; the French, English and Spanish intervention in Mexico of 1862-67; the Spanish attempt to recapture Peru in the 1860's, the Spanish-American War of 1898; and the various United States' interventions in Panama, Central America, and the Caribbean in the early Twentieth Century. A CARR, *THE WORLD AND WILLIAM WALKER* (1963); F. FREIDEL, *THE SPLENDID LITTLE WAR* (1958); H. HARING, *A HISTORY OF LATIN AMERICA* 320-25, 445-46, 514-15, 757-67 (1956); J. RIPPY, *LATIN AMERICA 176-78*, 223-24, 363-64, 370, 516 (1958); E. WALLACE, *DESTINY AND GLORY* (1957).

4. J. PARRY, *supra* note 2, at 251-71; H. HARING, *supra* note 3, at 193-207.

5. The stage was thus set in the nineteenth century for the 1938 confrontation between U.S. Secretary of State Cordell Hull and the Mexican Government over the nationalization of the Mexican oil industry. Dawson & Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 *FORD. L. REV.* 727, 733-34 (1962); See Kunz, *The Mexican Expropriations*, 17 *N.Y.U. L. Q.* 327 (1940); CLINE, *THE UNITED STATES AND MEXICO*, chs. 11-12 (1961).

6. In Latin America "The great change of our time is the consumer's revolution propelled by the United States." F. TANNENBAUM, *supra* note 2, at 202. "A mass market requires an egalitarian society based upon the mass." *Id.* at 204. This revolution, more than the urgings of political agitators, is altering forever the old Latin America and undermining the stratified society which has characterized it since the conquest (and thereby undercutting those aristocratic elements with which United States policy makers have been traditionally associated).

7. As a result, "The poor in Latin America are poorer today also because they want more than their forefathers did. Not only are there more of them, but they

for radical change in out-moded economic and political patterns.⁸ This has inspired programs for economic integration on the international level, and, within individual nations, for industrialization and product diversification to limit dependence upon primary commodity exports.⁹ Foreign investment is openly encouraged¹⁰ by recipient states, while capital-exporting nations and international lending institutions actively seek investment opportunities for reasons of private gain and foreign policy.

As a result, the tempo and number of transactions involving transfers of wealth and skills to, from, and within Latin America has been vastly accelerated, thereby increasing sharply the number, content, and possible legal interrelationships between aliens and foreign

have learned to expect more of life. They want more of the gadgets we advertise. Most of them have seen our movies, heard the radio or seen pictures in newspapers and magazines (which they could not read). New roads, such as the very excellent ones in Peru, have opened the way to the great city, and large numbers of people have arrived in crowded buses or on foot. They have seen the wonders of the modern world and they want to participate in it." *Id.* at 205-06.

8. The situation is, of course, greatly complicated by chronic political instability, appalling economic and educational disparities between the upper and lower classes, a soaring birth rate which will require Latin America to double its present food production by 1980 in order to feed its projected population of 360,000,000, the ideological confrontation between East and West, the Moscow-Peking rivalry, and the influence and intervention of Fidel Castro's Cuba. See generally ALEXANDER, *TODAY'S LATIN AMERICA* (1962); BENTON, *THE VOICE OF LATIN AMERICA* (1961); A. BERLE, *LATIN AMERICA-DIPLOMACY AND REALITY* (1962); HIRSCHMAN, *JOURNEYS TOWARD PROGRESS* (1963); JOHNSON, *POLITICAL CHANGE IN LATIN AMERICA: THE EMERGENCE OF THE MIDDLE SECTORS* (1958); *LATIN AMERICA ISSUES, ESSAYS AND COMMENTS* (Hirschman ed. 1961); P. NEHEMKIS, *LATIN AMERICA: MYTH AND REALITY* (1964); *SOCIAL CHANGE IN LATIN AMERICA TODAY* (Council on Foreign Relations ed. 1960) SZULC, *TWILIGHT OF THE TYRANTS* (1959); *THE UNITED STATES AND LATIN AMERICA* (The American Assembly ed. 1959).

9. The Latin American Free Trade Association (LAFTA) (Argentina, Chile, Brazil, Mexico, Peru, Colombia, Venezuela, Bolivia, Uruguay and Paraguay) and the Central American Common Market (CACM) have been functioning since 1960, and merger is now a distinct possibility. *LATIN AMERICAN ECONOMIC INTEGRATION: EXPERIENCES AND PROSPECTS* (M. Wionczek ed. 1966); *LA INTEGRACION ECONOMICA LATINO AMERICANA* (Banco Nacional de Comercio Exterior S.A. de Mexico ed. 1963).

10. Such legislation often offers tax holidays, customs exemptions, and other privileges which will give a new business enterprise a comparative competitive advantage. For example, in Guatemala the *Ley de Fomento Industrial* accords new industries a ten-year exemption from customs duties on imports of necessary machinery, as well as a five-year exemption from any tax on profits. 78 *RECOPIACION DE LAS LEYES DE LA REPUBLICA DE GUATEMALA* 50, 51 (1959-60). Similar privileges are offered by Costa Rica's *Ley de Desarrollo y Proteccion Industrial*. See Ley No. 2426 (Sept. 3, 1959) and its implementing legislation. See also Nattier, *Latin American Incentives and Restraints*, in *I DOING BUSINESS ABROAD* 12-17 (New York P.L.I. ed. 1962). Sometimes foreign firms feel compelled to establish themselves in a market to which they had formerly been exporting in order to meet competition provided by newly-established domestic industries. Angulo, *A Proposed Decalogue for Conducting Manufacturing Operations in Latin America* (unpublished manuscript in possession of the author).

nations, as well as opportunities for disagreement and dispute.¹¹ The influence of the non-Latin American alien and his culture upon the lands south of the Rio Grande River has never been so great. Hence, a review of the treatment accorded aliens in Latin American courts, and of the legal environment in which the courts function, may be both timely and informative.¹²

This essay will examine the various constitutional and legislative guarantees of access to judicial relief, seek to weigh the impact on access of the Calvo and the National Treatment Doctrines, and then illustrate, by reference to specific problems in the administration of justice and the enforcement of civil rights, some potential procedural problem areas which may remain after access has been obtained.

II. CONSTITUTIONAL AND LEGISLATIVE GUARANTEES OF ACCESS TO, AND FAIR TREATMENT IN, COURTS AND ADMINISTRATIVE TRIBUNALS

The procedural legislation of Latin American nations¹³ does not discriminate unreasonably against aliens, but accords them equal access to their courts with nationals.¹⁴ For example, article 20 of the

11. For a consideration of the implications of this general problem on a global scale, see Dawson, *International Law and the Procedural Rights of Aliens Before National Tribunals*, 17 INT'L & COMP. L. Q. 404 (1968).

12. Such an examination may now be particularly relevant since the new nationalism now sweeping Latin America "insists upon the recognition of the importance of Latin America in world affairs and is sometimes expressed in hostility to foreign entrepreneurs and vigorous dislike of interference from outside." D. PERKINS, *THE UNITED STATES AND LATIN AMERICA* 74 (1961). See also Thomas, *Latin American Nationalism and the United States*, 7 J. OF L. AM. STUDIES 5 (1965).

13. Space does not permit a country-by-country review of applicable laws, so a process of selection, seeking both the most typical, as well as the most unusual, legislation has been necessary.

14. There are, however, certain areas where aliens are treated differently, such as in local requirements for filing security bonds. This is not especially offensive, however, as long as the amounts of such bonds are reasonable. New York State, for example, requires non-residents to post security bonds. C.P.L.R. § 8501(a). Also, aliens can generally be expelled from Latin American countries if they are considered threats to internal stability, which is understandable in view of the border disputes, skirmishes, and wars of post-independence years. The Honduran Constitution, art. 29, provides that "the executive branch has the exclusive authority to require any foreigner whose presence is deemed unsuitable to leave the national territory, in conformity with the law." Constitution of the Republic of Honduras 1965 (Pan American Union ed. 1966). In Argentina see Ley No. 17,401, Represión del Comunismo, art. 14, Boletín Oficial 29/VIII/67. The cancellation of residence permits is on the administrative, rather than the judicial, level and, as in Surinam, an appeal to the court system may not lie (personal interviews with members of Surinamese Bar). Also, there may sometimes appear to be a difference in the treatment accorded to non-resident, as opposed to resident, aliens. For example, art. 150 of the 1967 Brazilian Constitution, which guarantees aliens the same civil rights as Brazilians, does not apply to non-residents. O.D. PEREIRA, *A CONSTITUCAO DO BRASIL*, 532 (1967).

Argentine Constitution states that "Foreigners enjoy in the territory of the Nation all of the civil rights of a citizen," which includes the right to appear in court and to the due process of law guaranteed in article 18 of said constitution.¹⁵ This is supplemented by Argentina's adherence to the 1928 Convention on the Status of Aliens, which states in article 5: "States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages of the exercise of said rights and guaranties."¹⁶ Article 285 of the Argentine Commercial Code allows unregistered foreign companies to conduct business activities in Argentina, which has been interpreted to mean they can also bring suit.¹⁷

The Honduran Constitution in article 25 states that "In Honduras foreigners enjoy all the civil rights of Hondurans with such restrictions as may be established by law for reasons of public order, security, or national interest."¹⁸ Article 150 of the 1967 Brazilian Constitution guarantees resident foreigners the civil rights of Brazilians, including the right to habeas corpus, the right to defend in court, the right to judicial assistance, and the right to "make representation to and to petition the public powers in defense of rights or against abuses of authority."¹⁹ Under article 74 of the Guatemalan Constitution, "Every person has free access to the courts for the purposes of exercising his rights of action in accordance with the law." The context of the article indicates clearly that "person" includes aliens as well as citizens.²⁰

15. Article 18 states in part: "No inhabitant of the Nation may be punished without previous trial, based on an earlier law than the date of the offense, nor tried by special commissions, nor removed from judges designated by law before the date of the offense. No one can be compelled to testify against himself, nor be arrested except by virtue of a written order from a competent authority. The defense, by trial, of the person and of rights is inviolable." CONSTITUTION OF THE REPUBLIC OF ARGENTINA 1853 (Pan American Union ed. 1963). See H.B. VARELA, LEGAL CONDITIONS FOR FOREIGN PRIVATE INVESTMENT IN ARGENTINA 2-3 (1967).

