

LST REVIEW

Volume 23 Issue 309 July 2013



THE WRIT OF AMPARO; PROPOSING AN ALTERNATIVE REMEDY TO HABEAS CORPUS IN SRI LANKA

LAW & SOCIETY TRUST

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ISSN 1391-5770

Editor's Note... ..

An innovative theme is featured in this Issue of the LST Review where *Mary Ann M. Bayang* embarks on a comparative examination of the writs of *Habeas Corpus* and *Amparo*, arguing that certain features of the writ of *Amparo* may be more suitable to be adapted for conflict-torn societies such as Sri Lanka.

Drawing on her experiences as a Filipino lawyer and using a recent Study on *Habeas Corpus*, (Law & Society Trust, 2011) as a base to highlight deficiencies in the working of the traditional *Habeas Corpus* remedy in this country, she emphasizes the fact that the *Amparo* was specifically brought into the Philippines to address the urgent need of an effective legal remedy for endemic patterns of enforced disappearances there.

What Sri Lankan advocates and analysts would find useful in this paper is its detailing of the practical working of the *Amparo* remedy. The fact that *Amparo* has been strategized specifically to address delays in the legal system in the affording of relief, its reach beyond ordering the relief of an improperly detained person and the ambit of the applicable interim reliefs, are interesting facets of this remedy.

As domestic studies have categorically exposed through firm statistical data looking at the judicial response thereto, the rate of dismissals of *habeas corpus* petitions by Sri Lanka's appellate courts (even at times when there was no active fighting in the country and the applications related to past violations) has been troublingly high. It is therefore of particular interest that the Rule in *re Amparo* does not permit instantaneous dismissals of applications. Instead, where it is judicially assessed that a particular case needs to be investigated further due to valid reasons such as witnesses being threatened, the Rule stipulates a period of two years within which that case may be archived and pursued further.

Most importantly in the Sri Lankan context, a general denial of responsibility by state officers allegedly responsible for illegal human rights abuses is not tolerated under the writ of *Amparo*. In contrast, as we have seen in regard to the *habeas corpus* writ, these general denials are accepted as a matter of course by Sri Lankan courts despite some enlightened precedents to the contrary

Yet it is axiomatic that the efficacy of any legal remedy, whether *Habeas Corpus* or *Amparo* must always depend on the corresponding efficacy of that particular legal system. In Sri Lanka, the writ of *Habeas Corpus*, if accompanied by consistently

courageous judicial interventions and solid political will, may have proved to be a most vibrant remedy for victims of gross human rights violations. This has however not been the case. Certainly a law incorporating comparative standards on the better functioning of the writ as well as elements of progressive judicial thinking (or in the minimum, enshrining these principles in Rules of Court), is imperative. But laws or Rules are ultimately limited in their impact if impunity is actively encouraged by the State as we see to our detriment in this country.

Similarly, the implementation of *Amparo* in the Philippines has not been without problems. As the author acknowledges;

Sadly, contemporary narratives of Amparo cases almost always depict a landscape of frustrations on the implementation of this writ

The reasons sound familiar; vagaries of the justice system, corrupt judges and pressure from the political establishment and the military. Nevertheless, the author's argument that the Writ of *Amparo* contains certain inherent features which address the prevalence of impunity in conflicted societies is a suggestion that certainly merits future scrutiny in the Sri Lankan context.

Kishali Pinto-Jayawardena

Proposing an Alternative Remedy? - The Relevance of the Writ of *Amparo* as the Writ of *Habeas Corpus* Falters in Sri Lanka

Mary Ann M. Bayang*

"How can I lose faith in the justice of life, when the dreams of those who sleep upon feathers are not more beautiful than the dreams of those who sleep upon the earth?"
(Kahlil Gibran)

1. INTRODUCTION

Core to the concept of universalism is the respect, protection and promotion of human rights and dignity of humanity. Yet these rights have been historically subjected to wanton violence by States or authorities as far as we can recall. History's grim narrative of human rights violations comprise the primary reasons for the founding of the United Nations (UN) "to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."¹

Sadly, more than half a century after the UN was established, the world continues to witness the ravages of war and violations of human rights. This miserable condition of humanity persists despite existing international mechanisms for the redress of human rights grievances and national judicial and non-judicial remedies. These remedies continue to evolve and expand as the efficiency of such remedies is probed and tested.

The *Writ of Habeas Corpus* is an ancient legal remedy that is, at present, available in the majority of jurisdictions around the world including Sri Lanka and the Philippines. It has been referred to as "the great writ"² or the "most extraordinary writ"³ and revered as the redeemer of fundamental freedoms. Despite the pre-eminent place given to the writ, its efficacy in protecting the human right to liberty continues to be questioned, especially in countries that have experienced major conflict such as Sri Lanka. Stringent critiques have been made by legal analysts in regard to the overall inefficacy of the habeas

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¹ United Nations Charter, Preamble.

² W. F. Duker, *supra*. 'A Constitutional History of *Habeas Corpus*', Connecticut: Greenwood Press (1980).

³ Joseph Dale Robertson, '*Habeas Corpus: The Most Extraordinary Writ*,' available at: <http://www.habeascorpus.net/hcwrit.html> accessed on 29 July 2013.

corpus remedy notwithstanding a few good decisions by the country's appellate courts. As part of the efforts to fortify Sri Lanka's legal system for the better protection of liberty rights, this paper introduces the *Writ of Amparo*, a legal remedy conceptualized in Mexico and utilized in almost all Latin American countries. It was introduced to the Philippines when the Philippine Supreme Court adopted *Rule on the Writ of Amparo*⁴ in 2007 to respond to widespread human rights violations during the tenure of the then Philippine President Gloria Macapagal Arroyo. Exploring non-traditional or at least lesser known, approaches for the legal protection of human rights falls well within the MHRD (Master of Human "Rights & Democratization) discipline. It is likewise very apt for policy reforms while the government is in its efforts to bring peace, justice and development to post-conflict Sri Lanka. The social relevance of this analysis impacts most on the victims and families of victims of human rights violations, especially in Sri Lanka's recent past, as it encourages the human rights movement that all is not lost in the legal battle for human rights.

1.1 Sri Lanka: the political landscape

The right to life, liberty and security of persons are natural rights. "Everyone has the right to life, liberty and security of person"⁵ and "every human being has the inherent right to life"⁶, "liberty and security of person"⁷. Sri Lanka has the legal and moral obligation to protect these basic rights and provide for efficient legal mechanisms for any violation thereof. In its current Constitution⁸ the State is vested with the duty to guarantee the protection of the fundamental rights of its people.

1.1.1 Lip Service or Commitment?

Violations of the human right to life, liberty and security have been particularly evident during the past decades of conflict in the country. The entry point to increased state violence in Sri Lanka is 1971. This year witnessed the first insurrection of the Janatha Vimukthi Peramuna (JVP).⁹ The JVP was a left-wing, communist, organization poised solely to take control of State power. Its strategy was to foment "a culture of political violence that has been the bane of the country since then."¹⁰ Violent strategies resorted to by the JVP which included the killings of public servants who were perceived to be 'representing' the State was met by an equally violent reaction on the part of the Sri Lankan Government. The army "resorted to mass arrests, torture, executions and other terror tactics in attempting to put down young well-organized

⁴ A.M. No. 07-9-12-SC, adopted on 27 September 2007, effective on 24 October 2007.

⁵ The Universal Declaration of Human Rights (UDHR), Article 3.

⁶ International Covenant on Civil and Political Rights (ICCPR).

⁷ *Ibid*, Article 9.1.

⁸ 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

⁹ Janatha Vimukthi Peramuna is a Sinhala term that means Peoples' Liberation Front. It was founded in 1964 by Rohana Wijeweera, taking on the leftist struggles of the then defunct Lanka Sama Samaja Party (LSSP-Lanka Equal Social Party) and Communist Party of Sri Lanka (CPSL), guided by the ideologies of Karl Marx, Vladimir Lenin and Mao Tse Dong. For more information, see their website: <http://www.jvpsrilanka.com/en/>.

¹⁰ Laksiri Fernando, 'The Insurrection that Turned Sri Lanka's Political Culture Violent', *Asian Tribune*, Vol. 12, No. 459 (n.d.), <http://www.asiantribune.com/news/2010/04/04/insurrection-turned-sri-lanka's-political-culture-violent> accessed 25 July 2013.

armed insurgents”.¹¹ Gunasekara¹² estimated that 15,000 to 20,000 persons were killed in just five weeks. This cataclysm first introduced the practice of systematic extra-judicial killings in the country. The second JVP insurrection in 1987 was no less horrendous involving similar patterns of state and non-state terror. It claimed the lives of some 45,000 to 60,000 youths.¹³

At the other end of the spectrum, the ethnic conflict between the government and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka’s North and East which was marked by isolated acts of terror and counter-terror by both protagonists escalated into an inconceivably brutal war following ethnic riots in the country in 1983 during the course of which Tamil civilians were killed by rampaging Sinhalese mobs ostensibly with the backing of some government ministers. During the decades that followed, the life, liberty, and security of person were consistently challenged through killings, disappearances, unlawful arrests, illegal detentions, and torture by state forces of persons suspected as being terrorists or aiding terrorists while the LTTE adopted equally barbaric measures of fighting the Sri Lankan State including the massacre of civilians, monks and the persistent use of suicide bombers targeting not only the Sinhalese but also leading Tamil intellectuals and politicians. Between February and December 1996, the ethnic conflict caused the arrest of 900 Sri Lankans when the army endeavored to recapture the northern province of Jaffna. During the 27-year ethnic conflict in the North and East, the number of deaths alone was estimated at 80,000 to 100,000.¹⁴ At the end of the war in 2009, 11,000 persons were imprisoned for being suspected as LTTE cadres. Some 300,000 civilians were detained without charges in so-called “rehabilitation centers.”¹⁵

Indeed, figure on the actual numbers of illegal arrests and detention, as well as disappearances during all these years of intense conflict is lacking. There are general gaps in the data on enforced disappearances in Sri Lanka. Only estimates at certain periods are available. For example, from 1984 to 1994, the disappeared numbered around 60,000.¹⁶ Even after the ending of active fighting in 2009, killings, disappearances, torture, illegal arrests and detentions continue. They remain unpunished. Endangered are the life, liberty and security of members of the ethnic communities, human rights defenders, journalists and even members of the judiciary who spoke out about abuses of power or advocated human rights

¹¹ Fred Halliday, ‘The Ceylonese Insurrection,’ *New Left Review*; No. 79, Sep. - Oct. 1971.

¹² Tisarane Gunasekara, ‘Insurrectionary Violence in Sri Lanka: The Janatha Vimukthi Peramuna Insurgencies of 1971 and 1987-1989’, *Ethnic Studies Report*, Vol. XVII, No. 1, January 1999, reviewing Prins Gunasekara, ‘Sri Lanka in Crisis: A Lost Generation – The Untold Story’, Colombo, S. Godage & Brothers, 1998, p. 776.

¹³ Prins Gunasekara, *Sri Lanka in Crisis: A Lost Generation – The Untold Story* (Colombo, S. Godage & Brothers, 1998), p. 10.

¹⁴ ABC News, ‘Up to 100,000 killed in Sri Lanka’s civil war: UN’, (May 21, 2009), <http://www.abc.net.au/news/2009-05-20/up-to-100000-killed-in-sri-lankas-civil-war-un/1689524> accessed on 8 February 2013.

¹⁵ Human Rights Watch, ‘World Report 2012: Sri Lanka’ (n.d.), <http://www.hrw.org/world-report-2012/world-report-2012-sri-lanka> accessed 27 July 2013.

