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THE COSTA RICAN AMPARO IN THE PERIOD 1950-1962

DIANA S. DONALDSON*

INTRODUCTION

Although the Costa Rican amparo is very much like the Mexican amparo and the Brazilian *mandado de segurança*,¹ fashioned for the protection of constitutional rights other than those embraced in habeas corpus, the Costa Rican *ambiente* imports significant differences into the functioning of its amparo. The rule of law may be said to hold sway in Costa Rica to a greater extent than in many Latin American countries.

Costa Rica achieved independence from Spain without a revolution. The particular way in which it did so may have averted the "legitimacy vacuum"² experienced by Latin America generally. A *Cabildo Abierto*, which included delegates from all *ayuntamientos* in the colony, was convened in Cartago to subscribe to the Act of Independence and to call elections for delegates to a *Junta de Legados*. The Spanish Governor of the province presided over the *Cabildo* and surrendered power directly to the *Junta de Legados* two weeks later, at which time he also sailed for Spain.³ Peralta finds in this non-revolutionary succession of governments the seed of Costa Rica's long-lived constitutional tradition.⁴

Since the Constitution of 1949, Costa Rica's elections have been fair and regular, a circumstance which continues to insure the stability and perceived legitimacy of its governments.⁵ Thus, the Costa Rican judiciary is not called upon to legitimate the government in power nor to save a society where Judge Hand's "spirit of moderation" is gone.

Stability in Costa Rica derives also from the relative absence of authoritarianism. There the Legislative branch of government dominates. The Executive is much weaker than in most of Latin America so that the Costa Rican president is far from a *patrón or caudillo*.⁶ In the absence

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of authoritarianism, the constitutional tradition survives and in turn strengthens Costa Rican democratic government.⁷ A highly literate populace and an agrarian structure composed largely of small and medium-sized farms⁸ provide additional protection against the authoritarianism which pervades the governmental systems of other Latin American countries.

Moreover, the Costa Rican Judiciary is exceptional for Latin America. The Constitution of 1949 guaranteed a centralized, independent Judiciary.⁹ Judges are appointed by the Legislative Assembly for an eight-year term with automatic renewal unless removed at the end of a term by two-thirds of the Assembly. The Judiciary, especially the Supreme Court, is much respected and free of corruption.¹⁰

One would expect to find Costa Rican courts acting on the merits and exercising independent judgment in deciding amparo actions against government functionaries. That it has found for the plaintiff in only 15% of amparo cases from 1950 through 1962 cannot be lightly attributed to its submissiveness to the Executive or to its weakness in the face of authoritarianism. The characteristics of Costa Rica's government and people which differentiate it from other Latin American countries also cast doubt on the validity of an analysis of Costa Rican amparo cases in terms applicable to those other countries.

Consequently, this paper will examine the workings of the Costa Rican amparo during the period 1950 through 1962 and delineate its limitations as an action to protect constitutional rights. Then it will attempt to discover the theories which Costa Rican courts apply in granting or denying amparos.

WORKINGS OF AMPARO

The remedy of amparo originated with Art. 48 of the Constitution of 1949.¹¹ It supplements the action of habeas corpus,¹² the action of "unconstitutionality,"¹³ and the separate jurisdiction over *lo contencioso-administrativo*.¹⁴ The Constitution embodied a wide range of rights in its 177 articles, reflecting the social welfare reforms implemented in the 1940's by the Calderón government, as well as the progressive economic and social ideas of the influential Social Democrat Party¹⁵ and the programs of the Center for the Study of National Problems, from which evolved the National Liberation Party.¹⁶ Among the "Social Rights and Guarantees" are the

right to free choice of work, a minimum wage which will guarantee dignity, an annual paid vacation, freedom of workers to organize, and the state's obligation to redistribute wealth and to establish a social security system. According to the Constitution, the amparo could be used to protect all these rights, but the implementing law and subsequent judicial interpretation narrowed its utility considerably.

Jurisdiction of Amparo Actions

Law No. 1161 of June 2, 1950, vested jurisdiction in the Supreme Court sitting in plenary session (*Corte Plena*) over amparo actions against the President, Ministers of Government, Governors of the Provinces, Commandants of the Plaza, and the Director General of the Civil Guard. Any other case of amparo must be heard by the Penal Judge of the jurisdiction where the act or omission occurred.¹⁷

Many cases before the *Corte Plena* in this period involved municipal resolutions affirmed by the Minister of the Interior or actions of municipal officials (*jefes políticos*) approved routinely by the Governor of the Province. Such relatively petty local matters were within the purview of the *Corte Plena* merely because of the traditional control of municipal government by the central government. *Jefes políticos* and governors were appointees of the central government and were responsible to it.¹⁸ By a process of "demunicipalization," autonomous central agencies and local independent boards or national ministries took over municipal functions.¹⁹ The flood of local issue amparo cases in the *Corte Plena* resulted from the national locus of municipal government functions.²⁰ The framers of the 1949 Constitution most likely did not contemplate this development, particularly since they had provided for municipal autonomy in Art. 170.

Even cases which begin in lower courts may end up in the Supreme Court, albeit not the *Corte Plena*. About half of the amparo cases brought before a Penal Judge in the period under study were appealed to a Penal Chamber of the Supreme Court as provided for in the Law of Amparo. The lower courts were upheld in about two-thirds of the appeals.

Compliance with Procedural Requirements

Art. 10 of the Law of Amparo directs that the defendant official be required to give information concerning the case in a speedy fashion. Art. 11 sets forth the brief time limits. From the cases, it appears that the courts customarily send telegraphic inquiries specifically authorized by

Art. 10 to the authority whose actions are being challenged. The defendant, almost without exception, fires back extensive explanations in response and sends along supporting documents.

