

7-1-1992

# A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil

Keith S. Rosenn

*University of Miami School of Law*, [krosenn@law.miami.edu](mailto:krosenn@law.miami.edu)

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#)

---

## Recommended Citation

Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. Miami Inter-Am. L. Rev. 659 (1992)

Available at: <http://repository.law.miami.edu/umialr/vol23/iss3/6>

This Article is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## ARTICLES

# A COMPARISON OF THE PROTECTION OF INDIVIDUAL RIGHTS IN THE NEW CONSTITUTIONS OF COLOMBIA AND BRAZIL

KEITH S. ROSENN\*

|  |     |
|--|-----|
| I. INTRODUCTION .....                                  | 660 |
| II. A COMPARISON OF PROTECTED INDIVIDUAL RIGHTS .....  | 661 |
| A. <i>The Right to Live</i> .....                      | 661 |
| B. <i>The Right to Humane Treatment</i> .....          | 664 |
| C. <i>Due Process</i> .....                            | 665 |
| 1. Retroactivity .....                                 | 666 |
| 2. Arrest or Detention .....                           | 667 |
| 3. Right to a Fair Trial .....                         | 668 |
| 4. Right to a Speedy Trial .....                       | 668 |
| 5. Presumption of Innocence .....                      | 669 |
| 6. Right to Appeal .....                               | 669 |
| 7. Double Jeopardy .....                               | 669 |
| 8. Right to Counsel .....                              | 670 |
| 9. Self-Incrimination and Testimonial Privileges ..... | 670 |
| 10. Exclusion of Illegally Obtained Evidence .....     | 671 |
| 11. Cruel and Unjust Punishment .....                  | 671 |
| 12. Extradition .....                                  | 672 |

---

\* Professor of Law, University of Miami School of Law. B.A., Amherst College; LL.B., Yale University Law School.

|  |     |
|--|-----|
| D. <i>Equal Protection</i> .....                                     | 673 |
| E. <i>The Right to Vote</i> .....                                    | 674 |
| F. <i>Freedom of Speech and of the Press</i> .....                   | 675 |
| G. <i>Freedom of Religion</i> .....                                  | 676 |
| H. <i>Right to Privacy</i> .....                                     | 677 |
| III. PROCEDURAL MEASURES TO IMPLEMENT INDIVIDUAL RIGHTS .....        | 678 |
| A. <i>States of Exception</i> .....                                  | 678 |
| B. <i>Procedural Measures to Enforce Constitutional Rights</i> ..... | 680 |
| 1. Habeas Corpus .....   | 681 |
| 2. The Collective Writ of Security .....                             | 682 |
| 3. Habeas Data .....   | 682 |
| 4. Amparo or Tutela .....  | 683 |
| 5. The Direct Action of Unconstitutionality .....                    | 685 |
| 6. Miscellaneous Actions .....                                       | 686 |
| C. <i>The Self-Executing Nature of Individual Rights</i> .....       | 686 |
| 1. Action of Unconstitutionality for Omission .....                  | 687 |
| 2. The Mandate of Injunction .....                                   | 688 |
| IV. CONCLUSION .....   | 688 |

## I. INTRODUCTION

Two of the most recent Latin American constitutions, the Colombian Constitution of July 1991<sup>1</sup> and the Brazilian Constitution of October 1988,<sup>2</sup> embody exceptionally ambitious attempts to afford constitutional protection to individual rights. Both constitutionalize a vast array of individual and collective rights, including a number of potentially problematic affirmative rights. Moreover, both devote considerable care and attention to the creation of pro-

---

1. CONSTITUCIÓN POLÍTICA DE COLOMBIA [COLOM. CONST.] (July 20, 1991). The Spanish text with indexes and brief commentary is published in GERMAN PLAZAS G., *LA NUEVA CONSTITUCIÓN PRESENTE Y FUTURO DE COLOMBIA (TEXTO OFICIAL COMENTADO)* (1991); REPÚBLICA DE COLOMBIA, *ESCUELA SUPERIOR DE ADMINISTRACIÓN PÚBLICA DE COLOMBIA* (1991).

2. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [BRAZ. CONST.] (Oct. 5, 1988). The Portuguese text is officially published by the Centro Gráfico do Senado Federal, *CONSTITUIÇÃO: REPÚBLICA FEDERATIVA DO BRASIL* (1988). For English translations, see *CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL* (Centro Gráfico do Senado Federal 1990); Keith S. Rosenn, *1988 Constitution of the Federative Republic of Brazil—Annotated English Translation*, in *A PANORAMA OF BRAZILIAN LAW* 383-518 (Jacob Dolinger & Keith S. Rosenn eds. 1992).

cedural and administrative mechanisms to ensure that these constitutional rights will actually be enforced.

Unlike Brazil, Colombia's Constituent Assembly began with a well organized and detailed draft prepared by a bright young team of lawyers well versed in comparative constitutional law.<sup>3</sup> Consequently, Colombia's Constitution is far better organized and structured than Brazil's, which was drafted from scratch by the entire 559-member Congress, divided into eight committees. The organizational superiority of the Colombian Constitution is reflected in its treatment of fundamental rights, which are placed in a separate chapter and divided into 31 separate articles. In contrast, the Brazilian Constitution places fundamental rights into a single humongous article 5, which has 77 subparts and 26 additional subdivisions. Some of these fundamental rights later reappear in subsequent articles.<sup>4</sup> Yet the individual rights guaranteed by both Constitutions are strikingly similar and signify an impressive advance in Latin American constitutionalism.

This study begins by comparing and contrasting the individual rights that have been constitutionally guaranteed in Brazil and Colombia. It then compares the procedural mechanisms created to implement these rights. It concludes by suggesting the difficulties both countries are likely to encounter in insuring that these individual rights are afforded meaningful protection in practice.

## II. A COMPARISON OF PROTECTED INDIVIDUAL RIGHTS

### A. *The Right to Live*

Both constitutions guarantee the right to live, but Colombia's guarantees this right in broader terms than does Brazil's. Colombia's Constitution states that the right to live is inviolable and flatly prohibits the death penalty.<sup>5</sup> On the other hand, Brazil's Constitution permits imposition of the death penalty by military

---

3. PRESIDENCIA DE LA REPÚBLICA, PROYECTO DE ACTO REFORMATARIO DE LA CONSTITUCIÓN POLÍTICA DE COLOMBIA (Feb. 1991) [hereinafter PROYECTO]. For background on the events leading to the drafting of the Colombian Constitution, see William Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39 (1991).

4. For a criticism of the organizational and structural flaws of the Brazilian Constitution, see Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 776-77 (1990).

5. COLOM. CONST. art. 11.

tribunals, but only during periods of declared war.<sup>6</sup>

The draft version of Colombia's Constitution provided for a right to die with dignity,<sup>7</sup> but this right disappeared in the final text. While avoiding controversy concerning euthanasia, the deletion lamentably left the right to die and to dispose of one's organs for medical purposes constitutionally unprotected.

The introductory clause to Article 5 of the Brazilian Constitution guarantees to all Brazilians and resident aliens the inviolability of several basic rights, *inter alia*, the right to live. The semi-final draft of the Brazilian Constitution contained a bizarre provision, felicitously deleted in the final draft, that guaranteed a right to live, even in cases of fatal illness. Curiously, the text to the introductory clause of Article 5, which tracks that of previous Brazilian Constitutions, does not guarantee the right to live, or any other individual rights for that matter, to *non-resident* aliens, but the language in the introductory clause should not be interpreted literally. Many of the rights set out in Article 5, including the right to live, apply to everyone. On the other hand, some of these rights are guaranteed only for Brazilians and resident aliens, while a few are restricted solely to Brazilians.<sup>8</sup>

Unlike some Latin American constitutions,<sup>9</sup> both the Brazilian and Colombian constitutions avoid the questions of when life begins and whether a fetus shall be deemed a living person. Both are silent on the controversial issue of a right to an abortion, although each contains language from which such a right might be inferred. Article 15 of the Colombian Constitution guarantees the right to personal and family intimacy,<sup>10</sup> while Article 5(X) of the Brazilian

6. BRAZ. CONST. art. 5 (XLVI) (a). Brazil's Military Criminal Code permits imposition of the death penalty for several crimes, including treason and espionage. CÓDIGO PENAL MILITAR [C.P.M.] arts. 355 (treason) & 366 (espionage) (Decree-Law No. 1.001 of Oct. 21, 1969).

7. The draft added the following final sentence to the guarantee of the right to live: "The law that guarantees the right to die with dignity and to dispose of the organs of one's own body shall respect the wishes of the person." PROYECTO, *supra* note 3, at 7.

8. Jacob Dolinger, *Nacionalidade e direitos dos estrangeiros*, in 2 COMENTÁRIOS À CONSTITUIÇÃO 114-17 (F. Whitaker da Cunha coord. 1991).

9. *E.g.*, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, art. 3 (1985) ("The State guarantees and protects human life from its conception, as well as the integrity and security of the person."); CONSTITUCIÓN POLÍTICA DEL PERÚ, art. 2 (1979) ("Every person has the right . . . [t]o life . . . . Whoever is to be born shall be considered as born for all that favors him or her.").