¹⁶ M.C.M. Iqbal, ‘Disappearances of Persons in Sri Lanka’, *Rule of Law in Sri Lanka* (n.d.), <http://www.ruleoflawsrilanka.org/resources/writings-of-m-c-m-iqbal/disappearances-of-persons-in-sri-lanka> accessed 26 July 2013.

accountability. Thus: "More than three years after the armed conflict between the Sri Lankan government and the LTTE ended, impunity persisted for alleged war crimes and crimes against humanity."¹⁷

1.1.2 Re Mediating a Solution

Effective mechanisms to protect human rights especially the right to life, liberty and security of persons are desperately needed in Sri Lanka now more than ever. The common remedies familiar to Sri Lankans in this regard is the *Writ of Habeas Corpus* and the judicial mechanism in regard to the lodging of fundamental rights cases, both of which are constitutionally secured¹⁸ By far, these mechanisms have been the primary legal source of protection of victims of human rights violations and fundamental freedoms. Have these remedies worked to salvage the universal right to life, liberty and security? The answer has been unanimously in the negative. Studies and analyses find them wanting. What are the reasons for this debacle? Are the rights of life, liberty and security forever doomed in the country? In the realm of the rule of law, what reforms can be initiated? This paper explores these questions and probes beyond what has already been dwelt upon by senior Sri Lankan scholars.

2. Review of Related Literature

Examining the *Writ of Amparo* as an alternative or at least a supplemental remedy to the so-called "great" *Writ of Habeas Corpus* would no doubt be a somewhat revolutionary suggestion. The reasons for this, as legal experts and historians would probably opine, are two-fold. First, the Sri Lankan Constitution does not mention a *Writ of Amparo*. And second, a more palatable argument would be that Sri Lanka primarily takes on England's legal system where *Habeas Corpus* finds its roots and in the context of which, a *Writ of Amparo* would seem incongruous. In the generality of studies and writings at the international level, the *Writ of Habeas Corpus* has always been discussed separately from the *Writ of Amparo*. Most writings have focused on tracing the historical roots of each writ¹⁹ or engaging in an analysis of each writ.²⁰ These geographically-focused studies or writings assess each writ as it applies to certain jurisdictions.²¹ Critical

¹⁷Amnesty International, 'Annual Report: Sri Lanka 2013', May 23, 2013, <http://www.amnestyusa.org/research/reports/annual-report-sri-lanka-2013> accessed on 27 July 2013.

¹⁸ 1978 Constitution, *supra*. Article 17.

¹⁹ See for example: a) Duker, *supra*.; b) Donald E. Wilkes (ed), 'Writ of Habeas Corpus' in *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*, 645-47; b) Law Information Institute, 'Habeas Corpus', Cornell University Law School, http://www.law.cornell.edu/wex/habeas_corpus accessed 10 July 2013; c) Rolando Vega Robert, 'El Recurso de Amparo', Ciudad Universitaria Rodrigo Facio (March 2002), <http://www.juridica.ucr.ac.cr/public/amparo.html> accessed 11 July 2013.

²⁰See for example: a) Eric M. Freedman, 'Habeas Corpus in Three Dimensions' (Harvard, 2009), <http://harvardcrcl.org/wp-content/uploads/2009/06/Freedman.pdf>, accessed 22 July 2013; b) Carlos Sanchez Mejorada, 'The Writ of Amparo: Mexican Procedure to Protect Human Rights', in *Annals of the American Academy of Political and Social Science*, Vol. 243, Essential Human Rights (Jan., 1946), pp. 107-111.

²¹ See for example: a) Elizabeth A. Faulkner, 'The Right to Habeas Corpus: Only in the Other Americas', *American University International Law Review*, Volume 9, Issue 3, 1994.

comparatives are mostly written in Spanish, understandably because this mechanism is most popular in Latin America.²² Other recent comparatives on these writs include the writ of *habeas data*.²³

Few literatures pitch the *writ of Habeas Corpus* against the *writ of Amparo*. Within the same minimal range are analyses of the better remedy in the protection of human rights. Articles on this subject are written primarily in Spanish texts as well. Alcalá's essay, for example, discusses which of the two writs would be most appropriate for Chile.²⁴ On the other hand, since the Philippines is the most recent country to adopt the *Writ of Amparo*, present literatures evolve around the two writs as it applies to the Philippine context.²⁵

The *writ of Habeas Corpus* in Sri Lanka, as the studies reviewed show, focus primarily on illegal detentions and tangentially on enforced disappearances, unlike in other jurisdictions, as in Pakistan²⁶ and Bangladesh²⁷ which also derive their legal traditions from the English legal system, which utilize the writ in extrajudicial killings as well. Existing works on the Sri Lankan context evolve around the efficacy of the *Writ of Habeas Corpus*. The standard is protecting individuals' right to liberty, criticizing and reviewing its implementation, and analyzing the role of government agencies, especially the judiciary and the executive departments, in applying this legal remedy. Additionally, the role of the legislature in the enactment of laws, like a *Habeas Corpus Act*, has been stressed, especially in the recent work, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times*²⁸ which by far is the existing most comprehensive discussion on the *Writ of Habeas Corpus* in Sri Lanka. This paper owes much reliance in regard to its analytical thrust on this comprehensive effort.

The authors looked into 884 cases covering the period 1994 to 2002. They reviewed the efficacy or inutility of the *writ of Habeas Corpus* as a remedy for the protection of the right to liberty; identified the barriers to an effective legal implementation of the writ; and outlined several recommendations to give life and spirit to the "great writ." Their principal recommendation is for a legislative enactment of a *Habeas Corpus Act* that will provide clearer parameters and stricter procedures in *Habeas Corpus* cases, including the award of exemplary costs in certain cases. Lacking in their analysis, however, as this paper now proposes to cover, is the adoption of another or supplemental legal remedy, which widens the legal

²² See for instance, Ignacio Luis Vallarta, 'El JUICIO DE AMPARO y el writ of habeas corpus: Ensayo, Critico-Comparativo' (De Francisco Diaz De Leon, 1881), <http://archive.org/stream/eljuiciodeampar00vailgoog#page/n6/mode/2up>, accessed 15 July 2013.

²³ See for example: Carla & Barbara, 'Amparo, Habeas Corpus y Data' (n.d.), <http://html.rincondelvago.com/amparo-habeas-corpus-y-data.html> accessed 15 June 2013.

²⁴ Humberto Nogueira Alcalá, 'El Habeas Corpus o Recurso de Amparo en Chile', *Revista de Estudios Políticos (Nueva Época)* No. 102; October-December, 1998, pp. 193-216.

²⁵ See for example: a) Vicente Mendoza, 'A Note on the Writ of Amparo', *Philippine Law Journal* (2008), Vol. 82, pp. 1-7.

²⁶ Muhammad Majid Bashir, 'Some Reflections on the Criminal Justice System and Writs of *Habeas Corpus* in Pakistan', *LST Review* (September & October 2010), Volume 21 Issue 275 & 276.

²⁷ M. Shamsul Haque, 'The Criminal Justice System and Writs of *Habeas Corpus* – Commonalities and Differences in Bangladesh', *LST Review* (September & October 2010), Volume 21 Issue 275 & 276.

²⁸ Kishali Pinto-Jayawardena & Jayantha de Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times* (Sri Lanka: Law and Society Trust, 2011).

protection of human rights and individual freedoms beyond *Habeas Corpus* protection of liberty, to include the protection of the right to life and security of persons.

This Study by Pinto-Jayawardena and De Almeida Guneratne²⁹ supplied the inspiration for other articles on the *Writ of Habeas Corpus* in Sri Lanka. M.C.M. Iqbal's article on disappeared persons, for instance, recognized that solutions require "changes in law, administrative procedures and even judicial structure."³⁰ Other writings dealt with the role of the judiciary in the protection of fundamental rights. Basil Fernando³¹ has suggested that the judiciary should be strengthened so that individual liberties may be protected. The International Crisis Group³² has linked the failure of the *Writ of Habeas Corpus* to the overall legal and political milieu that includes the diminishing independence of the courts, the inadequacy of constitutional provisions to empower the courts, the passage of emergency laws that further limit its powers, and the reprehensible political influence put by the executive on the judiciary. Many other works on the situation of the right to life, liberty and security in Sri Lanka centered on empirical data of enforced disappearances, arbitrary arrests and unlawful detentions, extra judicial killings, and the overall human rights portrait of Sri Lanka.³³

This paper will not contradict the assessments and recommendations of existing literature. In fact, the author basically agrees with most, if not all of them. The enactment of a *Habeas Corpus* Act is propitious. But more has to be proposed and done. This paper wishes to add interesting aspects, not heretofore essayed, on improving the protection, promotion and defense of the right to life, liberty and security in Sri Lanka, within the auspices of legal remedies beyond the *Writ of Habeas Corpus*. Some important points are the inability of courts to search places of detention, including military camps, and to address the fear of reprisal against the victims and their families³⁴ and the endemic dismissals of *habeas corpus* petitions. This obstacle to the full efficacy of the *Writ of Habeas Corpus* has been clearly identified in present studies.

This paper will explain how the *Writ of Amparo* can be a legal remedy superior to the *Writ of Habeas Corpus* in countries known for rampant human rights violations like Sri Lanka. Admittedly, as any law to be effective, the *Writ of Amparo* will depend on the respect for the Rule of Law. This paper, however,

²⁹ *Ibid.*

³⁰ M.C.M. Iqbal, *supra*.

³¹ Basil Fernando, 'SRI LANKA: The politics of Habeas Corpus and the marginal role of the Sri Lankan courts under the 1978 constitution', Asian Human Rights Commission (2011), <http://www.humanrights.asia/news/ahrc-news/AHRC-PAP-001-2011>, accessed June 10, 2013.

³² International Crisis Group, 'Sri Lanka's Judiciary: Politicised Courts, Compromised Rights', International Crisis Group Report (June 2009) N° 172, p. 30.

³³ See for example: a) Human Rights Watch's monitoring of the human rights situation in Sri Lanka, 'Sri Lanka', <http://www.hrw.org/asia/sri-lanka>, accessed 20 July 2013; b) Law and Society Trust's annual publication, 'Sri Lanka: State of Human Rights'; c) Amnesty International's monitor of human rights in Sri Lanka, 'Sri Lanka', <http://www.amnesty.org/en/region/sri-lanka>, accessed 25 July 2013.

³⁴ See for instance, Bashir, *supra*: "The High Court is generally unable to trace the whereabouts of disappeared persons, since they lack the power to search places of detention controlled by the military. The right to Habeas Corpus has been systematically undermined as a result, and in some cases the courts have ordered that the disappeared persons be produced before the courts, but these orders have reportedly been ignored by the military. In addition, those released are warned not to speak publicly about their experiences in detention."

will not explore in- depth this factor. Likewise, it will not examine the appropriate legal procedure to adopt the *writ* or how this can be different from fundament rights cases and other injunctive writs. Future efforts may look into these topics. This paper will focus on a comparative analysis of the writ of *Habeas Corpus* and the writ of *Amparo*.

