

# CREATIVE RULE-MAKING IN RESPONSE TO DEFICIENCIES OF EXISTING REMEDIES

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## THE FIRST PHILIPPINE AMPARO: AN UNPRECEDENTED VICTORY

## I. INTRODUCTION

The protection of people's constitutional rights is a prime responsibility of any democratic government. The Philippines has various legal and institutional mechanisms in which the State promotes and protects people's constitutional rights and civil liberties. Concerns, which are raised globally in the wake of disturbing waves of extrajudicial killings and enforced disappearances emphasize the need for ensuring that the legal mechanisms and institutions of the State are fully optimized and responsive in dealing with present challenges. This is one factor why the Executive Branch of the Philippine Government has acted swiftly in adopting measures in response to the findings of the Melo Commission,<sup>1</sup> the United Nations Special *Rapporteur*<sup>2</sup> and the European Union's Needs Assessment

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<sup>1</sup> See Administrative Order 157 [21 August 2006], which provides, *inter alia*:

Section 1. Creation and Mandate – There is hereby Created An Independent Commission to Address Media and Activist Killings

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Section. 3. Duties and Functions – The Commission shall have, among others, the following duties and functions:

1. Prioritize and focus investigation of media and activist killings;
2. Be the Government's sole voice on the issue of media and activist killings;
3. Make a report to the President outlining its action and policy recommendations including appropriate prosecution and legislative proposals, if any aimed at eradicating the root causes of extrajudicial killings and breaking such cycle of violence once and for all.

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<sup>2</sup> The United Nations created the position of Special *Rapporteur* on extrajudicial, summary or arbitrary executions in 1982. The job of the Special *Rapporteur* is to respond to cases of extrajudicial killings around the world by holding Governments to account both (a) where they or their agents are responsible or (b) where they have not done everything within their power to prevent or respond to killings carried out by others. The Special *Rapporteur* carries out this mandate through correspondence and fact-finding visits. These serve to clarify past violations, alert Governments to their legal obligations, and provide guidance on the measures required to prevent future violations, <http://www.extrajudicialexecutions.org/about/mandate.html> (last accessed on 23 December 2007).

Mission.<sup>3</sup> The sincerity though of the government in confronting the issues haunting it, still remains to be seen. Its continued self-denial and inability to contain the truth revealed by the fact-finding committees, that the military has a hand in the disappearances and killings of dissenters and journalists, throws into oblivion any hope that those who have perished would ever be found, and those killings would ever be stopped.<sup>4</sup> Turning itself into a post-modern *Pontius Pilate*, the government washes its hand and throws the rhetoric of being the defender of freedom and democracy; this, despite of the personal accounts of the victim-survivors contradicting the government's claim. Alarmed by the apathy of the government and blatant disregard of human rights, the judiciary in a bold and unprecedented move, took a more active role, if only to stop the seemingly nationally-synchronized killings and disappearances.

## II. BEYOND CONSOLE OF HABEAS CORPUS: LISTENING TO THE STIFLED SOBS OF DESAPARECIDOS

The writ<sup>5</sup> of *habeas corpus* has historically been an important instrument in safeguarding individual freedom against arbitrary state action. *Habeas corpus*, a Latin word which when roughly translated means, “we command that you have

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<sup>3</sup> A team of six experts from the European Union commenced a ten-day mission in the Philippines last 18 June 2007, to evaluate needs and identify technical assistance that the EU might usefully provide to help the Philippine Government identify and prosecute those responsible for extrajudicial killings, <http://www.delphi.cec.eu.int/docs/NAMPRESSRelease.pdf> [last accessed on 23 December 2007].

<sup>4</sup> The Melo Commission reports: “[t]here is no shirking the fact that people, almost all of them activists or militants, have been killed. There is no denying the reality that militant citizens have been liquidated. The numbers vary. Task Force Usig of the Philippine National Police listed down one hundred eleven (111) killings, which has since increased to one hundred thirty six (136). Amnesty International, in its official website, mentions 244 victims. The group Karapatan is said to have counted at least 724 killings. Unfortunately, none of the so-called activist/militant groups, be they outright communist or satellite groups, came forward if only to inform the Commission of the numbers of their members who have become victims of extrajudicial killings. Be this as it may, the number, whether at a low of 111 according to Task Force Usig, or a high of 724 of Karapatan, is one too many.” 22 July 2007.

<sup>5</sup> As is well known, the breve, or “writ,” was originally a short written command issued by a person in authority, and “tested” or sealed by him in proof of its genuineness. (Lifted from Edward Jenks’ *The Prerogative Writs in English Law*, *The Yale Law Journal*, Vol. 32, No. 6 [April 1923], at 523-534).

the body," is the name of a legal action, or writ, through which a person can seek relief from unlawful detention. Except as otherwise expressly provided by law, the writ of *habeas corpus* extends 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.<sup>6</sup> Also called the great writ of liberty, its purpose is to test the illegality of a person's detention.<sup>7</sup> Significantly, because the subject of which is a person's liberty, a petition for *habeas corpus* takes precedence in the calendar of the courts and must be acted upon immediately.<sup>8</sup> So important is the writ that under Article VII, Section 18 of the Constitution, the President of the Philippines himself cannot suspend its privilege, except only in cases of invasion, insurrection or rebellion, when the public safety requires it, and only for a period of 60 days, unless it is shortened or extended by joint majority vote of Congress in regular or special session. Vital as it may be in safeguarding the liberty of a person, the writ does have its own acknowledged limitations.

As aforesaid, the objective of the writ is to determine whether the confinement or detention is valid or lawful. If the confinement or detention is valid or lawful, the writ cannot be issued.<sup>9</sup> Beyond the questions of detention or withholding of lawful custody, the *habeas corpus* finds itself but helpless and contends itself as a silent witness of other manifestations of un-addressed violations of the civil liberties. In *habeas corpus*, the petitioner is either the party for whose relief the application for the writ is intended, or any other person on behalf of that party.<sup>10</sup> In passing upon a petition for *habeas corpus*, the court determines whether: (1) the person in whose behalf the application is made is imprisoned or restrained of his liberty; (2) the officer or name of the person by whom he is so imprisoned or restrained; or, if both are unknown or uncertain, such officer or person may be described by an assumed appellation; (3) the place where he is imprisoned or restrained, if known; (4) the cause of his detention, if a copy of the commitment order can be procured without impairing the efficacy of the remedy; or, if the imprisonment or restraint is without any legal

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<sup>6</sup> RULES OF COURT, Rule 102, §1.

<sup>7</sup> Justice Isagani Cruz's *Revising the Rules of Court*, Philippine Daily Inquirer, 1 July 2007, [http://opinion.inquirer.net/inquireropinion/columns/view\\_article](http://opinion.inquirer.net/inquireropinion/columns/view_article). (last accessed on 23 December 2007).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> *Tun Chin Hui v. Rodriguez*, 356 SCRA 31 (2001).

<sup>10</sup> RULES OF COURT, Rule 102, §3.

authority.<sup>11</sup> It is within these confines alone, that *habeas corpus*, bold as it may, finds its powers and ironically its limitations.

Currently, the efficacy of the *habeas corpus* is being challenged. For all its acknowledged importance, the limitations of this remedy has frustrated the defenses for guarded liberties. The writ is often thwarted where the detainee is a political dissident whom the authorities want to punish through illegal deprivation of his liberty. If a petition for *habeas corpus* is filed, a blanket denial by the respondent, who is usually a military or police officer, that the detainee is in his custody, warrants dismissal of the case by the court for lack of merit.<sup>12</sup> Clearly, the courts have no power against military's denial of allegations in *habeas corpus* petitions. *Habeas corpus* is granted only when the court is satisfied by clear and convincing evidence that a person is unlawfully restrained of his liberty<sup>13</sup> and that the respondent is detaining or restraining the applicant or the person in whose behalf the petition is filed.<sup>14</sup>

The petition for *habeas corpus* is a remedy which cannot be a means of obtaining evidence on the whereabouts of a person, or as a means of finding out who has specifically abducted or caused the disappearance of a certain person.<sup>15</sup> The task of gathering such information is already vested on other government agencies such People's Law Enforcement Board (PLEB) or the Commission on Human Rights (CHR). Accordingly, "if in the course of *habeas corpus* proceeding, the disappearance of a person becomes indubitable to the trial court but the responsibility could not be firmly attributed to the respondents to justify the order granting the relief sought, the court must refer the disappearance to the appropriate law enforcement authority who is then duty-bound to investigate the matter with due diligence and to locate the missing person."<sup>16</sup> "If the disappearance is caused by police agencies or their agents, the aggrieved party or

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *In the matter of the Petition for Habeas Corpus in behalf of Daniel Ngaya-an, et al. v. Conrado Balweg, et al.*, 200 SCRA 149 (1991); citing *Gonzales v. Viola*, 61 Phil. 824.