10. The right to intimacy was proposed in Article 20 of the Proyecto, which explained that this right was intended to protect the private life of the individual and the family. PROYECTO, *supra* note 3, at 123. Although a right to intimacy is defined mainly in terms of

Constitution declares that intimacy and private life are inviolable.<sup>11</sup> Moreover, Article 42 of the Colombian Constitution, which seems curiously misplaced under the heading of Social, Economic and Cultural Rights, guarantees each couple the right to decide freely and responsibly on the number of children they will have. In a similar vein, Article 226 § 7 of the Brazilian Constitution makes "family planning the free decision of each couple," forbidding "any coercion on the part of official or private institutions." While generally understood to guarantee contraceptive and family rights other than abortion,<sup>12</sup> these constitutional provisions could conceivably be interpreted broadly to guarantee a right to abortion.<sup>13</sup> Finally, both Constitutions contain adaptations of the open-ended Ninth Amendment of the U.S. Constitution, suggesting that rights unspecified in the constitutional text may also be regarded as constitutionally protected.<sup>14</sup>

---

privacy and secrecy, at its core arguably lies the autonomy of a woman's decision whether to bear a child. In a classic article on the subject, Professor Kenneth Karst noted:

Because the decision to procreate implicates so intensely the values of intimate association, significant state interference with the choice *not* to procreate also requires justification by reference to state interests of the highest order. . . . Coerced intimate association in the shape of forced childbearing or parenthood is no less serious an invasion of the sense of self than is forced marriage or forced sexual intimacy.

Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 640-41 (1980) (footnotes omitted).

11. Early commentary on this section of the Brazilian Constitution suggests little awareness of the potential for developing the right of intimacy beyond the concept of the tort liability for invasion of personal privacy. See, e.g., 1 PINTO FERREIRA, *COMENTÁRIOS À CONSTITUIÇÃO BRASILEIRA* 79-80 (1989); 2 CELSO RIBEIRO BASTOS & IVES GANDRA MARTINS, *COMENTÁRIOS À CONSTITUIÇÃO DO BRASIL* 61-65 (1988).

12. Martha I. Morgan, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J.L. & FEMINISM 353, 396 (1992). A similar guarantee of freedom in family planning is found in Article 47 of the 1985 Guatemalan Constitution, which also guarantees the right to life from the moment of conception in Article 3. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, arts. 3, 47. See *supra* note 9.

13. Such broad interpretations are unlikely in Brazil and Colombia. Both countries are heavily Catholic, have legislation imposing severe criminal penalties for abortion, and have cultures that have inhibited women's access to family planning services. See Morgan, *supra* note 12, at 390-92; Jim Russell, *Reproductive Health: The United Nations Convention on the Elimination of All Forms of Discrimination Against Women as a Catalyst for Change in Colombia*, 49 U. TORONTO FAC. L. REV. 106, 109 (1991); José Gomes de Oliveira, *Coment, Aborto, moral e direito: um tema para a constituinte*, 295 REVISTA FORENSE [REV. FOR.] 497 (1986) (Braz.).

14. BRAZ. CONST. art. 5(LXXVII) § 2; COLOM. CONST. art. 94. A prior version of the Ninth Amendment, contained in Article 150 § 35 of the 1967 Constitution, was actually relied upon by the Brazilian Supreme Court to invalidate portions of the National Security Law. Judgment of February 21, 1968 (Vieira Netto), STF, 44 Revista Trimestral de Jurisprudência [R.T.J.] 322 (Braz.), translated in KENNETH L. KARST & KEITH S. ROSENN, LAW

On the other hand, Colombia, unlike Brazil, has ratified the American Convention on Human Rights.<sup>15</sup> Article 4(1) of that Convention states that the right to live "shall be protected by law and, in general, from the moment of conception."<sup>16</sup> Since Article 93 of the Colombian Constitution provides that international treaties and conventions recognizing human rights, if ratified by Congress, shall prevail as domestic law, the Colombian courts are unlikely to construe their Constitution creatively to include a right to abortion.

### B. *The Right to Humane Treatment*

In language that tracks Article 5 of the American Convention on Human Rights,<sup>17</sup> both the Brazilian and Colombian Constitutions declare that no one shall be submitted to torture, cruel, inhumane, or degrading treatment.<sup>18</sup> Colombia expands this guarantee to include forced disappearance,<sup>19</sup> though there is no explicit counterpart for this provision in the Brazilian Constitution. The experience of other Latin American countries where, during certain periods, forced disappearance became a common method of depriving inhabitants of their right to live, as well as all other due process rights, suggests that enforcement of such a guarantee may be beyond the power or independence of most judiciaries in the region.<sup>20</sup> On the other hand, recent decisions of the Inter-American Court of Human Rights ordering Honduras to pay damages of 1.5 and 1.3 million lempiras (\$750,000 and \$650,000) respectively to the families of victims of mysterious disappearances suggest that some re-

---

AND DEVELOPMENT IN LATIN AMERICA 113, 115-116 (Latin American Studies Series No. 28, 1975).

15. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 69, reprinted in 9 I.L.M. 673 (1970).

16. *Id.* art. 4(1).

17. *Id.* art. 5(2) ("[n]o one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment").

18. COLOM. CONST. art. 12; BRAZ. CONST. art. 5(III).

19. COLOM. CONST. art. 12.

20. In the widely cited case of *Pérez de Smith*, Judgment of December 21, 1978, CSJN, 300 Fallos 1283 (Arg.), the Argentine Supreme Court openly admitted that the refusal of the military government to cooperate by providing the Judiciary with information regarding the whereabouts of thousands of persons who had mysteriously disappeared had rendered habeas corpus an ineffective remedy and had produced "an absence of justice" in Argentina. For background on this and companion cases, see Alejandro M. Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action Under a State of Siege*, 4 HUM. RTS. L.J. 311, 332-37 (1983). See generally Howard M. Kleinman, Note, *Disappearances in Latin America: A Human Rights Perspective*, 19 N.Y.U. J. INT'L L. & POL. 1033-60 (1987).

lief may be available through international legal process.<sup>21</sup>

Article 17 of the Colombian Constitution prohibits slavery, servitude and mistreatment of human beings. The Brazilian Constitution contains no counterpart prohibiting slavery, but such a guarantee seems implicit in Article 5(XV), which provides for freedom of movement for everyone during peacetime,<sup>22</sup> and in Article 5(XLII) and (XLIII), which declare the practice of torture, racism, and other forms of inhumane or degrading treatment to be non-bailable criminal offenses. Paradoxically, the latter provisions invite human rights abuses by mandating non-bailable pretrial detention for anyone merely accused of such offenses.

The Brazilian Constitution also contains several important guarantees of prisoners' rights. It assures prisoners respect for their moral and physical integrity;<sup>23</sup> requires that prisons be differentiated in accordance with the nature of the crime, age, and sex of the prisoner;<sup>24</sup> and guarantees female prisoners the right to remain with their children during the period they are breast-feeding.<sup>25</sup>

### C. *Due Process*

Both the Colombian and Brazilian Constitutions contain detailed, extensive, and liberal due process guarantees, particularly in criminal matters. Indeed, both incorporate a broad guarantee of due process. The Brazilian Constitution practically adopts the due process clauses of the 5th and 14th Amendments to the U.S. Constitution, stating that "[n]o one shall be deprived of liberty or property without legal due process."<sup>26</sup> The first sentence of Article 29 of the Colombian Constitution provides more generally that "[d]ue process shall apply to all types of judicial and administra-

21. *Velásquez Rodríguez*, Inter-Am. C.J.R., OAS/ser. L/V/III 19, doc. 13 (1988) (\$750,000 in damages); *Godínez Cruz*, Judgment of January 20, 1989, 25.5 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 209 (January 1991). See generally Juan E. Méndez & José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507-77 (1990); Note, *Governmental Liability for "Disappearances": A Landmark Ruling by the Inter-American Court of Human Rights*, 25 STAN. J. INT'L L. 289-322 (1988).

22. BRAZ. CONST. art. 5(XV) ("Movement in national territory shall be free in peacetime, with everyone being free, in terms of the law, to enter, remain or leave with his property.")

23. BRAZ. CONST. art. 5(XLIX).

24. *Id.* art. 5(XLVIII).

25. *Id.* art. 5(L).

26. *Id.* art. 5(LIV).



tive proceedings." In the United States, due process has come to have a controversial substantive as well as a procedural component, permitting courts to examine the legitimacy of the legislative end, as well as the reasonableness of the relationship between the ends and the means.<sup>27</sup> Whether either the Brazilian or Colombian due process guarantees will be interpreted to include a substantive component along the lines of that developed in the United States remains to be seen.<sup>28</sup>

The procedural aspects of these due process guarantees are made more concrete in Colombia and Brazil by specific provisions that can be grouped under the headings of (1) retroactivity, (2) arrest or detention, (3) right to a fair trial, (4) right to a speedy trial, (5) presumption of innocence, (6) right to appeal, (7) double jeopardy, (8) right to counsel, (9) self-incrimination and testimonial privileges, (10) exclusion of illegally obtained evidence, (11) cruel and unusual punishments, and (12) extradition.

### 1. Retroactivity

Both constitutions permit retroactivity in criminal matters only for measures that favor the defendant.<sup>29</sup> Colombia requires that all persons be tried in conformity with preexisting laws. The Brazilian guarantee is slightly broader. Nothing can be regarded as a crime without a prior law,<sup>30</sup> nor may any penalties be imposed unless previously authorized by law.<sup>31</sup>

---

27. For the history and meaning of substantive due process, see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 355-451 (4th ed. 1991).