3. Writ of *Habeas Corpus*

3.1 Origins

“That you have the body”³⁵ is the literal translation of the Latin legal maxim *habeas corpus*. Thus, a writ³⁶ of *Habeas Corpus* is an “order in writing, signed by the judge who grants the same, and sealed with the seal of the court of which he is a judge, issued in the name of the sovereign power where it is granted, by such a court or a judge thereof, having lawful authority to issue the same, directed to anyone having a person in his custody or under his restraint, commanding him to produce such person at a certain time and place, and to state the reasons why he is held in custody, or restraint.”³⁷

As a legal concept, the writ of *Habeas Corpus* is an ancient legal remedy. It is claimed to be of Anglo-Saxon common law origin that predates even the Magna Carta of 1215,³⁸ the first known document to have espoused the essence of the writ of *Habeas Corpus*.³⁹ During the era of the Magna Carta, *Habeas Corpus* was the “prerogative writ of the King and his courts, [but] the passage of hundreds of years time has permitted it to evolve into a prerogative writ initiated by the person restrained, or someone acting in his/her interests”⁴⁰ Since then, the writ of *Habeas Corpus* has evolved as a common and important feature of both English and American common law jurisdictions. England codified this common law practice and procedure in 1679 with the enactment by its Parliament of the Habeas Corpus Act.⁴¹

The Writ of *Habeas Corpus* can be availed of in cases of illegal confinement and in withholding the rightful custody of any person from the one entitled to it. It is not an adversarial action. It is not a procedure to determine the guilt or innocence of the detainer, but merely to ascertain the basis for another’s detention or custody. Thus, its objective does no more than to establish the reason for the

³⁵Stanford University, ‘Writ of *Habeas Corpus*’, Stanford University (n.d.), <http://www.stanford.edu/group/psylawseminar/Habeas%20Corpus.htm> accessed 20 June 2013.

³⁶The Law Dictionary, ‘What is a Writ? Definition of Writ (Black’s Law Dictionary)’, <http://thelawdictionary.org/writ/> accessed 15 June 2013. A writ is “a precept in writing, couched in the form of a letter, running in the name of the king, president, or state, issuing from a court of justice, and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding or as incidental to Its progress, and requiring the performance of a specified act, or giving authority and commission to have it done.”

³⁷ Bouvier’s Law Dictionary, (1859), Vol. I, p. 573.

³⁸ J. D. Robertson, *supra*.

³⁹ *The Magna Carta*, <http://www.constitution.org/eng/magnacar.htm> accessed 15 June 2013, “39. No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed except by the lawful judgment of their peers or by the law of the land.”

⁴⁰ J. D. Robertson, *supra*.

⁴¹ ‘A brief history of habeas corpus’, (BBC News, 9 March 2005) http://news.bbc.co.uk/2/hi/uk_news/magazine/4329839.stm, accessed 26 July 2013.

detention or deprivation of liberty of a person, and to determine either its legality or voluntariness. Detention under lawful authority is the only standard. The writ's purposes "are to obtain immediate relief from illegal confinement, to liberate those who may be imprisoned without sufficient cause, and to deliver them from unlawful custody. It is then essentially a writ of inquiry and is granted to test the right under which a person is detained."⁴²

The present configuration of *Habeas Corpus* is not intended as a substitute for the trial court's function. Where there is an available remedy in the ordinary course of law, the writ is not ordinarily granted, unless there is an exceptional circumstance to warrant otherwise. Moreover, *Habeas Corpus* 'should not be granted in advance of trial. The orderly course of trial must be pursued and the usual remedies exhausted before resorting to the writ where exceptional circumstances are extant;' "for the writ should not be considered subservient to procedural limitations which glorify form over substance."⁴³

The right, (or in some jurisdiction, the privilege), to the writ of *Habeas Corpus* is a reflection of the historical contest between the citizen or the individual and the authorities or the State. The goal was to constrict the abuse by the State of its vast powers by holding it accountable to any restraints on the individual's right to liberty.⁴⁴ Wyzanski, quoting the great Sir William Hodsworth, referred to the writ of *Habeas Corpus* as "the most effectual protector of the liberty of the subject that any legal system has ever devised."⁴⁵ History however has judged that this has not been the case. In Sri Lanka and the Philippines, for example, the presence of this remedy did not deter the State or its authorities endangering or prejudicing the people's right to liberty.

3.2 The Writ of *Habeas Corpus*: from England to Sri Lanka

England wrested control of Sri Lanka in 1796 from the Dutch colonizers. In 1811 English laws were introduced. This was after oppositions and rebellions were substantially subjugated.⁴⁶ But as early as 1801, the power to issue the Writ of *Habeas Corpus* was deemed transferred to the Sri Lankan Supreme Court under the First Charter of Justice when Sri Lanka (formerly Ceylon) was ceded as a Crown Colony under the British Proclamation of 1789. In 1833 the Writ of *Habeas Corpus* was re-enacted in the form of a statute, the Charter of Justice, and thereafter, in 1889, in the Courts Ordinance.⁴⁷ The recognition of the right to the writ of *Habeas Corpus* is an affirmation of the individual's right to liberty and against excessive acts of the State authorities. The concept behind the writ is the recognition of every person's

⁴² J.D. Robertson, *Supra*; 39 Am Jur 2d, *Habeas Corpus*, § 1, 179; M.D. Falkoff, "The Hidden Costs of Habeas Delay" in 83 University of Colorado Law Review 339 (2012), http://niu.edu/law/faculty/directory/falkoff_article.pdf, accessed July 30, 2013.

⁴³ *Velasco et al. v. Court of Appeals et al.*, G.R. No. 118644 July 7, 1995, citing 39 C.J.S. *Habeas Corpus*.

⁴⁴ J.D. Robertson, *supra*.

⁴⁵ Charles Wyzanski Jr., 'The Writ of Habeas Corpus', *Annals of the American Academy of Political and Social Science*, ISSN 0002-7162, 01/1946, Volume 243, Issue 1, pp. 101 – 106.

⁴⁶ Tim Lambert, 'A Brief History of Sri Lanka' (2012), <http://www.localhistories.org/srilanka.html> accessed 10 June 2013.

⁴⁷ K. Pinto-Jayawardena & J. Guneratne, *supra*, p. 13.

right to freedom from arbitrary and/or illegal arrests and detention.⁴⁸ While the writ of *Habeas Corpus* was historically configured as a form of control over State power through the protection of an individual's right to liberty, various countries have developed it to broaden its purposes. In Sri Lanka and the Philippines the writ has evolved to include issues of custody and authority between private persons. From extensive reports and studies,⁴⁹ many *Habeas Corpus* cases before the courts in Sri Lanka involve child custody disputes.

The right to liberty of Sri Lankans is enshrined in the 1978 Constitution.⁵⁰ The guarantee is that no one will be held in custody, detained or deprived of liberty without a court order and due process.⁵¹ Detention without any warrant or court order is allowed only for a period of 24 hours, which can be extended to another 24 hours, or a total of 48 hours in heinous crimes like abetment, acts committed with the use of explosives, rape, murder, kidnapping, etc.⁵² Sri Lankans may avail of the writ of *Habeas Corpus* by filing an application before the Court of Appeal (and from 1990, to the Provincial High Court through Act, No 19 of 1990) which is conferred with the original jurisdiction on all matters concerning the issuance of this writ.⁵³ The appeals court is empowered to direct any Court of First Instance to conduct inquiries into the allegations in an application for a writ of *Habeas Corpus*.⁵⁴

3.3 The Great Writ of Habeas Corpus Falters

The *Writ of Habeas Corpus* has unraveled into an inadequate remedy for the protection of liberty of persons. Petitions under its name have been expediently dismissed. The Philippines⁵⁵ and Sri Lanka share similar experiences in this regard. Following are some of the major gaps in the implementation of Sri Lanka's "great writ."

i. The mere claims of lawyers that charges had been filed against the detainee, or that the detainee had been located, has resulted in the dismissal of *Habeas Corpus* petitions. Of the 844 petitions reviewed by Pinto-Jayawardena and Guneratne,⁵⁶ 676 cases were dismissed on the oral manifestation of counsel that the detained had been charged; 390 cases were withdrawn by the detainees themselves; and 21 cases were dismissed either because the detainee was presented before a magistrate or was already

⁴⁸ K. Pinto-Jayawardena & J. Guneratne, *supra*.

⁴⁹ See for example: 1) K. Pinto-Jayawardena & J. Guneratne, *Ibid*; 2) Cyberspace Graveyard for Disappeared Persons, 'Chapter Ten- Part I – *Habeas Corpus* Applications: Historical Use of the Writ of Habeas Corpus' http://www.disappearances.org/news/mainfile.php/frep_sl_western/38/ accessed 02 June 2013.

⁵⁰ 1978 Constitution, *supra*.

⁵¹ *Ibid*. Chapter III, Article 13.

⁵² Code of Criminal Procedure (Special Provisions) Act, No. 42 of 2007. Some special provisions laws have however extended this period in certain special cases.

⁵³ 1978 Constitution, *Supra*, Chapter XVI, Article 141.

⁵⁴ *Ibid*.

⁵⁵ In the Philippines, the Supreme Court decision in *Velasco et al. v. Court of Appeals et al.*, *supra*, http://www.lawphil.net/judjuris/juri1995/jul1995/gr_118644_1995.html, accessed on July 28, 2013, summarized the reasons for the dismissal of habeas corpus petitions which included the filing of a criminal charge, the availment of bail, a commitment order was issued.

⁵⁶ 1978 Constitution, *supra*.

located. In these cases, the Sri Lankan court generally based its dismissals of the petitions on the verbal manifestations without demanding additional evidence to support them.⁵⁷ The Courts did not probe but relieved the public officer of the obligation to justify the earlier detention of the subject.

ii. Cases were dismissed for non-compliance with “time limits, or statutes of limitations, imposed for filing such claims.”⁵⁸ Tardiness was a ground to implicitly justify illegal custodies.

iii. Access to courts and justice was hampered by logistical challenges, distance, and lack of a support system in a remote and alien environment. Sixty-five cases were withdrawn because the petitioners lack the resources to pursue the cases in Colombo, Sri Lanka.⁵⁹

iv. Technical grounds were used to dismiss habeas corpus petitions. These included error in the caption⁶⁰ or failure to name a respondent properly.⁶¹

v. Custody was legalized where the place of detention was changed to rehabilitation centers. Hence, 37 cases were dismissed because the detainees were committed to rehabilitation centers for suspected LTTE cadres.⁶² The dismissal was decreed mechanically, that is, the courts did not probe into the propriety of such commitment to rehabilitation.⁶³

vi. Lack of legal representation resulted in the dismissal of 49 cases because the applicants were either absent or not represented by a counsel.⁶⁴ While 32 cases were dismissed on the merits, with inadequate legal representation, it was highly probable that the courts overlooked the inefficiency of legal counsel in building up the case and in gathering and preparing evidence.⁶⁵

vii. The application of strict procedures has been seemingly inconsonant with the character of the Writ of *Habeas Corpus* as a remedy against human rights violations. In the case of Gurusinghe,⁶⁶ the Court of Appeal (CA) dismissed the petition despite the findings by the Magistrate that it should be granted. The CA held that the “identification of witnesses failed to comply with” evidentiary rules relevant to criminal cases.⁶⁷ There were also dismissals due to minor inconsistencies in the testimonies of witnesses as to the type of vehicle where the respondents loaded the person

⁵⁷ K. Pinto-Jayawardena & J. Guneratne, *supra*.

⁵⁸ Committee Against Torture (CAT), ‘International Commission of Jurists Submission to the Committee Against Torture on the Examination of Combined Third and Fourth Periodic Reports of Sri Lanka Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, 47th Session, 31 October – 25 November 2011, http://www2.ohchr.org/english/bodies/cat/docs/ngos/ICJ_SriLanka47.pdf accessed 4 June 2013.