The official faces a severe penalty for non-compliance with the order to respond. If a reply has not arrived within the requisite time, which is never more than a few days, the amparo will be granted without more. And, as discussed below, once a court grants the amparo, the defendant acts at a great risk if he violates the court order. In only two cases during this period was the penalty for lack of response actually imposed, and those courts indicated that the petitioners would have won on the merits in any event.²¹ The other three instances where the authority failed to reply resulted in decisions against the petitioners although the courts recognized that the terms of Art. 10 had not been met.²² In four of the total of five cases, the request for information emanated from a Penal Judge rather than from the *Corte Plena*. It is predictable that lower courts will have more difficulty obtaining the cooperation of officials, and it is almost certain that cooperation will decline as the courts show themselves to be unwilling to impose the penalty at their command.

A second procedural aspect of the amparo has to do with the timeliness of the petition itself. Art. 3(e) establishes an irrefutable presumption of consent to the action complained of if an amparo is not instituted within eight days of the incident.²³ Research has revealed only one amparo out of 201 in which a court invoked this presumption.²⁴ There petitioners had begun an action of "revocation" against a proposed resolution which should, by the law governing actions of revocation, have brought an answer in fifteen days. The petitioners had waited a month after the date on which the answer was due to file their amparo petition protesting the proposed resolution and the lack of response to their revocation action. The *Corte Plena* was willing to count from the last date possible for the reply rather than from publication of the proposed resolution, but petitioners had acted too late even so and had thus presumptively consented to the resolution.

Whether the remaining two hundred petitions were filed within the statutory period does not necessarily appear on their face. Possibly other petitioners acted outside the eight-day limit, but the court chose not to invoke Art. 3(e). The case just discussed was also the only one during this period which involved an attempt to block a proposed resolution. Although strong pressures exist to limit the time within which an act of an official may be challenged, it is even more imperative to restrict the

period within which a proposed resolution can be prevented from becoming law. As the court has presumed consent only in the latter situation, one cannot conclude that courts stringently enforce the deadline in all instances.

Public Authorities as Defendants

Neither Art. 48 of the Constitution of 1949 nor the Law of Amparo expressly provides that amparo will lie only against acts or omissions of public officials. However, every amparo petition singles out as a defendant one or more public authorities. The limitation may be implicit in Art. 4 of the Law of Amparo:

The action will lie against any authority, functionary or employee, whether he acts on his own or in obedience to orders from his superiors. In the latter case, the action will be understood to be against the superior as well.

An examination of the amparo actions in this period reveals that discretionary acts by public authorities form the subject matter of almost all petitions. On this characteristic, the Costa Rican amparo can be distinguished from the Mexican amparo, which is only now beginning to evolve a doctrine of abuse of discretion.²⁵ When the express provisions of a law apply to a petitioner so that the enforcing authority is merely performing a ministerial task, the amparo is in essence proceeding against the law itself, which is forbidden by Art. 3(a) of the Law of Amparo, discussed below. This, at least, is the rationale of Costa Rican courts.

When, however, one in authority must make a judgment as to granting licenses or permits, shutting down businesses, expropriating land, or confiscating so-called subversive literature, he is exposing himself to an amparo suit. The extent to which Costa Rican courts are willing to support officials in their exercise of discretion forms a separate section below.

Enforcement of Orders

As set forth above, the Law of Amparo equips the courts with effective enforcement tools in order to persuade officials to reply and to insure the timeliness of petitions. The law also establishes a seemingly mandatory penalty for those who would scoff at court orders proceeding from amparo actions. Within forty-eight hours of the court order, the functionary or employee responsible for the violation must comply or be sentenced to prison for six months to three years.²⁶

A repeated violation evokes even harsher treatment. If a losing defendant in a prior amparo suit commits the same offense and is sued again by the prior petitioner, he will be sentenced to one to four years' imprisonment.²⁷

The respect accorded courts in Costa Rica should alone produce an effective amparo. With the sharp teeth installed by the Law of Amparo to reinforce the Judiciary's esteemed position, Costa Rican courts, unlike their counterparts in other Latin American countries, have a potentially powerful instrument to protect individuals in the exercise of their constitutional rights.

SURVEY OF AMPARO DECISIONS

The format of the amparo opinions published for this period reflects the strong position of the courts. Like opinions written in more prominent countries such as Argentina and Brazil,²⁸ dissents and concurring opinions appear. Early amparo cases upholding government suppression of Communist literature and disruption of meetings of allegedly Communist organizations brought forth powerful, well-reasoned dissents.²⁹

Amparo opinions, particularly those emanating from a *Juzgado Penal*, typically present the petitioner's case first (sometimes in his own words), incorporate the official reply with little apparent abridgement, summarize by listing facts proved and unproved, and declare the amparo granted or denied with a short statement of supporting reasons. Opinions are quite complete in their recital of facts and usually thorough in dealing with each of the complainant's claims.

Subject Matter

Overall, amparos in this period reflect the efforts of the government to protect the moral and social fabric of society, to regulate local commerce, and to invade minimally some property rights for the public benefit. Thus, many amparos involved the closing down of establishments alleged to be housing prostitutes while operating in the guise of hotels, bars, and even restaurants.³⁰ Evictions of inhabitants of these places caused other complaints. A multitude of suits concerned restrictions on small bars and night-clubs which were considered scandalous but had not reached the proportions of the first group of establishments. Complaints in this latter group involved the suspension of operating licenses,³¹ enforcement of early closing hours,³² and revocation of permission to install a juke box (*roc-kola*).³³

Almost as many suits centered on measures to rid the streets of itinerant or street corner kiosk peddlers.³⁴ Municipal resolutions banning street vending of certain items and denial of licenses to operate came under fire.

Claimed encroachments on property rights by the state also led to a number of amparo actions throughout this period.

