



## National Union of Peoples' Lawyers

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# THE WRIT OF AMPARO: A COMPARATIVE REVIEW

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National Union of Peoples' Lawyers (NUPL)

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<sup>1</sup> Atty. Neri Javier Colmenares was an Associate of the Asian Law Centre, Faculty of Law, University of Melbourne. He delivered this paper during the historic Founding Congress of the National Union of Peoples' Lawyers (NUPL) held at the Golden Prince Hotel, Cebu on September 15-16, 2007 and attended by over 120 lawyers, law students and paralegals from all over the country. He was also elected Secretary General of the NUPL. Chief Justice Reynato Puno, in his message to the Founding Congress of the NUPL, announced the immediate promulgation of the rules on the Writ of Amparo.

## INTRODUCTION

The recent Consultative Summit on Extrajudicial Killings and Enforced Disappearance organized by the Supreme Court highlighted legal concepts that are “alien”<sup>2</sup> to Philippine jurisprudence. Concepts like the *writ of amparo*, command responsibility and subsequently, the *writ of habeas data* were entertained as possible legal tools that may be useful in solving the escalating number of cases involving extra judicial killings and enforced disappearances that have plagued the country for many years.

Whether or not these legal procedures will help alleviate the human rights condition in the country remains to be seen. Much depend not merely on the provisions of the “*amparo rule*” that the Supreme Court has promulgated, but on the judicial will to implement these rules in the face of a recalcitrant executive department. This paper will attempt to give a general description of the concepts, hoping that it will stimulate discussion among legal practitioners and contribute to the efforts in the promotion, protection and defense of human rights in the country through the creative use of the rules.

## HISTORICAL ROOTS

Amparo literally means *amparar* or “to shelter” or “to protect”. The name stems from the nature and intent of the writ—a judicial procedure for the protection of certain

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<sup>2</sup> Amparo is not completely alien. The notion is akin in parts to the common law concept of habeas corpus and certiorari. The concept of *Habeas Data*, which essentially grants a person the right to demand the amendment or destruction of government data [dossier] on the petitioner, may be resorted to under the Constitution’s freedom of information provision and using the general principles under the Civil Code provisions on ‘quasi-delict’. The liberal procedure in *Habeas Data*, however, has no equivalence in Philippine jurisprudence. The legal concept of command responsibility is not at all alien since the Yamashita case until the *respondeat superior* ruling in *Aberca vs Ver*.

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constitutional rights. The Writ of Amparo [*recurso de amparo* or *juicio de amparo*] originated from the Mexican legal system and has no exact equivalence in common law. Amparo however is not totally alien to Philippine jurisprudence because it essentially encompasses “elements of several legal actions of the common law tradition: writ of habeas corpus, injunction, error, mandamus, and certiorari”.

It was initiated by Manuel Crecencio Rejon in the drafting of the Constitution of Yucatan in 1840 and later enshrined in the 1857 Mexican Constitution. It possibly stemmed from the Anglo-Saxon concept of the ‘*writ of habeas corpus*’, although amparo [except in some countries like Argentina] pertains to the protection of rights other than the deprivation of liberty, the remedy of which is a *habeas corpus* petition.

Depending on the cause of action, the Amparo proceedings may be direct or indirect. An indirect Amparo is filed before a district court. There is a procedure for appeal before a collegiate tribunal such as the Supreme Court in the case of indirect amparo. A direct Amparo is filed before a collegiate tribunal and is decided in a single instance with no further judicial recourse available. It generally has two components: the “*cessation*” [akin to a temporary restraining order] and the decision on the merits issued by the court as judgment.

The effectiveness of Amparo in many Latin American countries, as a legal remedy for enforced disappearance has not been very encouraging due to various reasons: exceptions such as “arrest during emergency rule or state of siege”, exhaustion of remedies, inclusion of private individuals as respondents, and the lack of “judicial” will by the courts to interfere in cases where the military or the government is the respondent.

As a legal tool, however, amparo does expand the restrictive notion of ‘*habeas corpus*’ and may be used creatively to protect

human rights—both individual and collective rights.

## MEXICAN AMPARO

The amparo power of the Mexican Supreme Court is found in Article 94 of the 1917 Constitution of Mexico and is provided in detail under Article 107.

Article 107 of the Mexican Constitution states that only the injured party can initiate an action for amparo. The Mexican amparo is, under Art. 103 of the Constitution, limited to acts of the State and its personnel. It does not encompass “unconstitutional” acts of private individuals. An amparo decision that a law is unconstitutional does not have an ‘*erga omnes*’ effect to invalidate that law in general but is only *res judicata* in regard to the issue and the parties involved in the petition. A law declared unconstitutional by the Philippine Supreme Court is void for all intents and purposes.