16. 46 Stat. 2753, T. S. 815; reprinted in app. II, W. GOLDSCHMIDT & J. RODRIGUEZ-NOVAS, AMERICAN-ARGENTINE PRIVATE INTERNATIONAL LAW (1966).

17. H.B. VARELA, *supra* note 15; CODIGO DE COMERCIO 45 1889, art. 285, (30th ed. 1960). Although each of the Argentine provinces has its own Code of Civil Procedure, the Commercial Code is of nation-wide application.

18. CONSTITUTION OF THE REPUBLIC OF HONDURAS 1965 (Pan American Union ed. 1966).

19. O.D. PEREIRA, *supra* note 14.

20. Article 74 reads in full: "Every person has free access to the courts for the purpose of exercising his rights of action in accordance with the law. Foreigners may have recourse to diplomatic channels only in the event of a denial of justice. The mere fact that a decision may be adverse to their interests is not to be considered as such. In any case the legal recourses established by Guatemalan laws must have been exhausted." CONSTITUTION OF THE REPUBLIC OF GUATEMALA 1965 (Pan American

In Peru, article 23 of the constitution states that "The Constitution and the laws afford protection to, and carry obligations equally for, all the inhabitants of the republic."²¹ No distinction is drawn between alien or citizen "inhabitants." The content of the "protection" referred to in the constitution is illuminated by the 1963 *Ley Orgánica del Poder Judicial del Perú*,²² article 1 of which states: "The function of administering justice is the prerogative of the Judicial Power and is exercised by its competent courts and tribunals in accordance with the constitution and the law."²³ Article 3 then establishes guarantees for the administration of justice, including an inalienable right of defense in proceedings held in open court, the right to a reasoned judgment with an exposition of the law relied upon, and assurance that cases once concluded will not be reopened.²⁴

It is interesting to note that in December, 1959, the Peruvian Congress resolved to adopt the *Universal Declaration of Human Rights*,²⁵ which in article 8 states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."²⁶ Eventually, on December 15, 1965, the *Declaration* was incorporated into the laws of the Republic,²⁷ thus supplementing guarantees of access and fair judicial treatment already available in Peruvian domestic law.²⁸

Union ed. 1966).

Other Latin American constitutions also grant aliens access to their courts. See, e.g., art. 8(h) of the Bolivian Constitution and art. 169 of the Ecuadorian Constitution. CONSTITUTION OF THE REPUBLIC OF BOLIVIA 1961 (Pan American Union ed. 1963); CONSTITUTION OF THE REPUBLIC OF ECUADOR 1946 (Pan American Union ed. 1961).

21. CONSTITUTION OF THE REPUBLIC OF PERU (Pan American Union ed. 1965).

22. Decreto Ley No. 14605 de 25 de julio de 1963; *El Peruano* 26 July, 1963, as amended, 19 August, 1963, discussed in, A.A. ARAMBURU MENCHACA, LA RECEPCION DE LA DECLARACION UNIVERSAL DE DERECHOS HUMANOS EN EL DERECHO PERUANO Y SUS EFECTOS INTERNACIONALES 10 (UNESCO/SS/HR/22, October 1, 1965).

23. *Id.*

24. Article 3(b),(c),(d) and (e). Also, art. 3(f) and (g) guarantee litigants the right to "compensation for judicial errors committed in criminal cases, after review as prescribed by law," and "the right of petition against the State for delicts committed by members of the Judiciary in the exercise of their duties, or by officers of other branches of government respecting the execution and compliance with judicial decisions and orders." Article 3(h) obliges the executive branch, on pain of legal liability, to enforce judicial decisions and orders.

25. Decreto Ley No. 13282 de 9 diciembre 1959; 1959 Normas Legales Nos. 29-31 at 493.

26. The Universal Declaration of Human Rights, U.N. Gen. Ass. Off. Rec., 3d Sess. (I), Resolutions (A/810) (1948).

27. Order of 15 diciembre 1965; cited in A.A. ARAMBURU MENCHACA, *supra* note 22, at 5.

28. I am deeply indebted to Dr. Aramburu Menchaga for his excellent explanation of the Peruvian legal system in general, and of the reception of the Declaration of Human Rights in particular, during several personal interviews in Lima, Peru, in February, 1967.

However, while the grant of access to, and relief in, national tribunals is indeed commendable, it is often more mandatory than permissive. That is, certain national constitutions and other legislation specifically require aliens to seek relief solely in local tribunals, denying or limiting any right to request diplomatic intervention by their own states.

III. THE CALVO AND NATIONAL TREATMENT DOCTRINES VERSUS THE INTERNATIONAL STANDARD OF JUSTICE

Prevailing Latin American legal opinion holds that aliens are entitled only to equal treatment with nationals and should rely upon local tribunals for redress of injuries. Consequently, with certain exceptions, aliens should not be permitted to invoke the diplomatic protection of their State of origin. This, the Doctrine of National Treatment, conflicts with the International Standard of Justice, which demands a higher standard for aliens if the treatment accorded nationals does not conform to international due process concepts.²⁹

While Latin American states have been criticized for invoking the Doctrine of National Treatment to avoid responsibilities to aliens,³⁰ I suggest that the Doctrine was originally evolved to encourage aliens to work and invest in Latin America, rather than to restrict their

29. The International Standard of Justice is less precise than the standard of national or equal treatment. It holds that the treatment accorded a country's own nationals is irrelevant as far as aliens are concerned, since aliens have a claim to a minimum standard of legal treatment that is not less than that promised by the "universal" standards of "civilized" states. Former United States Secretary of State Elihu Root once stated, concerning the minimum standard: "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice it accords its own citizens is that its system of law and administration shall conform to this general standard." *Cited and discussed in* F. DUNN, *THE PROTECTION OF NATIONALS* 141-43 (1932).

30. The national standard of treatment, it has been suggested, was not designed to protect aliens, "but to protect the state from the alien, extraordinary though it may sound." A. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 117 (1949). Or, as one commentator has explained: "As for the countries of investment, their political and social structure left them badly prepared to meet the demands of their position. The instability of their public life, marked as it was by coups d'etat, and by insurgent or revolutionary movements, often impaired the normal operation of their administrative and judicial institutions. The frequency of damage to aliens in these circumstances, and the absence of adequate legal remedies, exposed their governments to numerous claims against which they tried to arm themselves by propounding various doctrines more consonant with their own interests than with the rules of customary law. This was the reflection of a special psychology adequately explained by historical differences—a political survival which has already been reduced by changes in the ratio of interests and forces, and which doubtless one day will be entirely eliminated." C. DE VISCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 270-71 (1957).

rights or activities. In colonial times foreigners suffered certain disabilities in terms of residence rights, trade and commerce.³¹ Upon independence, however, the new nations sought to attract foreign trade and, as in Argentina, to encourage foreign immigration by assuring aliens that they would be accorded the same privileges as nationals. Thus, article 20 of the 1853 Argentine Constitution provided, as already noted, that "Foreigners enjoy in the territory of the Nation all of the civil rights of citizens,"³² while the 1853 Argentine-United States Treaty of Friendship, Commerce and Navigation assured free access to courts for nationals of both contracting parties.³³ However, despite proclaimed good intentions by Latin American governments, the civil wars, revolutions and general lawlessness of post-independence years occasioned injury to alien persons and property which government officials were powerless to prevent, and for which judicial relief was not always available.³⁴

While in Asia and Africa such events served to justify territorial acquisitions, this was not generally possible in Latin America. The new nations, while weak, were nevertheless sovereign and could command the loyalty of their unruly populaces against foreign invasion.³⁵ Moreover, the Monroe Doctrine and the policies of the British

31. Spain's constant, and ultimately futile, attempt to prevent non-Spaniards from trading with the New World is related in J. PARRY, *supra* note 2, at 116-35, 251-71.

32. The writings of the versatile Juan Bautista Alberdi, who urged encouragement of immigration of European peoples and capital as the best means of assuring national prosperity after the sterile years of the Rosas dictatorship, greatly influenced the draftsmen who produced the 1853 Constitution. H. HARING, *supra* note 3, at 610-11; T. MCGANN, *supra* note 2, at 28-29. Between 1857 and 1900, approximately 2,000,000 immigrants arrived, mostly from Spain and Italy, although some 800,000 were seasonal agricultural workers who returned to Europe. Between 1900 and 1930, another 2,900,000 disembarked in Buenos Aires and remained. T. FILLOL, *supra* note 2, at 26-27. The effect of this extraordinary tide of European immigration and European influence upon Argentine social and political patterns has been a subject of wide debate. C. IBARCUREN, LA HISTORIA QUE HE VIVIDO 69 (1954); R. ROJAS, LA RESTAURACION NACIONALISTA 53 (2d ed. 1922). DI TELLA, ARGENTINA, SOCIEDAD DE MASAS 85-123 (1965). Manuel Galvez wrote: "In Buenos Aires there is a lack of an aesthetic sense, just as there is a lack of an ethical sense, because it is a city of immigrants. The immigrants came to the country with the single idea of wealth. They are hungry, demoralized people who worship money." EL DIARIO DE GABRIEL QUIROGA 185 (1910).

33. 10 Stat. 1005, T.S. 4; I. Malloy 20 (Effective Dec. 20, 1954).

