WATCHING THE WATCHERS: A LOOK INTO THE DRAFTING OF THE WRIT OF AMPARO

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ABSTRACT

"What is the writ of amparo?" What started as a pernicious question boggling the minds of bar takers during the 1991 bar examinations has blossomed into a full-pledged rule striking fear in the hearts of perpetrators of extralegal killings and enforced disappearances. But how exactly did this rule come about? What provided the impetus for its enactment? What was included in the deliberations of the Supreme Court Committee on the Revision of Rules? This Article traces the development of the Philippine writ of amparo as promulgated by the Supreme Court and critically examines it as a measure to enforce constitutional rights. It explores the Rule on the Writ of Amparo[1] from behind the scenes and explains the intent of the framers who drafted the Rule. A peek into the discussions of the Justices present would show the comprehensive deliberation and the self-censorship and editing that was done to create a holistically sound and constitutionally firm Rule that prods without breaking the separation of powers.

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[1] A.M. No. 7-9-12-SC, promulgated September 25, 2007, effective October 24, 2007.

"Observation without interference is impossible... the tools of observation, and/or the biases of the observer, will in and of themselves change the behavior of the process being observed."

— Uatu, THE WATCHER[2]

I. INTRODUCTION

The 1987 Philippine Constitution bestows upon the Supreme Court the power to promulgate not only procedural rules in relation to the practice of law, but also those that would protect and enforce human rights.[3] Twenty years after the drafting of the 1987 Constitution, the Supreme Court re-examined its constitutional mandate and took a definitive stance on issues of constitutional rights, particularly those that fall into the concept of human rights.[4] The issue of extralegal killings and enforced disappearances in the country had escalated to an alarming scale that observers, both national[5] and international,[6] ceased their named functions and

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[2] Dwayne McDuffie & Scott Kolins, *The Observer Effect*, BEYOND! No. 6, at 2-3 (Marvel Publications, 2007).

[3] CONST. art. VIII, §5(5). "The Supreme Court shall have the following powers: x x x (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court."; *See* Chief Justice Reynato S. Puno, *View from the Mountaintop*, Keynote Speech at the *National Consultative Summit on Extrajudicial Killings and Enforced Disappearances – Searching for Solutions*, Manila Hotel, July 16, 2007.

[4] The authors are aware of the different literature describing constitutional rights and human rights. In this Article the notion is loosely used, and sometimes the two are interchanged. A comprehensive listing and study of extant rights may be found at the *Human Rights and Constitutional Rights* online publication of the Arthur W. Diamond Law Library at Columbia Law School, *available at* http://www.hrcr.org/chart/categories.html (last accessed December 5, 2007).

[5] *See* e.g. Asian Human Rights Commission, AHRC Website, *available at* http://philippines.ahrchk.net (last accessed December 5, 2007); Pinoy Human Rights website, *at* http://www.pinoyhr.net (last accessed December 5, 2007).

[6] *See* Philip Alston, United Nations Special Rapporteur on the State of Human Rights in the Philippines, *Press Report*, February 21, 2007, *available at* www.extrajudicialexecutions.org/news/Philippines_21_Feb_2007.pdf (last accessed December 5, 2007) "The theory that the 'correct, accurate, and truthful' reason for the recent rise in killings lies in purges committed by the CPP/NPA. This theory was relentlessly pushed by the AFP and many of my Government interlocutors. But we must distinguish the number of 1,227 cited by the

moved towards active participation. One particular observer, Philippine Supreme Court Chief Justice Reynato S. Puno, made a decision that would profoundly affect the country.[7]

The apparent inaction and silence of the Executive and Legislature, the besieged legitimacy of the Executive, and the political deadlocks stalling the legislative machinery, were all plausible independent variables that helped create an atmosphere where the proverbial referee had to take the ring and call for a recalibration of the rules of the game. The referee saw that the hits were below the belt, so to speak, and a call was made to change the rules.

The mandate to promulgate rules to enforce constitutional rights was vested by the Constitution itself on the Supreme Court precisely to more effectively check abuses against human rights.[8] Yet, the obstacle that rulemaking is exclusively the domain of Congress stood in the Court's path.[9] But being the meaning makers of the land, the Supreme Court has adopted a meaning more conducive to judicialization[10] – that the 1987 Constitution in Article VIII, Section 5(5) gave it the constitutional prerogative to promulgate rules concerning the enforcement of constitutional rights.