The amparo proceeding is summary in nature, and only those issues which do not require extensive evidentiary examination is admitted, as defined under Art. 107 of the Constitution:

*Except as provided in the following section, a writ of amparo against final decisions or awards, for violations committed therein shall be applied for directly to the Supreme Court of Justice, which shall render its decision **without other evidence than the original complaint, a certified copy of the claims of the aggrieved party, which shall be added to those made by the third party affected, the latter’s complaint submitted either by the Attorney General of the Republic or his designated agent x x x.***

The Mexican Constitution, at least on paper, frowns upon refusal of the Executive branch to cooperate with the Court by providing that “*If after amparo is granted, the responsible official persists in repetition of the contested act or attempts to evade the decision of the federal authority, he*

*shall be immediately removed from office and taken before the appropriate District Judge*” [Art. 107, Par. XVI]. In fact, Par. XVIII requires that *“anyone who violates this article will be turned over to a competent authority”*, which means that a violation of the amparo decision may lead to the immediate arrest and removal of that official.

Since an amparo petition is only filed against a public official, the Attorney General is mandated to appear in all amparo cases although the Constitution [Par. XV] provides for certain exceptions.<sup>3</sup> There are five types of “amparo” suits: 1) “amparo” as a defense of individual rights such as life, liberty, and personal dignity; 2) “amparo” against laws (defending the individual against un-constitutional laws); 3) “amparo” in judicial matters (examine the legality of judicial decisions); 4) administrative “amparo” (providing jurisdiction against administrative enactments affecting the individual); 5) “amparo” in agrarian matters (protecting the communal ejidal rights of the peasants). It is noteworthy that even if peasants can file an action for amparo on agrarian issues, landlords cannot file a similar suit [their remedy is the ordinary court procedure of appeal].<sup>4</sup>

Amparo was copied by many Latin American countries, some deviating from the original notion of the Mexican amparo, although the idea of ‘protection or shelter’ remains as the overriding theme of these other amparos.

## AMPARO IN CHILE

The legal notion of Amparo was initially outlined in the

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<sup>3</sup> Art. XV. The Attorney General of the Republic or an agent of the federal public ministry appointed for the purpose, shall be a party in all suits in amparo, but they may abstain from intervening in such cases, if the matter in question lacks public interest, in their opinion.

<sup>4</sup> Art. XIV. Landowners affected by decisions granting or restoring communal lands and waters to villages, or who may be affected by future decisions, shall have no ordinary legal right or recourse and cannot institute amparo proceedings. Persons affected by such decisions shall have solely the right to apply to the Federal Government for payment of the corresponding indemnity. This right must be exercised by the interested parties within one year counting from the date...

1925 Constitution of Chile and expressly enshrined under Article 19 and 20 of its 1985 Constitution.<sup>5</sup> This was later qualified by Constitutional Act No. 3 by virtue of Decree Law 1152 promulgated on September 11, 1996.

The Chilean amparo [under the 1925 Constitution and the Constitutional Act No. 3 of 1976] introduces an important innovation : While the Mexican amparo must be filed by the injured party, the Chilean amparo “*may be filed on behalf of any person who may unlawfully suffer any other deprivation, disturbance or threat to his right to personal freedom and individual security.*”<sup>6</sup> The Philippine Amparo, as outlined in Section 2 of the Supreme Court Rule on Amparo follows this expanded Chilean notion by granting not only

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<sup>5</sup> [Translated] Article 20. -The one that because of arbitrary or illegal acts or omissions undergoes deprivation, disturbance or threaten in the legitimate exercise of the rights and guarantees x x x may avail through himself or anyone in his name, to the respective Court of Appeals, that it will adopt immediately the orders to restore the violated right and to assure the due protection the affected one, without damage of the other rights.

Article 21. -All individual that will be arrested, lengthy or imprisoned with infraction of the arranged thing in the Constitution or the laws, will be able to avail by himself or, or anyone to its name, to the courts, in order that this one orders keep the legal formalities and adopts immediately the providencias that judge necessary to restore the violated right and to assure the due protection the affected one.

That magistrate will be able to order that the individual is brought to their presence and its decree indeed will be obeyed by all ones in charge of the jails or places of halting. Instructed of the antecedents, it will decree his immediate freedom or it will cause that the legal defects are repaired or will put to the individual to disposition of the competent judge, coming in all brief one and summarily, and correcting by himself those defects or giving account to that corresponds so that it corrects them.

The same resource, may be availed of by any person who illegally undergoes any other deprivation, disturbance or threatens in her right to the personal freedom and individual security.