At least three-fourths of the suits concerned expropriation of land or removal of stones from river banks, both to be used for highway construction, particularly for the Pan American Highway.³⁵ Other petitions dealing with land focused on rights held by the National Electric Service, to stone and gravel from rivers,³⁶ and water rights.³⁷ Municipal regulation of frontage and levels of new buildings³⁸ and designation of parking and loading areas on streets where plaintiffs operated their shops³⁹ were also attacked as takings of private property.

In the first half of the 1950's, owners and drivers of passenger-carrying vehicles frequently appealed denials of permits to drive certain routes between cities.⁴⁰ The complaints appeared to stem from clumsy governmental attempts to compensate for the scarcity of transportation by assigning fixed routes to carriers and standardizing the vehicles. Upon the expansion of highways in the country these petitions disappeared, only to be replaced by petitions from those whose property was impinged upon by the highway construction process.

Another category of complaint was not quite as short-lived as that concerning passenger service but nonetheless reached a definite peak early in the 1950's. From 1950 through 1953, allegedly Communist organizations protested governmental disruptions of their meetings, false arrests of their members, and confiscation of their publications by the Civil Guard.⁴¹ Such repressive actions can be attributed to the anti-Communist attitudes of those who had led the successful 1948 uprising against Calderón's government,⁴² which had aligned itself with the Costa Rican Communist party. The Korean War reinforced the government's Cold War fears. When memories of the 1948 uprising had faded and the Korean War had ended, complaints of harassment and denial of free expression similarly abated.

In 1960, however, the amparos revealed renewed confiscation of literature purported to be Communist propaganda. This time the Cuban revolution probably acted as a trigger. Confiscation and censorship were institutionalized within the Consultant Group on Publications (*Junta Consultiva de Publicaciones*).⁴³

Except for this last group of petitions, which stemmed from governmental repression in the face of a perceived threat to national security, the other complaints generally concerned relatively new laws, passed after 1949. Looked at as a whole, these new laws were aimed at social development and public works rather than strictly at economic development. At most, they were concerned with the infrastructure on which development would later be based.

Those recent laws conferred discretionary powers on officials charged with executing them. The government could thereby interfere with private rights to a greater extent than before and perhaps with less predictability. Those affected by the intrusion of government into unexpected areas reacted by questioning the legitimacy of the acts of public authorities. To some extent, amparo petitions in this period reflect insecurity caused by the expansion of government and an unwillingness to accept that functionaries possessed the authority to act in such novel ways.

Merryman terms this interference by government the "publicization" of private law and states that "the expanded role of government has often been viewed as leading to a contraction of the area of free play of private autonomy."⁴⁴ State intervention is potentially more of a threat to private rights in civil law countries because it not only pre-empt's areas of private activity but also public law brings with it rules of its own.

There the role of government was not limited to the protection of private rights; on the contrary, the driving consideration was the effectuation of the public interest by state action. . . .

In public legal relations the state was a party and, as representative of the public interest (and as successor to the prince), superior to the private individual.⁴⁵

In attempting to subject the state to overriding principles of constitutional law to protect their private rights, the petitioners in Costa Rica were carrying even further the publicization of private law.⁴⁶ The courts, on the other hand, appeared willing to impose private law principles on the state, especially to enforce contracts for reimbursement for expropriation. Thus, the loosening of public law versus private law concepts can be seen clearly in amparo cases.

The mixing of these two categories of law is aided by the concept of "public order". The latter term is defined as those principles, which may be drawn from private law as well as from public law, representing the general interests of society. Some courts in amparo actions have required

that the law underlying government action be one of the public order in order to justify interfering with private rights. This requirement is discussed below in the section on dismissals of petitions.

In summary, a theme which runs through the majority of amparo actions during these twelve years is the interference by the state with private rights in an unexpected, novel manner. The expanded role of the state has implications for the traditional concepts of public law and private law. Courts handling amparo cases in this period did not attempt to maintain the distinction between private law and public law but rather subsumed them in the concept of public order.

Amparo Petitioners

The amparo complainants who paraded past the courts in this period were predominantly middle-class and engaged in commerce. Small merchants, owners of corner bars, restaurants and night clubs, and people who ferried a few small boats or ran bus lines between cities appeared most often. A few white-collar workers, employed by the state, used amparo to protest wage reductions⁴⁷ and dismissals which allegedly did not comply with the Labor Code.⁴⁸

Not infrequently, landowners sued in amparo, but the size of their holdings cannot be established by the information in the opinions. Only a few are expressly described as owners of coffee farms.⁴⁹ Courts sympathetically portray the plight of others, who are probably small land owners.⁵⁰ As for the bulk of land-related petitions, one can only surmise from the courts' conclusions about the superiority of the public purpose for taking the land that the size of the holdings are substantial, else the courts might at least have mentioned the countervailing equities.

Several major businessmen filed amparo petitions during these years. Among them were an exporter of scrap metal,⁵¹ a director of a flour importing firm,⁵² and the manager and owner of a Costa Rican airline company.⁵³ Two attorneys also instituted amparo actions, one for access to government information he needed in his practice and one to protest the lifting of his license plates twice for parking violations.⁵⁴

Leftist organizations and individuals frequently used the amparo action. These routinely unsuccessful petitioners included editors of suspect newspapers,⁵⁵ leaders of various Communist-linked parties,⁵⁶ and members who received "subversive" literature in bulk through the mails.⁵⁷ Suspected of more active agitation were certain aliens who sued to block their imminent deportation.⁵⁸

The last distinct group of petitioners consists of dock workers in the provinces of Limón and Puntarenas. No other category of laborers brought amparo suits during this period even though the workers on foreign-owned plantations in the same two provinces were the most highly organized workers of all.⁵⁹ Perhaps their active trade unions provided an effective substitute for amparo suits.

Dock workers complained exclusively of suspension of their Identification Cards (carnets) and work permits which afforded them access to the docks under the Law of Registry of Dock and Customs Workers.⁶⁰ Officials lifted the documents whenever charges of theft or smuggling were pending against the worker.