⁵⁹ Pinto-Jayawardena & Guneratne, *supra*, p. xxv.

⁶⁰ *Ibid.* p. xxvi.

⁶¹ *Ibid.* citing HCA/11/95.

⁶² K. Pinto-Jayawardena & J. Guneratne, *supra*, p. xxvi.

⁶³ *Ibid.* p. xxvi.

⁶⁴ *Ibid.* p. xxiv.

⁶⁵ K. Pinto-Jayawardena & J. Guneratne, *supra*, p. xxiv.

⁶⁶ *Ibid.* p. xxiv.

⁶⁷ *Ibid.* citing H.C.A./45/92, C.A. Minutes of 22 September 1997.

subject of the petition.⁶⁸ The CA may have also abused its discretion in denying or dismissing applications on the ground of failure to comply with statutory limitations for filing applications or submitting pleadings.⁶⁹

viii. Cases were also transferred because of allegations of threats on the security of the respondents, mostly high ranking military officers, without regard to the dangers that the lowly petitioners may face for travelling to another jurisdiction to pursue the cases.⁷⁰

ix. Lack of political will to conduct investigations and prosecutions caused the inability to discharge the burden of proof required of the petitioners.⁷¹ Indeed, the failure of the State to investigate cases of disappearances eroded confidence in the Writ of *Habeas Corpus* “because it means that judicial authorities are prevented from proceeding further in such cases.”⁷² This is especially true where the petitioner has to prove his/her case beyond a reasonable doubt.⁷³ On the other hand, general denials by State forces of any involvement were deemed enough to defeat an application for the writ.⁷⁴

x. The unwarranted delays in the resolution of cases discouraged the petitioners from pursuing their cases.⁷⁵ For example, some 22 cases lasted for eleven years.⁷⁶ Threats to the life and security of the petitioners and their lawyers also had the same effect.

xi. The law itself provided inadequate protection. There was “no explicit statutory recognition of the principles of institutional or command responsibility to ensure that army officers or police officers in command of a particular army/police station are held responsible.”⁷⁷ Neither was there any provision for suspension from work of State forces who are respondents in habeas corpus applications. This engendered fear of reprisal against the lives and security of the petitioners and their families. No law or mechanism for witness protection also exists. This exposed the witnesses to harassments from the respondents.⁷⁸

xii. Delaying tactics and intimidations were common weapons of the respondents and/or their lawyers. Thus: “The Attorney General will often continue to hold on to a detention order signed by the President even after the filing of an indictment. By doing this, the Attorney General denies the detainee the right to bail that would normally be available to him or her when transferred to judicial custody. The continued application of the detention order renders the *Habeas Corpus* petition

⁶⁸ *Ibid.* citing the case of *Indrana Dagampala*, H.C.A./77/92, C.A. Minutes of 30 July 1998.

⁶⁹ K. Pinto-Jayawardena & J. Guneratne, *supra*.

⁷⁰ *Ibid.* p. xxix.

⁷¹ *Ibid.* p. xxxii.

⁷² CAT, *supra*.

⁷³ K. Pinto-Jayawardena & J. Guneratne, *Supra*, citing the case of *Gsampola Paddeniyage Gedera Cecelia*, H.C.A./69/90, C.A. Minutes of 10 March 1998.

⁷⁴ K. Pinto-Jayawardena & J. Guneratne, *Supra*, p. xxx.

⁷⁵ See M.D. Falkoff, *supra*.

⁷⁶ *Ibid.* p. xxix.

⁷⁷ CAT, *supra*, citing Pinto-Jayawardena & Guneratne, *supra*.

⁷⁸ *Ibid.*

meaningless.”⁷⁹ As well, multiple charges are filed against detainees to justify their arrest and detention even after habeas corpus is granted.⁸⁰

xiii. Instances of non-existing or lapsed detention orders are also common. Often the tactic is to secure a new or valid detention order to justify the custody. Hence: “It is not uncommon for a detainee to be held under a detention order that has lapsed or where there is no detention order at all there are instances ... where respondent counsel for the Government prevails upon the Court to adjourn the matter so that a valid detention order may be produced. The Courts comply, ordering the State to produce a valid detention order by the next day, failing which the individual is to be released. There is no legal basis justifying the Court to make such an order. In the absence of a valid detention order, or upon its expiration, a detainee must be released immediately.”⁸¹

xiv. Access to justice, particularly the Writ of *Habeas Corpus*, is hampered by the scarcity of available courts to hear and try efficiently habeas corpus cases. The petitioners’ lack of opportunity to appear before the courts for hearing their petitions deprives them of effectively and efficiently prosecuting the writ.⁸²

These challenges on the writ’s implementation apply not only to past *Habeas Corpus* petitions examined by Pinto-Jayawardena and Guneratne, but also to current petitions that were mentioned during recent consultations.⁸³ These numerous gaps in the full implementation of the writ of *Habeas Corpus* in Sri Lanka led to numerous recommendations, primarily the enactment of a Writ of *Habeas Corpus* Act to address the gaps. Yet let us now consider the relevance of a more encompassing remedy which is the Writ of *Amparo*.

4. Writ of Amparo: Nature and History

The Writ of *Amparo* appeared in legal literature for the very first time in the 1857 Constitution of Mexico.⁸⁴ “Amparo” literally means “protection” in Spanish.⁸⁵ In 1837 de Tocqueville’s “Democracy in America” circulated in Mexico and stirred great interest.⁸⁶ Its description of the practice of judicial review in the United States (US) appealed to many Mexican jurists.⁸⁷ One of them, Manuel Crescencio Rejón, drafted a constitutional provision for his native state, Yucatan, which granted judges the power to

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ CAT, *supra*.

⁸² K. Pinto-Jayawardena & J. Guneratne, *supra*, p. xxxii.

⁸³ *Ibid.*

⁸⁴ Carlos Sanchez Mejorada, *supra*.

⁸⁵ R. Barker, “Constitutionalism in the Americas: A Bicentennial Perspective”, 49 *University of Pittsburgh Law Review* (Spring, 1988) 891, 906.

⁸⁶ *Ibid.*, citing Zamudio, F., “A Brief Introduction to the Mexican Writ of Amparo”, 9 *California Western International Law Journal* (1979) 306, 309.

⁸⁷ *Ibid.*

protect all persons in the enjoyment of their constitutional and legal rights.⁸⁸ This idea was incorporated into the national constitution in 1847.⁸⁹

Since then, the protection has been an important part of Mexican constitutionalism.⁹⁰ If, after hearing, the judge determines that a constitutional right of the petitioner is being violated, he orders the official, or the official's superiors, to cease the violation and to take the necessary measures to restore the petitioner to the full enjoyment of the right in question. The Writ of *Amparo* thus combines the principles of judicial review derived from the US with the limitations on judicial power characteristic of the civil law tradition which prevails in Mexico. It enables courts to enforce the Mexican Constitution by protecting individual rights in particular cases, but prevents them from using this power to make law for the entire nation.⁹¹ Individual rights means all the rights accorded an individual, which is not limited to the right to liberty.

Subsequently, the Writ of *Amparo* spread throughout South America, gradually evolving into various forms, in response to the particular needs of each country.⁹² The countries having the Writ of *Amparo* as a legal remedy are: Argentina, Colombia, Venezuela, Dominican Republic, Uruguay, Peru, Paraguay, Brazil, Bolivia, Chile, Ecuador, Costa Rica, El Salvador, Nicaragua, Panama, Mexico, Guatemala, and Honduras.⁹³ These countries share a history of severe human rights abuse. Among them, the Writ of *Amparo* stands as the mechanism with greater amplitude in jurisdictional protection of fundamental rights and freedoms.⁹⁴ Eventually, with growing popularity, the Writ of *Amparo* became, in the words of a justice of the Mexican Federal Supreme Court, one piece of Mexico's self-attributed "task of conveying to the world's legal heritage that institution which, as a shield of human dignity, her own painful history conceived."⁹⁵

In general, these Latin American countries, except Cuba, "constitutionalized" an all-encompassing writ to protect the whole gamut of fundamental rights, including socio-economic rights.⁹⁶ But the particulars of the concept and practice of *Amparo* vary from country to country. For instance, in Argentina, the use of

⁸⁸ R. Barker, *supra*.

⁸⁹ Acta de Reformas, Art. 25 (1847) (amending Constitution of 1824) – "The federal courts shall protect any inhabitant of the Republic in the exercise and preservation of those rights granted to him by this Constitution and by laws enacted pursuant hereto, against attacks by the Legislative and Executive powers of the federal or state governments, limiting themselves to granting protection in the specific case in litigation, making no general declaration concerning the statute or regulation that motivated the violation."

⁹⁰ *Ibid.*; Constitution of 1857, arts. 101, 102, 107 (Mex.)

⁹¹ R. Barker, *supra*. See also Provost, R. "Emergency Judicial Relief for Human Rights Violations in Canada and Argentina," University of Miami Inter-American Law Review (Spring/Summer, 1992) 693, pp. 701-702.

⁹² Supreme Court, Annotation to the Writ of Amparo: Annotation (n.d.), p.45, http://www.freewebs.com/homerpablo/Remedial%20Law/Annotation_amparo.pdf, accessed 15 July 2013; See Article 107 of the 1857 Constitution of Mexico; Article 28 (15) of the 2008 Constitution of Ecuador; Article 77 of the 1992 Constitution of Paraguay; Article 43 of the 1994 Constitution of Argentina; Article 49 of the 1999 Constitution of Venezuela; Article 48 (3) of the 1949 Constitution of Costa Rica; and Article 19 of the Constitution of Bolivia.

⁹³ Gloria Orrego Hoyos, 'The Amparo Context in Latin American Jurisdiction: an approach to an empowering action' (April 2013), <http://www.nyulawglobal.org/globalex/Amparo.htm> accessed June 30, 2013.

⁹⁴ *Ibid.*

⁹⁵ Gloria Orrego Hoyos, *supra*.

⁹⁶ Supreme Court, Annotation, *supra*, p. 45.

the writ as a human rights protection is not problematic when it comes to protecting a citizen from harmful intentional acts.⁹⁷ In Bolivia, the rights protected by the writ of *Amparo* are even more extensive than in Argentina, “protecting not only civil and political rights, but also economic, social and cultural rights. This writ does not recognize exemptions, privileges or hierarchies.”⁹⁸ In Colombia, all judges have jurisdiction to hear the *tutela* or the writ of *amparo*.⁹⁹ Very similar to Colombia, “Chile shows more informality, and the *amparo* (named *recurso de protección*) can be filed by any natural or legal person affected, including collective entities - without legal personality - or any other person in its name.”¹⁰⁰ Other countries like Colombia, Chile, Germany and Spain have chosen to limit the protection of the writ of *Amparo* only to some constitutional guarantees or fundamental rights.

With the growing use of the Writ of *Amparo*, what began as a protection against acts or omissions of public authorities in violation of constitutional rights evolved for several purposes: (1) *Amparo libertad* for the protection of personal freedom, equivalent to the *Habeas Corpus* writ; (2) *Amparo contra leyes* for the judicial review of the constitutionality of statutes; (3) *Amparo casacion* for the judicial review of the constitutionality and legality of a judicial decision; (4) *Amparo administrativo* for the judicial review of administrative actions; and (5) *Amparo agrario* for the protection of peasants' rights derived from the agrarian reform process.¹⁰¹

This Writ of *Amparo* has been compared to the Writ of *Habeas Corpus*, and adjudged as much more promising: “The *Amparo* procedure, typically Mexican, has a much broader scope and field of application than the Anglo-Saxon writ of *Habeas Corpus*, from which the idea of the procedure may have originated, since it protects men not only against illegal arrest but against violation of any human rights, and it is also a remedy to the encroachment of the Federal authorities on the jurisdiction of the state, or vice versa.”¹⁰² In slightly different forms, it spread throughout Latin America and was incorporated in the American Convention of Human Rights.¹⁰³ It is said to be similar to injunctions and other equitable remedies of the US legal system.¹⁰⁴ This author sees more.