28. In *Vieira Netto*, Judgment of February 2, 1968, STF, 44 R.T.J. 322 (Braz.), translated in KARST & ROSENN, *supra* note 14, at 113-18, the Brazilian Supreme Court declared unconstitutional a provision of the National Security Law suspending from exercise the professional or business activities of anyone accused of violating the statute. The vote of the Reporter, Minister Cavalcanti, displayed a strong resemblance to U.S. substantive due process cases, declaring that the National Security Law violated the right to life and other unwritten substantive rights guaranteed by Article 150 § 35 of the 1969 Brazilian Constitution, which tracked the language of the Ninth Amendment to the U.S. Constitution. Nevertheless, Brazilian case law and doctrine has no real tradition of judicial appreciation of the reasonableness of legislation. CARLOS ROBERTO DE SIQUEIRA CASTRO, *O DEVIDO PROCESSO LEGAL E A RAZOABILIDADE DAS LEIS NA NOVA CONSTITUIÇÃO DO BRASIL* 186-191 (1989).

29. COLOM. CONST. art. 29; BRAZ. CONST. art. 5(XL).

30. BRAZ. CONST. art. 5(XL).

31. *Id.* art. 5(XXXIX).

## 2. Arrest or Detention

Article 28 of the Colombian Constitution contains a broad guarantee of freedom from police interference without a judicial order, declaring that no one can be molested, arrested, detained, imprisoned, or even have his address registered without a written order from a competent judicial authority. The terms of this guarantee would appear to make it unconstitutional for the police to apprehend anyone without an arrest warrant were it not qualified by Article 32, which permits anyone to arrest offenders apprehended *in flagrante* and allows authorities to pursue offenders into their own homes or into another's home after requesting permission. The Brazilian guarantee is slightly less broad than Colombia's, providing simply: "No one shall be arrested unless *in flagrante delicto* or by written and substantiated order of a proper judicial authority, except in the case of a military offense or strictly military crime, as defined by law."<sup>32</sup> Colombia's Constitution also prohibits administrative detention or imprisonment;<sup>33</sup> unfortunately, Brazil's Constitution contains no similar prohibition, permitting continuance of the unfortunate practice of allowing persons to be imprisoned through administrative procedures.

The Colombian Constitution requires that detainees be brought before a judge within 36 hours,<sup>34</sup> while the Brazilian Constitution requires immediate communication of an arrest and the place of detention to the proper judge and the arrestee's family or a person designated by the judge.<sup>35</sup> Lamentably, neither constitution guarantees a right to bail.<sup>36</sup> Indeed, the Brazilian Constitution even designates certain crimes as non-bailable. These crimes are singled out solely because of a desire to express moral outrage rather than the likelihood that the defendant may flee.<sup>37</sup>

---

32. *Id.* art. 5(LXI).

33. COLOM. CONST. art. 26.

34. *Id.* art. 28.

35. BRAZ. CONST. art. 5(LXI).

36. Article 5(LXVI) of the Brazilian Constitution provides: "No one shall be taken to prison or held therein when the law permits provisional liberty, with or without bond." BRAZ. CONST. art. 5(LXVI). This is an illusory constitutional right to bail, tautologically stating that one has a right to be released with or without bond when the law so allows.

37. *See, e.g.*, BRAZ. CONST. art. 5(XLII) (racism); *id.* art. 5(XLIII) (torture and drug trafficking); *id.* art. 5(XLIV) (actions of armed groups).

### 3. Right to a Fair Trial

Colombia's Constitution guarantees the accused the right of defense, as well as the rights to a public trial, to present proof, and to confront witnesses against him.<sup>38</sup> Brazil's Constitution, which often states guarantees in terms that apply to both criminal and civil proceedings, guarantees to all litigants the right to reply and the right to an ample defense.<sup>39</sup> It also guarantees every prisoner the right to identify those responsible for his detention or for his interrogation by the police,<sup>40</sup> as well as the right to be informed of his rights, including the right to remain silent.<sup>41</sup> The Brazilian Constitution, unlike the Colombian Constitution, guarantees the accused the right to a jury trial in all intentional homicides,<sup>42</sup> which traditionally include a number of abortion-related crimes.<sup>43</sup> The right to jury trial includes a full defense, secret voting, and the sovereignty of the jury's verdict.<sup>44</sup> The jury can be a valuable institutional check on governmental arbitrariness and abuse, but there is little evidence to suggest that the Brazilian jury actually performs this function.

### 4. Right to a Speedy Trial

Colombia's Constitution specifically guarantees that trial must proceed speedily, without any unjustified delays.<sup>45</sup> Lamentably, the Brazilian Constitution contains no similar guarantee. The Colombian Constitution, however, does not indicate what sanctions, if any, will be imposed for a violation of this guarantee. The criminal justice systems of both Brazil and Colombia are characterized by long delays with large numbers of criminal defendants languishing in jail for extended periods awaiting trial.<sup>46</sup> This problem is exacer-

---

38. COLOM. CONST. art. 29.

39. BRAZ. CONST. art. 5(LV).

40. *Id.* art. 5(LXIV).

41. *Id.* art. 5(LXIII).

42. *Id.* art. 5(XXXVIII).

43. These offenses are set out in Articles 124-128 of Brazil's Penal Code. See ADRIANO MARREY, ET AL., *JÚRI—TEORIA E PRÁTICA* 238-46 (3d ed. 1988).

44. BRAZ. CONST. art. 5(XXXVIII). The "sovereignty of the jury's verdict" simply means that judges may not substitute their judgment for that of the jury's. A reviewing court, however, may set aside a jury verdict and remand for a new jury trial if it finds that the verdict was manifestly against the weight of the evidence. RIBEIRO BASTOS & GANDRA MARTINS, *supra* note 11, at 208-09.

45. COLOM. CONST. art. 29.

46. GABRIEL RICARDO NEMOGÁ SOTO, *EL ESTADO Y LA ADMINISTRACIÓN DE LA JUSTICIA EN*

bated by the limited statutory rights to bail.<sup>47</sup> This is likely to be an area where the gap between the Colombian constitutional norm and practice remains large for a long time.

## 5. Presumption of Innocence

Colombia's Constitution states that everyone is presumed innocent until a judge has determined that the accused is guilty.<sup>48</sup> Brazil's Constitution states this guarantee more broadly, curiously and illogically extending the presumption of innocence until one's criminal conviction has become final and nonappealable.<sup>49</sup>

## 6. Right to Appeal

Unlike the U.S. Constitution, Colombia's Constitution commendably guarantees the accused the right to appeal. If only the defendant appeals, the appellate tribunal may not increase his sentence.<sup>50</sup> Regrettably, Brazil's Constitution contains no similar guarantee.

## 7. Double Jeopardy

Colombia's Constitution explicitly guarantees the accused the right not to be tried twice for the same offense.<sup>51</sup> Although Brazil's Constitution does not explicitly guarantee that an accused may not be tried twice for the same offense, in most cases such prosecutions will be barred by the similar, albeit weaker, guarantee of the principle of *res judicata*.<sup>52</sup>

---

COLOMBIA 165-71 (1990); COMISIÓN ANDINA DE JURISTAS SECCIONAL COLOMBIANA, SISTEMA JUDICIAL Y DERECHOS HUMANOS EN COLOMBIA 174-175 (1990) [hereinafter COMISIÓN ANDINA]; DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, 102D CONG., 2D Sess. 513, 517 (1992) (Jt. Rep. to House Comm. on For. Affs. & Sen. Comm. on For. Rel.) [hereinafter DEPARTMENT OF STATE].

47. Colombia's new Code of Criminal Procedure, which went into force on July 1, 1992, permits release of those persons detained for more than 180 days without trial. This provision was recently suspended by presidential decree to avoid releasing a substantial number of suspected narcotraffickers. *Colombia prolonga medidas de emergencia*, EL MIAMI HERALD, July 14, 1992, at 3A. Article 310 of Brazil's Code of Criminal Procedure, Decree-Law No. 3.931 of Dec. 11, 1941, grants the judge discretion to allow an arrested person to remain in a state of provisional liberty.

48. COLOM. CONST. art. 29.

49. BRAZ. CONST. art. 5(LVII).

50. COLOM. CONST. art. 31.

51. *Id.* art. 29.

52. BRAZ. CONST. art. 5(XXXVI). See FERREIRA, *supra* note 11, at 150; 4 FERNANDO DA

## 8. Right to Counsel

Colombia's Constitution guarantees the accused the right to a lawyer chosen by him or *ex officio* during the investigation and trial. The Brazilian constitutional guarantee is stated in much broader terms, guaranteeing the right to the assistance of a lawyer not only to persons who have been arrested,<sup>53</sup> but to all indigents in civil proceedings as well.<sup>54</sup> The Brazilian Constitution also confers constitutional status on the Public Defender, which is to be organized as a career with life tenure.<sup>55</sup> Both countries, however, have had serious problems in insuring that the right to assistance of counsel, which was also guaranteed under prior constitutions, is more than perfunctory.<sup>56</sup> The right to counsel would be much stronger if stated in terms of a right to competent assistance of counsel at all critical stages of the proceedings, as well as the right to additional support services, such as experts and investigators.