In brief, the majority of individuals who brought amparo actions in this period fell into two broad categories: (1) owners of small businesses, including bars, restaurants, hotels, shorthaul passenger transport, general stores, and (2) landowners, probably most with holdings greater than the size of single-family farms. The remainder of cases involved intellectuals with alleged Communist affiliations, aliens, dock workers, and a very few professionals and substantial businessmen. Conspicuously absent were workers in areas other than docks and foreign-owned companies.

ANALYSIS OF DISMISSALS

Courts during this period typically denied amparos on one or more of the following three grounds: (1) the defendant officials had not acted arbitrarily; (2) no constitutional rights had been violated; and (3) the amparo action fell within the forbidden categories of Art. 3 of the Law of Amparo.

Lack of Arbitrariness

The amparo is available only against "acts which are obviously arbitrary or unjustified and which are aimed at preventing or threatening the exercise of individual rights."⁶¹ So long as the official is acting in accordance with a law which has not been declared unconstitutional, his actions are per se not "arbitrary."⁶² The *Corte Plena* has also defined "arbitrary" to mean "lack of motive to justify the act."⁶³ Consequently, the term "unjustified" in the phrase quoted at the outset is surplusage because "arbitrary" has been defined to encompass it.

Plaintiffs are severely burdened by the definition of "arbitrary" which merely requires the official to show any motive to explain his act.

That is, since an official can overcome a plaintiff's allegation that an act was arbitrary merely by showing some motive which could possibly explain his act, it is difficult to conceive of a situation in which a plaintiff will prevail. A *post facto* rationale to justify an act is easily developed, particularly if it will not be examined closely by the courts.

"Obviously arbitrary" is interpreted by courts to imply an objective standard. However, though sometimes requested to impose a fine on petitioners for having sued maliciously, courts have never done so. Rather, they admit that the act complained of may reasonably have appeared to be arbitrary to the petitioner.

An explanation for such judicial narrowing of the availability of the amparo action is found in the existence concurrently of the "action of unconstitutionality" to challenge a law.⁶⁴ Courts apparently decided that the constitutional and legislative intent was to provide two non-overlapping actions. The action of unconstitutionality which has more venerable antecedents in Costa Rica than the amparo, pre-empts the area of challenges to laws on grounds of unconstitutionality. What remains for amparo jurisdiction is the challenge to official acts or omissions. But courts will not allow such suits to be converted into tests of the constitutionality of the underlying laws. A law untouched by an action of unconstitutionality is, for purposes of the amparo petition, irrefutably presumed constitutional and confers immunity on one acting in accord with its provisions. The law itself must be attacked in a different proceeding.

Some near-laws do not carry sufficient weight to protect officials who follow them, from the charge of arbitrariness. An executive regulation, for example, cannot be relied upon to authorize an official act because it does not rise to the level of a decree law.⁶⁵ Officials also discovered that an "administrative norm" is a foundation of sand.⁶⁶ On the other hand, a resolution of a municipal council commands the same respect as any national law in the amparo proceedings.

Some later amparo decisions suggest that the only laws which can preserve an official act from the flaw of arbitrariness are those which are part of the "public order":

Furthermore, the acts attributed to the functionary against whom the plaintiff is proceeding do not partake of that characteristic of arbitrariness or illegality, rather they stem from laws of the public order.⁶⁷

As amparo actions almost always involve laws which are unmistakably of the public order, courts are not really constricting the range of justifications for official action.

The concept of public order is vital in the area of public exercise of discretionary power. Courts in this period frequently refused to examine the manner in which officials exercised grants of discretionary power as long as the exercise promoted the public order. Therefore, the Civil Guard could be upheld in its arrests of pacifist petition-carriers because its acts were discretionary and aimed at upholding the public order.⁶⁸ In the same way, decisions of official censorship boards could not be questioned via amparo because they were given discretion in the interests of the public order.⁶⁹

The absence of arbitrary action has accounted for the largest number of dismissals. No petitioner attempted to argue that the law underlying the official's act was not of the public order; indeed, it is difficult to find a law mentioned in the decisions which cannot be construed as constituting part of the public order. Therefore, what appears to be a slight crack in the official defense to a charge of unconstitutional action is probably unavailable.

The laws partaking of the public order which are often cited are as follows: Law of Municipal Ordinances and the Sanitary Code (for closing down dubious establishments), Law of Passenger Transport Service, Law of Transit, Law of Public Roads, Law Regulating Aliens, Law of Registry of Dock and Customs Workers, and Law Banning Publications Against the Security of the State. In addition, specific municipal resolutions aimed at particular individuals are cited. From their titles and from what the opinions reveal of their substance, the laws are part of the package discussed above whose objective was to improve the social order and to promote public works. By upholding official actions pursuant to these laws, courts in this period perforce supported the new programs of the progressive government. The hurdle of proving arbitrary action forced a petitioner who was injured by these new laws to go the route of an action of unconstitutionality or to abandon his complaint altogether.

Violation of a Constitutional Right

The requirement that an act be arbitrary is usually mentioned in conjunction with the second requirement that the act complained of prevent or threaten the exercise of a constitutional right. Merely proving

the official acted contrary to law is not sufficient; the petitioner must also show an invasion of one of his rights as a result. "The action of amparo is to control the constitutionality, and not the legality, of the dispositions, acts or resolutions of public functionaries."⁷⁰

Occasionally courts have found that officials did not follow the law, but this circumstance does not inevitably lead to a grant of the amparo. According to the courts, an act may be contrary to existing law, and therefore arbitrary, but it does not thereby necessarily violate any constitutional right.⁷¹

Even procedural arbitrariness does not rise to the level of unconstitutionality, to the courts' way of thinking. As an example, the procedure whereby establishments of dubious reputation are closed down would constitute an unconstitutional denial of due process in the United States. Usually a municipal official acts solely on the basis of complaints and does not afford the owner notice or a hearing before he orders the closing. Sometimes the owner first learns of the order when he reads it in a newspaper. Amparo courts do not review the regularity or fairness of the procedure and are in fact willing to borrow from common law countries to invoke precedent in order summarily to uphold orders shutting down such places: "In similar cases this court (*Corte Plena*) has decided in the same way."