34. For an illuminating first-hand account of the confusion and anarchy permeating Central America in the early post-independence years, see generally J. STEPHENS, INCIDENTS OF TRAVEL IN CENTRAL AMERICA, CHIAPAS & YUCATAN (1841); See also T. KARNES, THE FAILURE OF UNION: CENTRAL AMERICA 1824-1960 at 12-95 (1961), and A. JAUREGUI, 3 LA AMERICA CENTRAL ANTE LA HISTORIA 137-58 (1949). For a description of Mexico see F. DUNN, DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 117-65 (1933).

35. The expulsion in 1807 of invading English troops by the poorly-armed populace of Buenos Aires, although it took place before independence, was a case in point. H. HARING, *supra* note 3, at 270-71; J. PARRY, *supra* note 2, at 346-47.

Government discouraged European territorial conquest, while domestic considerations, such as preoccupation with the western frontier and with digesting the gains of the Mexican War, temporarily blunted United States territorial appetites.³⁶

Therefore, diplomatic intervention and protection were utilized, after appeals to local courts proved unavailing, in attempts to obtain, by more subtle means, the protection of alien interests endangered by political turmoil. In the words of Frederick S. Dunn, this device "served as a substitute for territorial conquest in bringing the Latin American states within the orbit of international trade and intercourse, and, while the results obtained were not what these countries might have desired, the probable alternatives would have been far less desirable from their standpoint."³⁷

When, however, Latin Americans became aware that diplomatic protection was being abused, their jurists looked anew at the National Treatment concept, seeking to turn it to protective ends. Indeed, it would seem, in retrospect, as if diplomatic insistence for redress of injuries often depended more on political, than on legal, considerations. As one commentator writes: "There has been at times a striking parallel between the upward and downward curve of American territorial and economic ambitions, and the concern with which American officials seemed to regard reported injuries to Americans in Mexico The same events which in times of mounting ambitions took on an aspect of extreme gravity were at other times treated as minor misfortunes that might happen in any country."³⁸ Also, assertion of international claims was considered to have been used to justify armed invasion and occupation, as in the French expeditions to Mexico in 1838 and 1861, the United States interventions in the Caribbean after 1900, and in the 1902-03 German, British and Italian threat to Venezuela.³⁹ At the same time, distrustful of local tribunals where available, aliens often would appeal first to their local diplomatic representatives before seeking relief in local courts.⁴⁰

Since aliens insisted that rights to intervene on behalf of nationals were posited upon international law, it was on this level that the

36. D. PERKINS, A HISTORY OF THE MONROE DOCTRINE (1955). For similar reasons the concept of extraterritorial jurisdiction was not utilized in Latin America as it was in Asia and Africa. D. SHEA, THE CALVO CLAUSE 4-5 (1955).

37. F. DUNN, *supra* note 29, at 58. Prof. Dunn's study of the historical development of diplomatic protection is most informative and helpful. *Id.* at 46-66. Prof. Edwin Borchard defined diplomatic interposition or intervention as "the pressure of a claim by official representations, under the authority and in the name of the government." THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 441 (1915).

38. F. DUNN, *supra* note 34, at 7-8.

39. F. DUNN, *supra* note 29, at 57; D. SHEA, *supra* note 36, at 12-13.

40. D. SHEA, *supra* note 36, at 10.

Latin Americans counter-attacked. Shortly before 1870, the Argentine diplomat and jurist Dr. Carlos Calvo began formulating a comprehensive formula to restrict diplomatic interposition.⁴¹ His so-called Calvo Doctrine was based upon two principles: first, sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from interference by other states, either through force or diplomacy; and, second, aliens are not entitled to rights and privileges not accorded nationals. Therefore, they may seek redress for grievances only in local courts.⁴² These twin concepts of non-intervention and absolute denial of diplomatic protection are the core of the Calvo Doctrine, which in turn may be considered a corollary of the Doctrine of National or Equal Treatment.

The non-intervention portion of the Calvo Doctrine has been accepted by the United States in principle since the 1933 Montevideo Conference, although recent events in the Dominican Republic might indicate the contrary.⁴³ However, the Latin American conception of non-intervention also entails denial of diplomatic intervention on behalf of aliens, a broad definition not acceptable to the United States, which defines intervention more restrictively and does not consider itself obliged to avoid intervening on its citizens' behalf, especially where there has been a denial of justice.⁴⁴

Attempts to assure acceptance of the second portion of the Calvo Doctrine have assumed the form of constitutional provisions, municipal legislation, and contractual stipulations between aliens and Latin American states. Some of these attempts acknowledge rights to intervene in cases of denial of justice, others do not.

For example, the Honduran Constitution provides: "Aliens may not have recourse to diplomatic channels except in cases of a denial of justice. For these purposes denial of justice is not understood to

41. Contained in his monumental, six volume work, *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE* (Paris ed. 1896).

42. D. SHEA, *supra* note 36, at 19; H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 2, at 99-100.

43. One commentator suggests that it is questionable if unilateral intervention will ever be completely discarded as a policy alternative as long as there exists no effective multilateral machinery for dealing with problems of hemispheric subversion. Kane, *American Involvement in Latin American Civil Strife*, 1967 *PROC. AM. Soc'y INT'L L.* 58 (1967).

44. H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 2, at 101-02, indicate that the Inter-American Juridical Committee defined intervention to include "Acts by which it is attempted to impose or there is imposed upon a state the recognition of a privileged status for aliens beyond the rights, remedies, and guaranties granted to its nationals under local law." The United States representative on the committee vigorously dissented, stating: "Normal diplomatic protection of the lives and property of citizens abroad under international law should not be included . . . under the guise of intervention. The use of the term intervention in this sense is a misnomer." *Id.*

mean an executed verdict that is unfavorable to the claimant. Should this provision be contravened, and claims are not terminated amicably, resulting in loss to the country, the claimant shall forfeit his rights to live in the country."⁴⁵ Article 14 of the Guatemalan Constitution states: "Foreigners may have recourse to diplomatic channels only in the event of a denial of justice. The mere fact that a decision may be adverse to their interests is not to be considered as such. In any case, the legal recourses established by Guatemalan laws must have been exhausted."⁴⁶

Article 32 of the Peruvian Constitution provides, however, without reference to denial of justice: "Foreigners as regards property are in the same conditions as Peruvians without being able in any case to invoke an exceptional position in this respect or have recourse to diplomatic claims."⁴⁷ The Costa Rican Constitution, in a slight variation on this theme, states in article 19 that aliens ". . . are subject to the jurisdiction of the courts of justice and the authorities of the Republic, and may not resort to diplomatic intervention except as provided in international conventions."⁴⁸

Where constitutional provisions allow intervention in cases of denial of justice, they confirm general international practice which requires exhaustion of local remedies and perpetration of a denial of justice before diplomatic interposition is permitted.⁴⁹ However, state practice, arbitral decisions, and the opinions of publicists deny the efficacy of provisions unconditionally barring diplomatic protection otherwise justified under international law, on the grounds that limitations on the responsibility of states for injuries to aliens are determined by international, not municipal, law.⁵⁰

Latin Americans have been more successful in implementing the Calvo Doctrine by including in contract provisions binding aliens to local redress and obligating them to eschew diplomatic protection in disputes stemming from the contractual relationship.⁵¹ This is somewhat different from a unilateral attempt to impose the Doctrine

45. CONSTITUTION OF THE REPUBLIC OF HONDURAS, *supra* note 18.

46. CONSTITUTION OF THE REPUBLIC OF GUATEMALA, *supra* note 20. *See also* art. 20 of the CONSTITUTION OF BOLIVIA, *supra* note 20.

47. CONSTITUTION OF THE REPUBLIC OF PERU, *supra* note 21.

48. CONSTITUTION OF THE REPUBLIC OF COSTA RICA 1949 (Pan American ed. 1961); Art. 20 of the CONSTITUTION OF THE REPUBLIC OF BOLIVIA 1961 (Pan American ed. 1963) states "Foreign subjects and enterprises are subject to Bolivian laws and in no case may they invoke exceptional position or have recourse to diplomatic claims."

49. *See* notes 58-61 *infra* and accompanying text for a discussion of the "exhaustion of local remedies rule."

50. D. SHEA, *supra* note 36, at 25. Attempts to incorporate the Doctrine in treaties and other municipal legislation have not been fruitful. *Id.* at 21-24, 26-27.

51. *See* discussions in D. SHEA, *supra* note 36, at 27-32; F. DUNN, *supra* note 29, at 169-72.

through municipal law, since here the individual purports specifically to waive his rights to diplomatic protection. The voluntary nature of this waiver is, however, sometimes open to question, since aliens may be forced to subscribe to such clauses as the price for doing business in foreign jurisdictions. For example, article 17 of the Peruvian Constitution provides: "Mercantile companies, national or foreign, are subject, without restrictions to the laws of the Republic. In every State contract with foreigners, or in the concessions in the latter's favour, it must be expressly stated that they must submit to the laws and tribunals of the Republic and renounce all diplomatic claims."⁵²

Nevertheless, if the clause exempts denials of justice, it may be considered as merely declarative of general international principles, and thus superfluous but proper. If drawn sufficiently broadly to exclude denials of justice from diplomatic recourse, the clause becomes more controversial. In such cases the United States maintains that Calvo Clauses will not prevent interposition otherwise permissible under generally recognized rules of international law. On the Vatelian theory that any injury to the alien also vicariously injures his state, the state has an independent right of action which the individual cannot waive. However, the United States does not consider insertion of Calvo Clauses in contracts as improper, and refuses to advise citizens not to make such commitments. Moreover, it is not uninfluenced, in deciding whether or not to espouse a claim, by the execution of such a renunciation, and regards it as binding on the individual.⁵³ Also, as a matter of policy, the United States Department of State does not espouse contract claims of citizens against other states absent a breach of substantive international law, such as a gross denial of justice.⁵⁴

52. CONSTITUTION OF THE REPUBLIC OF PERU, *supra* note 21. A typical Calvo Clause which the laws of Mexico require to be inserted in the charters of all corporations having foreign shareholders provides: "Every alien who at the time of formation of a company, or at any time thereafter, acquires or may acquire an interest or participation in said company shall be considered by that simple fact as a Mexican in connection thereof, and it shall be understood that he agrees not to invoke the protection of his government under the penalty, in case of breach of this agreement, of losing his interest or participation to the Mexican Nation." Decree of June 29, 1944, *Diario Oficial*, July 7, 1944. See also art. 27 of the CONSTITUTION OF 1917. While most Latin American states require Calvo Clauses in public contracts, Argentina, Brazil and Uruguay do not. D. SHEA, *supra* note 36, at 269-80. For early discussions of the enforceability of a Calvo Clause, see E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 792 *et seq.* (1915). For a more recent brief commentary, see UNITED STATES TRADE AND INVESTMENT IN LATIN AMERICA 45-48 (Columbia Society of International Law eds. 1963). See also CONSTITUTION OF REPUBLIC OF ECUADOR, art. 177, *supra* note 20.