## 9. Self-Incrimination and Testimonial Privileges

Colombia's Constitution not only grants the accused broad immunity from testifying against himself but also extends testimonial immunity to spouses, companions, and relatives up the fourth degree of consanguinity.<sup>57</sup> Granting these relatives a constitutional privilege against testifying simply continues prior law, but nonetheless appears excessive. Brazil's Constitution simply provides that persons under arrest must be informed of their rights, among which is the right to remain silent.<sup>58</sup> Colombia's guarantee against self-incrimination would be more effective if the authorities were required to advise arrestees of this constitutional right. Brazil's guarantee against self-incrimination would also be more meaningful if the Brazilian courts were to declare unconstitutional Articles 186 and 198 of the Code of Criminal Procedure, which permit the

---

COSTA TOURINHO FILHO, *PROCESSO PENAL* 240-41 (10th ed. 1987).

53. BRAZ. CONST. art. 5(LXIII).

54. *Id.* art. 5(XXIV).

55. *Id.* art. 134.

56. Joaquim Falcão, *Lawyers in Brazil, in LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 400-42 (Richard L. Abel & Phillip S.C. Lewis eds. 1988); Roberto Rosas, *A Advocacia-Geral da União, in A CONSTITUIÇÃO BRASILEIRA 1988 INTERPRETAÇÕES* 268, 276 (II Fórum Jurídico, 2d ed. 1988); COMISIÓN ANDINA, *supra* note 46, at 86-87; DEPARTMENT OF STATE, *supra* note 46, at 549-554.

57. COLOM. CONST. art. 33.

58. BRAZ. CONST. art. 5(LXIII).

courts to infer guilt from the accused's exercise of his right to remain silent.<sup>59</sup>

#### 10. The Exclusion of Illegally Obtained Evidence

Both constitutions commendably bar the use of illegally-obtained evidence. Colombia's Constitution provides that evidence obtained in violation of due process is null and void.<sup>60</sup> In Brazil, evidence obtained by unlawful means is deemed inadmissible in all proceedings.<sup>61</sup> The courts in both countries will have to work out on a case-by-case basis when evidence is obtained in violation of due process or illegally, and how far down the chain of causation the taint of the constitutional violation will extend.

#### 11. Cruel and Unjust Punishment

Both constitutions ban a number of punishments deemed cruel or unjust. Both prohibit the death penalty, but only Colombia's prohibition is complete.<sup>62</sup> Brazil permits use of the death penalty in times of declared war.<sup>63</sup> The Brazilian Constitution specifically prohibits courts from sentencing convicted defendants to life imprisonment, forced labor, banishment, or any other cruel punishment.<sup>64</sup> No penalty may extend to someone other than the convicted party, but the obligation to indemnify the victim and a decree of confiscation of the defendant's property may extend to the defendant's successors.<sup>65</sup> The Colombian Constitution, on the other hand, prohibits the penalties of banishment, life imprisonment, and confiscation. A court may, however, deprive a defendant of property obtained by unjust enrichment at the expense of the

---

59. Article 186 of Brazil's Code of Criminal Procedure provides: "Before starting the interrogation, the judge shall advise the accused that although he is not obliged to answer the questions that were put to him, his silence can be interpreted to prejudice his own defense."

Article 198 provides: "The silence of the accused does not signify a confession, but it may constitute an element in the formation of the judge's determination." In Colombia, on the other hand, the judge may not draw any negative inference when an accused exercises the right to remain silent. GUSTAVO PELÁEZ VARGAS, *MANUAL DE PRUEBAS PENALES* 142 (1981).

60. COLOM. CONST. art. 29.

61. BRAZ. CONST. art. 5(LVI).

62. COLOM. CONST. art. 11.

63. BRAZ. CONST. art. 5(XLVII)(a).

64. *Id.* art. 5(XLVII).

65. *Id.* art. 5(XLV).

state or grave deterioration of social morals.<sup>66</sup>

The Brazilian formulation is superior with respect to confiscation, for it is difficult to see any real justification for denying to the courts the power to confiscate the proceeds of criminal activity. While the phrase "grave deterioration of social morals" in the Colombian Constitution is unclear, restricting judicial power to confiscate the property of those who are criminally convicted looks lamentably like special patrimonial protection for drug traffickers. Banning both the death penalty and life imprisonment indicates a confidence in the rehabilitative capacity of imprisonment that is probably unwarranted.

## 12. Extradition

Both constitutions treat the privilege of not being extradited for crimes committed abroad as a fundamental right, sharply limiting the power of the government to extradite its own citizens.<sup>67</sup> No native-born Brazilian may be extradited, and naturalized Brazilians may be extradited only for crimes committed prior to naturalization or for involvement in narcotics.<sup>68</sup> Brazil may extradite foreigners, but not for political crimes or opinion.<sup>69</sup> The Colombian Constitution prohibits extradition of native-born citizens,<sup>70</sup> but is curiously silent with respect to imposing any restrictions upon extradition of naturalized Colombians. As does Brazil, Colombia prohibits extradition of foreigners for political crimes or opinion.<sup>71</sup> Colombia's Constitution even contains an obviously unenforceable guarantee that Colombians who commit crimes abroad that are also crimes in Colombia will be tried in Colombia.<sup>72</sup>

Conventionally, the right not to be extradited is not regarded as fundamental, nor are there any reasons for constitutionalizing such a right other than extreme nationalism or political expedi-

---

66. COLOM. CONST. art. 34.

67. Both constitutions also contain language guaranteeing respect for the international practice of granting political asylum. Brazil's Constitution simply states that Brazil will be governed by the principle of conceding political asylum. BRAZ. CONST. art. 4(X). Colombia's Constitution recognizes the right to asylum in the terms provided for by law. COLOM. CONST. art. 36.

68. BRAZ. CONST. art. 5(LI).

69. *Id.* art. 5(LII).

70. COLOM. CONST. art. 35.

71. *Id.*

72. *Id.*

ency. Extradition has been a highly controversial political issue, particularly in Colombia, and its constitutional treatment of the subject represents a political compromise designed to diminish the violence directed towards anyone involved in the extradition of narcotraffickers.

#### *D. Equal Protection*

Both Constitutions contain equal protection clauses, but Colombia's is more extensive. The first paragraph of Article 13 of the Colombian Constitution broadly embodies the principle of nondiscrimination. It provides that all persons are equal before the law, shall receive the same protection and treatment by the authorities, and shall enjoy the same rights, liberties, and opportunities, without discrimination on the basis of sex, race, national or family origins, language, religion, or political or philosophical opinion. The next paragraph constitutionally mandates adoption of affirmative action programs favoring groups that have been victims of discrimination or marginalization. Resolution of the obvious tension between the principles of nondiscrimination and affirmative action will have to be developed by the courts, for it is difficult to advantage one group without disadvantaging others.

Brazil's equal protection clause is contained in the introductory clause to Article 5, which provides: "All are equal before the law, without distinction of any nature. . . ." Neither Brazil's nor Colombia's equal protection clause can be read literally, particularly with respect to aliens, for other constitutional provisions permit certain kinds of legal discrimination that is inconsistent with the principle of equal protection.<sup>73</sup> Since neither country has a developed body of equal protection doctrine or caselaw, the complexities of equal protection analysis will have to be developed by the courts on a case-by-case basis.

---

73. Article 100 of Colombia's Constitution states a general reciprocity principle: A foreigner enjoys the same civil rights in Colombia as his own country grants to Colombians. This is qualified by permitting the legislature to enact laws that subject foreigners to special conditions for public policy reasons, and by permitting the law or the Constitution to limit the guarantees of rights for aliens. Brazil imposes a series of restrictions against foreign individuals with respect to the practice of certain professions and owning rural land and against foreign-owned firms in the areas of mining, petroleum, informatics, and government contracting. See KEITH S. ROSENN, *FOREIGN INVESTMENT IN BRAZIL* 157-73 (1991).



*E. The Right to Vote*

Both constitutions guarantee the right to vote in very broad terms. Article 14 of the Brazilian Constitution states that "popular sovereignty shall be exercised by universal suffrage through direct and secret vote, with equal value for all." Article 40 of Colombia's Constitution guarantees the right to vote to all citizens, a right reiterated in the form of a secret ballot in Article 258. Neither constitution excludes illiterates from voting, but Brazil requires literacy in order to be eligible to run for public office.<sup>74</sup> Both constitutions disenfranchise aliens and most minors. Brazil's Constitution dubiously allows juveniles as young as 16 to vote in all elections, while Colombia's requires that voters be at least 18 unless the law provides otherwise.<sup>75</sup> Brazil's Constitution curiously disenfranchises conscripts during their period of obligatory military service,<sup>76</sup> while Colombia's disenfranchises all members of the military and national police while in active service.<sup>77</sup> The Brazilian Constitution curiously makes voting mandatory for all literate persons between the ages of 18 and 70, and optional for illiterates, those aged 16 and 17, and those older than 70.<sup>78</sup> The Colombian Constitution contains no mandatory voting requirement.

The language in Article 14 of the Brazilian Constitution stating that votes are to have "equal value for all" is likely to generate a great deal of litigation from voters from more heavily populated electoral districts. Far more clearly than in the United States, the Brazilian Constitution confers a claim that failure to establish districts with equal numbers of voters has debased the value of the votes of more populous districts in violation of their constitutional right to have their votes weighted equally.<sup>79</sup>

---

74. BRAZ. CONST. art. 14 § 4.

75. COLOM. CONST. arts. 98-99.

76. BRAZ. CONST. art. 14 § 2.

77. COL. CONST. art. 219.

78. BRAZ. CONST. art. 14 § 1.

79. The United States Supreme Court has construed the Equal Protection Clause and the language of Article 1 § 2—that congressional representatives be elected "by the people"—to mandate periodic redistricting of electoral districts so that they are approximately equal in population. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (mandating one-person, one-vote apportionment for state legislatures); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (mandating one-man, one-vote apportionment for congressional districts). See generally Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968); Gerhard Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1 (1973). For subsequent developments, see John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984).