<sup>14</sup> *In the matter of the Petition for Habeas Corpus of Ferdinand E. Marcos etc. v. Executive Secretary Catalino Macaraig*, 18 May 1989, G.R. No. 88079, En Banc, Minute Resolution.

<sup>15</sup> *Martinez v. Mendoza*, G.R. No. 153795, 17 August 2006.

<sup>16</sup> Summation, National Consultative Summit on Extrajudicial Killings and Enforced Disappearances, <http://www.supremecourt.gov.ph/publications/summit/summation1.pdf> (last accessed on 23 December 2007).

his representative may secure the assistance of the PLEB or the CHR.”<sup>17</sup>

Where the person is arrested by the police who claimed to have released him but still continued to be missing, the petition for *habeas corpus* was held to be an inappropriate remedy.<sup>18</sup> For instance, in *Dizon v. Eduardo*,<sup>19</sup> an application for the issuance of a writ of *habeas corpus* filed by petitioners-parents, on behalf of their son and daughter who were arrested by the Philippine Constabulary (PC) elements of Pampanga without warrant of arrest or Presidential Order of Arrest. They were detained by the respondents and were allegedly released nine days later. However, they were never seen nor heard from since their supposed release. Alleging that their signatures on their release papers were falsified and thus, they were never released by the military, said release being a scheme of the respondents to prolong their detention, torture, and interrogation, the petitioners-parents sought a writ of *habeas corpus*. The petition did not prosper. With regret, the Supreme Court failed to grant the relief sought, though counseled that the concerned elements of the police force may be charged with falsification, perjury, and criminal contempt of court should there be a false sworn return and violation of Article 125, Revised Penal Code, pertaining to delay in delivery of detained persons to the proper judicial authorities, or if the established circumstances warrant, it is possible also for the aggrieved party to initiate the criminal proceeding for abduction or kidnapping against the guilty elements of the police force in the proper office such as the Department of Justice, or the Provincial or City Prosecutor’s Office, in addition to resorting to the PLEB or CHR.<sup>20</sup> The High Court simply “does not have the means and the facilities to conduct an investigation of the whereabouts and fate of the *desaparecidos*.”<sup>21</sup>

Then again, the government, even if the same admits the detention, would usually have a legal ground to evade the petition. During the period of dictatorship, a person’s unlawful arrest could be easily sustained with the production of the tyrannical presidential detention order issued by President Marcos, causing the court to tamely acknowledge the order as a legal basis for

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<sup>17</sup> *Supra* note 14.

<sup>18</sup> Justice Lucas P. Bersamin, *Available Judicial Remedies in Cases of Extrajudicial Killings and Enforced Disappearances*, <http://www.supremecourt.gov.ph/publications/summit/Summit/Bersamin> (last accessed on 23 December 2007).

<sup>19</sup> 158 SCRA 470 (1988).

<sup>20</sup> *Supra* note 14.

<sup>21</sup> *Supra* note 18.

the dismissal of the case.<sup>22</sup> A vivid illustration is the notorious case of *Ilagan v. Enrile*.<sup>23</sup> In this case, when the arrested lawyers were ordered released by the Supreme Court by virtue of *habeas corpus*, the military-respondents managed to circumvent the order by subsequently filing rebellion charges against them. Unfortunately, the Supreme Court agreed, citing Rule 102, Section 4, of the Rules of Court, which provides that if “the person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or a judge, or by virtue of a judgment or order of a court of record, and the court or judge has jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed...”

The confines of *habeas corpus* in protecting human rights can be more clearly gleaned from two recent Court of Appeals’ cases on enforced disappearances of Sherlyn Cadapan, Karen Empeno, and Manuel Merino, abducted in June 2006 in Hagonoy, Bulacan,<sup>24</sup> and the disappearance of Leopoldo Ancheta, also in June 2006, in Guiguinto, Bulacan.<sup>25</sup> Both were petitions for *habeas corpus* filed against Major General Jovito S. Palparan Jr. and other military officials.

In the first case, Cadapan and Empeno were alleged members of the *Kilusang Magbubukid ng Pilipinas and Alyansa ng mga Magbubukid ng Bulacan*, while Merino was only a good samaritan who assisted the two. Cadapan *et. al.* were abducted by armed men.<sup>26</sup> The writ of *habeas corpus* was returned by respondent military officials denying participation in the alleged abduction and custody of the said missing persons. Because of lack of indubitable evidence that the three missing persons were in the custody of the military, the Court of Appeals could do no further but dismiss the case, finding itself helpless to aid the grief of the families. All the court could do is to order a further investigation to be separately undertaken by the Philippine National Police, the National Bureau

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<sup>22</sup> *Supra* note 6.

<sup>23</sup> 139 SCRA 349 (1985).

<sup>24</sup> *In the Matter of the Petition for Habeas Corpus of Sherlyn T. Cadapan, Karen E. Empeño and Manuel Merino, represented by Spouses Erlinda T. and Asher P. Cadapan, and Concepcion E. Empeño v. Major General Romeo Tolentino, General Jovito Palparan, Lt. Col., Rogelio Boac, Arnel Enriquez, and Lt. Francis Mirabelle T. Samson*, CA-G.R. SP No. 95303, 29 May 2007.

<sup>25</sup> *In the Matter of Petition for Habeas Corpus of Leopoldo Maglalang Ancheta v. Major General Jovito S. Palparan, Jr., Norberto Gonzales, et. al.*, CA-G.R. SP. No. 95656, 19 June 2007.

<sup>26</sup> Their families accompanied by members of the local chapter of KARAPATAN, a human rights group made inquiries but the respondent military officials denied that they have custody of the missing persons.

of Investigation, and the Commission on Human Rights in accordance with the High Court's instruction in the case of *Martinez v. Mendoza*,<sup>27</sup> in particular:

“When respondents deny custody of an allegedly detained person, petitioners have the duty of establishing the fact of detention by competent and convincing evidence; otherwise, the writ of *habeas corpus* cannot be issued. Nonetheless, when the disappearance of a person is indubitable, the law enforcement authorities are duty-bound to investigate it with due diligence and to locate the missing person. When the wrongdoing is attributable to the police agencies and/or their agents, the aggrieved may secure the assistance of the People's Law Enforcement Board or the Commission on Human Rights.”

In the words of the appellate court, “...the present petition for *habeas corpus* is not the appropriate remedy since the main office or function of the *habeas corpus* is to inquire into the legality of one's detention which presupposes that respondents have actual custody of the person subject of the petition.”<sup>28</sup> And there gone into the oblivion the little hope left for Cadapan and others.

The case of Leopoldo Ancheta is no different story of a disappearance without a trace. A simple man who happened to be working with the National Democratic Front of the Philippines Peace Panel, Ancheta banished after armed men abducted him.<sup>29</sup> Similarly, the writ of *habeas corpus* served upon the military was returned and again, the military pulled the usual stuffs—denial of custody and disavowal of participation in the disappearance. The appellate court cannot help but lament on the inadequacy of the existing judicial remedies. In its emphatic words, “it is always heartrending to see agony and anguish in the eyes of a person whose loved one has disappeared without a trace. And who can remain unaffected, having to listen to the stifled sobs of a soul torn to pieces by loss and desperation? We do understand the plight of petitioner, and

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<sup>27</sup> *Supra* note 14, cited in *In the Matter of the Petition for Habeas Corpus of Sherlyn T. Cadapan, Karen E. Empeño and Manuel Merino, represented by Spouses Erlinda T. and Asher P. Cadapan, and Concepcion E. Empeño v. Major General Romeo Tolentino, General Jovito Palparan, Lt. Col., Rogelio Boac, Arnel Enriquez, and Lt. Francis Mirabelle T. Samson*, CA-G.R. SP No. 95303, 29 May 2007.

<sup>28</sup> *Supra* note 24.

<sup>29</sup> In the petition, it was alleged by his wife that per the eyewitness account of tricycle drivers, he was abducted by armed men aboard a Toyota Revo near the supermarket where they were supposed to meet early evening of 24 June 2006. The investigation of the group KARAPATAN, which Ancheta's wife contacted for help, stated that the suspected perpetrators were elements of the military.

commiserate with her. Sadly, for now, that is all this Court can do.<sup>30</sup>

Clearly, with the foregoing pronouncements, the courts are not the repositories of all remedies for every grievance,<sup>31</sup> the cases of Cadapan *et al.*, and Ancheta are testimonies of stifled sobs of *desaparecidos*, beyond the console of the writ of *habeas corpus*. The Court can only do what the law warrants it to do.<sup>32</sup> But the Highest Tribunal cannot allow itself to be a silent witness to the unremedied plight of those who disappeared without traces. Armed with the lessons learned from its dark history in the martial law era, the Court took the initiative in one of its bravest move in modern history – the promulgation of the Writ of *Amparo* – a writ designed to supplement the inefficacy of *habeas corpus*. In the advent of the enactment of Republic Act No. 9372, the Human Security Act of 2007, the Writ of *Amparo* and *Habeas Data*<sup>33</sup> is depended upon to serve as powerful protection of the citizens against possible human rights violations.<sup>34</sup> The writ of *Amparo* though is not a substitute for *habeas corpus*. While *habeas corpus* is designed to enforce the right to freedom of the person, *Amparo* on the other hand, is designed to protect those other fundamental human rights enshrined in the Constitution but not covered by the writ of *habeas corpus*.<sup>35</sup>

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<sup>30</sup> *Supra* note 25.