53. D. SHEA, *supra* note 36, at 45.

54. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and*

Despite international refusal to recognize the intrinsic value of the Doctrine of National Treatment as a precept of international, as opposed to Latin American law, it still influences contemporary events. Reluctance to deviate from adherence to the Doctrine, and thereby perhaps subject themselves to an international standard in the nineteenth century formulation of which they had little voice,⁵⁵ motivates current Latin American refusal to execute multilateral agreements which define international compensation standards in any but the broadest terms,⁵⁶ or to adhere to the World Bank's Convention on the Settlement of Investment Disputes between the States and Nationals of other States.⁵⁷

Foreign Affairs, 56 AM. J. INT'L L. 663, 662 (1962).

55. With respect to the major role played by European legal and political presuppositions in developing the law of responsibility for injury to aliens, see F. DUNN, *supra* note 29, at 53-54; Dawson & Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles*, 31 U. CHI. L. REV. 63, 73-75 (1963); Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783, 807-09 (1964); Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 866 (1961). It is interesting to note that even nations such as Argentina, which does not incorporate the Calvo Doctrine in its constitution or other legislation, and which does not require Calvo Clauses in Government contracts, nevertheless espouses the Doctrine of National Treatment.

56. R. LILICH, *THE PROTECTION OF FOREIGN INVESTMENT* 190 (1965); Metzger, *Property in International Law*, 50 VA. L. REV. 594, 598-600, 622-23 (1964). The 1962 Resolution of the United Nations General Assembly on "Permanent Sovereignty over Natural Resources" seeks to please all members and therefore incorporates *both* national and international compensatory standards, as well as the obligation to exhaust local remedies. "[T]he owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted." UN Gen. Ass. Off. Res. 17th Sess., Plenary 1194 (A/RES/1803 (XVII) (1962)). Reprinted in Metzger, *supra* at 601-02. This attitude also accounts for the lack of friendship, commerce and navigation treaties between the United States and Latin American nations incorporating compensation clauses. *Id.* at 614. The Treaty of Friendship, Commerce and Navigation Between the United States and Nicaragua is an exception. (Article VI (4)). 9 U.S.T. 449, T.I.A.S. No. 4024, 367 U.N.T.S. 3 (effective May 24, 1958).

57. The author has been told in personal interviews with attorneys in Rio de Janeiro and Buenos Aires that this is because contracting states are obliged to comply with awards in proceedings to which they have been parties and, it is feared, the particular arbitration panel involved may not have been inclined toward the equal or national treatment theory and will thereby accord aliens more favorable treatment than nationals. However, in *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. OF TRANSNAT'L L. 262 (1966), Aaron Broches Esq., General Counsel of the International Bank for Reconstruction and Development, points out that "the fact that a State has become a party to the Convention does not obligate that State or an investor who is a national of that State to make use of the facilities of the Centre [the International Centre for the Settlement of Investment Disputes established by the Convention]. No State and no investor can be brought before a conciliation commission or an arbitral tribunal without having consented thereto." *Id.* at 264. Elsewhere Mr. Broches seeks more specifically to allay Latin American fears that the Convention would violate "the constitutional

The alien in Latin America is also channeled into the local tribunals by the exhaustion of local remedies rule, which requires pursuing avenues of judicial and administrative relief available in the foreign state before invoking diplomatic protection.⁵⁸ As a procedural device for allocating jurisdiction between the national and the international legal orders, it has long been accepted as a basic proposition of international law.⁵⁹ When, however, aliens are denied recourse to local tribunals or when recourse would be fruitless, the rule need not be observed⁶⁰ and an appeal to the diplomatic arena

principle of equality of citizens and aliens," would introduce compulsory arbitration and thus infringe upon the sovereignty of the Latin American states, and would evidence "an unacceptable lack of confidence in the integrity and independence of the national courts." *The Convention on the Settlement of Investment Disputes* 9 A.B.A. INT'L & COMP. L. SECTION BULL. No. 11, 14-15 (1965).

58. Many policy justifications for the rule have been given by commentators. E. Borchard suggests five: "First, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act of the state, that the state is willing to leave the wrong unrighted." *Supra* note 37, at 817-18. Professor Richard B. Lillich states that "the main rationale behind the rule remains the same: the desire to settle disputes between aliens and states on the local level rather than make them matters of international concern." *The Effectiveness of the Local Remedies Rule Today*, 1964 PROC. AM. SOC'Y INT'L L. 10. Another commentator suggests that it is "a normal manifestation of a constant human tendency to dislike and resist outside intrusion in private affairs" and that private, rather than public "processes are generally more efficient because the investigation is done by those close to the event." Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 391 (1964).

59. The International Court of Justice in the *Interhandel* Case (Switzerland v. United States) has declared that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law . . ." [1959] I.C.J. 6, 27. *See also* Panevezys-Saldutiskis Railway Case, P.C.I.J. Ser. A/B No. 76 (1939). This principle is also recognized by the United States Supreme Court which, in *Sabbatino v. Banco Nacional de Cuba*, 376 U.S. 398 (1964), stated "the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." *Id.* at 422-23. Similarly, international agreements recognize the validity of this proposition. For example, while the 1907 Convention establishing the Central American Court of Justice allowed individuals to invoke its jurisdiction, they had first to exhaust local remedies. M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 49 (1943); Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759 (1932).

60. Head, *A Fresh Look at the Local Remedies Rule*, 1967 CAN. Y.B. INT'L L. 142, 151-55 (1967). Sometimes the fruitlessness of invoking ostensibly available local

will lie on the theory that there has been a denial of procedural justice or of international due process.⁶¹ A denial of justice would arise, according to a United States Department of State Memorandum on Cuba, if there were a "denial or unwarranted obstruction of access to . . . courts, gross deficiency or delay in judicial process, manifestly unjust judgment or an atmosphere of hostility or prejudice which would make it futile to attempt to exhaust local remedies."⁶²

The expression "denial of procedural justice" is admittedly vague,⁶³ although there have been various attempts, by positing the requirements of a fair trial, to give it meaningful content. The famous 1929 *Harvard Draft Convention on Responsibility of States for Damage Done on their Territory to the Person or Property of Foreigners* suggested that municipal legal systems should avoid (1) denial of, delay or unwarranted obstruction of access to courts; (2) gross inefficiency in the administration of the judicial or administrative process; and (3) failure to provide those guarantees generally considered indispensable to the proper administration of justice.⁶⁴

Article 7 of the 1961 *Harvard Draft Convention on the International Responsibility of States for Inquiries to Aliens* and section 181 of the American Law Institute's *Restatement of the Foreign Relations Law*

remedies may be due to political, rather than purely legal, factors. For example, local counsel may be so intimidated that they will be unwilling to represent an alien. In Cuba, members of the Havana Bar refused to appeal the expropriations initiated by the Castro Government, and, according to a prominent New York City attorney with wide international experience, indicated "that the personal risk involved in taking these American cases was too great." UNITED STATES TRADE AND INVESTMENT IN LATIN AMERICA 42 (Columbia Society of International Law ed. 1963).

61. THE ALI'S RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter referred to as the RESTATEMENT] in § 213 excuses compliance with the exhaustion of local remedies rule when available remedies "would not satisfy the requirements of procedural justice," when "exhaustion would be clearly ineffective in view of one or more prior determinations made, on substantially identical claims, by the highest agency of the state that has authority to grant relief," or when "the state of the alien's nationality, which has espoused his claim, is asserting in its own behalf a claim arising out of the same wrongful conduct."

62. Reprinted in Kerley, *Contemporary Practice of the United States Relating to International Law*, 56 AM. J. INT'L L. 165, 166 (1962). In reference to Cuba the United States Department of State took the position that the unavailability of local remedies waived the requirement. Lillich, *The Cuban Claims Act of 1964*, 51 A.B.A.J. 445, 447 n.26 (1965).

63. THE RESTATEMENT, *supra* note 61, in § 178 defines "denial of procedural justice" as ". . . conduct, attributable to a state and causing injury to an alien, that departs from the international standard of justice . . . with respect to the procedure followed in enforcement of the state's law as it affects the alien in criminal, civil or administrative proceedings, including the determination of his rights against, or obligations to, other persons."