Costa Rican courts construe the due process guarantee of Art. 39 of the Constitution of 1949 as applicable only in criminal cases. Furthermore, one Penal Judge expressed the opinion that procedural short-cuts are justified in a country which is "so undisciplined." His reference was to the handling of traffic violations, and discipline may be particularly lacking in that area, but the assumption may be more universal. If so, it may help to explain the courts' acceptance of summary, one-sided procedures on the part of government officials who surely do not have the authority to act on rumors, gossip, and tips.

Petitioners have not accepted the courts' statements that arbitrary actions are not ipso facto constitutional violations. Two articles of the Constitution of 1949 arguably are contravened when an official acts arbitrarily. Arguments based on Art. 33, guaranteeing equality under the law, have simply been ignored by the courts. Attempts to use Art. 11, which provides that public functionaries "cannot arrogate to themselves faculties which the law does not give them," have met with more success. However, the *Corte Plena* refused to consider a petition which alleged a violation of Art. 11 alone because it did not state a personal right.⁷² When courts agree to consider the possible violation of Art. 11, the petitioner

has invariably linked that particular provision to other claims based on more acceptable articles. The success of contentions based on Art. 11, even in conjunction with other articles, appears to depend on the official's acting without any law at all behind him.⁷³

Arbitrary official action in itself may not clearly violate a constitutional article, yet it may result in an infringement of rights which are admittedly protected by a constitutional guarantee. But for the first two years of its existence, the Law of Amparo provided that it protected only "individual rights." The articles falling under Title V, entitled "Social Rights and Guarantees," could not be invoked in amparo. The only amparo case in which a law was declared unconstitutional was a decision by the *Corte Plena* that the Law of Amparo had unconstitutionally narrowed the scope of Art. 48 of the Constitution of 1949.⁷⁴ The court held that Art. 48 had established amparo to protect all rights, social as well as individual. The Law of Amparo was promptly amended to remove the limitation to individual rights.⁷⁵

A court dismissing a petition which has stated a good constitutional claim often feels compelled to deal with the claim, although sometimes it stops at the lack of arbitrary action. Frequently a balancing process, such as occurs in United States due process cases, ensues in which the invaded right is weighed against the public interest. However, the state will most likely win every amparo case because its interest in maintaining the public order always outweighs the individual interest. Public law is of primary importance. In essence, "public order" is shorthand for "compelling state interest" in such cases.

Courts, as a last resort, construe the words of the constitutional guarantee to exclude the interest at stake. This method was used almost entirely in the area of freedom of expression to arrive at support for state suppression. For example, television programs were deemed to be "spectacles" rather than an "expression of thought."⁷⁶ Communist publications mailed to a petitioner were not "private documents" susceptible of protection under Art. 24 because they were intended to be read publicly, and they could not be protected as "written communication" because the only act taking place in Costa Rica was distribution, not publication.⁷⁷

In summary, a variety of judicial devices have arisen to prevent finding the violation of a constitutional right or to justify it when it has been found. The fact that a law belongs to the public order may defeat a petitioner who can show a constitutional violation just as that fact enters into the decision on arbitrariness.

Article 3

The Law of Amparo in Art. 3 sets forth five circumstances fatal to an amparo action. The most frequently cited is subsection (d) which requires the exhaustion of the remedies established by law for the acts complained of. In general, petitioners had failed to appeal the act of a subordinate to his superior.⁷⁸ Of advantage to petitioners is the inapplicability of the exhaustion requirement if initiation of the other remedy has not produced any result within fifteen days.

Petitions stumble over the other subsections of Art. 3 less often. According to subsection (a), amparo will not lie against "legislative dispositions." Under this subsection, the *Corte Plena* dismissed a challenge to a municipal building code because it was passed in accordance with the national Law of Construction and thus fell within the haven provided for legislative enactments.⁷⁹ Protests against ministerial acts apparently were considered equivalent to protesting the law itself for purposes of subsection (a). For example, the subsection was applied to a case in which the mayor closed down a bar whose location was prohibited by the express, detailed terms of the Liquor Law.⁸⁰

Judicial dispositions are similarly immune from challenge by amparo under subsection (b) if the court in question is acting within its competence. Moreover, subsection (c) protects administrative authorities who are merely executing orders of a court.⁸¹

Subsection (e), which exempts consented-to acts, has been discussed above in the context of presumptive consent. Courts have also implied consent from actions and oral assurances. In one case, a verbal expression of willingness to have land used temporarily for storage of highway construction machinery was sufficient to allow the use of the land without payment.⁸² Petitioner claimed that his consent had not been sought or obtained formally, but the *Corte Plena*, over a strong dissent, held his oral acquiescence to be sufficient to bring subsection (e) into play.

Some Latin American amparos include dismissals for mootness in their counterparts to Art. 3.⁸³ It is clear that the Costa Rican Legislature contemplated the mootness issue. Art. 15 of the Law of Amparo directs courts to admonish functionaries and hold them subject to the penalties for repeating their offense despite the mootness of the case. Dismissal for mootness is not expressly provided. Nonetheless, courts have determined that in moot cases they cannot "restore the enjoyment of constitutional rights," which is the purpose of amparo, so they dismiss for mootness although not specifically authorized to do so.⁸⁴

The exceptions listed in Art. 3 can be attributed to the doctrine of separation of powers. In Costa Rica, this doctrine is well-respected, so the Judiciary observes the terms of Art. 3 punctiliously. Even so, of the amparo petitions dismissed during this period, fewer than one-fourth were denied under Art. 3 or for mootness. The remainder were denied on the two grounds examined earlier.