<sup>31</sup> *Dizon v. Eduardo*, 158 SCRA 470 (1988).

<sup>32</sup> *Supra* note 14.

<sup>33</sup> The literal translation from Latin of *Habeas Data* is “*you should have the data*”. *Habeas Data* is a constitutional right to protect, per lawsuit filed in court, to protect the image, privacy, honour, information self-determination and freedom of information of a person. *Habeas Data* can used to discover what information is held about his or her person (via rectification or destruction of the personal data held. *Habeas Data* originated, *inter alia*, from the Council of Europe’s 108th Convention on Data Protection of 1981 (aimed at protecting the privacy of the individual regarding the automated processing of personal data; with right to access their personal data held in an automated database. Warwick.ac.uk Andres Guadamuz, “*Habeas Data: The Latin American response to data protection*”, *Journal of Information, Law & Technology* 2000(2), [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000\\_2/guadamuz](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/guadamuz) (last accessed on 23 December 2007).

<sup>34</sup> Commentary by former Supreme Court spokesman Ismael Khan Jr., published in the *Philippine Daily Inquirer* last 17 July 2007.

<sup>35</sup> <http://www.irb-cisr.gc.ca/en/research/rir/> (last accessed on 23 December 2007).

### III. GENESIS OF THE WRIT OF AMPARO

Contrary to what is commonly believed, *amparo* is not a woman at all. *Amparo* or *amparar* is a Spanish word that means protection, or to protect, favor, or aid.<sup>36</sup> The writ of *amparo*, tracing back its origin from the Kingdom of Aragon, is an institution that has been first used in the Mexican legal system since the nineteenth century.<sup>37</sup> It is a Mexican legal procedure aimed at protecting human rights. Though initiated earlier by Manuel Crescencio Rejon in the drafting of the Constitution of Yucatan in 1840,<sup>38</sup> it was only in the 1857 Constitution of Mexico that a procedure for protecting human rights was first adopted. Described as “the most important procedural mechanism in the Mexican legal system,” the writ of *amparo* started out as a protective tool against acts or omissions of public authorities in violation of constitutional rights with special application to peasants’ rights arising from the agrarian reform process.<sup>39</sup> Gradually, it has evolved as an all-encompassing judicial remedy to review the constitutionality of statutes and decisions of judicial, quasi-judicial and administrative agencies and to remedy violations of both political and socio-economic rights.<sup>40</sup> The typical Mexican *Amparo* procedure has a much broader scope and field of application than the Anglo-Saxon writ of *habeas corpus*, from which the idea of procedure may have originated.<sup>41</sup> The Mexican *amparo* protects men not only from illegal arrest but also against violation of any human rights. It is also a remedy to the encroachments of the Federal authorities on the jurisdiction of the states, or vice versa.<sup>42</sup> *Amparo* is probably the most firmly rooted institution in the field of Mexican law. From Mexico, *amparo* rapidly spread and was found in one form or another in Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala,

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<sup>36</sup> <http://en.wikipedia.org/wiki/Amparo> (last accessed on 23 December 2007).

<sup>37</sup> *The Constitutional Court of the Republic of Macedonia: Proposals for Legislative and Administrative Reform*, <http://www.policy.hu/treneska/iterim-reserach.html> (last accessed on 23 December 2007).

<sup>38</sup> Atty. Neri Javier Colmenares, *The Writ of Amparo: A Comparative Review*, 15 November 2007, <http://www.pinoypress.net/2007/11/15/the-write-of-amparo-a-comparative-review/> (last accessed 23 December 2007).

<sup>39</sup> *Supra* note 25.

<sup>40</sup> *Id.*

<sup>41</sup> Carlos Mejorada. *The Writ of Amparo. Mexican Procedure to Protect Human Rights. Annals of the American Academy of Political and Social Science*, Vol. 243, ESSENTIAL HUMAN RIGHTS (Jan., 1946), at 107-111, <http://links.jstor.org/> (last accessed 23 December 2007).

<sup>42</sup> *Id.*

Honduras, Nicaragua, Panama, Paraguay, and Peru. It is now also the *mandado de seguranca* of Brazil and the *amparo* in Argentina. Each country has its own variation of the writ and does not emulate the comprehensive scope of their Mexican origin. States with writ of *amparo*, have not copied the all-purpose scope of the Mexican *amparo*. Rather, the replications have generally limited themselves to *amparo* as a quick and efficacious remedy for violations of fundamental liberties.<sup>43</sup> In these aforesaid Latin American countries, *amparo* has further been constitutionally adopted to protect against human rights abuses especially in those countries governed by military *juntas*,<sup>44</sup> and an extraordinary recourse designed to challenge arbitrary and oppressive government actions,<sup>45</sup> specially in those other Latin-American countries which have experienced political instability and military *coups*. In the 21<sup>st</sup> century, *amparo* has found a firmly rooted place in the histories of states and has evolved to be a much-invoked effective shield against frequent violation of human rights.<sup>46</sup>

In the Philippines, *amparo* was virtually unheard of to the law students until the then Ateneo law professor and now Supreme Court Associate Justice Adolfo Azcuna incorporated it as a bewildering question in the 1991 bar examinations. Justice Azcuna first proposed the adoption of the writ of *amparo* in the 1971 Constitutional Convention. His proposition, unfortunately, was not adopted. He got another chance to raise it as a delegate in the 1986 Constitutional Commission. Eventually, it was adopted not as the writ of *amparo*, but as a provision in Section 5, Article VIII of the 1987 Constitution, which grants the Supreme Court the power to promulgate rules concerning the protection and enforcement of constitutional rights.<sup>47</sup>

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<sup>43</sup> Father Joaquin G. Bernas, *The Argentinean Amparo*, Philippine Daily Inquirer [http://opinion.inquirer.net/inquireropinion/columns/view\\_article.php?article\\_Id.=87599](http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_Id.=87599) (last accessed 23 December 2007).

<sup>44</sup> Benchmark Online September 2007 (<http://www.supremecourt.gov.ph> (last accessed 23 December 2007)).

<sup>45</sup> *Supra* note 25.

<sup>46</sup> Editorial: *Grasping and using the writ of amparo*, <http://www.nordis.net/blog/?p=1437> (last accessed 23 December 2007).

<sup>47</sup> [http://www.positivenewsmedia.net/am2/publish/Cities\\_And\\_Towns\\_23/Amparo\\_writ\\_can\\_be\\_used\\_even\\_against\\_vigilantes.shtml](http://www.positivenewsmedia.net/am2/publish/Cities_And_Towns_23/Amparo_writ_can_be_used_even_against_vigilantes.shtml) (last accessed 23 December 2007).

#### IV. UNSHEATHING THE UNUSED POWER OF THE JUDICIARY IN DEFENSE OF THE VULNERABLE MAN

On 16 July 2007, justices, activists, militant leaders, police officials, politicians, as representatives of all sides of the political and social spectrum in the society, attended the Supreme Court-sponsored “National Summit on Extrajudicial Killings and Forced Disappearances: Searching for Solutions,” to provide a broad and fact-based perspective on the issue of extrajudicial killings and enforced disappearances. The Summit was convened in the hope to come up with recommendations on the resolution of these issues. In so doing, the commitment to uphold respect for life and human rights is enforced and revitalized. One of the compelling reasons for the two-day Summit was, in the words of Chief Justice Puno, “to prevent losing eye contact with these killings and disappearances, revive our righteous indignation, and spur our united search for the elusive solution to this pestering problem.”<sup>48</sup>

Furthermore, Supreme Court Associate Justice Adolfo Azcuna stressed on the doctrine of “equal political liberties” first exhorted by John Rawls in his book *Political Liberalism*. The doctrine stemmed from the recognition of the person as an individual blessed with natural rights and clothed with civil and political rights, which all the nations of the world have agreed upon to uphold, and which the 1987 Philippine Constitution has recognized to attain a just and humane society.<sup>49</sup>

At the end of the day, the Summit came up with three major recommendations, to wit: “First, to redefine the doctrine of command responsibility along the line applied to the late Gen. Tomoyuki Yamashita; second, to include the writ of *amparo* as part of the Rules of Court; and third, to revive the peace process with the Communist Party of the Philippines and its military arm, the New People’s Army, and political arm, the National Democratic Front.”<sup>50</sup> Of the three, the incorporation of the writ of *amparo* as part of the Rules of Court offers immediate relief because it can be adopted by the Supreme Court *pronto*, without need of a new law and invoking only its rule-making

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<sup>48</sup> Lifted from Keynote speech delivered by Supreme Court Chief Justice Reynato S. Puno on the occasion of the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances at the Centennial Hall, Manila Hotel, 16 July 2007.