64. 23 AM. J. INT'L L. SPEC. No. 133 (1929).

of the United States assert that to receive a fair trial an alien must: (a) have the benefit of an impartial tribunal or administrative authority; (b) receive specific information in advance of the charges against him; (c) have time to prepare his case; (d) have full opportunity to know the substance and source of any evidence against him and to contest its validity; (e) have the opportunity to obtain witnesses and evidence on his behalf; (f) have the opportunity to obtain and consult with legal counsel of his own choice, if necessary free of charge if this is provided to aliens; (g) have access to the services of an interpreter if needed; (h) be able to communicate with representatives of his own government and to have such representative present at the proceedings; and (i) obtain disposition of his case with reasonable dispatch.⁶⁵ The *Draft Convention* would also confer upon aliens "any other procedural right conferred by a treaty or recognized by the principle legal systems of the world."⁶⁶ Other considerations might include denial of rights to appeal, executive interference in litigation or in the execution of judgment, unconscionably short limitations periods, stringent security deposits, or restrictions imposed by local codes upon admissibility of evidence.⁶⁷

Close examination of national procedural codes becomes especially relevant if aliens are granted, under the Doctrine of National Treatment, the same rights as citizens to appear and litigate in national courts. Inquiry then is no longer confined to ascertaining if discrimination exists against aliens, but must proceed to considering whether procedural codes, in letter or application, accord all litigants a procedural due process acceptable under international law.⁶⁸

65. Draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, April 15, 1961, Reporters, Sohn and Baxter, Harvard Law School, pp. 90-91, 55 AM. J. INT'L L. 545, 550 (1961); RESTATEMENT *supra* note 61, at § 181. For an appraisal of the RESTATEMENT with relation to the international standard of justice, see Murphy, *State Responsibility for Inquiries to Aliens*, 41 N.Y.U.L. REV. 125 (1966).

66. *Supra* note 65, art. 7(k).

67. Head, *supra* note 60 at 157-58. For an extensive outline of factors to be considered, see Dawson, *International Law and the Procedural Rights of Aliens Before National Tribunals*, 17 INT'L & COMP. L.Q. 404, 418-20 (1968).

68. While a procedural code may superficially seem perfectly fair to both aliens and nationals, if it is improperly administered a denial of justice claim may be raised. However, the quality of the administration of justice varies considerably from time to time, so that while administration might be grossly deficient during one period, it might be entirely adequate during another. This leads one to be cautious in making sweeping generalizations concerning any particular Latin American nation, especially since the overwhelming trend has been to seek to improve the administration of justice. See Dawson, *Professional Interchange Among Lawyers in the Americas*, 53 A.B.A.J. 903 (1967).

IV. PROBLEM AREAS: THE ADMINISTRATION OF JUSTICE AND THE ENFORCEMENT OF CIVIL RIGHTS

Observers of the Latin American scene sometimes incorrectly presume that, due to political climates unstable in relation to our own, Latin American courts and judges will be incompetent at best, and corrupt at worst. They fail to realize that typical Latin American disorders, except in the immediate contexts of social revolutions such as swept Mexico and Cuba, do not necessarily disrupt all institutions in a particular society.⁶⁹ Thus, members of the judiciary normally remain in office untouched despite military coups. There are unfortunate exceptions. In the 1966 Argentine revolution the entire Federal Supreme Court was dismissed and replaced, although intermediate and lower federal and provincial courts were not affected.

In general, however, commercial life goes on, and in nations dependent upon international trade for a great portion of their gross national product it could not be any other way. There has, therefore, been little or no interference with the legal process in normal civil and commercial matters. There are, nevertheless, two major potential problem areas, both of which may be aggravated by political and economic disorder. These are the administration of justice and the enforcement of civil rights.

A. *The Administration of Justice*

The judicial power in Latin America exists within the traditional tripartite division of government into executive, legislative, and judicial branches.⁷⁰ The executive branch is generally considered the

69. Latin American courts are usually organized within a unitary system, with a supreme court in the capital, superior courts located in other principal cities, and lower courts extending down to justice of the peace tribunals in smaller towns and villages. Argentina, however, possesses a dual system of federal and provincial courts much like our own, with the possibility of removal from one system to another. H. DE VRIES & J. RODRIGUEZ-NOVAS, *THE LAW OF THE AMERICAS* 111-17 (1965). *CONSTITUTION OF THE REPUBLIC OF ARGENTINA* 1853, § III (Pan American Union ed. 1963). Eder, *Judicial Review in Latin America*, 21 *OHIO ST. L.J.* 570, 575-76 (1960). Brazil, although nominally a federation, has increasingly drawn away from dual federal and state courts so that the great majority of Brazilian courts are administered autonomously by the various states. There is, however, a federal supreme court and a federal appellate court, as well as special military, labor and electoral courts. Brazilian state courts operate under standard procedural rules of federal origin. H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* at 195-98; *CONSTITUTION OF BRAZIL* 1967, chap. VIII, (Pan American Union ed. 1967). By contrast, in Argentina each province has its own procedural code, although some members of the Federal Government told the author in the course of personal interviews in Buenos Aires that they hope the new 1968 Federal Code of Civil Procedure will be adopted by all the provinces as well.

70. In general, judges are appointed by one branch with the approval of another, although in Brazil federal legislation provides for a career judiciary in which judges retain almost complete control over the selection of their colleagues and successors.

strongest and the legislative branch the weakest, since the legislature formulates general legislation and the executive puts it into effect by *reglamentos* and executive decrees. The power to issue *reglamentos* is very broad, and until a *reglamento* appears a particular law may lack enforcement provisions.⁷¹ The President, then, in effect has wide legislative powers, and in times of emergency may legislate by decree, or may pass so-called decree-laws when the legislature is not in session or has been disbanded, as is presently the case in Argentina.⁷²

Although the executive is specifically prohibited from interfering in the exercise of judicial authority, he nevertheless exerts great influence through the Ministry of Justice and the so-called Government Attorney, a direct agent of the executive who represents the government in criminal cases and in civil cases involving expropriation and attachment of property.⁷³ Further executive intervention into the judicial realm is illustrated by the coexistence of administrative courts with ordinary judicial organs.⁷⁴ In addition, there may be, as in Brazil, special executive courts in the labor, military and electoral areas.⁷⁵

Paradoxically, however, more effort is expended in preventing the judicial power from overlapping into the legislative and executive areas than vice versa. Thus, judicial precedent and *stare decisis* are given little weight on the theory that if a judge rendered a decision which constituted binding precedent for future decisions, he would be intruding upon the legislative or executive domains,⁷⁶ thereby

H. CLAGETT, THE ADMINISTRATION OF JUSTICE IN LATIN AMERICA 32-36 (1952); Scheman, *Brazil's Career Judiciary*, 46 J. AM. JUDICATURE Soc'y 134 (1962).

71. H. CLAGETT, *supra* note 70, at 15.

72. Article 54(3) of the 1967 Constitution of Brazil also provides that if the President sends a bill to Congress, which he deems "urgent," it automatically becomes law if Congress does not act upon it within forty days. CONSTITUTION OF BRAZIL 1967 *supra* note 69, art. 54(3).

73. H. CLAGETT, *supra* note 70, at 17.

74. H. CLAGETT, *supra* note 70, at 17-18. In Colombia the *Consejo de Estado* functions as the supreme court of the administrative sphere, before which claims against the government must be brought. *Id.* at 66. Article 136 of the Constitution of 1886, which establishes the *Consejo*, states, "The Supreme Court and the Council of State shall be equal in rank." CONSTITUTION OF THE REPUBLIC OF COLOMBIA 1886, art. 136 (Pan American Union ed. 1962).

75. H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 69, at 195-98; CLAGETT, *supra* note 70, at 55-115, CONSTITUTION OF BRAZIL 1967, *supra* note 69, art. 120-35.

76. Reluctance to permit legislation by judicial decree may be traced to art. 5 of the Code Napoleon, which, by prohibiting judges from prescribing general principles of law, sought to prevent a return to the abuses of rule-making powers which characterized pre-Revolutionary tribunals. Eder, *supra* note 69, at 572; H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 69, at 193-94. Also relevant is the civil law precept that custom, and decisions interpreting it, cannot be sources of law. For example, art. 2 of the Civil Code of Honduras states that, "Custom does not constitute a right except in those cases in which the law refers to it." The Civil Code of Argentina in art. 1(17) states that, "Usage, custom or practice cannot create rights except when the laws refer to them." On the European continent, the progenitors of today's

violating the doctrine of separation of powers. Moreover, in at least one country, Ecuador, the legislature and not the judiciary is deemed the guardian and sole interpreter of the constitution.⁷⁷ Other nations restrict to varying degrees the courts' power to declare legislative or executive acts unconstitutional, except in cases then before them. These decisions are not always binding upon lower courts and do not necessarily require legislative revocation of the law found unconstitutional.⁷⁸

The manner in which Latin American court proceedings are generally conducted, and the procedural code provisions which govern the course of the proceedings, may seem unfamiliar to alien litigants accustomed to common law jurisdictions. Mere unfamiliarity, how-

civil law countries from earliest times looked to written codes, such as the Corpus Juris Civilis of Justinian, as sources of law. See generally J. VANCE, SOURCES OF LATIN AMERICAN LAW (1943); C. WALTON, THE CIVIL LAW IN SPAIN AND SPANISH AMERICA (1900). The Corpus Juris Civilis was never accepted in England, where customs and usages and, eventually, court decisions interpreting and defining them, came to be the primary source of law. P. EDER, A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW 4-6 (1950). "The Latin jurist is apt to carry the analogy of natural physical laws further than we care to. Just as there are natural laws governing the universe which it is within the province of the scientist to discover, so there are natural laws, he thinks, governing human relations which it is within the province of the jurist to ascertain. Within the framework of these natural laws, it is the duty of the legislator to lay down in advance the rules that shall govern human conduct and not leave the ascertainment of these rules to the haphazard decision of the courts when and if private litigants choose to thrash them out at their own risk and expense." *Id.* at 7. As a result, in Latin America, decisions cannot, as in the common law system, constitute binding precedent for future decisions. The Civil Code of Chile, for example, states in art. 3 that "Judicial decisions have no binding effect except in the cases in which they are pronounced." Article 17 of the Colombian Civil Code is almost identical. There are, however, limitations to this generalization, and the judge's power to interpret abstract code provisions, coupled with constant improvement in facilities for reporting decisions, as in Venezuela and in Argentina, are perhaps eroding in strict application. In Mexico, moreover, a series of five consecutive decisions by the supreme court on the same constitutional point will bind all federal and state courts. LEY DE AMPARO DE 1936, art. 148. H. CLAGETT, *supra* note 70, at 125, and discussion therein. Also, as a practical matter, lower courts will follow decisions of the supreme court if they wish to avoid being overruled on appeal. See H. DE VRIES & J. RODRIGUEZ-NOVAS, *supra* note 69, at 197-98. It is interesting to note, however, that the 1949 Peron amendments to the Argentine Constitution, which provided in art. 95 that supreme court decisions interpreting the constitution created judicial precedent binding on all other courts and judges in the country, did not survive the dictator's downfall. For a brief comment discussing procedures to eradicate the Peron amendments ("the profanities of 1949"), see Montaña, *The Constitutional Problem of the Argentine Republic*, 6 AM. J. COMP. L. 340, 344 (1957).