*F. Freedom of Speech and of the Press*

Both constitutions contain powerful guarantees of freedom of speech. Both prohibit prior censorship and provide commendably broad protection for free speech and a free press.

Article 20 of the Colombian Constitution guarantees freedom to express and disseminate one's thoughts and opinions, freedom to inform and to receive true and impartial information, and freedom to found mass means of communication. The mass media are declared to be both free and socially responsible, which makes them liable for defamation or similar torts. Article 23 guarantees the right to petition the government for reasons of both public and private interest, while Articles 37 and 38 protect freedom of assembly and association. Article 73, which originally simply reiterated Article 20, has been amended to guarantee professional liberty and independence to journalists.

The Brazilian Constitution contains several free speech and free press provisions that significantly broaden the nature of the prior constitutional guarantees by eliminating prior censorship.<sup>80</sup> Whereas prior free speech and press guarantees were concisely stated in a single article, they are now widely dispersed in a series of sometimes overlapping or redundant provisions. In comparison with the Brazilian guarantees of freedom of speech and press, Article 20 of the Colombian Constitution is a model of precision. The first Brazilian provision is Article 5(IV), which cryptically states: "Manifestation of thought is free, anonymity being prohibited." Article 5(IX) then overlaps and somewhat confusingly expands this guarantee by providing: "Expression and communication of intellectual, artistic, and scientific activity are free, independent of any censorship or license." More than two hundred articles later, these guarantees are reiterated.<sup>81</sup>

---

80. The draft of the Colombian Constitution contemplated prior censorship with the approval of the Constitutional Court for dissemination of information that might generate grave and imminent danger to the life of persons or public security or perturbed public order. PROYECTO, *supra* note 3, at 126. This exception was eliminated by the Constituent Assembly.

81. Article 220 provides in relevant part:

The expression of thoughts, creation, speech and information, through whatever form, process or vehicle, shall be subject to no restrictions, observing the provisions of this Constitution.

§1. No law shall contain any provision that might constitute an impediment to the full freedom of information by the press in any medium of social communication, observing the provisions of art. 5 (IV), (V), (X),

The Brazilian Constitution also creates a vague, undefined constitutional right to information, as well as a constitutional shield that may enable journalists to protect their sources. It assures everyone "access to information, safeguarding the secrecy of sources whenever necessary for the exercise of one's profession."<sup>82</sup> All of these guarantees are qualified, and to a certain extent undermined, by provisions designed to safeguard actions for libel, slander, and the protection of privacy. Thus, Article 5(V) safeguards "a right of reply, proportional to the injury," as well as a right to compensation for material and moral damages. It also safeguards a right to indemnification for damages to one's image, although what that adds to material and moral damages is unclear.

### G. *Freedom of Religion*

Both Constitutions contain ample guarantees of freedom of religion. Both also strongly suggest that no conscientious objector may be compelled to perform military service.

Colombia's Constitution guarantees freedom of religion, as well as the right freely to profess one's religion and to spread one's religion either individually or collectively. All religious and church confessions are declared to be free before the law.<sup>83</sup> In addition, Colombia's guarantees liberty of conscience, stating that no one shall be molested because of personal convictions or beliefs, nor compelled to reveal them or act against one's conscience.<sup>84</sup>

Brazil's Constitution makes liberty of conscience or belief inviolable and assures free exercise of religion.<sup>85</sup> Protection of places of worship and rendering of religious assistance to civil and military entities is also assured, but this is a very weak guarantee, for it is assured only "in terms of the law."<sup>86</sup> No one may be deprived of rights because of religious beliefs or philosophical or political con-

---

(XIII), and (XIV).

§2. Any and all censorship of a political, ideological and artistic nature is prohibited.

The remainder of Article 220 permits the federal government to inform the public about the nature of shows and exhibitions and to establish means by which the public can defend itself against unwanted radio and TV programs. It also permits government regulation of advertisements for tobacco, alcohol, agrotoxics, and medicines.

82. BRAZ. CONST. art. 5(XIV).

83. COLOM. CONST. art. 19.

84. *Id.* art. 18.

85. BRAZ. CONST. art. 5(VI).

86. *Id.* arts. 5(VI)-(VII).

victions, unless they are invoked to avoid a legal obligation imposed upon everyone and one refuses to perform alternative service.<sup>87</sup>

#### H. Right to Privacy

Both Constitutions contain direct guarantees of personal privacy. Colombia's guarantees to all the right to personal and family intimacy and their good names, imposing a duty upon the State not only to respect these rights but also to make others respect them.<sup>88</sup> Brazil's states that a person's intimacy, private life, honor, and image are inviolable and assures indemnification for material and moral damages for violation of these rights.<sup>89</sup> The Brazilian Constitution also strongly guarantees the privacy of one's home, particularly during the night. Entry into a dwelling is permitted without permission only in cases of *flagrante delicto*, disaster or rescue, or with a court order, but then only during daytime.<sup>90</sup> Colombia's guarantee of the privacy of one's home is not as clearly articulated. Authorities in hot pursuit may follow a fleeing suspect into the suspect's own home, but if the suspect flees into a neighbor's home, the authorities must request permission from the resident.<sup>91</sup>

Both Constitutions guarantee the secrecy of correspondence, data, and telegraphic and telephonic communications, permitting interception only by judicial order.<sup>92</sup> Brazilian courts may issue wiretap or intercept authorizations only in connection with criminal investigations or prosecutions.<sup>93</sup> Colombia's Constitution specifically authorizes the government to require presentation of account books and other private documents for tax or judicial purposes as determined by statute,<sup>94</sup> an authorization deemed unnecessary by the drafters of the Brazilian Constitution.

It is hard to predict what flesh may ultimately be placed upon the privacy and personal intimacy skeletons set forth in the Brazilian and Colombian Constitutions. As a matter of comparison, a few

---

87. *Id.* art. 5(VIII).

88. COLOM. CONST. art. 15.

89. BRAZ. CONST. art. 5(X).

90. *Id.* art. 5(XI).

91. COLOM. CONST. art. 32.

92. COLOM. CONST. art. 15; BRAZ. CONST. art. 5(XII).

93. BRAZ. CONST. art. 5(XII).

94. COLOM. CONST. art. 15.

years ago the Argentine Supreme Court utilized the privacy provision contained in Article 19 of the Argentine Constitution to invalidate a statute criminalizing possession of narcotic drugs for personal use.<sup>95</sup> Also, the U.S. Supreme Court discovered a privacy right in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution and utilized it to invalidate statutes that had criminalized the use of contraceptives<sup>96</sup> and abortion.<sup>97</sup> The U.S. Supreme Court, however, refused to extend this privacy principle to invalidate a statute that had criminalized sodomy between consenting adults in private<sup>98</sup> or to permit parents of a hopelessly comatose accident victim to disconnect life support systems.<sup>99</sup>

### III. PROCEDURAL MEASURES TO IMPLEMENT INDIVIDUAL RIGHTS

The drafters of both constitutions were well aware that merely guaranteeing individual rights in a constitution is by itself insufficient to insure that such rights are actually respected in practice. Both countries have long traditions of unenforced or under-enforced constitutional rights. Hence, the drafters recognized the need for procedural mechanisms to permit the courts to remedy alleged violations of constitutional rights. They were also well aware that a great many abuses of individual rights have occurred during states of siege and other states of exception when basic constitutional controls are relaxed. Consequently, both constitutions reflect significant efforts by the drafters to ensure that individual constitutional rights will be respected in practice.

#### A. *States of Exception*

The new Brazilian Constitution commendably places impor-

---

95. Judgment of Aug. 29, 1986 (Bazterrica), CSJN, [1986-D] *Revista Juridica Argentina—La Ley* [L.L.] 550 (1986); Judgment of Aug. 29, 1986 (Capalbo), CSJN, [1986-D] L.L. 582 (1986) (Arg.). These decisions were not always followed by the Argentine lower courts. In 1990, after a successful court packing maneuver by the Menem regime, the Argentine Supreme Court effectively overruled this line of cases. Judgment of Dec. 11, 1990 (Ernesto Alfredo Montalvo), CSJN, [May 24, 1991] LA LEY 4 (unbound version) (Arg.). For background on the right to privacy in Argentina, see DELIA MATILDE FERREIRA RUBIO, *EL DERECHO A LA INTIMIDAD* (1982).

96. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

97. *Roe v. Wade*, 410 U.S. 113 (1973).

98. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986).

99. *Cruzan v. Director, Missouri Dep't of Health*, 197 U.S. 261 (1990).

tant constraints upon the Executive's power during times of emergency. The President may declare a state of defense for up to 60 days whenever public order or social peace is threatened and may decree restrictions upon the rights of assembly and the secrecy of the mails, telephones, and telegraphs.<sup>100</sup> During this period, the Executive may imprison persons for up to ten days for crimes against the State, provided the imprisonment is communicated to an appropriate judge and the prisoner is not maintained incommunicado. The declaration of the state of defense must be submitted to Congress for ratification within 24 hours.<sup>101</sup> The President may declare a state of siege only if authorized to do so by Congress, and then only in cases of grave commotion or a state of war or its equivalent. During a state of siege, the Executive has the power: (1) to require that persons remain in a determined place; (2) to detain persons in places not used to house persons convicted of common crimes; (3) to restrict liberty of the press and other communication media; (4) to violate the secrecy of correspondence and other forms of communication; (5) to suspend freedom of assembly; (6) to commit searches and seizures in homes; (7) to intervene in public services; and (8) to requisition property.<sup>102</sup> A state of siege for reasons of grave commotion cannot be decreed for more than 30 days, nor can it extend for longer than 30 days at a time.