<sup>49</sup> Summation, National Consultative Summit on Extrajudicial Killings and Enforced Disappearances, <http://www.supremecourt.gov.ph/publications/summit/summation1.pdf> (last accessed 23 December 2007).

<sup>50</sup> Tony Lopez, *Amparo v. Arroyo*, 19 July 2007, *The Manila Times*, <http://www.manilatimes.net/national/2007/july/19/yehey/opinion/> (last accessed 23 December 2007).

power under the 1987 Constitution. Hence, in his keynote address, the Chief Justice told the Summit that:

“In expanding the judicial rule-making authority to enhance the protection and enforcement of constitutional rights, our Constitutional Commissioners were endowed with prophetic eyes. For two decades later, we would be bedeviled by extrajudicial killings and forced disappearances that would expose the frailties of our freedom, the inadequacy of our laws if not the inutility of our system of justice... [thus] the judiciary “has decided to unsheathe its unused power to enact rules to protect the constitutional rights of [the Filipino] people.”<sup>51</sup>”

Consequently, during the summit, Chief Justice Puno and Justice Azcuna officially declared the legal conception of the Philippine Writ of *Amparo*. According to the Chief Justice, the writ of *amparo* is the greatest legal weapon to protect the constitutional rights of our people.<sup>52</sup> He promised that the writ of *amparo* will offer “the victims and the aggrieved parties with more remedies like better witness protection, temporary protection orders, right to what they call in other countries as *habeas data*...” Since under the present writ of *habeas corpus*, many victims of extrajudicial killings and forced disappearances could not be found since state agents conveniently and simply deny that they have the custody of the victims, in this aspect, the writ of *amparo* promises to provide better legal remedies against human rights violations. It is a legal remedy that “could pierce the veil of impunity” shrouding the perpetrators of extrajudicial killings and enforced disappearances.<sup>53</sup> However, its effectivity as a legal recourse faces a challenge from President Gloria Macapagal-Arroyo’s implementation of Administrative Order 197<sup>54</sup> on the same day that The Rule on the Writ of

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<sup>51</sup> Lifted from Chief Justice Reynato S. Puno’s *The View from Mountaintop*, <http://ca.supremecourt.gov.ph/index.php> (last accessed 23 December 2007).

<sup>52</sup> Jay B. Rempillo, *CJ Puno: Amparo, Best Legal Weapon to Protect People’s Constitutional Rights*. 16 October 2007, <http://www.supremecourt.gov.ph/news/courtnews/2007/10/10150701.php> (last accessed 23 December 2007).

<sup>53</sup> National Union of People’s Lawyers (NUPL) Secretary-General and Counsels for the Defense of Liberties (CODAL) spokesperson Atty. Neri Javier Colmenares espoused that view.

<sup>54</sup> Media reports labeled Administrative Order No. 197 as a “gag order” on the Department of Defense and the Armed Forces of the Philippines, something that would prevent the defense and military personnel from testifying in hearings by the Legislature. Among others, it is provided under the said. administrative order that:

*Amparo* took effect. A.O. 197 not only prohibits disclosure of military secrets and undue interference in military operation inimical to national security but also commands the military to work closely with the Presidential Human Rights Committee (PHRC) on killings and disappearances for speedy action on cases and effective reforms to avoid abuses.

## V. EXTRAJUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES IN THE INTERNATIONAL PLANE

The tragedy that confronts man as he faces the reality of extrajudicial killings and enforced disappearances transcends even territorial boundaries.

Extrajudicial killings and death squads are most common in Palestine, Iraq, Central and South America, Afghanistan, Bangladesh, India, Kashmir, Jamacia, Kosovo, Chechnya, Russia, Uzbekistan, North Ossetia, parts of Thailand and in the Philippines.<sup>55</sup> The usual victims are political activists and media persons.<sup>56</sup> Extrajudicial killings are the illegal killing of leading political, trades union, dissident and/or social figures by either the state government, state authorities like the armed forces and the police, or by criminal outfits.<sup>57</sup> They are killings committed without due process of law, *i.e.* without legal safeguards

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“1. The Department of National Defense (DND) and the Armed Forces of the Philippines (AFP) shall work closely with the Presidential Human Rights Committee (PHRC) subcommittee on killings and disappearances for speedy action on cases and effective reforms to avoid abuses, with regular reports to the Commander-in-Chief through the Executive Secretary as PHRC chair, and in consultation with the Court Administrator, invited as PHRC subcommittee observer.

2. The DND/AFP shall draft legislation in consultation with the Presidential Legislative Liaison Office and Congress allies for safeguards against disclosure of military secrets and undue interference in military operations inimical to national security.”

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<sup>55</sup> [http://en.wikipedia.org/wiki/Extrajudicial\\_punishment](http://en.wikipedia.org/wiki/Extrajudicial_punishment). Extra-judicial\_killings (last accessed 23 December 2007).

<sup>56</sup> *Supra* note 24.

<sup>57</sup> [http://en.wikipedia.org/wiki/Extrajudicial\\_punishment](http://en.wikipedia.org/wiki/Extrajudicial_punishment). Extra-judicial\_killings (last accessed 23 December 2007).

or judicial proceedings. As such, these include the illegal taking of life regardless of the motive, summary and arbitrary executions, “salvagings” even of suspected criminals, threats to take the life of, say, media persons who are openly critical of erring government officials and the like.<sup>58</sup> Also known as political killings, they refer to killings due to the political affiliation of the victims; the method of attack; and involvement or acquiescence of state agents in the commission of the killings.<sup>59</sup>

Forced Disappearance has been defined in several international instruments. According to the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the United Nations General Assembly in 1992, to which the Philippines up to now has not yet ratified, enforced disappearances occur when “persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.”<sup>60</sup> Similarly, the Inter-American Convention on Forced Disappearance of Persons, adopted in 1994, defines “forced disappearance” of persons as “the act of depriving a person or persons of his or her freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”<sup>61</sup> Under the Rome Statute of the International Criminal Court, enforced disappearance, the systematic practice of which can be a crime against humanity, is the “arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged

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<sup>58</sup> *Writ of Amparo*. The notes collate the most recent commentaries on the topic by retired Justice Flerida Ruth P. Romero of the Philippine Supreme Court, [http://lexphilippinensia.blogspot.com/2007/09/notes-writ-of-amparo\\_25.html](http://lexphilippinensia.blogspot.com/2007/09/notes-writ-of-amparo_25.html) (last accessed 23 December 2007).

<sup>59</sup> *Supra* note 24.

<sup>60</sup> U.N. General Assembly, “Declaration on the Protection of All Persons from Enforced Disappearance,” (New York: United Nations, 1992), A/RES/47/133.

<sup>61</sup> Convention, Article 2.

period of time.”<sup>62</sup> Simply put, enforced disappearances are deprivations of liberty for political reasons committed by or with the authorization, support or acquiescence of the state.<sup>63</sup>

Whatever the kind of disappearance is banned in all situations. “No matter how legitimate the reasons for a person’s detention, no one has the right to keep that person’s fate or whereabouts secret or to deny that he or she is being detained.”<sup>64</sup> For neither a threat of war nor a state of war may be invoked to justify enforced disappearances.<sup>65</sup> Needless to say, these practices run counter to the basic tenets of international humanitarian law and human rights law.<sup>66</sup>

## VI. THE WRIT OF AMPARO: A DEPARTURE FROM THE TRADITIONAL LEGAL PRINCIPLES

### *Amparo as a Prerogative Writ*

In general, The Rule on the Writ of *amparo* promulgated by the Supreme Court departs in certain instances from traditional legal notions and principles.

The Philippine variation of the writ of *amparo* partakes of the nature of a prerogative writ.<sup>67</sup> Its nature is neither criminal, nor civil, nor administrative. The filing of the petition does not suspend nor preclude the filing of criminal, civil or administrative actions.<sup>68</sup> The *amparo* proceeding, being not criminal in nature, does not determine the criminal guilt of the respondent. However, if

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<sup>62</sup> Rome Statute, Article 7(2)(1).

<sup>63</sup> *Supra* note 24.

<sup>64</sup> International Committee of the Red Cross, *Enforced Disappearance Must Stop*, 30 August 2003, <http://www.icrc.org/Web/Eng> (last accessed 23 December 2007).

<sup>65</sup> Declaration on the Protection of All Persons from Enforced Disappearance.