<sup>6</sup> Article 16 of the 1925 Constitution provided that every individual who may be arrested, charged, or imprisoned contrary to the provisions of the Constitution governing these matters:

may apply, for himself, or by anyone in his name, to the judicial authority designated by law, petitioning that the legal requirements be observed. This judicial authority shall order the individual to be brought before him and his order shall be obeyed exactly by all those having charge of prisons or places of detention. Informed of the facts he shall declare his immediate release, or cause the legal defects to be corrected, or put the individual at the disposition of the proper judge, proceeding throughout in a brief and summary manner, correcting the defects personally or referring them for correction to whomever it may concern.

the injured party, but even human rights organizations the standing to file the petition.

The Code of Criminal Procedure of Chile, [Book II, Title V, ] further regulates the remedy of amparo and stresses that :

- (i) the court must make a finding on the remedy within a period of 24 hours;*
- (ii) it may instruct one of its judges to go to the place in which the person arrested or prisoner is located;*
- (iii) it may order the person arrested or the prisoner to be brought before it (habeas corpus);*
- (iv) if it revokes the order for detention or imprisonment or orders its defects to be corrected, it must pass the records to the Public Prosecutor, who is obliged to file a complaint against the perpetrator of the abuse.*

Note that the Chilean amparo includes the writ of habeas corpus which must be resolved ‘within 24 hours’ and definitely “*not when the wrong caused by an unjust imprisonment has taken on large proportions or has been endured in its totality*”. [Supreme Court of Chile, Decision of December 19, 1932]. The Procedure also requires the prosecution of the public official who was responsible for unjust deprivation of liberty, an important mechanism in the battle against impunity and abuse.

The Chilean Supreme Court declared in a case that “*once an appeal has been accepted and the liberty of the person arrested or imprisoned ordered, the Court shall ensure that its decision is duly carried out, for which purpose it shall require in all the cases it deems necessary an immediate report from the official responsible for executing it or from the head of the establishment in which the person covered by the remedy is located*”.

These lofty pronouncements for the speedy remedy of those deprived of their rights was, however, followed more in the breach during periods of authoritarian rule. Under

*Pinochet* for example [from 1973 to 1983] only 10 amparo cases were admitted by the Chilean judiciary out of 5,400 petitions filed. This was mainly due to the escape clause in the Chilean Amparo which is best described by the Report of Chile to the Inter-American Commission on Human Rights :

*In the case of a state of siege, the recurso de amparo is inoperative against detentions ordered by the administrative authority in accordance with the powers that have been conferred on that authority. In effect, Article 306 of the Code of Penal Procedure provides that the recurso de amparo is available when the order of arrest is issued by an authority who does not have the power to arrest, or when the order has been issued on some basis other than those specified by the law, or when there has been a violation of the appropriate procedures.*

The Philippine Amparo contains a similar, though limited, provision under Section 14 (b) and (c) in relation to forms of relief.

Most of the Amparos, including the Chilean Amparo, have stringent “exhaustion requirements” for judicial civil, criminal, or labor matters because it shall be granted only “*against final judgments or awards against which no ordinary recourse is available by virtue of which these judgments can be modified or amended, whether the violation of the law is committed in the judgments or awards, or whether, if committed during the course of the trial, the violation prejudices the petitioner’s defense to the extent of affecting the judgment*”. This is similar to the rule on Certiorari in the Philippine Rules of Court and may render the remedy of amparo ineffective in cases of enforced disappearance which requires immediate action. The Chilean Amparo also requires that it may be resorted to in civil and criminal cases only if a prior objection was registered and followed by a refusal of the tribunal or government personnel to rectify.



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State agents who fail to acknowledge the fate or whereabouts of a disappeared, however, may be liable under Decree Law No. 1.008 which requires that government personnel “*inform the family of the detained person within 48 hours from arrest*”.

## AMPARO IN ARGENTINA

Amparo is provided under Article 43 of the 1994 Constitution of Argentina, which state that:

*Any person may file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.*

*This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, may be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms.*

*Any person may file this action to obtain information on the data about himself and their purpose, registered in public records or databases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired.*

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<sup>7</sup> Definition of Habeas Data.

*When the right damaged, limited, modified, or threatened affects physical liberty, or in case of an illegitimate worsening of procedures or conditions of detention, or of forced missing of persons, the action of habeas corpus may be filed by the party concerned or by any other person on his behalf, and the judge shall immediately make a decision even in a state of siege.*

Essentially, therefore, the Amparo of Argentina provides that any person, including a human rights organization may file the petition on behalf of an injured party, whose constitutional rights [except rights affected by arbitrary detention or enforced disappearance] have been or will be violated. In cases of disappearances, a petition for habeas corpus is the proper procedure and not amparo.