Colombia's Constitution has established even greater restraints than Brazil's on the powers of the Executive to curtail individual rights during states of exception. During a state of internal commotion, no civilian may be investigated or tried by criminal military courts.<sup>103</sup> Moreover, legislative decrees issued by the Executive during a state of exception may not suspend human rights or fundamental liberties. In all cases, the rules of International Humanitarian Law must be respected. The legislature is required to enact a statute that will regulate governmental powers during a state of exception and to set up judicial controls to protect individual rights, in conformity with international treaties.<sup>104</sup> Measures

---

100. BRAZ. CONST. art. 131 § 1.

101. *Id.* art. 136 § 4. Congress must decide whether to ratify the state of defense within 10 days.

102. *Id.* art. 139.

103. COLOM. CONST. art. 213.

104. These conventions include:

1. The Third and Fourth Geneva Conventions of Aug. 12, 1949, approved by Law No. 5 of 1960.

2. The International Pact on Economic, Social and Cultural Rights, approved by Law No. 74 of 1968.

adopted by the Executive during a state of exception must be proportional to the gravity of the actual facts, a provision that invites meaningful judicial scrutiny.<sup>105</sup> Colombia's Constitution also imposes liability upon the President and his cabinet ministers for any abuses committed during states of exception.<sup>106</sup> Because states of exception historically have lasted for years, Colombia's new Constitution sharply limits their duration. States of exception usually may last only 90 days; Senate authorization is required to prolong them for an additional 180 days.

### *B. Procedural Measures to Enforce Constitutional Rights*

The drafters of both constitutions determined that existing procedures were inadequate to protect constitutional rights. Therefore, they created or borrowed several intriguing procedural innovations designed to protect constitutional and legal rights. Both countries have long had the Anglo-American writ of habeas corpus.<sup>107</sup> In addition, Brazil's 1934 Constitution created the writ

3. International Pact of Civil and Political Rights, approved by Law No. 74 of 1968.

4. Optional Protocol of the International Pact on Civil and Political Rights, approved by Law No. 74 of 1968.

5. International Convention on the Elimination of All Forms of Racial Discrimination, approved by Law No. 22 of 1981.

6. Convention for the Prevention and Sanction of the Crime of Genocide, approved by Law No. 28 of 1959.

7. Convention on the Statute of Refugees, approved by Law No. 35 of 1961.

8. Protocol on the Statute of Refugees, approved by Law No. 65 of 1979.

9. Convention on the Elimination of All Forms of Discrimination Against Women, approved by Law No. 51 of 1981.

10. International Convention on the Repression and Punishment of Crimes of Apartheid, approved by Law No. 26 of 1987.

11. Convention on the Political Rights of Women, approved by Law No. 35 of 1986.

12. Convention on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishments, approved by Law No. 70 of 1986.

13. Convention on the Rights of Children, approved by Law No. 12 of 1991.

14. Inter-American Convention on Human Rights, approved by Law No. 16 of 1972.

PROYECTO, *supra* note 3, at 201-02. The conventions are conveniently collected in CONSEJERÍA PARA DESARROLLO DE LA CONSTITUCIÓN, *LOS DERECHOS CONSTITUCIONALES: FUENTES INTERNACIONALES PARA SU INTERPRETACIÓN* (1991).

105. COLOM. CONST. art. 214(2).

106. *Id.* art. 214(5).

107. Brazil was the first Latin American country to adopt habeas corpus, which was anticipated in the 1830 Penal Code and regulated in the 1832 Code of Criminal Procedure. Phanor J. Eder, *Habeas Corpus Disembodied: The Latin American Experience*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 463, 465 (Kurt H. Nadelmann et al. eds., 1961).

of security (*mandado de segurança*) to protect any liquid and certain right unprotected by habeas corpus, a writ generally effective as a summary procedure to protect against illegal or abusive acts of public authorities.<sup>108</sup> In 1910, a Colombian constitutional reform created the popular action, which permits any citizen to challenge the constitutionality of any law on its face in a suit filed directly before the Supreme Court.<sup>109</sup>

## 1. Habeas Corpus

Habeas corpus is now a constitutionalized remedy in both countries to protect against illegal deprivations of liberty.<sup>110</sup> The Colombian Constitution guarantees the right to bring an action of habeas corpus before any judge at any time if a detainee believes that he has been deprived of liberty illegally. The judge to whom the request for habeas is addressed has 36 hours in which to decide.<sup>111</sup> The Brazilian guarantee of habeas corpus is significantly broader than the Colombian guarantee. Habeas corpus may be brought in Brazil not only when one has been detained, but also when one has been merely threatened with a constraint on his liberty by illegality or abuse of power.<sup>112</sup> If the imprisonment is illegal, the judge must immediately relax the restraint.<sup>113</sup> Moreover, illegality includes unconstitutionality; hence the writ of habeas corpus is frequently used in Brazil to challenge the constitutionality of statutes and executive acts.

---

In Colombia, Article 1 of Law 27 of 1963, and Articles 56-64 of Decree 1358 of 1964 created habeas corpus, which was subsequently regulated by articles 417-25 of the 1971 Code of Criminal Procedure and articles 454-66 of the 1987 Code of Criminal Procedure.

108. JOSÉ CRETILLA JÚNIOR, *DO MANDADO DE SEGURANÇA* (3d ed. 1984); J.M. OTHON SIDOU, *DO MANDADO DE SEGURANÇA* (3d. ed. 1969); ARNOLD WALD, *DO MANDADO DE SEGURANÇA NA PRÁTICA JUDICIÁRIA* (3d ed. 1968).

109. The history of the popular action is set out in LUIS CARLOS SACHICA, *CONSTITUCIONALISMO COLOMBIANO* 96-105 (8th ed. 1991); J.A.C. Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia: Nature and Evolution of the Present System*, 23 S. CAL. L. REV. 484, 496-504 (1950).

110. Habeas corpus has been a constitutional remedy in Brazil since the 1891 Constitution. BRAZ. CONST. (1891) art. 72 § 22. Colombia's present Constitution is the first to make habeas corpus an explicit constitutional guarantee.

111. COLOM. CONST. art. 30.

112. BRAZ. CONST. art. 5(LXV).

113. *Id.* art. 5(LXVI).



## 2. The Collective Writ of Security

The Brazilian Constitution expands the writ of security to make it explicitly applicable to illegality or abuse of power committed not only by public authorities, but also by agents of private legal entities exercising public authority.<sup>114</sup> More importantly, the new Constitution creates a collective writ of security to alleviate some of the problems stemming from the limited nature of class actions and the lack of a well-developed doctrine of *stare decisis*, which have generally required each person aggrieved by a particular law or regulation to bring an individual writ of security to obtain relief.<sup>115</sup> Now any political party represented in Congress, or any union, business syndicate or association, legally constituted for more than one year, may bring a collective writ of security to defend the rights of its members or associates.<sup>116</sup>

## 3. Habeas Data

The Brazilian Constitution imports from Portugal a new action called *habeas data*, which has also been adopted in the new Colombian Constitution, albeit without calling it by that name.<sup>117</sup> This action allows anyone to discover information the government has about the plaintiff in its data banks and to rectify that data if it is incorrect. The draft of the Colombian Constitution, which used the terminology *habeas data*, contemplated excusing the government from releasing data for national security purposes,<sup>118</sup> but this exception was eliminated by the Constituent Assembly.

The Brazilians adopted *habeas data* as a reaction to the abuses of the military governments that secretly gathered and stored information that was used against citizens without their

---

114. BRAZ. CONST. art. 5(LXIX). This change in the constitutional text reflects the orientation of the prior case law of the Brazilian courts. Sydney Sanches, *Inovações processuais na constituição federal de 1988*, 304 REVISTA FORENSE [REV. FOR.] 210 (1988) (Braz.).

115. Since 1964, Brazil has had a kind of *stare decisis* in the form of the *súmula*, which is a series of short legal rules capsulizing points of law authoritatively decided by the appellate courts. Brazil lacked any class action until 1985, when Law No. 7.347 of July 24, 1985, created a class action limited to protection of three types of injuries: (1) environmental; (2) consumer; and (3) cultural. Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 513-14, 522 (1986).

116. BRAZ. CONST. art. 5(LXX). See generally Athos Gusmão Carneiro, *O mandado de segurança coletivo e suas características básicas*, 316 REV. FOR. 35 (1991) (Braz.).