77. "Congress alone has the power to interpret the Constitution in a manner generally obligatory and to resolve doubts which may arise concerning the meaning of any one or more of its precepts. Thus Congress alone has jurisdiction to declare whether a law or legislative decree is or is not unconstitutional." THE CONSTITUTION OF THE REPUBLIC OF ECUADOR 1946, art. 189 (Pan American Union ed. 1961), *discussed in* Eder, *supra* note 69, at 573, 597.

78. H. CLAGETT, *supra* note 70, at 138-39; Eder, *supra* note 69, at 610-12.

ever, hardly justifies pleas of denial of justice, although it underlines emphatically the necessity of intelligent selection of local counsel, whose training and legal outlook may differ markedly from that of his United States counterparts.⁷⁹

Procedure in Latin American lawsuits is largely written, with little provision for oral testimony in court or for direct or cross-examination of parties and witnesses by opposing attorneys. The testimony of witnesses is normally not taken in open court, but before a judge's secretary or clerk, and then only as to factual matters and upon written interrogatories supplied by the parties. The clerk, who generally is not a lawyer, reads the questions to the witness and either records the answers in longhand or on a typewriter. If the answer is lengthy, he composes a summary. While attorneys representing the opposing parties may be present, they may not question witnesses directly, but must use the clerk as an intermediary. In special circumstances the judge's presence may be requested, but this is usually not done. The written answers are then placed in the case file, which the judge reads before rendering his decision.⁸⁰

Also, the jury trial has never attained the importance in Latin America which it enjoys in our own country. Although various constitutions mention the right to trial by jury, it is nearly always in connection with criminal actions, rather than civil cases, and in a number of countries its use is restricted further to libel actions.⁸¹ Latin Americans claim that promptness and certainty in the administration of justice would be imperiled if juries were utilized as triers of facts.⁸² Since in most civil law nations judges are career officials, experience and training supposedly leave them better qualified to interpret both the facts and the procedural codes' evidentiary provisions which limit their fact-finding discretion. I suggest that the explanation may have more sociological overtones, and that juries may ill-suit societies which are not homogeneous, and which are composed of supreme individualists segregated from each other by

79. Dawson, *Professional Interchange Among Lawyers in the Americas*, 53 A.B.A.J. 903, 905 (1967).

80. See comparison in EDER, *supra* note 76, at 37-38, of trials in the United States and in Latin America. There are, of course, variants from this central theme. Article 366 of the Peruvian Code of Civil Procedure, in providing for testimony by the parties, allows a litigant, or his attorney, to question the other party directly and orally. CODIGO DE PROCEDIMIENTOS CIVILES, art. 366 (J. Fajardo ed. 1967).

81. See discussion in CLAGETT, *supra* note 70, at 116-22; EDER, *supra* note 76, at 39-41. In some countries constitutional provisions for jury trials have never been implemented, even in criminal actions. CLAGETT, *supra* note 70, at 116-22.

82. CLAGETT, *supra* note 70, at 117-18. The Brazilian experience suggests that the opposite may be true. P. GARLAND, *A BUSINESSMAN'S INTRODUCTION TO BRAZILIAN LAW AND PRACTICE* 22 (1966).

visible hierarchal distinctions based upon wealth, power, social status, culture and education.⁸³

In the absence of a jury system, the rules of evidence, which in Latin America are included within the articles of the codes of procedure, did not develop, as did ours, through accumulation of judicial precedents designed to prevent juries from being prejudiced or misled. Therefore the complicated judge-made precepts surrounding the hearsay rule and its exceptions are unknown. Instead, the tendency is to admit as much evidence as possible, leaving the weighing thereof to the court.⁸⁴

Nevertheless, Latin American codes restrict more narrowly than we those persons who can testify in court. Article 450 of the Peruvian Code of Civil Procedure prohibits from serving as witnesses persons under eighteen years of age, the insane, those deprived of the use of reason by drunkenness or some other cause at the time the deed occurred about which they are to testify, deaf-mutes who cannot read or write, persons considered unworthy of belief due to notorious bad habits or vagrancy, perjurers, and those sentenced to prison.⁸⁵

The Argentine Code is not as restrictive, although article 427 excludes spouses and those in direct line of descent from the parties,⁸⁶ as does article 453 of the Peruvian Code, with certain limitations.⁸⁷ Under article 443 of the Argentine Code, questions asked witnesses must relate only to facts, while article 446 states that anyone who

83. For an interesting profile of the highly individualistic Argentine national character, with its decidedly European orientation, see T. FILLOL, *SOCIAL FACTORS IN ECONOMIC DEVELOPMENT: THE ARGENTINE CASE* 5-39 (1961). F. Tannenbaum, referring to Guatemala, with its large Indian populace which participates only marginally in national economic and political life, writes "there can be no national leadership because culturally there is no nation." F. TANNENBAUM, *TEN KEYS TO LATIN AMERICA* 116 (1960). Guatemala is, in effect, a non-national state. Dawson, *Labor Legislation and Social Integration in Guatemala: 1871-1944*, 14 *AM. J. COMP. L.* 124, 127-28 (1965). The same may be said of Peru, Ecuador and Bolivia, which are clearly divided culturally between majorities of a primarily aboriginal, non-European orientation, and minorities who consider themselves part of the twentieth century western world. *SOCIAL CHANGE IN LATIN AMERICA TODAY: ITS IMPLICATIONS FOR UNITED STATES POLICY* 68-176 (Council on Foreign Relations ed. 1960).

84. This accords with our own jurists' most recent thinking, as demonstrated by the liberal admissibility requirements of the *MODEL CODE OF EVIDENCE*, rules 501-531 (1942).

85. *Supra* note 80. The Chilean *CODIGO DE PROCEDIMIENTO CIVIL* art. 357 (Edición Oficial ed. 1964), excludes also "those who make a profession of testifying in court." According to art. 480 of the Peruvian Code, a witness who does not speak Spanish may be examined through an interpreter appointed by the judge. Article 491 provides for expert testimony upon "points which demand special knowledge in some science or art." *Supra* note 80, art. 480-91.

86. *CODIGO PROCESAL CIVIL Y COMMERCIAL DE LA NACION* (Secretaria de Estado de Justicia ed. 1967).

87. *Supra* note 80. These persons can, however, testify concerning age, civil status, and family matters. See also art. 359 of the Chilean Code. The Chilean Code in art. 365 also provides for oral examination by the judge. *Supra* note 85, art. 359 & 365.

interrupts a witness's testimony may be fined.⁸⁸ No party can, without court permission, summon over twelve witnesses.⁸⁹

Of major concern to aliens are the very short periods of time which many Latin American procedural codes provide for answering pleadings or for appealing adverse decisions. For example, the Peruvian Code allows ten days after notification to answer complaints and gives five days within which to appeal.⁹⁰ Honduras allows three days within which to appeal from final judgment,⁹¹ while the Argentine and Chilean Codes each allow five days.⁹² These periods seem rather brief when litigation involving litigants thousands of miles apart is today such a real possibility. Other provisions, however, may indicate that these periods only become operative once a party has received notification in the form of a complaint or notice of final judgment.⁹³ Thus, the time period might not start to run until a defendant in, for example, the United States, had been served with appropriate papers by the consul of the foreign nation involved. Moreover, the Argentine Code, which ordinarily allows fifteen days to answer complaints, also provides extensions based upon one day for every two hundred kilometers between a defendant and the court where litigation has begun.⁹⁴ The Chilean Code grants defendants located abroad eighteen days to answer, plus a number of days equivalent to the time in which a defendant would have to answer a complaint in his own jurisdiction.⁹⁵

These curtailed periods are not inexplicable. Very often procedural codes were adopted a number of years ago, before international litigation became the distinct possibility it is today, so that their drafters contemplated only parties in the same city or town, if not country. Or, as with the new Argentine Code, drafters felt that short time periods would accelerate court procedures and relieve court congestion.⁹⁶

This raises the problem of judicial efficiency. One of the most frequently-heard complaints among alien businessmen operating in Latin America is that while court procedures are generally fair, an inordinately long time elapses before decisions are rendered. There is, of course, no doubt that justice delayed is justice denied, and

88. *Supra* note 86.

89. *Supra* note 86, art. 430.

90. *Supra* note 86, arts. 320 & 1093.

91. CODIGO DE PROCEDIMIENTO Y ENJUICIAMIENTO CIVIL DE HONDURAS 1906, art. 203 (1949 ed.).

92. *Supra* note 86, art. 244; *supra* note 85, art. 189.

93. *Supra* note 80, art. 1093.

94. *Supra* note 86, arts. 158, 335, 338.

95. *Supra* note 85, art. 259.