The Writ of *Amparo* protects any human right.¹⁰⁵ It is a “shield” against “the too frequent violation of human rights by arbitrary authorities.” It comprehensively reaches every human right or individual guarantee that is by “(1) laws or decrees enacted by the Federal Congress or by the state legislature; (2)

⁹⁷ Gloria Orrego Hoyos, *supra*.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Supreme Court, Annotation, *Supra*, p. 45; see also Zagaris, B., “The Amparo Process in Mexico”, 6 Mexico Law Journal (Spring 1998) 61, 66 and Provost, R., *supra* at pp.708-709.

¹⁰² Gloria Orrego Hoyos, *supra*.

¹⁰³ Brewer Carias & Allan-Randolph, ‘Constitutional Protection of Human Rights in Latin America: A comparative study of amparo proceedings’, Cambridge University Press (2009).

¹⁰⁴ *Ibid.*

¹⁰⁵ Mexican Amparo expands post-conviction rights beyond habeas corpus, April 8, 2013, <http://gritsforbreakfast.blogspot.com/2013/04/mexican-amparo-writ-expands-post.html> accessed on June 30, 2013.

judicial resolutions in civil or criminal suits; or (3) acts of whatever nature, of any other authority”¹⁰⁶ To be actionable, an application for this writ must address an act that (1) violates an individual guarantee (2) causes an actual prejudice to the complainant, (3) has not been expressly or tacitly consented to, (4) cannot be redressed by an ordinary remedy or recourse, and (5) has not been irreparably consummated.”¹⁰⁷ While the writ has been a successful means of protecting the human rights guaranteed in the Mexican Constitution, it has also been used to correct supposedly erroneous application of precedents.

5. The Writ of Amparo in the Philippines:

A primary compulsion for the writ was the wave of enforced disappearances and extra-judicial killings in the Philippines. As has been said, the “trail of blood leads to the doorsteps of Malacañang”¹⁰⁸, the President’s office. The victims were mostly activists, journalists and lawyers, fierce opponents or critique of then President Gloria Macapagal-Arroyo’s government and the country’s military hierarchy that propped it. The violations shocked the world and compelled a reaction to act. The Judicial department rose to the challenge and organized the “National Consultative Summit on Extrajudicial Killings and Enforced Disappearances” in July 2007.¹⁰⁹ The Summit resoundingly advocated the adoption of the procedure for the Writ of *Amparo*.¹¹⁰ It was “envisioned to provide a broad and fact-based perspective on the issue of extrajudicial killings and enforced disappearances.”¹¹¹ Thus, “representatives from all sides of the political and social spectrum, as well as all the stakeholders in the justice system”¹¹² participated in mapping out ways to resolve the crisis while an environment of impunity exists in the executive department.

The catalyst was “the prevalence of extralegal killing and enforced disappearances.”¹¹³ The adoption of the writ was an exercise for the first time of the Supreme Court’s expanded power to promulgate rules to protect the Filipino people’s constitutional rights.¹¹⁴ This power of the Supreme Court made its maiden appearance in the 1987 Constitution in response to the Filipino people’s collective experience under the martial law regime.¹¹⁵ As the Writ of *Amparo* was intended to address the intractable problem of

¹⁰⁶ *Ibid.*

¹⁰⁷ Mejerada, *supra*.

¹⁰⁸ Luis Jalandoni, ‘The Trail of Blood Leads to Malacañang’, National Democratic Front of the Philippines (29 May 2006), <http://www.ndfp.net/joomla5/index.php/media-releases-mainmenu-53/statements-mainmenu-71/267-the-trail-of-blood-leads-to-malacaang.html> accessed 30 July 2013.

¹⁰⁹ Hans Seidel Foundation, ‘National Consultative Summit on Extrajudicial Killings and Enforced Disappearances – Searching for Solutions’ (n.d.), <http://www.hss.de/southeastasia/en/philippines/news-events/2007/national-consultative-summit-on-extrajudicial-killings-and-enforced-disappearances-searching-for-solutions.html> accessed 12 September 2013.

¹¹⁰ *Secretary of National Defense et al. v. Manalo et al.*, G.R. No. 180906, October 7, 2008.

¹¹¹ Supreme Court, Annotation, *supra*, p. 43.

¹¹² *Ibid.*

¹¹³ Supreme Court, Annotation, *supra*.

¹¹⁴ *Ibid.*

¹¹⁵ 1987 Constitution of the Republic of the Philippines, Art. VIII, Section 5(5): “The Supreme Court shall have the following powers x x x (5) Promulgate rules concerning the protection and enforcement of constitutional rights x x x”

“extralegal killings”¹¹⁶ and “enforced disappearances,”¹¹⁷ understandably, its coverage, in its present form, is confined to these two instances or to threats thereof. While the 1987 Constitution of the Philippines does not explicitly provide for the Writ of *Amparo*, several of the above *Amparo* protections are embedded in and guaranteed by the constitution. It provides for the judicial power “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”¹¹⁸ This provision accords a similar general protection to human rights extended by the *Amparo contra leyes*, *Amparo casacion*, and *Amparo administrativo*. *Amparo libertad* is comparable to the remedy of *Habeas Corpus* found in several provisions of the Constitution.¹¹⁹ The clause emerged from the United States common law tradition of judicial review, which finds its roots in the 1803 case of *Marbury v. Madison*¹²⁰.

6. Amparo: Expanding the Mantle on Protecting Human Rights

In arguing that a *Writ of Amparo* is more appropriate in countries gravely affected by human rights violations, the highlighted provisions of the Philippine version will be discussed below and compared with the Writ of *Habeas Corpus* in the same jurisdiction. Annotations on these provisions are included for a more comprehensive presentation of the advantages and disadvantages of these remedies in the Philippine context. Combining the highlighted provisions with the annotations should provide a template of good practices and lessons learned that could be adopted for other countries like Sri Lanka and the advantages would provide the answer to most of the gaps in the full protection of human rights as enumerated above.

6.1 Legal Basis

The *Writ of Habeas Corpus*¹²¹ is explicitly sanctioned by the Philippine Constitution¹²² and implemented by the judiciary through Rule 102 of the Philippine Rules of Court. The *Writ of Amparo* is not explicitly mentioned in the Constitution. It is a judicial initiative, passed by the Supreme Court under its constitutional power to “promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts.”¹²³

¹¹⁶ Supreme Court, Annotation, *supra*, p. 48 – “Extralegal killings” are “killings committed without due process of law, *i.e.*, without legal safeguards or judicial proceedings.”

¹¹⁷ *Ibid.*, - “enforced disappearances” are “attended by the following characteristics: an arrest, detention or abduction of a person by a government official or organized groups or private individuals acting with the direct or indirect acquiescence of the government; the refusal of the State to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of liberty which places such persons outside the protection of law.”

¹¹⁸ 1987 Constitution, *supra*, Article VIII, Section 1.

¹¹⁹ *Ibid.*, Art. III, Sections 13 & 15; Art. VII, Section 18; Art. VIII, Section 5 (1).

¹²⁰ 5 U.S. 137

¹²¹ Rule 102, Rules of Court in the Philippines (1964).

¹²² 1987 Constitution, *supra*, Article III, Section 13.

¹²³ *Ibid.*, Article VIII, Section 5(5).

6.2 Nature, Scope and Functions

The *Writs of Amparo* and *Habeas Corpus* have similarities. They are both prerogative writs. Both *writs* are neither a civil, criminal, administrative, nor special civil action. *Amparo* protects more specie of human rights than does *Habeas Corpus*. Only when one's right to liberty is actually restrained can he or she avail of the privilege of the *writ of Habeas Corpus*.¹²⁴ The latter is a curative remedy. In contrast, the *Writ of Amparo* reaches the rights to life, liberty, and security, specifically "extralegal killings and enforced disappearances."¹²⁵ It covers both the threat and the reality of violations of these rights.¹²⁶ It is therefore simultaneously preventive and curative.

While the principal objective of *Amparo* is the determination of whether an enforced disappearance, extralegal killing, or threats thereof had occurred, this *Writ* does not, by so doing, fix liability for such disappearance, killing or threats, whether criminal, civil or administrative under the applicable substantive law.¹²⁷ It may happen however that the proceeding for fixing liability would follow the adjudication of the petition for a *Writ of Amparo*.

The objective of the *Writ of Habeas Corpus*,¹²⁸ on the other hand, is solely the judicial intervention for the immediate release of a person who is illegally deprived of liberty.¹²⁹ It stops there, in theory and practice. *Habeas Corpus* is not to determine any criminal, civil or administrative liability or to order compensation for illegal detention. It is simply confined to compelling the immediate release of a person if it was found that his/her detention is unlawful.

Amparo further expands the protective mantle for human rights, as compared to the ambit of *Habeas Corpus*. It answers these issues: whether an enforced disappearance or extra-legal killings have taken place or a threat thereof is taking place, who is responsible or accountable for these human rights violations, and what appropriate remedies can be defined and imposed to address them. In these situations, the burden of the public authorities to discharge is two-fold. The first is to ensure that all efforts at disclosure and investigation are undertaken under pain of indirect contempt of court when governmental efforts are less than what the individual situations require. The second is to address the disappearance, so that the life of the victim is preserved and his or her liberty and security restored.

¹²⁴ Rule 102, *supra*, Section 1: "the writ of *Habeas Corpus* shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto."

¹²⁵ A.M. No. 07-9-12-SC, *supra*, Section 1: "the petition for a writ of *Amparo* is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity. The writ shall cover extralegal killings and enforced disappearances."

¹²⁶ A.M. No. 07-9-12-SC, *supra*.

¹²⁷ *Ibid*.

¹²⁸ Rule 102, *supra*.

¹²⁹ *Chin Yow v. United States*, 208 U.S. 8, 28 S.C. 201, 52 Led. 369.

In these senses, court orders and directives in a *Writ of Amparo* proceeding are “continuing efforts that are not truly terminated until the extrajudicial killing or enforced disappearance or threat is fully addressed by the complete determination of the fate and the whereabouts of the victim or guarantee of safety of persons under threat, by the production of the disappeared person and the restoration of his or her liberty and security, and, in the proper case, by the commencement of criminal action against the perpetrators.”¹³⁰

6.3 *Locus Standi*

The rule on *Habeas Corpus* is more liberal on the standing of the person who can file the petition. It may be the detainee or any person on his or her behalf.¹³¹ But while the petition may be filed by “any person,” it needs to be done “on behalf” of the detainee. *Amparo* restricts the authority of persons to file a petition by identifying the specific persons:

1. “Any member of the immediate family, namely: the spouse, children and parents of the aggrieved party;
2. Any ascendant, descendant or collateral relative of the aggrieved party within the fourth civil degree of consanguinity or affinity, in default of those mentioned in the preceding paragraph; or
3. Any concerned citizen, organization, association or institution, if there is no known member of the immediate family or relative of the aggrieved party.”