117. BRAZ. CONST. art. 5(LXXII); COLOM. CONST. art. 15.

118. PROYECTO, *supra* note 3, at 123.

having the opportunity to contest the accuracy of that information. *Habeas data* is a sensible reaction to the invasions of privacy produced by technological advancement in the area of data processing and storage. A number of *habeas data* actions have already been brought successfully in the Brazilian courts. These courts have taken the position that the action will be deemed appropriate only after the administrative authority has refused to act upon a specific request by the interested party.<sup>119</sup>

#### 4. Amparo or Tutela

Article 86 of the Colombian Constitution creates a *tutela* action to protect fundamental rights. Although denominated an action of *tutela* rather than *amparo*, its characteristics are that of *amparo*: a preferential and summary procedure that may be brought by the affected person or that person's representative that will result in immediate protection of the individual's fundamental constitutional rights when they are violated or threatened by an action or omission of any public authority.<sup>120</sup> Whether a right is specifically enumerated in the constitutional text under Title II, Chapter 1 (Articles 11-41), which is denominated "Fundamental Rights," is not decisive as to whether a right is fundamental for the purposes of protecting it by an action of *tutela*. The Constitutional Court recently reversed an appellate court for denying a *tutela* action because the action sought to protect a right to education, which is enumerated under Title II, Chapter 2, denominated "Social, Economic and Cultural Rights." Utilizing an intricate and eclectic interpretive technique, the Constitutional Court indicated that it will decide for itself whether a particular right is sufficiently fundamental to be protected by the action of *tutela*.<sup>121</sup>

---

119. Caio Tácito, *Judicial Control of Administrative Action in Brazil*, in A PANORAMA OF BRAZILIAN LAW 47 (Jacob Dolinger & Keith S. Rosenn eds., 1992). Eight requests for *habeas data* were filed in the Supreme Court on the day after promulgation of Brazil's Constitution. GAZETA MERCANTIL, Oct. 7, 1988, at 5. For a general discussion of *habeas data*, see J.M. Othon Sidou, *Las nuevas figuras del derecho procesal constitucional brasileño: mandado de injunção y habeas data*, 24 BOLETÍN MEXICANO DE DERECHO COMPARADO 169-87 (1991).

120. See HECTOR FIX ZAMUDIO, LA PROTECCIÓN PROCESAL DE LOS DERECHOS HUMANOS ANTE LAS JURISDICCIONES NACIONALES 100-33 (1982). The legislature is authorized to enact a statute permitting the action of *tutela* to be brought against private parties who render public services or whose conduct gravely or directly affects collective interests. COLOM. CONST. art. 86.

121. Judgment of May 8, 1992 (Pastora Emilia Upegui Noreña), 21 Jurisprudencia Y Doctrina [Juris. Y Doct.] 490, 492-501 (1992) (Colom.).

The action of *tutela* makes Colombia an unusual hybrid, combining a decentralized form of judicial review with a constitutional court. Countries with constitutional courts generally prohibit any other courts from exercising the power of judicial review.<sup>122</sup> In Colombia, however, an action of *tutela* can be brought in any court, which may then issue an order protecting the right. The judge has only 10 days in which to render a decision, which is to be carried out immediately. If the decision is challenged, its validity may ultimately be determined by the newly created Constitutional Court, which is thereby in a position to revise decisions of not only the intermediate appellate courts, but also those of the Supreme Court and the Council of State, which had hitherto been courts of last resort.

The constitutional text states that the action of *tutela* may be brought only if the affected party has no other means of judicial defense except some measure that might be used temporarily to avoid irreparable harm.<sup>123</sup> To prevent the ordinary courts from stifling development of the *tutela* action, the Constitutional Court has sensibly interpreted this restriction as applying only to situations where the affected party can resort to an alternative judicial procedure that can provide immediate and effective protection to the threatened constitutional right.<sup>124</sup>

The action of *tutela* has been regulated by Decree 2591 of 1991, which expressly forbids its use to challenge judicial decisions because of erroneous interpretations of the law or to challenge the evidence. It also prohibits its use to challenge interlocutory judicial decisions.<sup>125</sup> The initial decisions interpreting the reach of this statute have attempted to confine it narrowly to prevent the action of *tutela* from being used as a substitute for appeal. The action of *tutela* will not lie against judicial decisions that have become *res judicata*,<sup>126</sup> against administrative acts,<sup>127</sup> against striking judicial

---

122. MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 46-66 (1971).

123. COLOM. CONST. art. 86.

124. Judgment of May 11, 1992 (Luz Marina Motta de Manrique v. Gobernador de Huila), 21 Juris. Y Doct. 502, 507-509 (1992) (Colom.).

125. COLOM. CONST. art. 40.

126. Judgment of Oct. 1, 1992, Constitutional Court, cited in *La tutela se juega su futuro*, EL ESPECTADOR, Oct. 4, 1992, at 1; Judgment of Jan. 23, 1992 (Melania Arias Lima et al), Supreme Court Cham. Civil Cass., 21 Juris. Y Doct. 150 (Colom.). See Supreme Court decisions of Dec. 9, 1991 and Jan. 17, 1992 and Council of State decision of Jan. 21, 1992, cited in 21 Juris. Y Doct. 237, 238 (1992) (Colom.).

127. Judgment of Feb. 17, 1992 (Gerardo Solarte Rosero), Chamber of Civil Cass., 21 Juris. Y Doct. 239 (Colom.).

functionaries,<sup>128</sup> or as a substitute for appeal.<sup>129</sup>

### 5. The Direct Action of Unconstitutionality

Under the 1969 Brazilian Constitution, the Supreme Court had the power to determine the unconstitutionality of any law or normative act on its face, a decision with *erga omnes* effects,<sup>130</sup> but standing to bring such an action, called a representation (*representação*), was the exclusive province of the Procurator General.<sup>131</sup> In the current Constitution, representation has been renamed the direct action of unconstitutionality. Standing to bring the action has been expanded to include the President, the Directors (*Mesas*) of the Senate or House of Representatives, state governors, the Federal Council of the Brazilian Bar Association, any political party represented in Congress, and any national labor or business association.<sup>132</sup> Brazil's direct action of unconstitutionality is still much more restricted than Colombia's popular action, which permits any citizen to challenge the constitutionality of any statute directly before the Constitutional Court.<sup>133</sup> Brazil's modification of the representation action represents a very substantial increase in the ability of its Supreme Court to declare laws and statutes unconstitutional.

Both the popular action and the direct action of unconstitutionality have the unfortunate effect of depriving the highest constitutional courts of the benefit of the opinions of the lower courts, of seeing the actual effect of the statute on litigants, and of being able to duck untimely or too sensitive matters by imposing barriers to justiciability. Indeed, these direct actions involving abstract declarations of unconstitutionality may eventually embroil Colombia's Constitutional Court and Brazil's Supreme Court in an undue amount of conflict with the other branches of government.

---

128. Judgment of Jan. 23, 1992 (José Leonidas y José Darío Bustos Martínez), Supreme Court *en banc*, 21 Juris. Y Doct. 180 (Colom.).

129. Judgment of Mar. 11, 1992 (Hernando Jai Hernández), Chamber of Civil Cass., 21 Juris. Y Doct. 324 (Colom.).

130. BRAZ. CONST. (1969) art. 118(1).

131. Judgment of Mar. 10, 1971 (Movimento Democrático Brasileiro v. Procurador-Geral da República), Supremo Tribunal Federal *en banc*, 59 R.T.J. 333 (Braz.).

132. BRAZ. CONST. arts. 102(a) & 103.

133. COLOM. CONST. arts. 40(6) & 241(4).

## 6. Miscellaneous Actions

Article 87 of Colombia's Constitution permits every person to bring an action before the courts to enforce a law or administrative act. Article 88 states that the law shall regulate popular actions for the protection of collective rights and interests relating to public patrimony, space, security and health, administrative morals, the environment, free economic competition and others of similar nature. It also provides for a class action to deal with damages that are suffered by numerous persons, without prejudice to their bringing private actions.

Brazil has long had a popular action allowing any citizen to sue to nullify any act injurious to the public patrimony.<sup>134</sup> The 1988 Constitution expands this popular action to include acts that injure administrative morality, the environment, and historic or cultural patrimony.<sup>135</sup>

Article 89 of the Colombian Constitution permits the legislature to establish other types of actions, appeals, or procedures that may be brought for the protection of individual rights or collective interests when faced with an action or a mission by public authorities. Article 90 imposes liability upon the states for damages resulting from actions or omissions of public authorities. Article 91 imposes liability on a governmental agent that manifestly violates a constitutional precept to the detriment of an individual.

### C. *The Self-Executing Nature of Individual Rights*

Both constitutions make most individual rights self-executing. Article 85 of the Colombian Constitution provides that the individual rights protected by the Colombian Constitution, with a few exceptions, apply immediately.<sup>136</sup> In addition, Article 84 provides

---

134. BRAZ. CONST. (1934) art. 113(38). See generally JOSÉ AFONSO DA SILVA, *AÇÃO POPULAR CONSTITUCIONAL: DOCTRINA E PROCESSO* (1968).

135. BRAZ. CONST. art. 5(LXXIII).

136. The draft had taken the position that all fundamental rights guaranteed in the constitution were self-executing, but the Constitution has taken the approach of specifically identifying which rights are self-executing. The only fundamental rights not deemed self-executing are those contained in Article 22 and Article 25. Article 22, which makes peace a constitutional right and duty, is a provision that presents obvious problems of enforcement; Article 25, which makes labor a right and social obligation and provides that every person has the right to a job in dignified and just conditions, is an aspirational provision whose enforceability is also clearly problematic. Another provision that is not designated as self-executing is somewhat surprising: The right to bring criminals apprehended *in flagrante*

that if a right or activity has been regulated in a general manner, the authorities may not require permits, licenses, or additional requirements in order for persons to exercise these rights or activities.