96. Personal interviews in Buenos Aires during February, 1967.

dilatory administration of justice has on more than one occasion inspired complaints of denial of justice.⁹⁷ However, before casting the first stone, one might consider that in New York there has been no addition to the Manhattan and the Bronx Supreme Courts in forty-three years. Calendars are incredibly clogged. In the supreme court there is a present delay of over six months in tort jury cases in some fifteen counties, ranging as high as fifty-four months in Suffolk County and fifty months in Dutchess and Rockland. Pending cases now total over 67,500 for the New York Supreme Court, and 140,000 for New York City's civil court.⁹⁸

Latin American court congestion difficulties are intimately related not only to the increased complexities and congestion of urban life which beset courts in the United States, but also to waves of internal immigration as country dwellers flock to the cities to escape the hopeless poverty of rural life. They eke out existence in hovels built from packing cases, cardboard, mud bricks and scrap lumber in the *favelas* in Rio de Janeiro, the *barriadas* of Lima, and the *villas de miseria* in Buenos Aires. They cling to the hills surrounding Bogotá and Caracas, often burrowing caves in the ground for shelter. Their presence has created grave political, social and health dilemmas, as well as problems of bitter social maladjustment, crime and law enforcement.⁹⁹ The situation does not appear to be improving, since galloping birth rates quickly cancel any gains in new housing erected by well-intentioned governments.

B. Civil Rights and Their Enforcement

Latin American constitutions promise citizens and aliens certain minimum civil rights. The Peruvian Constitution provides that no

97. RESTATEMENT, *supra* note 61, § 181(h), includes among factors to be considered in determining if an alien has had a fair trial, whether he has had the benefit of "reasonable dispatch by the tribunal or administrative authority in reaching a determination." Courts in Brazil and Mexico, for example, are so congested that they cannot pass promptly upon applications for *mandados da seguranza* and *amparo*, which were designed to assure swift relief from governmental violations of basic civil rights. Eder, *supra* note 69, at 584, 602. A member of the Brazilian Bar writes "given the general lack of expeditious handling of civil cases by the judicial system plus the relative unavailability of emergency remedies, plus traditionally low awards, it is desirable to conduct one's affairs in such a manner that if it is necessary to resort to court, the most rapid and best protected remedy is available. Generally speaking, this would invoke an executory or summary proceeding, which in turn generally presupposes an obligation which is 'liquid and certain,' such as a negotiable instrument or a secured credit (by mortgage, pledge, etc.), which normally does not include a suit upon a contract." GARLAND, *supra* note 82, at 23.

98. Fuld, *The Gordian Knot: Congestion and Delay in Our Courts*, 39 N.Y.S.B.A.J. 488, 489 (1967).

99. W. BENTON, *THE VOICE OF LATIN AMERICA* 17-18 (1961); TANNENBAUM, *supra* note 83, at 206-07.

one may be detained without written warrant except in cases of *fraglante delicto*, and, in any event, the detained person must be arraigned within twenty-four hours.¹⁰⁰ The Constitution also guarantees rights of peaceful assembly, freedom of the press, rights of petition, and the inviolability of the home against unauthorized entry.¹⁰¹ Article 23 extends these rights to resident aliens.¹⁰² In Brazil article 150 assures resident aliens and nationals of: (1) freedom of speech, press, peaceful assembly; (2) freedom from ex post facto legislation; (3) the right to jury trial in homicide cases, to a full defense at law, to due process of law, to habeas corpus; and (4) the right to sue the government for its acts.¹⁰³ Article 20 of the Argentine Constitution grants foreigners, whether or not they are residents, all the civil rights of citizens.¹⁰⁴ The Ecuadorean Constitution in article 180 states: "In Ecuador foreigners enjoy, within the limits of the law, the same rights as Ecuadorians, with the exception of political rights and the guarantees which the Constitution establishes in favor of Ecuadorians only."¹⁰⁵

To protect these rights from abuse by the state, Latin Americans have devised several procedural safeguards, the efficacy of which may be inversely proportional to the strength of the regime in power, and, very often, related to the wealth, education and influence of the person invoking them. These devices include habeas corpus, the Brazilian *mandado de seguridad*, the Mexican *amparo*, and the Colombian popular action.

The existence of these safeguards stems from the ability of individuals, be they aliens or nationals, to sue the state. In Latin America the state is generally considered a juridical person with rights and obligations at private law, and can therefore be summoned to account for its actions in open court.¹⁰⁶ The common law theory that the sovereign can do no wrong is not well known, despite Latin Ameri-

100. CONSTITUTION OF THE REPUBLIC OF PERU 1933, art. 56 (Pan American Union ed. 1965).

101. *Id.* arts. 57-66.

102. *Id.* art. 23.

103. CONSTITUTION OF BRAZIL 1967 (Pan American Union ed. 1967).

104. CONSTITUTION OF THE REPUBLIC OF ARGENTINA 1853 (Pan American Union ed. 1963).

105. *Supra* note 77.

106. 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 411-13 (1967), citing, Sullivan, *The Alien's Right to Bring Suit Against the State: A Preliminary Survey*, memorandum, May 1, 1961, MS. DEPT. OF STATE, file 711, 332/5-161. There are exceptions. The 1952 Guatemalan Ley de Reforma Agraria indicated there could be no judicial review of expropriations made pursuant to it. Recourse could be had to executive agencies, but the times for appeal were so short that it was theoretically possible "to expropriate a property fully and totally within six weeks." Stern, *Guatemalan Agrarian Reform Law*, 2 AM. J. COMP. L. 235, 237 (1953).

can proclivities for strong central government. Thus, in Colombia the *Consejo de Estado*, the nation's supreme administrative court, has exclusive jurisdiction over claims for compensation arising from expropriations by the state.¹⁰⁷ Even when in 1963 the administration of Argentina's President Iba cancelled petroleum concession contracts executed by the predecessor Frondizi government, the oil companies, most of which were foreign, were able to obtain court orders restraining Yacimientos Petrolíferos Fiscales, the government oil monopoly, from seizing the fields in question.¹⁰⁸

Of all Anglo-American institutions, habeas corpus has been most admired and imitated by our neighbors to the south. Brazil was the first Latin American nation to adopt habeas corpus, and in the Penal Code of 1830 made it a criminal offense for judges to refuse or delay issuance of the writ, which in 1871 was specifically made available to aliens.¹⁰⁹ While at first the writ was designed to prevent restraints upon movement, it was eventually extended by courts to threats to personal liberty even where no detention had yet occurred. Thus, the first Brazilian republican constitution in 1891 provided: "Habeas corpus is given whenever an individual suffers or is in imminent danger of suffering violence or coercion by reason of illegality or abuse of power."¹¹⁰ Since illegality was considered to include unconstitutionality, the writ was extended to obtain judicial review of legislative and executive acts. However, a 1926 constitutional amendment limited the writ to its original purpose—protection against unjustifiable restrictions on freedom of movement.¹¹¹

107. H. CLAGETT, *THE ADMINISTRATION OF JUSTICE IN LATIN AMERICA* 61-63 (1952); personal interviews in Bogotá, Colombia, August, 1965.

108. For analysis of the background of the cancellation, see Luce, *Argentina and the Hickenlooper Amendment*, 54 CALIF. L. REV. 2078 (1966). A January 13, 1966, decision by the Peruvian Supreme Court should be noted. Until recently the sale of matches in Peru was a government monopoly. The government imported matches from the Swedish Match Company, reselling them in boxes under a very colorful trademark depicting a Peruvian Llama, which had been registered in Peru in the name of the Swedish Match Company since 1924. In 1954 the monopoly was abolished. In 1963 a private firm in Lima entered into an agreement with the Swedish Match Company to import matches and sell them under the Llama trademark. Legislators in congress then alleged that the Swedish company was using the trademark improperly, since it had become state property due to its use by the government monopoly for over forty years. On September 30, 1964, the executive branch ordered the mark re-registered as state property. The Swedish company sued, receiving a favorable decision in First Instance, losing in the Second Instance, and then, winning a final victory in the Supreme Court. The Court ordered the government to re-register the trademark in the plaintiff's name. BOLETIN INFORMATIVO DEL MINISTRO DE RELACIONES EXTERIORES No. 1443, Lima, February 15, 1966.

109. Eder, *Habeas Corpus Disembodied: The Latin American Experience*, in *TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW* 463, 466-67 (1961).

110. *Id.* at 467.

111. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 581 (1960).

Despite the current Brazilian military regime, habeas corpus is still obtainable by aliens and citizens alike under article 150(20) of the 1967 constitution, and has been used effectively to minimize dangers to personal liberty represented by recent expansion of the military tribunals' jurisdiction over civilians.¹¹²

Brazilians and aliens may also rely upon the "writ of security," or *Mandado de Seguranza*, as a procedural remedy similar to our injunction¹¹³ to enjoin government officials from acting in clear violation of the laws or of the Constitution.¹¹⁴ A commonly invoked procedure,¹¹⁵ its great value lies in preventing government action before it occurs, thus avoiding the subsequent necessity of recourse to administrative or judicial claim procedures to recover damages based upon the illegal action. The writ must be filed in the Supreme Court when it is against the President of the Republic, and in the Federal Court of Appeals when cabinet ministers are its target.¹¹⁶ Since it is considered a "summary action," it is adjudicated expeditiously.¹¹⁷

In Mexico, the *amparo* remedy was developed to test the unconstitutionality of legislation and to enjoin government action by extending the habeas corpus concept to all constitutional freedoms. However, it is available only in federal courts, since only they can declare statutes unconstitutional.¹¹⁸ The *amparo* complaint must describe the act against which the action is brought, the constitutional provisions deemed violated, and the manner in which violation occurred. The defendant authority must then answer, after which there is a court

112. Article 120(1) of the 1967 Brazilian Constitution extends the jurisdiction of military courts to "civilians in cases provided for by law, for the repression of crimes against national security or the military institutions, with the right of ordinary military appeal to the federal Supreme Court." *Supra* note 103, art. 120(1). Although practically all Latin American nations recognize the right to habeas corpus, efficacy may depend upon the attitude of the regime in power. In Argentina during the Peron era judges who granted the writ were subject to reprisals. Eder, *supra* note 109, at 470.

113. "A writ of security shall be granted to protect a clear and certain right of an individual not protected by *habeas corpus*, regardless of what authority may be responsible for the illegality or abuse of power." *Supra* note 103, art. 150(21).