It expressly provides for a ‘collective amparo’ where the rights affected may pertain to a group rather than a mere individual such as rights to cultural heritage or environmental rights. Like the Philippine amparo, it may be filed against a government personnel or a private individual.

The Amparo is further regulated by law under Act No. 16.986 The law provides for the filing of a writ of amparo against any act or omission of a public authority which “currently or imminently may damage, limit, modify or threaten rights and guarantees explicitly or implicitly recognized by the Constitution, except for individual liberty, which is protected by habeas corpus.”

Article 2 of the law regulates the admissibility of a petition for a writ of amparo against an act of a public official. An amparo petition is not admissible when:

- a) there exist judicial or administrative remedies through which it may be possible to obtain protection of the constitutional right or guarantee concerned;*
- b) the impugned act emanates from an organ of the judiciary or has been adopted in express application of Act No. 16.970;*

- c) *judicial intervention might directly or indirectly compromise the regularity, continuity, and effectiveness of a public service, or the workings of essential state activities;*
- d) *determining the possible invalidity of the act would require wider discussion, further evidence, or a declaration of unconstitutionality of laws, decrees, or orders;*
- e) *the petition is not filed within 15 business days from the date on which the act was carried out or should have occurred.”*

Like the Mexican amparo, a final judgment on the petition constitutes a *res judicata* with respect to amparo as to the parties. The Argentinean amparo is not suspended even if martial law [state of siege] is declared.

An amparo petition against an act or omission of a private person is governed, not by Act 16.986 but by Article 321 of the Code of Civil and Commercial Procedure in the following terms: *“The procedure provided at Article 498 [Special expedited summary proceeding] shall be applicable ... when a claim is filed against an act or omission of a private person which currently or imminently may damage, limit, modify or threaten any right or guarantee explicitly or implicitly recognized by the Constitution, provided that urgent reparation of the injury or immediate cessation of the effects of the act are necessary, and the matter, by its nature, does not require substantiation via another proceeding contained in this Code or other laws.”*

A novelty in the jurisprudence of Argentina is a decision that imposes ‘active court intervention’ in cases where the military denies custody of a disappeared person. The Court pronounced that the judiciary, being part of the state, *“also governs”* and therefore, has the power and the right to intervene to protect the rights the people it ‘governs’.

## AMPARO IN NICARAGUA

Other countries also have amparo in their legal systems through positive law instead of the Constitution.

Nicaragua for example provides for amparo under Decree 232 of January 4, 1980. The Nicaraguan Amparo, which includes the writ of habeas corpus, operates on:

- (i) behalf of a person who has been detained or “threatened” with detention*
- (ii) against acts restricting personal freedom that are committed by private individuals and*
- (iii) against a sentence imposed upon a person who has not been detained and who wishes to be released from its effects.*

Amparo in Nicaragua may be filed “orally or in writing” by any individual on behalf of the injured party, at “any day and at all hours” [article 2 and 4]. Unlike the Argentinean amparo which prohibits impleading a court in an amparo petition, amparo in Nicaragua allows for the reversal of a judicial decision ‘

A government official who disobeys or violates an amparo decision may be ordered ‘removed’, indicted or fined [article 8 and 12]. If the employee disobeying the writ of habeas corpus is an employee or agent of the executive, the Court hearing the case shall immediately inform the executive through the Supreme Court so that it may carry out the instructions within forty-eight hours.

If the Executive refuses, or allows the deadline to pass without complying with the writ, the Supreme Court shall make this fact known to the public without prejudice to its ordering trial for the non-complying employee, and without prejudice to the rights of the interested party or parties.

The historical development of the writ of amparo in

various Latin American countries has been uneven.<sup>8</sup> One of the historical lessons from the experience of these countries is that the effectiveness of the writ largely depends on the extent with which the victims' asserted their rights and the commitment of the judiciary to rule on these petitions with independence and impartiality and implement the writ with courage and judicial will to protect, promote and defend human rights.

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<sup>8</sup> This paper was based and taken from the following articles and documents:

- (i) "The Action of Amparo in the Argentine Constitution as an Emergency Measure to Safeguard Constitutional Rights," by Federico Gallo Quintian
- (ii) "The writ of amparo, Mexican Procedure to Protect Human Rights" by Carlos Sanchez Mejorada
- (iii) Report on the Human Rights in Chile to the Inter-American Commission on Human Rights [IACHR]
- (iv) Report of the Government of Argentina to the IACHR
- (v) Report of the Government of Nicaragua to the IACHR
- (vi) Report of various Latin American countries to the Organization of American States on the state of human rights in their particular countries.