<sup>66</sup> *Supra* note 64.

<sup>67</sup> Prerogative writs are a class of writs which originate from English law. Originally they were available only to the Crown, but later they were made available to the king’s subjects through the courts. The prerogative writs are a means by which the Crown, acting through its courts, effects control over inferior courts or public authorities throughout the kingdom. The writs are issued in the name of the Crown, who is the nominal plaintiff, on behalf of the applicant, [http://en.wikipedia.org/wiki/Prerogative\\_writ](http://en.wikipedia.org/wiki/Prerogative_writ) (last accessed on 23 December 2007).

<sup>68</sup> A.M. No. 07-9-12-SC, as amended, § 21.

the evidence so warrant, the *amparo* court may refer the case to the Department of Justice for criminal prosecution.<sup>69</sup> Originally, the Committee included a provision allowing a claim for damages. The idea however was dropped for fear that such a claim would unduly delay the proceeding, considering the possibility of counterclaims and cross-claims being set up, which eventually may defeat the summary nature of the *amparo* proceeding. It was decided that the aggrieved party should instead file in a claim in a proper civil action.

### *The Amparo's Broader Scope*

As an effective and inexpensive instrument for the protection of constitutional rights, the writ of *amparo* is akin to the writ of *habeas corpus* but much broader in scope.<sup>70</sup> The filing of the petition for the writ of *amparo* though, is not mutually exclusive with the filing of other reliefs such as *habeas corpus*.<sup>71</sup> The nature of the writ is defined under Section 1 of The Rule on the Writ of *Amparo* as a “remedy available to any person whose right to life, liberty, or security is violated or threatened by an unlawful act or omission by a public official or employee or by a private individual or entity.” Since *amparo* is not specifically defined under the 1987 Constitution, Section 1 enumerates the constitutional rights protected by the writ, and limits its scope only to right to life, liberty, and security of persons. Though in other jurisdictions, the *amparo* is all-encompassing as it protects all constitutional rights, the Philippine variation limits the coverage of its protection only to the right to life, liberty, and security, since the other constitutional rights of the people are already enforced through different remedies.<sup>72</sup>

From another perspective, the writ is broader than its counterparts in other countries because it protects not only against actual violations but also **against threats of violation of rights**. Moreover, the writ covers not only unlawful acts or omissions of public officials or employees, but that of private individuals or entities as well.<sup>73</sup> “Entities” refer to “artificial persons, as they are

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<sup>69</sup> *Annotation on the Writ of Amparo*, [http://www.supremecourt.gov.ph/Annotation\\_amparo.pdf](http://www.supremecourt.gov.ph/Annotation_amparo.pdf) (last accessed 23 December 2007).

<sup>70</sup> *Supra* note 35.

<sup>71</sup> Jay B. Rempillo, *SC Approves Rule on Writ of Amparo*, <http://www.supremecourt.gov.ph/publications/benchmark/2007/09/090701.php> (last accessed 23 December 2007).

<sup>72</sup> *Supra* note 65.

<sup>73</sup> *Supra* note 52.

also capable of perpetrating the act or omission.”<sup>74</sup>

However, unlike the other *amparos* which cover violation of constitutional rights in general, the rule seems to be limited a number of rights and this often results to various possible interpretations.<sup>75</sup>

Another notable deviation from its Latin American counterparts, is that the Philippine *Amparo* does not cover property rights. Unlike the Mexican *amparo*, which explicitly covers property rights and thus, allows the writ on issues involving agrarian disputes, the Philippine version intently falls short from covering such area.<sup>76</sup>

However, the introduction of the legal notion of “security” opens doors for broad interpretations, which may cover economic rights since “security” includes rights pertaining to livelihood, economic well being, and other economic rights.<sup>77</sup>

It is noteworthy too, that the Philippine *amparo* did not follow the Mexican variation, which provides relief for violation of rights to human dignity presumably because of the breadth of the notion of “dignity.”<sup>78</sup>

Also, the writ includes protection of “liberty” which may include deprivation of liberty previously covered by *habeas corpus* petitions. It is unclear how the rule will differentiate the applicability of *habeas corpus* and *amparo*.<sup>79</sup> For instance, in Chile, there is no difference between *amparo* and *habeas corpus* petitions. On the other hand, *amparo* rules in Argentina and Mexico, clearly delineate the coverage of *amparo* vis-à-vis *habeas corpus* by providing that the deprivation of liberty is remedied through a *habeas corpus* petition, and is not covered by *amparo*. The most likely interpretation of this provision in the Philippine *amparo*, in cases of actual deprivation of liberty, is to limit *amparo* to cases where the fate or whereabouts of the person subject of the petition is unknown.<sup>80</sup> The recourse should be *habeas corpus* if the detention of a subject is

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<sup>74</sup> *Supra* note 65.

<sup>75</sup> Atty. Neri Javier Colmenares, *Initial Analysis on the Philippine Amparo*, <http://www.bulatlat.com/2007/10/initial-analysis-philippine-amparo> (last accessed 23 December 2007).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

already admitted by the state, but the legality of the same is contested.<sup>81</sup>

The case is different, however, when it comes to “threatened” deprivation of liberty. In such situation, the subject has not yet been arrested or disappeared. The remedy is clearly *amparo* since the said situation is clearly beyond the ambit of a *habeas corpus* petition.<sup>82</sup> The inclusion of “threats” to liberty as a justiciable controversy could play a role in stopping the military from “calling and inviting” members of progressive organizations for interrogation for the “invited” persons may immediately file an *amparo* petition to inquire why the military is inviting them to their camps.<sup>83</sup>

Moreover, the writ is a remedy if the right to “life” is violated or threatened.<sup>84</sup> Preparatory to the filing of criminal charges, families of victims of extrajudicial killings may therefore resort to *amparo* as a means of identifying the perpetrator. In the case of Reverend Isias Sta. Rosa in Bicol who was found dead beside another dead person subsequently identified as a member of the Philippine Army, resort to *amparo* may be availed of to get more information on the mission order found in body of the soldier and other relevant issues prior to the filing of a criminal complaint.<sup>85</sup>

Furthermore, the writ covers both government officials and private individuals or entities.<sup>86</sup> This is where the rule, based on the experience of victims in other Latin American countries, gets complicated. Ordinarily, acts committed by private individuals, such as deprivation of liberty or murder, is dealt with under the Revised Penal Code and under the Rules on Criminal Procedure. In fact, the Mexican *amparo* only applies to public officials and did not include within its *amparo* rules “private crimes” or “unconstitutional” acts of private individuals leaving the same to be resolved by ordinary legal processes.<sup>87</sup> Under Article 103 of the Mexican Constitution, the Mexican *amparo* is particularly limited to acts of the State and its personnel.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

### *The Retroactive Application of Amparo*

The rule may be applied retroactively. Section 26 of the rule expressly allows for retroactive application, making the rule applicable even to pending cases. *Thus, acts of extrajudicial killings or enforced disappearance which were not subject of any complaint filed in court or of any judicial process, may still be filed on or after 24 October 2007 using amparo since procedural rules may apply retroactively.* The Rules of Court shall apply in suppletory character insofar as it is not inconsistent with The Rule on the Writ of *Amparo*.<sup>88</sup> Moreover, this new Rule on *amparo* will take precedence and will remain unaffected by prior inconsistent rules, resolutions, regulations or circulars of the Supreme Court.<sup>89</sup>

### *The Legal Basis of Amparo*

In every single Latin American country where *amparo* and *habeas data* have been adapted, all were established directly in their Constitutions.

Mexico's *amparo* is found in Articles 103 and 107 of the Mexican Constitution—the judicial review of governmental action, to empower state courts to protect individuals against state abuses.<sup>90</sup>

In Chile, the legal notion of *amparo* was initially outlined in its 1925 Constitution and expressly enshrined under Article 19 and 20 of its 1985 Constitution. This was later qualified by Constitutional Act No. 3 by virtue of Decree Law 1152 promulgated on 11 September 1996. The Code of Criminal Procedure of Chile further regulates the remedy of *amparo*.<sup>91</sup>

In Argentina, *amparo* is provided under Article 43 of the 1994 Constitution of Argentina.<sup>92</sup> The *Amparo* is further regulated by law under Act

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<sup>88</sup> *Supra* note 68, §25.

<sup>89</sup> *Supra* note 65.

<sup>90</sup> Father Joaquin G. Bernas, *The Mexican Amparo*, Philippine Daily Inquirer, [http://opinion.inquirer.net/inquireropinion/columns/view\\_article.php?article\\_Id=86232](http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_Id=86232) (last accessed 23 December 2007).

<sup>91</sup> THE MEXICAN CONSTITUTION, Book II, Title V.

<sup>92</sup> 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.