114. CLAGETT, *supra* note 107, at 141-42; Eder, *supra* note 109, at 582; Eder, *supra* note 111, at 468-69.

115. H. DE VRIES & J. RODRIGUEZ-NOVAS, in *THE LAW OF THE AMERICAS* 196 (1965) state that in the Federal District, between 1950 and 1958, approximately 22,000 *mandados* were filed, as against a total of 9,942 actions of other types brought against the government.

116. CLAGETT, *supra* note 107, at 142; Eder, *supra* note 111, at 583.

117. *But see* Eder, *supra* note 111, at 584.

118. CONSTITUTION OF THE UNITED MEXICAN STATES 1917, art. 107, *as amended* (Pan American Union ed. 1964). See general discussion in CLAGETT, *supra* note 107, at 135-39; Eder, *supra* note 111, at 599-602. The *amparo* concept has been adopted in several other Latin American states, including Guatemala. CONSTITUTION OF THE REPUBLIC OF GUATEMALA 1965, arts. 80-84 (Pan American Union ed. 1966).

hearing in which evidence is offered. The action can only be directed against an act of a public authority, be it legislative, administrative, or judicial. Proof is required of direct personal injury, although this need not be financial.¹¹⁹

There are limitations on *amparo*, since in general it cannot enjoin expropriations for the public benefit. Thus, Mexican courts held that *amparo* did not lie against decrees expropriating foreign oil properties because the community interest was involved.¹²⁰ Furthermore, as already noted,¹²¹ decisions of unconstitutionality apply only to the case at bar, and precedent binding on lower courts is created only when the supreme court renders five identical *amparo* decisions on the same constitutional point.¹²²

The Colombian Constitution, article 214, enables private citizens to challenge the constitutionality of laws and decrees before the Supreme Court.¹²³ This, the so-called popular action, resembles our declaratory action except that there need be no actual controversy. Moreover, it "permits challenge of statutes dealing with purely administrative matters not likely to become the subject of private litigation and thus integrates the duty of the Supreme Court to act as guardian of the whole Constitution and not merely of the Bill of Rights."¹²⁴ It has been utilized to hold confiscation of enemy alien property unconstitutional¹²⁵ and to invalidate legislation expropriating private property for public use without compensation, interfering with freedom of speech, and granting special privileges running counter to the principle of equality before the law.¹²⁶

However, the effectiveness of the relief promised by habeas corpus, the *mandado de seguridad*, *amparo*, and the popular action may be severely diluted by another Latin American institution, the *suspensión de garantías* or *estado de sitio*, by which, in times of national emergency, the exercise of basic civil rights may be temporarily forbidden. At such times either the issuance of the protective writ itself may

119. Eder, *supra* note 111, at 600.

120. Ramirez, Orantes, Burgoa, Clagett, *The Mexican Suit of Amparo*, 33 GEO. L.J. 418 (1945).

121. *Supra* note 76.

122. NUEVA LEY DE AMPARO, arts. 192 & 193, DIARIO OFICIAL, January 10, 1936; as amended DIARIO OFICIAL April 30, 1968.

123. CONSTITUTION OF THE REPUBLIC OF COLOMBIA 1886 (Pan American Union ed. 1962).

124. Eder, *supra* note 111, at 592.

125. Eder, *Confiscation of Enemy Alien Property Held Unconstitutional By Colombian Supreme Court*, 54 AM. J. INT'L L. 159 (1960).

126. Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Columbia: Nature and Evolution of the Present System*, 23 S. CAL. L. REV. 484 (1950).

be suspended or, as is more likely, enjoyment of rights which the writ is designed to enforce may be denied.

Thus, article 69 of the Peruvian Constitution, which states that "all the individual and social rights recognized by the Constitution admit of the action of *habeas corpus*," extends *habeas corpus* beyond physical detention to assure freedom from arrest without a warrant, the right of public assembly, and the inviolability of the home and correspondence from unauthorized search and seizure.¹²⁷ Article 70 of the Constitution states, however, that "when necessary for the security of the State," the executive branch may totally or partially suspend the aforesaid guarantees, eliminating, in effect, these particular rights for which *habeas corpus* could otherwise be invoked.¹²⁸ In Argentina the same situation may be produced by declaration of a state of siege "in the event of internal disorder" either by Congress or by the President when Congress is not in session.¹²⁹ Article 151 of the Guatemalan Constitution grants the President the power, in the event of invasion, "serious disturbance of the peace, public disaster, or of activities against the security of the State," to suspend guarantees relating to arrest without warrant, freedom of speech, freedom from unwarranted search and seizure, and the right of peaceful assembly,¹³⁰ all of which would ordinarily be protected by *habeas corpus* and *amparo*. Article 107 of the Honduran Constitution authorizes the President to suspend the above guarantees and, in addition, to suspend the right of *habeas corpus* itself.¹³¹

The foregoing suspensions apply to nationals and aliens alike. In some circumstances they may even be directed especially to aliens, although not all constitutions are as clear as that of Colombia, which states in article 11: "foreigners shall enjoy in Colombia the same civil rights that are accorded Colombians. But the law may, for reasons of public order, subject foreigners to special conditions or deny them the exercise of specified civil rights."¹³²

Occasionally special domestic legislation, such as the 1967 Argentine Repression of Communism Act,¹³³ may pose special difficulties in the civil rights area. This legislation, drafted by the Government of Gen-

127. The guarantee is supplemented by art. 133, whereby a petition against the state may be brought in the courts in respect of any regulation, decision or government decree of general application which may be in violation of the constitution or of the law. *Supra* note 100, arts. 69 & 133.

128. *Supra* note 100, art. 70.

129. *Supra* note 104, arts. 67(26) & 86(19).

130. CONSTITUTION OF GUATEMALA, *supra* note 118, art. 151.

131. CONSTITUTION OF THE REPUBLIC OF HONDURAS 1965, art. 107 (Pan American Union ed. 1966).

132. *Supra* note 123, art. 11.

133. REPRESSION DEL COMUNISMO Ley No. 17,401, BOLETIN OFICIAL 29/VIII/67.

eral Carlos Ongania, provides imprisonment of one to eight years and, in the case of aliens or naturalized citizens, expulsion from the country, for persons classified as "Communists."¹³⁴ Article 1 defines Communists as "physical or legal persons who carry on activities proven to be of undoubtedly Communist ideological motivation. Activities carried on prior to this law may be taken into account."¹³⁵

An administrative agency determines in secret proceedings, if persons are Communists, and then notifies the person involved of its decision. The determination may then be appealed through administrative channels to the executive power.¹³⁶ Once administrative remedies are exhausted, an aggrieved party may appeal to a federal court, which will only reverse the administrative decision if it indicates "manifest arbitrariness."¹³⁷

Natural persons classified as Communists may not, *inter alia*, become citizens, hold public office, teach in public or private schools, receive state scholarships, operate radio or television stations, acquire, direct or administer publication activities, or hold offices in labor unions.¹³⁸ Companies which are being investigated under the Act may be "intervened" by the government and their activities suspended.¹³⁹ Aliens "who, because of their backgrounds, are reputed to be Communists" may be denied entry into the country.¹⁴⁰ Persons classified as Communists under the Act may, at the end of five years, petition for their "rehabilitation," offering evidence that during this period they have not engaged in subversive activities.¹⁴¹

The preamble to the Act states that there is no intent to penalize the rights of citizens to freedom of expression concerning "political and social events," and that it is only directed against Communist inspired "activities disturbing to or subversive of the social order."¹⁴² Nevertheless, the legislative standards seem quite vague and susceptible to varying interpretations.

134. Ley No. 17,401, arts. 11, 14 & 15; Decreto 8329 of November 13, 1967, establishes in greater detail the procedures to be followed in classification, 14 REVISTA DE LEGISLACION ARGENTINA, JURISPRUDENCIA ARGENTINA 69 (Nov., 1967).

135. Ley No. 17,401, art. 1.

136. *Id.* at arts. 3 & 4.

137. *Id.* at art. 4.

138. *Id.* at art. 6.

139. *Id.* at art. 9.

140. *Id.* at art. 7. This prohibition does not apply to members of the diplomatic or consular corps or to members of official government missions.

141. *Id.* at art. 10.

142. BOLETIN INFORMATIVO: ANALES DE LEGISLACION ARGENTINA No. 26 at 7 (Sept. 11, 1967).

V. CONCLUSION

The foregoing is a highly selective resumé of treatment accorded aliens under procedural legislation in various Latin American nations. A more comprehensive survey would include consideration of the influence of aboriginal law upon current legal attitudes, the implications of code systems with respect to legal reasoning, the arbitration of private disputes which transcend national frontiers, the availability of legal aid, the enforcement of foreign judgments, and the treatment accorded enemy aliens.

In general, however, it appears that aliens receive equitable treatment in Latin American courts, especially in commercial matters, although to a certain extent this may vary with the political environment and the nationality of the particular alien. An alien which is a citizen of a state with which the host nation wishes to maintain good relations may receive better treatment in the administration of the law than citizens of nations with which the host state has boundary disputes or other disagreements.¹⁴³

Jurisprudential and political considerations aside, the personal adjustment of the alien to the local environment may also seriously affect the consideration which his claim receives from both national courts and from his own diplomatic representatives. Willingness to cooperate with municipal authorities, to observe the substantive laws of the host state even when nationals may not do so, and to abide by local court and administrative procedures and customs is not only the first line of defense before national tribunals, but also builds a record of good faith which the alien may eventually find indispensable in persuading his own state to espouse his claim.

143. This is equally true in substantive areas of the law. One commentator suggests that although both English and United States oil properties were nationalized by Mexico, English companies received "a proportionately greater recompense than did their American counterparts" because historically the United States had long been regarded by Mexicans as aggressive and imperialistic. CLINE, *THE UNITED STATES AND MEXICO* 250 (1940).