The filing of the petition suspends the right of all other authorized parties to file similar petitions. Likewise, the filing of the petition by an authorized party on behalf of the aggrieved party suspends the right of all others, observing the order established herein.”¹³²

Despite the restriction, *Amparo* is progressive. For it permits *actio popularis*, a complaint initiated by one who is not a victim. This concept grants *locus standi* to concerned citizens and organizations. “This allows human rights organizations to file *amparo* petitions on behalf of victims simply to vindicate human rights. It is a fact that ‘(h)uman rights organizations have the institutional capacity and accountability to file’, and giving them standing to sue can contribute greatly to shattering the culture of impunity under which human rights violations are committed. Allowing third persons and organizations

¹³⁰ *Vicente v. Mendoza*, ‘A Note on the Writ of Amparo’, *Philippine Law Journal* Vol. 82 (2008), pp. 2-3.

¹³¹ Rule 102, *supra*, Section. 3.

¹³² A.M. No. 07-9-12-SC, *supra*, Section 2.

to file is a recognition of the fact that the aggrieved party or his/her immediate family members may be cowed into fear, effectively discouraging them from availing of the remedy.”¹³³

6.4 Time of Filing

Habeas Corpus cases may only be filed on a working day during working hours while *Amparo* may be filed at any day, at any time,¹³⁴ prompting the Supreme Court to direct the availability of court personnel to receive such petitions. This provision emphasized the recognition by the court of the urgency of the situation and the necessity of protecting the right to life, liberty and security of persons with quick dispatch.

6.5 Venue/Jurisdiction

In both *Amparo* and *Habeas Corpus*, the petitioner may opt to file the case either before the Philippines’ Regional Trial Court (RTC), the Court of Appeals (CA), or the Supreme Court (SC), without any need to observe the Philippine concept of “hierarchy of courts.”¹³⁵ *Amparo* petition allows the filing before the *Sandiganbayan*, a court dedicated to hearing cases against high-ranking government officials who are accused of graft, corruption, and other crimes in relation to their public office, where one or more of the respondents fall within its jurisdiction.¹³⁶ *Habeas Corpus* cases may also be filed before specialized Family Courts in cases where the dispute involves the custody of minor children¹³⁷ or in Municipal Trial Courts in the absence of all RTC judges.¹³⁸

6.6 Docket fees

The rule on *Amparo* exempts the petitioner from the payment of “docket and other lawful fees when filing the petition,”¹³⁹ a provision not available in *Habeas Corpus*. This exemption will partially address the problem of financial difficulties of the victims or their families in filing cases before the courts. Of course, other litigation expenses might still be incurred in the process. Certainly, this will prevent any delays in the filing of the petition due to lack of financial capacity to pay filing fees.

¹³³ Cheryl Daytec-Yangot, ‘The Writs of Habeas Corpus and Amparo: Two Remedies Against the Menaces of State Power in the Philippines’, A paper submitted to the National Union of Peoples Lawyers (NUPL, 2011).

¹³⁴ A.M. No. 07-9-12-SC, *supra*, Section 3.

¹³⁵ A.M. No. 07-9-12-SC, *supra*, Section 3; Rule 102, *supra*, Section 2. The “hierarchy of courts” means that before a person can petition the Supreme Court, it must first go through the lowest court level that has the jurisdiction or authority to hear the petition. The lowest court for an *amparo* petition is the Regional Trial Court, followed by the Court of Appeals, which shares equal rank with the *Sandiganbayan*, then the highest court in the hierarchy, the Supreme Court.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Judiciary Reorganization Act of 1980.

¹³⁹ A.M. No. 07-9-12-SC, *supra*, Section 4.

6.7 Exhaustion of Remedies and Relation to Criminal, Civil or other cases

The Supreme Court has clarified that *Habeas Corpus* cannot be availed of where other remedies are available to the petitioner. It should not be granted in advance of trial. The orderly course of trial must be pursued and the usual remedies exhausted before resorting to the writ where exceptional circumstances are extant. It has also been held that *habeas corpus* cannot be issued as a writ of error or as a means of reviewing errors of law and irregularities not involving the questions of jurisdiction occurring during the course of the trial, subject to the caveat that constitutional safeguards of human life and liberty must be preserved, and not destroyed. It has been opined that where restraint is under legal process, mere errors and irregularities, which do not render the proceedings void, are not grounds for relief by *habeas corpus* because in such cases, the restraint is not illegal.”¹⁴⁰

The rule on *Amparo* is different. The filing of a petition for the *writ of Amparo*, conversely, “shall not preclude the filing of separate criminal, civil or administrative actions.”¹⁴¹ When a criminal case is instituted, the *Amparo* case will be consolidated with it but the rules on *Amparo* will continue to govern the disposition of the reliefs prayed for.¹⁴² The criminal case need not be exhausted as a condition for the *Amparo* to progress or issue. This is one important liberal provision, which stemmed from “the lessons learned in many of the *Amparos* in Latin America which were circumvented by the exhaustion requirement and was generally used by state security forces to delay petitions for the writ thereby rendering the remedy ineffective.”¹⁴³

6.8 Burden of Proof and Quantum of Evidence

The quantum of evidence to sustain a *Habeas Corpus* petition is preponderance of evidence while a *writ of Amparo* requires mere substantial evidence.¹⁴⁴ Preponderance of evidence means probability of truth. “It is evidence which is more convincing to the court as worthier of belief than that which is offered in opposition thereto.”¹⁴⁵ “Substantial evidence,” on the other hand, is “that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.”¹⁴⁶

The burden in *Amparo* is appropriate for its purpose of protecting life, liberty and security. For the standard is reason, whether the *Amparo* petitioner’s posturing is consistent with reason, and not vis-à-vis the other parties’ evidence, *i.e.*, whether it is more than what the adversity has offered. In practical terms, especially for the petitioner who seeks protection of his or her life, liberty and security, convincing reason

¹⁴⁰ *Kiani v. Bureau of Immigration and Deportation (BID), et. al.*, G.R. No. 160922, February 27, 2006, citing *Caballes v. Court of Appeals*, G.R. No. 163108, February 23, 2005, 452 SCRA 312.

¹⁴¹ A.M. No. 07-9-12-SC, *supra*, Section 21.

¹⁴² *Ibid*, Section 22-23.

¹⁴³ Neri Javier Colmenares, ‘Initial Analysis on the Philippine Amparo’, (Bulatlat, October 14-20, 2007) Vol. VII, No. 36, p. 3.

¹⁴⁴ A.M. No. 07-9-12-SC, *supra*, Section 17.

¹⁴⁵ *Chua v. Westmont Bank, et. al.*, G.R. No. 182650, 27 February 2012.

¹⁴⁶ Rule 133, Section 5, Rules of Court of the Philippines.

is easier to do than overcoming the evidence of the other. What is reasonable is adequate to satisfy substantial evidence; what is reasonable does not always supply preponderance of evidence especially where the *amparo* respondent has adduced evidence that the *amparo* petitioner is hard-pressed to rebut.

6.9 Primary Reliefs

The ultimate relief that can be granted in *Habeas Corpus* is the release of the detainee.¹⁴⁷ This is due primarily to the nature of the writ of *habeas corpus*, which is the production of “the body.”

But judgment on the *writ of Amparo* “shall grant the privilege of the writ and such reliefs as may be proper and appropriate; otherwise, the privilege shall be denied.”¹⁴⁸ Appropriate reliefs granted would refer to the main objectives of the *writ*, which is the protection of life, liberty and security.¹⁴⁹

The reliefs are variable depending on the circumstances of the petition. In enforced disappearances, for example, the primary relief would be “the release of the detainee from detention and an injunction of acts that violate or threaten to violate rights to life, liberty, and security. But where there is a threat rather than actual violation of the rights covered by *amparo*, a relief is for the court to order the respondents to desist from performing any threatening act against such rights of the aggrieved party.”¹⁵⁰

Moreover, the court in the *writ of Amparo*, may order the respondents to: “(i) to recover and preserve evidence related to the death or disappearance of the person identified in the petition which may aid in the prosecution of the person or persons responsible; (ii) to identify witnesses and obtain statements from them concerning the death or disappearance; (iii) to determine the cause, manner, location and time of death or disappearance as well as any pattern or practice that may have brought about the death or disappearance; (iv) to identify and apprehend the person or persons involved in the death or disappearance; and (v) to bring the suspected offenders before a competent court.”¹⁵¹

Both writs do not include claims for civil damages. There was an initial intent to include relief for civil damages in the case of *Amparo*. But the Supreme Court backtracked. It said that civil damages could deleteriously affect the summary and speedy nature of the remedy. Disputes on civil damages can defeat the purposes of securing the immediate removal of victims from circumstances that threaten their right to life, liberty and security.¹⁵² Often, dilatory process governs actions for civil damages.

¹⁴⁷ Rule 102, *supra*, Section 6.

¹⁴⁸ A.M. No. 07-9-12-SC, *supra*, Section 18.

¹⁴⁹ A.M. No. 07-9-12-SC, *supra*, Section 18.

¹⁵⁰ Daytec-Yangot, *supra*.

¹⁵¹ A.M. No. 07-9-12-SC, *supra*, Section 9.

¹⁵² Supreme Court, Annotation, *supra*.

6.10 Interim reliefs available in *Writ of Amparo*¹⁵³

Another major advantage of the *writ of Amparo* is the availability of four interim reliefs. They may be prayed for and granted at the time of the filing of the petition or at any time prior to judgment. These reliefs are:

- (i) *Temporary Protection Order*. It is meant to protect the aggrieved party and any member of the immediate family by committing them to an authorized government agency or an accredited person or private institution capable of keeping and securing their safety. The inclusion of non-government institutions as havens for victims or their families, addresses the hesitations that the aggrieved persons may have in allowing themselves to be protected by a government agency when their case is against another agency or officials of the same government.
- (ii) *Inspection Order*. The court, “may order any person in possession or control of a designated land or other property, to permit entry for the purpose of inspecting, measuring, surveying, or photographing the property or any relevant object or operation thereon.”¹⁵⁴ A motion for the issuance of this Order “shall state in detail the place or places to be inspected. It shall be supported by affidavits or testimonies of witnesses having personal knowledge of the enforced disappearance or whereabouts of the aggrieved party.”¹⁵⁵ This interim relief is significant due to the propensity of government officials to hide the victims in premises that are off-limits to ordinary court processes. Examples of these premises are military camps and police precincts. No search warrants can be issued to inspect these places.
- (iii) *Production Order*. The court, “may order any person in possession, custody or control of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, or objects in digitized or electronic form, which constitute or contain evidence relevant to the petition or the return, to produce and permit their inspection, copying or photographing by or on behalf of the movant.”¹⁵⁶

While motions for the issuance of inspection and protection orders may be opposed “on the ground of national security or of the privileged nature of the

¹⁵³ A.M. No. 07-9-12-SC, *supra*, Section 14.

¹⁵⁴ A.M. No. 07-9-12-SC, *supra*, Section 14.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

information,¹⁵⁷ evidence has to be presented and hearing in chambers must be conducted “to determine the merit of the opposition.”¹⁵⁸

- (iv) *Witness Protection Order*. The court “may refer the witnesses to the Department of Justice for admission to the Witness Protection, Security and Benefit Program, pursuant to Republic Act No. 6981. The court, justice or judge may also refer the witnesses to other government agencies, or to accredited persons or private institutions capable of keeping and securing their safety.”

There is however a negative aspect of the Philippine *Amparo* regarding these interim reliefs. The inspection and production orders are likewise available to the respondents, who frequently are State forces. This will allow them to abuse the rule by using it against human rights defenders, their organizations, and their premises.¹⁵⁹ The State forces can compel the respondents to open their premises and books for inspection by them. In the context of human rights cases, this is dangerous. It provides leeway for harassments and justification for surveillance. This in turn may lead and graduate to what the *Amparo* was meant to address in the first place, more enforced disappearances and extrajudicial killings.