GRANTS OF AMPARO

The small percentage of cases in which petitioners succeeded in their suits fall into four areas: (1) right to work; (2) freedom of expression; (3) property rights; and (4) access to public information. Official corruption figured in one case.

Right to Work

Courts upheld claims based on the right to work on very distinctive and narrow fact patterns. In two cases, the controlling factor appeared to be that the public authority was attempting to limit the *location* in which petitioners could open their establishments.⁸⁵ The administrative presumption that the location was somehow to blame for the immoral nature of the business operating there was found to be unconstitutional. Denial of a permit based on that particular ground would be found an abuse of discretion.

Challenges to government control of passenger transport routes resulted well for plaintiffs before the end of 1951, at which time the Law of Passenger Transport Services was enacted.⁸⁶ Thereafter, any regulation of routes which injured a complainant was held not to be arbitrary because based on a law in effect.

Another type of right to work case which succeeded concerned a dock worker whose carnet was listed due to his arrest, although he was later released from jail.⁸⁷ The court restricted suspension of the carnet to cases in which there was at least probable cause for the arrest.

Freedom of Expression

The very first Costa Rican amparo decision held that an order not to broadcast a controversial radio program violated freedom of expression, despite the national security grounds the official gave for his action.⁸⁸ The right to petition was upheld in another early case in which the Progressive

Party had received no response to its petition for recognition by the Municipal Council on the basis that it was Communist-linked.⁸⁹

One of the last decisions of this period granted the amparo against the destruction of newspapers.⁹⁰ There the court was swayed more by the fact that the defendant official had acted on his own without waiting for a pronouncement from the Consultant Group for Publications than by the violation of freedom of expression.

Amparo petitions were upheld in this area only rarely. Whenever they proceeded against an entity other than the Civil Guard, the chances of success were improved immensely. The Civil Guard appeared to have almost unlimited discretion to take action against behavior which it deemed to be subversive of the national security and contrary to democratic principles.

Property Rights

The private interests in property which were able to withstand analysis in terms of the social function of property were those of small holders.⁹¹ The state, in these cases, could not prove that it was entitled to any part of the land in question either by reference to earlier transactions or by citing a law.

One amparo was used to uphold a private commercial interest against another private interest in land. It proceeded against local police, but in substance the defendant was the United Fruit Company, which had used the police as its agents to order petitioner's business off what it claimed to be its private property.⁹² The court held that the property at issue had been used as a public road for such a long time that it could not be closed without violating the Law of Public Roads.

Access to Information

Art. 30 of the Constitution of 1949 grants access to government departments for information pertaining to the public interest. Courts have assiduously upheld this right except when the information is not even colorably of public interest.⁹³ As a result, Art. 30 has developed into an effective and valuable instrument for insuring freedom of information.

Access to government cannot depend on paying a bribe, however. An attorney was charged a fee for the return of his license plates by a functionary who apparently pocketed the money.⁹⁴ The court gravely

observed that this act violated the constitutional prohibition against imposing fines without prior sentence. This case of arguable corruption was the only one of its kind in this period.

CONCLUSION

It is difficult to say whether amparo in Costa Rica between 1950 and 1962 had any effect on the actions of government officials and functionaries. Its potential for controlling behavior was, in essence, limited to discretionary acts of public authorities, and abuse of discretion, or arbitrariness, could only be found if there were no law in force or no possible motive to justify the action. Authorities seemed to continue actively to carry out post-1949 measures despite amparo actions. Even repeated actions under the same law did not serve to chill official behavior under that law.

It is not surprising that the courts did not become an instrument to undercut reformist legislation in this period. The National Liberation Party in Costa Rica, which provided the Presidents from 1949 through 1959 and staffed the Legislature and the bureaucracy for even longer,⁹⁵ probably also produced the judges. It had begun as an organization of law students and was dominated by the middle class.⁹⁶ Judges before whom amparo petitions came were undoubtedly in sympathy with the legislative measures which prompted the complaints.

Not only were judges favorably disposed toward the progressive legislation, but they early set boundaries for themselves to which they adhered to throughout. The Law of Amparo itself precluded direct attacks on laws, and indirect attacks were similarly blocked by the judge-made rule that a defendant acting in accordance with a law was not acting arbitrarily.

Measures which prompted the most challenges were in effect quite conservative. Many were aimed at moral regeneration of urban areas. Those laws formed the basis for paternalistic behavior on the part of government: closing bars early to conserve earnings of presumably spendthrift workers, prohibiting juke boxes because they might be a source of immorality, censoring television programs and publications, housing itinerant peddlers in municipal centers to get them off the streets, and shutting down unsavory establishments upon complaints of townspeople. Perhaps most Latin American judiciaries could be depended upon to uphold official action taken in response to such laws.

One area of more radical change is expropriation. Here, Costa Rican courts merely looked for a law which granted the power to expropriate, usually the Law of Public Roads. If the purpose for which the land was taken was legal, the taking was upheld. Courts were willing to deny medium to large-sized landholders any remedy other than compensation. One presumes that the compensation was less than adequate, although no amparo was brought to protest the amount of reimbursement received from the state, because the takings would not have generated as many amparos if fair market value were paid.

In the area of amparo, therefore, courts did not hinder, if they did not promote, social and economic development measures legislated by the state. Economic development was in its infancy during most of this period,⁹⁷ but development of human resources and building up transportation and marketing infrastructures proceeded apace. Costa Rican courts, by protecting official action to implement the laws from challenges for abuse of discretion, may have prevented the amparo action from becoming the instrument to dismantle some of the new legislation. Although the areas in which the amparo was called upon to operate seem relatively trivial, the narrow availability of amparo had implications for the wider sphere of laws of the public order in general.