Article 5 § 1 of the Brazilian Constitution provides that "the rules defining fundamental rights and guarantees are applicable immediately." This provision, taken from the Portuguese Constitution of 1976, is problematic because a number of the fundamental rights are guaranteed only in terms of the law.<sup>137</sup> Because of Brazil's long history of under-enforcement of constitutional rights and the large number of programmatic constitutional provisions that require enactment of implementing legislation,<sup>138</sup> the drafters of Brazil's Constitution created two new procedural institutions: the action of unconstitutionality for omission; and the mandate of injunction (*mandado de injunção*).

### 1. Action of Unconstitutionality for Omission

An action of unconstitutionality for omission, a concept borrowed from the Portuguese Constitution of 1976, can be brought directly before the Brazilian Supreme Court whenever the failure to adopt a statute or regulation makes a constitutional norm ineffective.<sup>139</sup> In the case of a legislative omission, the Supreme Court can try to cajole the legislature into issuing the necessary legislation by notifying the legislature that it has a constitutional duty to adopt the measure. If the culprit is an administrative agency, the

---

*delicto* before a judge and to pursue these offenders into their own homes or into the homes of neighbors. Certain of the other individual rights that are not regarded as self-executing are the right not to be extradited, the right of asylum, the right of free association, and the right of employees and employers to form syndicates or associations without state intervention.

137. See e.g., BRAZ. CONST. art. 5(VI) (assuring free exercise of religion as set forth in law); *id.* art. 5(XV) (any person may enter or leave the country with his property under the terms of the law); *id.* art. 5(XXVI) (protecting small rural properties, as defined by law, from attachment for debts and requiring the law to provide for ways to finance their development).

138. In 1989, the Brazilian Ministry of Justice published a study entitled *Leis a elaborar*, indicating that in 256 instances the constitutional text expressly requires enactment of legislation and that 87 other parts of the constitutional text implicitly require complementary legislation. While the Brazilian Congress has been notoriously dilatory in enacting complementary legislation, this study exaggerates the problem because implementing legislation had already been on the books in a number of areas. Caio Tácito, *O Direito à Espera da Lei*, 181-82 REVISTA DE DIREITO ADMINISTRATIVO 38, 40 (1990) (Braz.).

139. BRAZ. CONST. art. 103 § 2.

Supreme Court has the power to direct that the necessary administrative actions be adopted within thirty days.

## 2. The Mandate of Injunction

The mandate of injunction may be granted "whenever the lack of regulatory rules makes exercise of constitutional rights and liberties and the prerogatives inherent in nationality, citizenship or sovereignty infeasible."<sup>140</sup> The mandate of injunction is a misnomer that bears little resemblance to the Anglo-American injunction. The poorly drafted constitutional provision, which has produced considerable confusion and controversy, has not yet been regulated. In the meantime, the Brazilian Supreme Court has held that the remedy is self-executing but that until it is regulated, the courts should use the procedures established for the writ of security.<sup>141</sup>

The promise of the mandate of injunction, which some commentators saw as a mandate enabling the courts to formulate and apply temporary rules to permit enforcement of constitutional rights in concrete cases,<sup>142</sup> has not been fulfilled. Thus far, the Supreme Court has been reluctant to grant writs of injunction. When it has, the Court has refused to remedy the violation, taking the position that its duty is simply to call the omission to the attention of the Congress.<sup>143</sup> Under this interpretation, the mandate of injunction essentially duplicates the action of unconstitutionality for omission.

## IV. CONCLUSION

Despite these ample and well-defined constitutional guarantees, the enforcement of individual rights will continue to be problematic in both Brazil and Colombia without significant strengthening of the judiciary. Maladministration of justice has long been a

---

140. *Id.* art. 5(LXXI). If the failure to issue the required rules is attributable to the President, the Congress, or the superior federal courts, the Supreme Court has original jurisdiction of mandate of injunction actions. *Id.* art. 101(I)(q). If the failure is attributable to some other federal agency or authority, the Superior Tribunal of Justice has original jurisdiction. *Id.* art. 105(I)(h).

141. Rosenn, *supra* note 4, at 797.

142. See, e.g., Barbosa Moreira, *Brazilian Civil Procedure: An Overview*, in A PANORAMA OF BRAZILIAN LAW 183, 204-05 (Jacob Dolinger & Keith S. Rosenn eds., 1992).

143. *Mandado de Injunção* No. 219 of Aug. 22, 1990, cited in Tácito, *supra* note 138, at 42.

serious problem in Brazil and Colombia. Lengthy delays have caused serious denials of justice. Both countries have grave problems with death penalties being imposed by paralegal groups, such as death squads and lynch mobs. This reflects a serious lack of confidence in the abilities of their criminal justice systems to apprehend, to try, and to punish dangerous criminals.<sup>144</sup> Torture and maltreatment of prisoners is a common occurrence in Brazilian police stations, jails, and prisons.<sup>145</sup> Colombia has had chronic problems with uncontrollable violence, disappearances, torture, and violations of due process.<sup>146</sup> It also has a serious problem with the intimidation of judges by all too credible threats of violence.<sup>147</sup> In both countries, the great bulk of deprivations of individual rights have gone unpunished.

Both constitutions contain a number of provisions designed to improve judicial independence and efficiency. For example, both Constitutions try to free the courts from executive tutelage by permitting the judiciary to prepare its own budget requests for Congress.<sup>148</sup> Colombia's new Constitution goes much further than Brazil's in seeking to reform the judicial system. For example, it replaced its system of investigative magistrates with a U.S.-style system of professional prosecutors. It has created a new Constitutional Court and has attempted to turn the Procurator General into an independent watchdog who will be elected by the Senate rather than appointed by the President. The Procurator General heads the Public Ministry, which will house a newly created institution called the Public Defender (*El Defensor del Pueblo*), who is charged with the promotion, publication, and exercise of individual

---

144. See, e.g., MARIA CÉLIA PAOLI ET AL., *A VIOLÊNCIA BRASILEIRA* (1982); COMISIÓN ANDINA, *supra* note 46, at 197-217; Palacio Castañeda, *The Crisis of and Alternatives to the State Judicial Monopoly at the End of the 20th Century: Exploratory Notes on the Colombian Case*, in 1 *MAS ALLA DEL DERECHO: BEYOND LAW* 21, 35-43 (1991); Germán Palacio Castañeda, *Administración de justicia, los jueces y la crisis institucional en Colombia: contradicciones y dilemas*, 1 *JURIMPRUDENCIAS* 33, 37-42 (1990) (Colom.).

145. AMNESTY INTERNATIONAL, *BEYOND THE LAW: TORTURE AND EXECUTION IN URBAN BRAZIL* (June 1990); DEPARTMENT OF STATE, *supra* note 46, at 487; Sandra Faria, *El sistema carcelario brasilero: perspectivas para la década del 90*, 2 *JURIMPRUDENCIAS* 103, 110-117 (1991) (Colom.).

146. COMISIÓN ANDINA, *supra* note 46; DEPARTMENT OF STATE, *supra* note 46, at 549-54.

147. Luz E. Nagle, *The Rule of Law or the Rule of Fear: Some Thoughts on Colombian Extrajudicial Executions*, 13 *LOY. L.A. INT'L & COMP. L. J.* 851, 867-870 (1991); Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 *U. MIAMI INTER-AM. L. REV.* 1, 7 (1987).

148. BRAZ. CONST. art. 99; COLOM. CONST. art. 256(5).



rights.<sup>149</sup> Yet it is doubtful that these impressive measures will by themselves be sufficient.

Both countries need to invest considerably more resources in the judiciary to attract the best and the brightest members of the legal profession into judicial careers. Substantial sums need to be spent on continuing judicial education to imbue the judiciary with a meaningful sense of its critical role in protecting and preserving individual rights. Civil and criminal procedures have to be streamlined and modernized to enable the courts to dispose of pending cases more speedily. Considerable sums need to be spent on protecting judicial independence from being undermined by terrorism and corruption.

Yet even if the judiciaries of Brazil and Colombia can be persuaded to change their mentalities and to make unprecedented activist efforts to try to ensure the protection of individual rights, the courts alone cannot make effective protection of such rights a reality. Substantial resources must be invested to upgrade the caliber of the police and to improve their training. Underfunded and poorly trained police forces are incapable of coping with the high levels of crime in Brazil and Colombia.<sup>150</sup> Until this basic deficiency is remedied, police and other security force are unlikely to make serious efforts to respect constitutional rights and liberties.

Moreover, the general population must be educated with respect to which rights are constitutionally guaranteed and how these rights can be asserted. People also have to be taught to value and respect these rights. Substantial sums have to be devoted to making legal assistance to the indigent and the quasi-indigent truly effective. In short, without a widespread societal commitment to the notions that individual constitutional rights are of the highest importance and that a considerable amount of resources, time, and collective effort has to be dedicated to their protection, the impressive efforts of the drafters of these Constitutions to insure that respect for fundamental human rights becomes a reality will be unsuccessful.

---

149. COLOM. CONST. arts. 281-284.

150. See Alvaro Lazzarini, *Segurança pública e o aperfeiçoamento da policia no Brasil*, 316 REV. FOR. 3, 6-10, 27-31 (1991) (Braz.).

*Postscript*

Since this article went to press, Brazil has ratified the American Convention on Human Rights. On October 21, 1992, a formal complaint was filed with the Inter-American Commission on Human Rights, seeking condemnation of Brazil for the slaying of 111 inmates at the Carandiru Prison in São Paulo on October 2, 1992.<sup>151</sup>

---

151. *OAS Condemnation of Brazil Sought*, MIAMI HERALD, October 22, 1992, at A18.