6.11 Enforceability of judgments

The writ of *Habeas Corpus* is enforceable anywhere in Philippines if it was issued by the Court of Appeals or the Supreme Court. But if issued by the Regional Trial Court,¹⁶⁰ it is enforceable only within its jurisdiction. An *Amparo writ*, on the other hand, is enforceable anywhere in the Philippines¹⁶¹ irrespective of which court issued the same.¹⁶² This rule will address the military’s usual technique of transferring their members outside of the court’s jurisdiction to evade liability.

6.12 Dismissals and *Res Judicata*

There is no specific provision for the dismissal of *Habeas Corpus* cases. Daytec-Yangot, based on Philippine case law, concluded that *Habeas Corpus* petitions are no doubt “dismissible when there is insufficient evidence to trump the legality of detention or to rebut the respondents’ general denial of

¹⁵⁷ *Ibid.*

¹⁵⁸ A.M. No. 07-9-12-SC, *supra*, Section 14.

¹⁵⁹ Colmenares, *supra*.

¹⁶⁰ Rule 102, *supra*, Section 2.

¹⁶¹ The Philippines is an archipelago of three major islands: Luzon, Visayas, and Mindanao. The largest political subdivision is the province, then followed by the city, the municipality, and the barangay, in descending order. The three major islands is composed of several provinces, cities, municipalities, and barangays. A writ of *Habeas Corpus* issued by an RTC can be enforced only within a city or several cities and municipalities. On the other hand, a writ of *amparo* issued by the same RTC can be enforced anywhere in Luzon, Visayas, and Mindanao.

¹⁶² A.M. No. 07-9-12-SC, *supra*, Section 3.

custody.”¹⁶³ Recall that the burden in *Habeas Corpus* cases is for the petitioner to present preponderant evidence.

Amparo cases cannot however be dismissed instantaneously. This is because the rule directs the court not to dismiss a petition and instead to archive it if it “cannot proceed for a valid cause such as the failure of petitioner or witnesses to appear due to threats on their lives.”¹⁶⁴ To archive cases means to let the cases sleep till proper action can be taken on them. These archived cases are periodically reviewed. It is only after the lapse of 2 years from archiving that the case may be dismissed for “failure to prosecute.”¹⁶⁵ There is therefore a window of two years to strengthen the case further. Note as well that only substantial evidence is demanded – the test is reason.

The foregoing rules may well rectify the arbitrary dismissal of cases in *Habeas Corpus*, and make “it easier for the victims to revive the petition when circumstances change. This legal mechanism could play an important role in the battle against impunity, and may be deemed as a warning on the perpetrators of human rights abuses that they may still be held to account in the future under a new president or once their ‘protectors’ in government are gone.”¹⁶⁶

The prevailing position is that in *Habeas Corpus*, the doctrine of *res judicata*, which prevents the filing of a similar petition after dismissal on the merits, cannot be used as a ground for dismissal.¹⁶⁷ As well, the rules on *Amparo* do not mention the application of *res judicata*. Its provisions are on archiving of cases and a ban on dismissal of cases. This only means that *res judicata* cannot be used to dismiss petitions.

6.13 Command Responsibility

The concept of command responsibility, which makes a superior liable or responsible for the acts or omissions of his or her subordinates,¹⁶⁸ is absent in *Habeas Corpus*. This gap impliedly limits the reach of this writ solely to the person who is in actual custody of the detainee. The Writ of *Amparo* has somehow breached the aversion against command responsibility.

Though this matter remains debatable as regards the *Writ of Amparo*, Daytec-Yangot forcefully argues that command responsibility is well within the coverage of *Amparo*. She points to the Philippine Supreme

¹⁶³ Daytec-Yangot, *supra*.

¹⁶⁴ A.M. No. 07-9-12-SC, *supra*, Section 20.

¹⁶⁵ *Ibid*.

¹⁶⁶ Colmenares, *supra*, p. 4.

¹⁶⁷ Daytec-Yangot, *supra*.

¹⁶⁸ Guenael Mettraux, ‘The Doctrine of Superior/Command Responsibility (n.d.), Peace and Justice Initiative, <http://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility> accessed 28 July 2013: Doctrine of Command Responsibility: A superior, whether *de jure* or *de facto*, may be held criminally responsible under that doctrine in relation to crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators, knew or had reason to know (or, in the case of military superiors at the ICC, “should have known”) that these crimes had been committed or were about to be committed and, with and despite that knowledge, wilfully and culpably failed to prevent or punish these crimes.”

Court ruling in *Razon v. Tagitis*.¹⁶⁹ The latter held the police officials and staff responsible. Moreover, the principle of command responsibility is entrenched in laws and rules governing military actions.¹⁷⁰ The function of the *Writ of Amparo* by parity of reasoning must necessarily imply the availability of the same doctrine in the enforcement of this writ against the military and the police.

6.14 General Denials

A general denial in *Habeas Corpus* is not prohibited. In fact, many petitions were dismissed on the bare allegations of the respondents that they did not have in their custody the person subject of the petition.¹⁷¹ The rules on *Amparo* however explicitly proscribe a general denial and even mandates the respondents to state under oath the actions they have taken in relation to the person subject of the petition.¹⁷² In fact, the respondents are directed to state under oath what they have done or plan to do to remedy and counteract the killing, threat or disappearance. This makes them prone to contempt proceedings in case of misrepresentations.

6.15 Contempt

The provision on contempt of court is present in both *Amparo*¹⁷³ and *Habeas Corpus*.¹⁷⁴ This is meant to punish the respondents with imprisonment or fine in case of failure to obey court orders. The challenge, however, is how to implement this in actual situations. The military, for example, may deny the enforcement of protection or inspection orders. It can insist on its own interpretation of national security and privileged information.¹⁷⁵ The case of *Cadapan, et al.*¹⁷⁶ portrays the refusal of the military to present the bodies of Cadapan and Empeno before the RTC. The military hierarchy's defiance continues, without anyone among the respondents being imprisoned or fined for such contempt.

6.16 Addressing Procedural Delays

Both remedies underscore the urgency of the actions by deviating from the dilatory procedural formalities of other actions. But the reality in *Habeas Corpus* cases is that court proceedings drag on for years. The Asian Human Rights Commission (AHRC) referred to the remedy as perverted.¹⁷⁷ *Amparo* wanted to address delays in judicial proceedings. This is by providing specific time frames, *i.e.*, first hearing will be

¹⁶⁹ *Razon v. Tagitis*, G.R. No. 182498, 3 December 2009.

¹⁷⁰ See for instance: a) Commonwealth Act No. 1, known as the National Defence Act, December 21, 1935; b) Executive Order No. 94, October 4, 1947; c) Circular No. 28, Series of 1956, Armed Forces of the Philippines;

¹⁷¹ *Daytec-Yangot*, *supra*.

¹⁷² A.M. No. 07-9-12-SC, *supra*, Section 9.

¹⁷³ A.M. No. 07-9-12-SC, *supra*, Section 16.

¹⁷⁴ Rule 102, *supra*, Section 16.

¹⁷⁵ *Colmenares*, *supra*, p. 6.

¹⁷⁶ G.R. No. 173288, July 19, 2006.

¹⁷⁷ *Philippines: Perversion of Habeas Corpus Writ indicates breakdown in justice system*, AHRC (18 October 2011), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-152-2011> accessed 27 July 2013.

set within 7 days from issuance of writ,¹⁷⁸ 72 hours for respondents to file their return (response),¹⁷⁹ hearing will be done day to day until completion,¹⁸⁰ and 10 days to render judgment¹⁸¹ and 5 days for appeal.¹⁸² Consequently, the rule lists several prohibited pleadings and motions¹⁸³ that were not mentioned in the *Habeas Corpus* rule, purposely to expedite proceedings. It appears therefore the *Amparo* proceedings should happen at a faster pace than *Habeas Corpus* would.

Procedural delays in the resolution of *Amparo* cases are prevalent. Take for instance the case of *James Balao*.¹⁸⁴ He is a victim of enforced disappearance. The petition for the *writ of Amparo* was filed on October 8, 2008 before the RTC in Benguet, a province in the Philippines. Delays attended the release of the court Decision on January 19, 2009. The Decision directed the respondents to disclose the whereabouts of James Balao, to release him from their custody, and to cease and desist from inflicting harm on his person. An appeal was directly lodged with the Philippine Supreme Court. It took the latter almost three years to resolve the case, regrettably reversing the RTC Decision. To date, James Balao is still missing or “disappeared.”

6.17 Suspension of the Privilege of the Writ of *Habeas Corpus*

The Philippine Constitution decrees: “The privilege of the writ of *Habeas Corpus* shall not be suspended except in cases of invasion or rebellion, when the public safety requires it”¹⁸⁵ or in times of martial law. This is one perceived drawback of *Habeas Corpus*. Daytec-Yangot opined that this constitutional rule to suspend *Habeas Corpus* does not apply to the writ of *Amparo*. She reasons that the latter “is an independent remedy in itself.”¹⁸⁶ Moreover, the State’s obligation to protect human rights is not suspended in times of rebellion or invasion. Consequently, as a remedy to protect human rights, *Amparo* cannot be suspended.

6.18 Practical difficulties in the implementation of the writ

While the *writ of Amparo* may be a laudable innovation, Colmenares fears that it contains certain provisions that may even be used to turn the table against victims of human rights violations. Thus, the rule “may open up the system to abuse by litigious private individuals against another private individual or entity for harassment purposes. Unlike government, private citizens are not equipped to respond to petitions filed against them in so many possible venues, particularly since Section 9 requires them to file their ‘return’ within 72 hours from receipt of the writ.”¹⁸⁷ Daytec-Yangot¹⁸⁸ countered that while the

¹⁷⁸ A.M. No. 07-9-12-SC, *supra*, Section 6.

¹⁷⁹ A.M. No. 07-9-12-SC, *supra*, Section 9.

¹⁸⁰ A.M. No. 07-9-12-SC, *supra*, Section 13.

¹⁸¹ A.M. No. 07-9-12-SC, *supra*, Section 18.

¹⁸² A.M. No. 07-9-12-SC, *supra*, Section 19.

¹⁸³ A.M. No. 07-9-12-SC, *supra*, Section 11.

¹⁸⁴ *Arthur Balao, et. al. v. Gloria Macapagal Arroyo, et. al.*, G.R. No. 186050, 13 December 2011.

¹⁸⁵ 1987 Constitution, *supra*. Article III, Section 15.

¹⁸⁶ *Supra*.