NOTES

¹Camargo, *The Right to Judicial Protection: "Amparo" and Other Latin American Remedies for the Protection of Human Rights*, 3 *Law.Am.* 191, 211, 223 (1971).

²K. Rosenn & K. Karst, *Law and Development* 186 (in press).

³H. Peralta, *El Derecho Constitucional en la Independencia de Costa Rica* 16 (1965).

⁴*Id.*

⁵Busey, *Observations on Latin American Constitutionalism*, 24 *The Americas* 46, 61 (1967). Busey devotes a part of his article to "The Costa Rican Exception." *Id.* at 60-64.

⁶A. Edelman, *Latin American Government and Politics* 3788-99 (1965).

⁷Busey, *supra* note 5, at 61.

⁸H. Blustein et. al., *Area Handbook for Costa Rica* (1970).

⁹C. Araya et. al., *El Desarrollo Nacional en 150 Años de Vida Independiente* (1971).

¹⁰Busey, *supra* note 5, at 64.

¹¹Const. of 1949, Art. 48 provides in relevant part: To maintain or restore the enjoyment of the other rights (other than those protected by habeas corpus) consecrated in this Constitution, every person shall have, in addition, the action of Amparo, jurisdiction over which shall be in those courts fixed by law.

¹²Const. of 1949, Art. 48.

¹³Const. of 1949, Art. 10. See also M. Tulio Zeledon, *El Recurso de Inconstitucionalidad* 16-23 (1948).

¹⁴Const. of 1949, Art. 49. See also Camargo, *supra* note 1, at 200.

¹⁵C. Araya, *supra* note 9, at 98-101.

¹⁶B. English, *Liberación Nacional en Costa Rica* (1971).

¹⁷Art. 6.

¹⁸C. Baker et al., *Municipal Government in Costa Rica: Its Characteristics and Functions* (1971).

¹⁹*Id.* at 54.

²⁰With the advent of a new municipal code four years ago, local power may be sufficiently free of central government oversight that the *Corte Plena* no longer has to deal with amparos about municipal ordinances. See C. Baker, note 18.

²¹No. 22, Dec. 10, 1952 (governor failed to respond); No. 19, June 18, 1952 (President of Municipal Council did not reply).

²²No. 143, Oct. 29, 1960 (Director of Public School); No. 116, July 10, 1959 (Traffic Department); No. 111, Feb. 3, 1959 (President of Municipal Council).

²³Law No. 1161, Art. 3(e) provides:

The action of Amparo will not lie: (e) When the act or omission which violates the right is consented to expressly or presumptively by the aggrieved person.

Consent shall be presumed when more than eight days have elapsed after the cessation of the violation or threat of violation of the right without the institution of an Amparo action by the aggrieved person.

²⁴No. 196, Feb. 22, 1963 (decided in 1962).

²⁵K. Rosenn, *supra* note 2, at 129.

²⁶Law No. 1161, Arts. 16 and 17.

²⁷Law No. 1161, Art. 18 provides:

If the acts or omissions on which a successful action of Amparo is based are repeated with injury to the same person in such a way as to give rise to another Amparo action, and if the author is the same functionary or employee, he will be sentenced to prison from one to four years.

²⁸K. Rosenn, *supra* note 2, at 91 n.7.

²⁹*e.g.*, No. 10, Aug. 19, 1951; No. 6, Oct. 29, 1950.

³⁰*e.g.*, No. 192, Jan. 29, 1963 (decided in 1962); No. 186, Oct. 9, 1962; No. 125, May 4, 1960; No. 31, Sept. 18, 1953; No. 22, Dec. 10, 1952.

³¹*e.g.*, No. 131, Sept. 21, 1960; No. 125, May 4, 1960 [establishment opened on site of earlier bar known popularly as "The Fleshpot" (*Olla de Carne*)]; No. 17, June 20, 1952.

³²*e.g.*, No. 134, July 6, 1960.

³³*e.g.*, No. 181, Aug. 23, 1962.

³⁴*e.g.*, No. 198, March 1, 1963 (decided in 1962); No. 140, Dec. 13, 1960; No. 111, Feb. 3, 1959; No. 35, Jan. 7, 1954; No. 27, April 8, 1953.

³⁵*e.g.*, No. 201, Jan. 9, 1963 (decided in 1962); No. 137, Oct. 19, 1960; No. 124, April 30, 1960; No. 113, April 17, 1959.

³⁶No. 184, Aug. 11, 1962.

³⁷No. 115, June 24, 1959.

³⁸No. 5, Oct. 11, 1950.

³⁹No. 196, Feb. 22, 1963 (decided in 1962); No. 123, March 22, 1960.

⁴⁰*e.g.*, No. 38, Feb. 9, 1954; No. 25, Dec. 12, 1952; No. 13, April 18, 1952; No. 7, Oct. 10, 1950.

⁴¹*e.g.*, No. 28, June 16, 1953; No. 19, June 18, 1952; No. 10, Aug. 19, 1951; No. 9, Sept. 9, 1951; No. 8, April 8, 1951; No. 6, Oct. 29, 1950.

⁴²B. English, *supra* note 16, at 124.

⁴³No. 183, Aug. 11, 1962 (government may regulate physical access to records if reasonably necessary to prevent crowding); No. 144, Dec. 4, 1960; No. 119, July 16, 1959 (data was made available during pendency of amparo, so case was moot).

⁴⁴Merryman, *The Public Law—Private Law Distinction in European and American Law*, 17 J. of Pub. Law 3, 15 (1968).

⁴⁵*Id.* at 12-13.

⁴⁶The most frequently cited articles are as follows: Art. 56, guaranteeing the right to work and free election of work; Art. 23, respecting the inviolability of one's domicile, and Art. 45, guaranteeing the right of private property (used to protest the closing of scandalous establishments and the taking of land); a combination of Art. 24 (inviolability of private documents and oral or written communications), Art. 28 (freedom from persecution for personal opinions), Art. 29 (freedom from prior restraint on publication), and Art. 98 (right to associate in political parties) to protest suppression of expression and organizations.