No. 16.986.<sup>93</sup> Other countries also have *amparo* in their legal systems through positive law instead of the Constitution. Nicaragua, for instance, provides for *amparo* under Decree 232 of 4 January 1980.<sup>94</sup>

In the Philippines, *amparo* was made available by the Supreme Court, without need of a new legislation and invoking only its rule-making power under the Article VIII, Section 5, Paragraph 5 of the 1987 Constitution, which provides that the Supreme Court shall have the power to “[p]romulgate rules concerning the protection and enforcement of constitutional rights [which] shall not diminish, increase, or modify substantive rights.<sup>95</sup>” It is, however, qualified that “the Rule on the Writ of *Amparo* shall not diminish, increase or modify substantive rights recognized and protected by the Constitution<sup>96</sup>” because *amparo* is but a procedural rule. As held in the case of *Fabian v. Desierto*,<sup>97</sup> the Supreme Court had the occasion to clarify what constitutes procedural rules *viz*:

[T]he test whether the rule really regulates procedure, that is, the *judicial process for enforcing rights and duties recognized by substantive law* and for justly administering remedy and redress for a disregard or infraction of them. If the rule takes away a vested right, it is not procedural. If the rule creates a right such as the right to appeal, it may be classified as substantive matter; *but if it operates as a means of implementing an existing right, then the rule deals merely with procedure.*<sup>98</sup>

### *Amparos’ Rule of Procedure*

#### *Who May File*

In addition to the aggrieved party, or in case of his inability or refusal to

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<sup>93</sup> *Supra* note 54.

<sup>94</sup> *Id.*

<sup>95</sup> 1987 CONST., Art. VIII, §5, ¶5 (emphasis supplied).

<sup>96</sup> *Supra* note 68, §24.

<sup>97</sup> G.R. No. 129742, 16 September 1998; citing 32 Am. Jur. 2d, Federal Practice and Procedure, § 505, p. 936 and *People vs. Smith*, 205 P. 2d 444.

<sup>98</sup> G.R. No. 129742, September 16, 1998, at 22-23 citing 32 AM. JUR. 2d, Federal Practice and Procedure, §505, at 936; *People v. Smith*, 205 P. 2d 444 (emphasis supplied).

do so, maybe because of fear of reprisal,<sup>99</sup> the petition for writ of *amparo* may be filed by any qualified person or entity in the following order:

- (a) Any member of the immediate family, namely: the spouse, children and parents of the aggrieved party;
- (b) 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
- (c) Any concerned citizen, organization, association or institution, if there is no known member of the immediate family or relative of the aggrieved party.<sup>100</sup>

This expansion of standing is positive in terms of facilitating recourse to the remedy. A similar order of priority of those who can sue is provided in our rules implementing the law on violence against women and children in conflict with the law.<sup>101</sup> The rationale for the hierarchy is to prevent the indiscriminate and groundless filing of petitions for *amparo* which may even prejudice the right to life, liberty or security of the aggrieved party. For instance, the immediate family may be nearing the point of successfully negotiating with the respondent for the release of the aggrieved party. An untimely resort to the writ by a non-member of the family may endanger the life of the aggrieved party. The Committee is aware that there may also be instances wherein the qualified members of the immediate family or relatives of the aggrieved party might be threatened from filing the petition. As the right to life, liberty and security of a person is at stake, this section shall not preclude the filing by those mentioned in paragraph (c) when authorized by those mentioned in paragraphs (a) or (b) when circumstances require.<sup>102</sup>

However, the problem that may be encountered under Section 2 is the interpretation of the phrase “in the following order” and the requirement that a third party can only file the petition in case “there is no known” member of the aggrieved party’s family. This restriction partly stems from the complication brought about by the fact that the writ covers acts or omissions by private individuals. Where respondents are state security forces, this requirement may make the family of the victim a target for harassment and threats not to file the

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<sup>99</sup> [http://lexphilippinensia.blogspot.com/2007/09/notes-writ-of-amparo\\_25.html](http://lexphilippinensia.blogspot.com/2007/09/notes-writ-of-amparo_25.html) (last accessed 23 December 2007).

<sup>100</sup> *Supra* note 68, §2.

<sup>101</sup> See A.M. No. 04-10-11-SC effective 15 November 2004.

<sup>102</sup> *Supra* note 65.

petition in cases and at the same time preempt third parties from filing an *amparo* petition. The state of impunity prevailing today is partly brought about by the fact that families and witnesses are afraid to file a complaint or testify against the police or members of the AFP. By limiting the right of third person who are mostly human rights organizations to file the petition only in cases where there is no known member of the victim's family, the rule effectively gives the perpetrators the opportunity to defeat the remedy.<sup>103</sup>

This rule, as outlined in Section 2, follows the expanded Chilean notion by granting not only the injured party, but even human rights organizations the standing to file the petition.

### *Jurisdiction, Venue, Docket Fees, Archiving*

An outstanding feature of this Philippine version of the writ of *amparo* is the availability of reliefs at anytime before final judgment.<sup>104</sup> Under the Rule, the petition may be filed on any day and at any time with the Regional Trial Court of the place where the threat, act or omission was committed or any of its elements occurred, or with the Sandiganbayan, the Court of Appeals, the Supreme Court, or any justice of such courts.<sup>105</sup> The rule does not impose a strict hierarchy of courts and in fact allows a petition to be filed before any member of these collegial bodies. In other words, the aforementioned courts exercise concurrent jurisdiction over petitions for the issuance of the writ of *amparo*.

The section on jurisdiction and venue is basically similar to the Rule on petitions for the writ of *habeas corpus*. A slight deviation, however, occurs with the inclusion of the Sandiganbayan, for the reason that public officials and employees will be respondents in *amparo* petitions.

It will be noted that in filing the *amparo* petition with the Regional Trial Court, the venue shall be in the place where the act or omission was committed or where any of its elements occurred. The evident intent of the rule is to prevent the filing of the petition in some far-flung area to harass the respondent. Moreover, the rule attempts to preempt any prejudice to the effective dispensation of justice, as in most cases, the witnesses and the evidence are located within the jurisdiction of the Regional Trial Court where the act or omission was committed.<sup>106</sup>

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<sup>103</sup> *Supra* note 70.

<sup>104</sup> *Supra* note 35.

<sup>105</sup> *Supra* note 68, §3.

<sup>106</sup> *Supra* note 65.

The liberal rule on jurisdiction and venue will indeed facilitate the filing of the petition. This is similar to the Nicaraguan *amparo*, which may even be filed “orally or in writing” by any individual on behalf of the injured party, at “any day and at all hours.”<sup>107</sup>

Another liberal feature of the rule is the exemption granted to the petitioner from the payment of the docket and other lawful fees.<sup>108</sup> Indeed, it effectively makes the remedy accessible to the victims insofar as it relieves them of the financial burden to prosecute their case for the enforcement of our sacrosanct rights should not be frustrated by lack of finances.<sup>109</sup> The only possible danger in this provision is that this may open up the system to abuse by litigious private individuals against another private individual or entity for harassment purposes.<sup>110</sup> Most importantly, the writ is not limited to a specific territorial jurisdiction but shall be enforceable anywhere in the Philippines.<sup>111</sup> 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 therein.<sup>112</sup>

Owing to the summary nature of the proceedings, the writ is issued as a matter of course when on the face of the petition it ought to issue. Upon the filing of the petition, the court, justice or judge shall immediately order the issuance of the writ if on its face it ought to be issued.<sup>113</sup> To expedite its resolution, the writ shall also set the date and time for summary hearing of the petition which shall not be later than seven days from the date of its issuance.<sup>114</sup> The *amparo* proceedings enjoy priority and cannot be unreasonably delayed.<sup>115</sup> A clerk of court who refuses to issue the writ after its allowance, or a deputized person who refuses to serve the same, shall be punished by the court, justice, or judge

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<sup>107</sup>Article 2 and 4 of Decree 232, <http://www.cldh.org/countryrep/Nica81eng/chap.4a.htm> (visited 23 December 2007).

<sup>108</sup> *Supra* note 68, §4.

<sup>109</sup> *Supra* note 65.

<sup>110</sup> *Supra* note 70.

<sup>111</sup> *Supra* note 68, §3.

<sup>112</sup> *Supra* note 68, §2.

<sup>113</sup> *Supra* note 68, §6.

<sup>114</sup> *Id.*

<sup>115</sup> *Supra* note 65.

for contempt without prejudice to other disciplinary actions.<sup>116</sup> The foregoing is a modified version of a similar provision in Rule 102, governing petitions for a writ of *habeas corpus*.