¹⁸⁷ Colmenares, *supra*, p. 3.

possibility of abuse is real, this may be dealt with by the Civil Code making malicious prosecution, “prompted by a sinister design to vex or humiliate a person...initiated deliberately by the defendant knowing that his charges were false and groundless” an actionable wrong. The potential risks from this, said Daytec-Yangot, “are far outweighed by the benefit of an accessible remedy for victims of arbitrary State acts. Recent experience shows that the victims of enforced disappearances and extrajudicial killings do not belong to the upper echelon of society, which may suggest a relationship between one’s social class membership and vulnerability to State abuse.”¹⁸⁹

Sadly, contemporary narratives of *Amparo* cases almost always depict a landscape of frustrations on the implementation of this writ. Colmenares comments that “the entire process is of course ‘court dependent’ [considering that *Amparo* is part and parcel of the Philippines’ rules of court], subject to the vagaries of the justice system such as whether or not a judge is corrupt, biased in favor of government, can withstand threats and pressure from powerful respondents, and whether the judiciary can assert itself should the military disregard its orders.”¹⁹⁰ On the one hand, “despite possible venues for abuse, the rule on the writ of *Amparo* contains many provisions that may be used to pierce the veil of impunity that shrouds the justice system. Whether or not the writ of *Amparo* becomes an effective tool in the battle against impunity, the active participation of the victims, their families and human rights advocates in the quest for justice should never be abandoned. The writ of *Amparo*, or any rule for that matter, will always be insufficient to stop institutionalized human rights violations without the involvement of the most important pillar of the justice system—the people.”¹⁹¹ Impunity, more than anything else, is the worst nemesis in any legal remedy for human rights protection.¹⁹²

The foregoing highlights of the writ of *Amparo*, when juxtaposed with the reasons why the writ of *Habeas Corpus* is faltering in Sri Lanka, would respond to most of the causes for the ailing “great writ”. In fact, it offers more protection to a wider range of human rights. But is the *Amparo* a legal possibility in Sri Lanka?

7. A Writ of *Amparo* in Sri Lanka: A Legal Choice

7.1 International Law

The Writ of *Amparo*, as a remedy for redress of human rights violations in Sri Lanka, is sanctioned by international and domestic laws. As a member of the United Nations, Sri Lanka has the duty to “affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,

¹⁸⁸ *Supra.*

¹⁸⁹ *Supra.*

¹⁹⁰ Colmenares, *supra.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

and to promote social progress and better standards of life in larger freedom.”¹⁹³ The fundamental rights are primarily found in the International Bill of Rights – UDHR, ICCPR and the International Convention on Economic, Social and Cultural Rights (ICESCR).

The UDHR, which has evolved into an international customary law of universal application,¹⁹⁴ provides that “[e]veryone has the right to life, liberty and security of persons.”¹⁹⁵ Ratified by Sri Lanka, the ICCPR provides that:

Art. 6.1 - 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Art. 9.1 - 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.¹⁹⁶

Beyond the UDHR and the ICCPR, Sri Lanka has adhered to other international human rights instruments. The notables are the CAT and the four Geneva Conventions¹⁹⁷ respecting human rights in times of war.

Sri Lanka is also under an international legal obligation to abide by United Nations’ declarations and resolutions. One specific resolution relevant to this topic was passed by the UN General Assembly in 1979. In that resolution, all UN members expressed their “conviction that the application within the legal system of States of *Amparo*, *Habeas Corpus* or other legal remedies to the same effect is of fundamental importance”¹⁹⁸ and that all governments are called upon “to guarantee to persons within their jurisdiction the full enjoyment of the right of *Amparo*, *Habeas Corpus* or other legal remedies to the same effect, as may be applicable in their legal system....”¹⁹⁹

¹⁹³ United Nations Charter, Preamble; See also Articles 1(3), 55(c), 56 and 62.

¹⁹⁴ Antonio Augusto Cancado Trindade, ‘Universal Declaration of Human Rights’, United Nations, *Audiovisual Library of International Law*, available at http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_s.pdf accessed on 30 July 2013.

¹⁹⁵ UDHR, *supra*.

¹⁹⁶ ICCPR, *supra*.

¹⁹⁷ For more information on the Conventions, see <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>.

¹⁹⁸ UN General Assembly, *The right of amparo, habeas corpus or other legal remedies to the same effect.*, 17 December 1979, A/RES/34/178, <http://www.refworld.org/docid/3b00f13120.html> accessed 30 July 2013.

¹⁹⁹ *Supra*: “The General Assembly....

“1. Expresses its conviction that the application within the legal system of States of *amparo*, *habeas corpus* or other legal remedies to the same effect is of fundamental importance for:

- (a) Protecting persons against arbitrary arrest and unlawful detention;
- (b) Effecting the release of persons who are detained by reason of their political opinions or convictions, including in pursuance of trade union activities;
- (c) Clarifying the whereabouts and fate of missing and disappeared persons;

Human Rights Watch²⁰⁰ (HRW) postulates that Sri Lanka's failure to ratify the International Convention for the Protection of All Persons from Enforced Disappearance,²⁰¹ did not preclude it from giving respect to and observing the provisions of the 1992 Declaration on Enforced Disappearance.²⁰² The HRW observes: "Although a non-binding standard, the Declaration reflects the consensus of the international community against this type of human rights violation and provides authoritative guidance as to the safeguards that must be implemented in order to prevent it."

HRW further asserts Sri Lanka's international obligations to protect human rights as a result of its ratification of the ICCPR and the CAT. Accordingly, Sri Lanka has the "duty to investigate serious violations of human rights and to punish the perpetrators" and the obligation "to ensure that enforced disappearances are considered crimes by law, and to prosecute any person who commits, orders, attempts to commit, or otherwise participates in an enforced disappearance, or has responsibility as a superior."²⁰³

7.2 National Law

Sri Lanka's Constitution²⁰⁴ guarantees the fundamental rights of its citizens to liberty and therefore guards them from arbitrary arrests and detentions, to wit:

Chapter III, Article 13. Fundamental Rights

(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

2. *Considers* that the use of those remedies may also forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment;

3. *Calls upon* all Governments to guarantee to persons within their jurisdiction the full enjoyment of the right of *amparo*, *habeas corpus* or other legal remedies to the same effect, as may be applicable in their legal system;"

²⁰⁰ *Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka*, Human Rights Watch (2008), <http://www.hrw.org/reports/2008/srilanka0308/index.htm> accessed 30 July 2013.

²⁰¹ International Convention for the Protection of All Persons from Enforced Disappearance, adopted September 23, 2005, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

²⁰² United Nations Declaration on the Protection of All Persons from Enforced Disappearances (Convention against Enforced Disappearances), adopted December 18, 1992, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

²⁰³ *Recurring Nightmare*, *supra*.

²⁰⁴ 1978 Constitution, *supra*.

The right to life is not explicitly decreed in the fundamental rights section of the Sri Lankan Constitution. Still, the general view is that it is “implicitly and tacitly recognised in the Article 13(4).”²⁰⁵ As a natural right, the right to life is inherent in every human being that no government can deny.²⁰⁶ Even without any express provision, Sri Lanka cannot deprive one of this right or derogate from it in whatever form or set it aside for another’s benefit.²⁰⁷

Adopting a writ of *Amparo* can also be a response to the Lessons Learnt and Reconciliation Commission’s (LLRC) recommendations to address enforced or involuntary disappearance and create mechanisms to address grievances of Sri Lankans arising from abuse of power by State officials or persons acting on their behalf.²⁰⁸

There is of course the fear that even with a Writ of *Amparo*, the State can easily override its efficacy by passing emergency laws. Theoretically, the overriding nature of the right to life, liberty and security of persons, should ensure that emergency law does not detract from the protection of these rights. meet this fear. The absolute right against arbitrary detention and the right to be free from torture and other cruel, inhuman and degrading treatment²⁰⁹ and the supreme right to life, are non-derogable rights. They cannot, at all times, be suspended, even in times of emergency.²¹⁰ This character of the right to life, liberty and security must stand out in Sri Lanka’s legal landscape and defeat the prevalent culture of impunity.

Operationalizing the Writ of *Amparo* in Sri Lanka is an objective that requires serious and in-depth studies. The legal process alone on how a writ of *amparo* can be injected into the Sri Lankan legal system is challenging enough. Should this be done only through a legislative act? Or is it possible to do so solely through judicial activism, as in the Philippines? Can the Sri Lankan Supreme Court maximize its rule making power under Article 136 of its Constitution to breathe life to a writ of *amparo*? Additionally, how can *Amparo* be justified when there is a constitutionally sanctioned judicial mechanism when

²⁰⁵ M.A.M.H. Barry, ‘Sri Lanka Needs an All-Inclusive and Accommodative Constitution’, *Daily Mirror* (25 February 2013), <http://www.dailymirror.lk/opinion/172-opinion/25975-sri-lanka-needs-an-all-inclusive-and-accommodative-constitution-.html> accessed 30 July 2013 citing the *Kottabadu Durage Sriyani Silva case* (2003).

²⁰⁶ “Natural rights - natural rights, political theory that maintains that an individual enters into society with certain basic rights and that no government can deny these rights.” Read more: natural rights | Infoplease.com <http://www.infoplease.com/encyclopedia/history/natural-rights.html#ixzz2aXFsiHwL> accessed on 30 July 2013.

²⁰⁷ John Locke, 1689, *Two Treatises of Government*, P. Laslett (ed.), Cambridge: Cambridge University Press, 1988.

²⁰⁸ ‘Report of the Commission on Inquiry on Lessons Learnt and Reconciliation,’ PRIU (November 2011), http://www.priu.gov.lk/news_update/Curent_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf accessed 16 July 2013.

²⁰⁹ *Absolute and Non-Derogable Rights in International Law*, Human Rights Law Center, 21 July 2011, http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/supplementary_info/263_-_Addendum.pdf accessed 30 July 2013; “Absolute rights cannot be limited for any reason. No circumstance justifies a qualification or limitation of absolute rights.” *Absolute Rights*, Australian Government Attorney General’s Department, <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx> accessed on 30 July 2013.

²¹⁰ *Human Rights, Terrorism and Counter-Terrorism*, Office of the United Nations High Commission on Human Rights (OHCHR) (n.d.), <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> accessed 30 July 2013.

fundamental rights are infringed? These are interesting and intriguing topics. Another paper will have to address them. Future research in that regard should inspire tremendous promise.

8. Conclusion

Impunity in regard to gross human rights violations including enforced disappearances, extra-legal killings, threats to security, illegal arrests and unlawful detentions is all pervasive in Sri Lanka today. Political will to effectively address impunity is of course a pre-condition to resolving these violations. But there must also be a preventive, curative, and punitive legal framework in place. Political will is as transient as the vagaries of the wind. An effective legal framework, on the other hand, ensures a consistent response every time human rights are violated, regardless of who sits in the throne of power.

Unfortunately, there are serious shortcomings in Sri Lanka's legal framework to address each and all of the major violations mentioned above. The Writ of *Habeas Corpus* has produced more miseries than rejoices in the Sri Lankans' right to liberty. Comprehensive studies²¹¹ have documented the manner in which petition after petition for this writ have been rendered nugatory for reasons utterly detached from the primary issue of liberty. What is worse, the writ itself is too limited in scope. Tracing its origins from as far back as history is recorded, the writ of *Habeas Corpus* has faltered in adapting to the clever mutations by which States' forces play with, endanger, and actually harm the people's right to liberty. It is time to rejuvenate by reforming Sri Lanka's legal remedies – this time, to add another writ to compensate, perhaps even replace, the once great Writ of *Habeas Corpus*. This paper has enumerated gaps in the full implementation of the writ of *Habeas Corpus* and discussed how a writ of *Amparo* could perhaps fill the void.

Sri Lanka is currently under pressure to adopt similar measures to comply with its international legal and moral obligations. The Philippine experience may serve as a paradigm but Sri Lanka can innovate further to suit its own conditions, as other countries in South America have done. If Sri Lanka implements the Writ of *Amparo*, it must look into best practices and avoid the problems that the Philippine *Amparo* has engendered. The journey is no doubt long and tedious. The legal process on how the writ of *Amparo* can be adopted in Sri Lanka and how *Amparo* can be significant, given Sri Lanka's constitutional requirements. For the sake of redressing the infringement of fundamental and human rights, these thought processes must begin now.

²¹¹ *Supra*.

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