⁴⁷No. 15, April 18, 1952.

⁴⁸No. 185, Nov. 22, 1962; No. 23, Jan. 18, 1953 (court found plaintiff was not a public servant although he worked for a quasi-public agency.)

⁴⁹No. 122, March 18, 1960; No. 115, June 24, 1959; No. 148, June 13, 1961.

⁵⁰No. 129, June 12, 1960; No. 32, Oct. 27, 1953.

⁵¹No. 12, Nov. 9, 1951.

⁵²No. 144, Dec. 4, 1960.

⁵³No. 118, Sept. 17, 1959.

⁵⁴No. 183, Aug. 11, 1962 (attorney denied access to record room); No. 135, Oct. 8, 1960 (parking violation); No. 116, July 10, 1959 (parking violation).

⁵⁵*e.g.*, No. 197, January 24, 1963 (decided in 1962); No. 195, Feb. 1, 1963 (decided in 1962).

⁵⁶*e.g.*, No. 10, Aug. 19, 1951; No. 8, April 8, 1951.

⁵⁷*e.g.*, No. 147, Feb. 1, 1961; No. 28, June 16, 1953; No. 9, July 9, 1951.

⁵⁸No. 180, May 4, 1962; No. 146, Jan. 24, 1961; No. 120, Aug. 5, 1959 (subject for habeas corpus); No. 29, July 24, 1953 (citizen of El Salvador claimed right of asylum).

⁵⁹B. English, note 16 *supra*, at 107.

⁶⁰No. 178, Aug. 7, 1962 (Limón); No. 136, Aug. 6, 1960 (Puntarenas); No. 30, Aug. 4, 1953 (Limón).

⁶¹This often-cited phrase originated with Amparo No. 6, Oct. 29, 1950. Later the term "individual" was deleted.

⁶²No. 178, Aug. 7, 1962.

⁶³No. 6, Oct. 29, 1950.

⁶⁴Const. of 1949, Art. 10; see M. Tulio Zeledon, note 13 *supra*.

⁶⁵No. 7, Oct. 10, 1950.

⁶⁶No. 192, Jan. 29, 1963 (decided 1962). There the "norm" was to prohibit the opening of a business similar to one which was shut down for moral reasons on the same site.

⁶⁷No. 148, June 13, 1961. See also No. 179, Oct. 11, 1962.

⁶⁸No. 10, Aug. 19, 1951.

⁶⁹No. 138, Sept. 13, 1960.

⁷⁰No. 186, Oct. 9, 1962.

⁷¹No. 142, Oct. 8, 1960; No. 132, Sept. 28, 1960 (the act "may be contrary to existing norms of law, but it does not pertain to the rights consecrated in the Constitution.")

⁷²No. 141, Dec. 13, 1960 (the court used Art. 8 of the Law of Amparo to order the petitioner to correct the defect and, upon his noncompliance, dismissed the petition).

⁷³No. 198, Oct. 30, 1962 (official charged fine without legal authority to do so).

⁷⁴No. 18, June 18, 1952.

⁷⁵Amended Aug. 9, 1952.

⁷⁶No. 138, Sept. 13, 1960.

⁷⁷No. 28, June 16, 1953; No. 9, July 9, 1951 (concurring opinion).

⁷⁸No. 188, Oct. 13, 1962 (appeal denial of permit to repair by Chief Sanitary Engineer to Ministry of Health); No. 182, June 19, 1962 (appeal expulsion of son by principal of public school to Minister of Public Education); No. 11, Oct. 18, 1951 (appeal Governor's cancellation of license to Ministry of Interior).

⁷⁹No. 5, Oct. 11, 1950.

⁸⁰No. 17, June 20, 1952.

⁸¹No. 130, Sept. 21, 1960 (Civil Guard evicted petitioner pursuant to judicial order); No. 21, Oct. 17, 1952 (same).

⁸²No. 200, April 25, 1963 (decided in 1962).

⁸³See e.g., Mexican Law of Amparo, Art. 73.

⁸⁴No. 119, July 16, 1959 (data requested from Supreme Tribunal of Elections made available); No. 36, Feb. 5, 1954 (business had been allowed to reopen during pendency of action).

⁸⁵No. 192, Jan. 29, 1963 (decided in 1962) (nightclub); No. 22, Dec. 10, 1951 (Third class hotel).

⁸⁶No. 13, April 18, 1951 (decided in 1951); No. 7, Oct. 10, 1950.

⁸⁷No. 136, Aug. 6, 1960.

⁸⁸No. 1, Sept. 1, 1950.

⁸⁹No. 19, June 18, 1952.

⁹⁰No. 197, Jan. 24, 1963 (decided in 1962).

⁹¹See e.g., No. 129, June 12, 1960 (site of petitioner's house); No. 32, Oct. 27, 1953 (state refused to fix boundary line for land it had sold to complainant).

⁹²June 28, 1952.

⁹³e.g., No. 183, Aug. 11, 1962; No. 144, Dec. 4, 1960 (amparo denied by Penal Court of San José; reversed by Second Penal Chamber of the Supreme Court).

⁹⁴No. 135, Oct. 8, 1960.

⁹⁵H. Blutstein, note 8 *supra*.

⁹⁶Alba, *The Latin American Style and the New Social Forces* in A. Hirschman, *Latin American Issues: Essays and Comments* 43, 50 (1961).

⁹⁷"The small amount of industrial activity that existed in Costa Rica in the early 1950's was basically of the import substitution-assembly type, spurred as in most Latin American countries by World War II shortages and recurring balance of payment difficulties." Kozolchyk, *Toward a Theory on Law in Economic Development: The Costa Rican USAID-ROCAP Law Reform Project*, 1971 Ariz. St. U.L.J. 684, 693 (1971).