### ***Return of the Writ***

The writ will require respondent to file his return, which is the comment or answer to the petition. The return must be detailed to help determine whether the respondent fulfilled the standard of conduct required by the Rule. Particularly, within five working days after service of the writ, the respondent is required to file a verified written return together with supporting affidavits which shall, among other things contain the following:

- (a) The lawful defenses to show that the respondent did not violate or threaten with violation the right to life, liberty and security of the aggrieved party, through any act or omission;
- (b) The steps or actions taken by the respondent to determine the fate or whereabouts of the aggrieved party and the person or persons responsible for the threat, act or omission;
- (c) All relevant information in the possession of the respondent pertaining to the threat, act or omission against the aggrieved party; and
- (d) If the respondent is a public official or employee, the return shall further state the actions that have been or will still be taken:
  - (i) to verify the identity of the aggrieved party;
  - (ii) 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;
  - (iii) to identify witnesses and obtain statements from them concerning the death or disappearance;
  - (iv) 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;
  - (v) to identify and apprehend the person or persons involved in the death or disappearance; and
  - (vi) to bring the suspected offenders before a

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<sup>116</sup> *Supra* note 68, §7.

competent court.<sup>117</sup>

Other matters relevant to the investigation, its resolution and the prosecution of the case shall also be stated in the return. These requirements will also avoid the ineffectiveness of the writ of *habeas corpus*, where often the respondent makes a simple denial in the return that he or she has custody over the missing person, which will consequently cause the petition dismissed.<sup>118</sup> The requirements under paragraph (d) of Section 9 are based on United Nations standards.<sup>119</sup> Further, a general denial of the allegations in the petition shall not be allowed<sup>120</sup> and the period to file a return cannot be extended except on highly meritorious ground.<sup>121</sup>

### ***Interim Reliefs***

The interim reliefs available to the parties are distinct features of the writ of *amparo*. Some of these reliefs can be given immediately after the filing of the petition *motu proprio* or at any time before final judgment.<sup>122</sup>

As provided under Section 14 of the Rules, upon filing of the petition or at anytime before final judgment, the court, justice or judge may grant any of the interim reliefs:

- (1) temporary protection order (TPO);
- (2) inspection order (IO);
- (3) production order (PO); and
- (4) witness protection order (WPO).

Under the temporary protection order, the court, justice or judge, upon motion or *motu proprio*, may order that the petitioner or the aggrieved party and any member of the immediate family be protected in a government agency or by an accredited person or private institution capable of keeping and securing their safety.<sup>123</sup> This is akin to the 'cessation' stage in the other *amparos*.

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<sup>117</sup> *Supra* note 68, §9.

<sup>118</sup> *Supra* note 65.

<sup>119</sup> See Art. III, United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, <http://www1.umn.edu/humanrts/instree/executioninvestigation> (visited 23 December 2007).

<sup>120</sup> *Supra* note 68, §9.

<sup>121</sup> *Supra* note 112.

<sup>122</sup> *Supra* note 65.

<sup>123</sup> *Supra* note 68, §14, ¶a.

While under the witness protection order, the court, justice or judge, upon motion or *motu proprio*, 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.<sup>124</sup> 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.<sup>125</sup>

The provisions on inspection and production can be utilized to go beyond the blanket or general denials of the respondent and break the mantle of protection given by certain officers over suspected human rights violators. These inspection and production provisions are akin to the slightly used discovery rules under the Revised Rules of Court. Although the respondent may object to these orders on grounds of national security or privileged information, the courts are still given the plenary powers to decide whether or not the claim to the much abused justification of national security is valid.<sup>126</sup>

### ***Summary Hearing, Preliminary Conference, Appeal***

The hearing on the petition shall be summary<sup>127</sup> and shall be held from day to day until completed, for time cannot stand still when life, liberty or security is at stake.<sup>128</sup> Consequently, the Rule has a provision on prohibited pleadings and motions so as not to delay the proceedings.<sup>129</sup> Hence, the filing of a motion to dismiss even on the ground of lack of jurisdiction over the subject matter and the parties is proscribed for the same reason. However, the court, justice or judge may call for a preliminary conference to simplify the issues and determine the possibility of obtaining stipulations and admissions from the parties.<sup>130</sup> The hearing is given the same priority as petitions for *habeas corpus*.<sup>131</sup> If the petitioner is able to prove his cause of action after the hearing, the privilege

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<sup>124</sup> *Supra* note 68, §14, ¶d.

<sup>125</sup> *Id.*

<sup>126</sup> *Supra* note 70.

<sup>127</sup> *Supra* note 68, §13.

<sup>128</sup> *Supra* note 65.

<sup>129</sup> *Supra* note 68, §11.

<sup>130</sup> *Supra* note 122.

<sup>131</sup> *Supra* note 68, §19, ¶3.

of the writ of *amparo* together with the appropriate reliefs shall be granted.<sup>132</sup>

The court shall render judgment within ten (10) days from the time the petition is submitted for decision.<sup>133</sup> Any party may appeal from the final judgment or order to the Supreme Court under Rule 45.<sup>134</sup> The period of appeal shall be five (5) working days from the date of notice of the adverse judgment.<sup>135</sup>

Under Section 1, Rule 45 of the Revised Rules of Court, “a party desiring to appeal by *certiorari* from a judgment or final order or resolution of the Court of Appeals, the Sandiganbayan, the Regional Trial Court or other court whenever authorized by law, may file with the Supreme Court a verified petition for review on *certiorari*” and “the petition shall raise only questions of law which must be distinctly set forth.” The *amparo* rule departs from the said Rule 45 in allowing the appeal to raise questions of fact or law or both.<sup>136</sup>

### *Quantum of Proof*

The parties shall establish their claims by substantial evidence.<sup>137</sup> However, the rule imposes a higher standard of diligence on public officers or employees than on private individuals or entities. If the respondent is a private individual or entity, he must prove that ordinary diligence, as required by applicable laws, rules and regulations, was observed in the performance of duty.<sup>138</sup> On the other hand, if the respondent is a public official or employee, he must prove that extraordinary diligence as required by applicable laws, rules and regulations, was observed in the performance of duty.<sup>139</sup> The respondent public official or employee cannot invoke the presumption that official duty has been regularly performed to evade responsibility or liability.<sup>140</sup>

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<sup>132</sup> *Supra* note 65.

<sup>133</sup> *Supra* note 68, §18.

<sup>134</sup> *Supra* note 68, §19, ¶1.

<sup>135</sup> *Id.*, ¶2.

<sup>136</sup> *Supra* note 129.

<sup>137</sup> *Supra* note 68, §17.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

### **Contempt**

The power to cite for contempt is an inherent power of a court to compel obedience to its orders and to preserve the integrity of the judiciary. Like the *amparos* in Mexico, Argentina and Nicaragua,<sup>141</sup> Section 16 of the rule provides for sanctions. The court, justice or judge may order the respondent who refuses to make a return, or who makes a false return, or any person who otherwise disobeys or resists a lawful process or order of the court to be punished for contempt. The contemnor may be imprisoned or imposed a fine.<sup>142</sup> Also, a clerk of court who refuses to issue the writ after its allowance, or a deputized person who refuses to serve the same, shall be punished by the court, justice or judge for contempt without prejudice to other disciplinary actions.<sup>143</sup>

Unlike its Latin American counterparts, however, the rule does not include the power to order the removal or even arrest of a belligerent public official or the automatic prosecution of the public official. Some Latin American *amparos*, for instance, require that an *amparo* decision ordering the release of a person from detention must pass through the prosecutor who is expressly required to file an information against the respondent public official.<sup>144</sup>

It must be stressed that if the respondent military officers certifies that the person subject of the petition is not in their custody after conducting diligent search for the disappeared among their units, he is deemed to be making a false return, and will therefore be liable, if he is later on found to actually have custody of the victim. Absent this interpretation, the Philippine *amparo* may suffer the same fate as the Chilean *amparo* where the state security forces go unpunished despite the discovery in their custody of a person, the custody of whom they have previously denied.<sup>145</sup>

### **Exhaustion of Administrative Remedies**

One of the most significant liberal features of the rule is that unlike many other *amparos*, ours does not require exhaustion of remedies before the court can acquire jurisdiction. This possibly stems from the lessons learned in many

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<sup>141</sup> *Supra* note 70.

<sup>142</sup> *Supra* note 68, §16.

<sup>143</sup> *Supra* note 111.

<sup>144</sup> *Supra* note 70.

<sup>145</sup> *Id.*

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.<sup>146</sup>

### *Res Judicata*

The Rule does not enunciate any provision on *res judicata*, which is a feature of the Mexican *amparo*, although it declares the petition dismissed with prejudice upon failure to prosecute the case after the lapse of two (2) years from notice to the petitioner of the order archiving the case.<sup>147</sup> But the court is not authorized to dismiss the petition, and shall only archive it, if upon its determination it cannot proceed for a valid cause such as the failure of petitioner or witnesses to appear due to threats on their lives.<sup>148</sup> This archiving of the case, rather than causing its dismissal, makes it easier for the victims to revive the petition when circumstances change. This liberal provision could play an important role in battling 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.<sup>149</sup> Hence, if petitioners cannot proceed to prove their allegations for a justifiable reason, like the existence of a threat to their lives or the lives of their witnesses, the court will not dismiss the petition but will only archive it. The parties will be notified before a case is archived, as the order has to be justified by a good reason, to be determined after hearing.

Archiving can be ordered only during the pendency of the case. The case may be revived within two (2) years from its archiving. After two (2) years, it may be dismissed for failure to prosecute. Since it is the petitioner who would be prejudiced by its final dismissal, the two (2)-year prescriptive period is reckoned from the date of notice to the petitioners of the order of archiving. Two (2) years is deemed a reasonable time for the aggrieved parties to prosecute their petition.<sup>150</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Supra* note 68, §19, ¶2.

<sup>148</sup> *Supra* note 68, §20, ¶1.

<sup>149</sup> *Supra* note 70.

<sup>150</sup> *Supra* note 65.

**CONCLUSION:**  
**THE FIRST PHILIPPINE AMPARO:**  
**AN UNPRECEDENTED VICTORY**

The problem that the country faces today cannot be simply put into words. Extrajudicial killings and enforced disappearances remain unchecked. Needless to say, the number of victims throughout the Philippines seems to be moving uphill.

Before *amparo* was made available, there was a very slight possibility for the victims and their families to successfully obtain assistance and relief, owing to the insufficiency of the writ of *habeas corpus*. People facing threats became ‘fugitives,’ running away from the government. They were not criminals though. They were ordinary citizens - farmers, students, journalists - who are bold enough to exercise their constitutional rights of freedom of expression and freedom of the press. Unfortunately though, to the government, the exercise of these rights translates to a “crime” for which the victims have to pay, albeit at a very high price. Their words and acts displeased those in powers. They vanished into the oblivion, and some re-surfaced—dead.

On 24 October 2007, the first day *amparo* took effect, the Supreme Court received the first writ of *amparo* plea from the parents of two missing students Sherlyn Cadapan and Karen Empeño, and their companion, Manuel Merino, whose petition for writ of *habeas corpus* was earlier dismissed.

The very first success case of the writ of *amparo* was the release of Rowil Muñasque, a *Bayan Muna* leader following the order of Judge Reinerio Ramas of Pagadian, Zamboanga del Sur. He was abducted by the soldiers belonging to the 53<sup>rd</sup> Infantry Battalion stationed in the same province. The military did not deny having custody of Muñasque, but claimed that the latter had waived his right to question his detention. In due course, the army had no choice but to produce him in court.<sup>151</sup> After the first day of hearing on the petition, he was immediately reunited with his family after missing for two weeks.

On the day of Muñasque’s release, the relatives of 22-year old Luisito Bustamante similarly filed a petition for writ of *amparo* before the Davao City Regional Trial Court. A week after the filing of the petition, the writ achieved another triumph. In ordering his release, Executive Judge Isaac Robillo, Jr.

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<sup>151</sup> *Chief Justice Puno Lauds Writ of Amparo’s Victory*, [http://www.supremecourt.gov.ph/news/courtnews/2007/11/\(visited 23 December 2007\)](http://www.supremecourt.gov.ph/news/courtnews/2007/11/(visited%2023%20December%202007).).

upheld Bustamante's liberty and his basic rights as a civilian.<sup>152</sup>

Responding to the order of the Supreme Court *En Banc*<sup>153</sup> to hear a petition for *amparo*, the Court of Appeals issued another writ to protect labor leader, Leny Robiños, an organizer of the *Aguman Da Reng Maglalautang Capampangan* and the provincial chapter of the *Kilusang Magbubukid ng Pilipinas*. Leny Robiños was the alleged target of an attempted abduction by the military. But failing to find her during a raid on their house, the military took Romulos, her brothers, as ransom for her surrender. The Court of Appeals ordered the inspection of certain military detachments and safe houses used as detention areas, in its search for the missing brothers.

To some extent, this new ground-breaking rule may lead to a clash between the judiciary and the executive departments of the government. Extrajudicial killings, enforced disappearances, and other human rights violations are carried out with impunity by suspected state security forces who hide behind various cloaks. Claims of confidentiality for the sake of national security and the principle of presumption of regularity are just a few of the defense mechanisms employed by the military to evade responsibility. The executive department, for instance, may disregard inspection and production orders of the judiciary and may insist its interpretation of what constitutes 'executive privilege'<sup>154</sup> and 'national security' issues. Further, with the implementation of A.O. 197, the purposes and value of the rule is confronted by a threat of defeat.

The effectiveness of the writ of *amparo* largely depends not only on the courage of the victims in asserting their rights, but also on the bravery of the judiciary to traverse the uncharted path with faith that goodness and justice will prevail over evil.

The Supreme Court promulgated the Rule on the Writ of *Amparo* merely by invoking its constitutionally granted power to promulgate rules concerning the protection and enforcement of constitutional rights. Such act though, it is feared, may be tantamount to judicial legislation, violative of the doctrine of

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<sup>152</sup> *Extra-Judicial Killings and Enforced Disappearances: Where Do We Go From Here?* <http://ca.supremecourt.gov.ph/index>. (visited 23 December 2007).

<sup>153</sup> *In the Matter of the Petition for the Writ of Amparo in Favor Romulos Robiños, Ryan Supan, Leny Robiños and Lolita Robiños v. Gloria Macapagal Arroyo, Gen. Hermogenes Esperon, P/Dir. Gen. Avelino Razon, Lt. Col Edison Caga, Lt. Eric Bulosan, et. al.*, G.R. No. 180160, 31 October 2007, Minute Resolution.

<sup>154</sup> The power of the Government to withhold information from the public, the courts, and the Congress. Black's Law Dictionary (6<sup>th</sup> ed., 1991) at 569-570.

separation of powers,<sup>155</sup> since the rule has the force of law. It may be interpreted as a human rights legislation, providing for redresses against the State's abuses. The Supreme Court, however, must not be faulted for taking its own initiative in making up for the failure of the other branches to ensure the victims of human rights violations of expedient and adequate relief. In expanding its judicial rule-making power as a response to the deficiencies of existing remedies, the adoption of this new rule must instead be favorably acknowledged.

Regrettably for Congress, it may be said that it has done very little legislative work in this regard. The implementation of the Rule on the Writ of *Amparo* does not absolve nor excuse the Congress from enacting laws for further protection of human rights. Laws against torture, and enforced disappearances, affording adequate legal remedies to the victims need to be urgently enacted.<sup>156</sup> It is noteworthy that the Rule on the Writ of *Amparo* is merely procedural. Indeed, it cannot diminish, increase, or modify substantive rights.

Furthermore, being an elected member of the United Nations Human Rights Council, it is the duty of the government to take actions to enact adequate laws to comply with its international obligations. Notably, the Philippines must in particular do its role under the *United Nations Convention Against Torture*, which requires as a State party to the Convention to enact the corresponding domestic law. For many years, the proposed laws against torture and enforced disappearance have been pending before the Legislature. Sadly, there are so far no indications that it would be acted upon. The government still needs even to ratify the instruments on *International Convention for the Protection of All Persons*

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<sup>155</sup> “The doctrine of separation of powers calls for the other departments being left alone to discharge their duties as they see fit... The legislative and executive branches are not bound to seek [the judiciary’s] advice as to what to do or not to do. Juridical inquiry has to be postponed in the meanwhile. It is a prerequisite that something had by then been accomplished or performed by either branch before a court may come into picture.” (*Tan v. Macapagal*, 43 SCRA 677 [1972], at 681).

<sup>156</sup> On 28 September 2007, the Asian Human Rights Commission (AHRC) commented on the Writ of *Amparo* and *Habeas Data* may still be insufficient to resolve the problems of extralegal killings and enforced disappearances in the Philippines. According to it, there must be cooperation from all parts of the government and civil society. “Though it responds to practical areas it is still necessary that further action must be taken in addition to this. The legislative bodies, House of Representatives and Senate, should also initiate its own actions promptly and without delay. They must enact laws which ensure protection of rights—laws against torture and enforced disappearance and laws to afford adequate legal remedies to victims, [http://en.wikipedia.org/wiki/Asian\\_Human\\_Rights\\_Commission](http://en.wikipedia.org/wiki/Asian_Human_Rights_Commission), (last accessed on 23 December 2007).

from *Enforced Disappearance* and to subsequently enact corresponding laws on the matter. Its reluctance to be a State party to the said convention, manifests its insincerity to face the problem head-on.

It is hoped that the writ of *amparo*, so noble in its vision, will not be abused by scrupulous criminals or be circumvented by the military. In the wake of the full enforcement of the Human Security Act of 2007, the improper enforcement of its many ambiguous provisions will surely erode many of our civil liberties. Feared to be a draconian law, *amparo* stands the best vanguard of the liberties threatened to be transgressed and trampled upon.