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military from the limited number of cases in which the CPP/NPA have acknowledged, indeed boasted, of killings. While such cases have certainly occurred, even those most concerned about them, such as members of Akbayan, have suggested to me that they could not amount to even 10% of the total killings. The evidence offered by the military in support of this theory is especially unconvincing. Human rights organizations have documented very few such cases. The AFP relies instead on figures and trends relating to the purges of the late 1980s, and on an alleged CPP/NPA document captured in May 2006 describing Operation Bushfire. In the absence of much stronger supporting evidence this particular document bears all the hallmarks of a fabrication and cannot be taken as evidence of anything other than disinformation."; *see also* Eric G. John, Deputy Assistant Secretary for East Asian and Pacific Affairs, *Statement Before the Subcommittee on East Asian and Pacific Affairs Senate Committee on Foreign Relations*, Washington, DC, March 14, 2007. "we take the problem of extrajudicial killings in the Philippines seriously, and are committed to helping our Philippine allies as they bring those responsible to justice. We are encouraged by the steps that the Philippine Government has taken to date, but we will continue to make clear that more progress is essential and that we stand ready to be of additional assistance to Philippine authorities."

[7] PUNO, *supra* note 3. "The [1987] Constitution transformed the Court from passivity to activism. This transformation, dictated by our distinct experience as a nation, is not merely evolutionary but revolutionary."; *see also Chief Justice Puno mulling wider powers for judiciary*, TAIPEI TIMES, *available at* http://www.taipeitimes.com/News/world/archives/2007/08/07/2003373077 (last accessed December 5, 2007).

[8] *See* JOAQUIN BERNAS, S.J. THE INTENT OF THE 1986 CONSTITUTION WRITERS 527 (1995)

[9] *See Id.*, at 525-27

[10] *See* C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics, in* NEAL TATE & TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER 1-10 (1995).

On September 25, 2007, the Rule on the Writ of *Amparo*[11] ("Rule") was promulgated by the Supreme Court of the Philippines. It took effect last October 24, 2007 - on the same day of the 62nd Anniversary of the United Nations - after having been published in "three newspapers of general circulation."[12]

The Nation saw the news and press releases on the *National Consultative Summit on Extrajudicial Killings and Enforced Disappearances—Searching for Solutions*, held on July 16-17, 2007. Two months after, the Rule was promulgated. In between was a closed door deliberation of the Supreme Court Committee on the Revision of Rules to sift through the proposals from the Summit and to determine the possible judicial response, including the promulgation of the Rule.

In recent articles and periodical accounts, much ink has been spilled on the Supreme Court's promulgation of the Rule. Some have decried that the Supreme Court has become an "activist court," contrary to its traditional mandate of "passivity."[13] Some may laud the promulgation of the Rule as a pragmatic move to alleviate the human rights situation in the Philippines.

This Article traces the development of the Philippine writ of *amparo* as promulgated by the Supreme Court and critically examines it as a measure to enforce constitutional rights. It explores the Rule from behind the scenes and explains the intent of the framers who drafted it. A peek into the discussions of the Justices present would show the comprehensive deliberation and the self-censorship and editing that was done to create a holistically sound and constitutionally firm rule that prods without breaking the separation of powers.

II. CONSTITUTIONAL MOORINGS AND THE IMPETUS FOR THE WRIT OF AMPARO

The right to be free from extralegal, arbitrary, or summary executions is recognized not only in the 1987 Constitution, which provides that "no person shall be deprived of life, liberty... without due process of law,"[14] but also by a number of international human rights instruments.[15] For example, Article 6 of the

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[11] A.M. No. 7-9-12-SC.

[12] The requirement of publication brings to mind the necessity of informing the public of the rules – the public being informed, the individual is presumed knowledgeable. This has great consequence as will be seen later. The effect of the Rule on the Writ of Amparo is both national and hierarchical in scope.

[13] *See* Raul Pangalangan, *Passion for a Reason*, 'Judicial Activism and its limits', Philippine Daily Inquirer, February 1, 2008

[14] CONST. art. II, §1.

[15] Prohibitions against arbitrary killings are also found in article 4 of the American Convention on Human Rights, signed Nov. 22, 1969, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6

International Covenant on Civil and Political Rights specifically provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[16]

A. THE 1987 PHILIPPINE CONSTITUTION

An examination of our present Constitution will yield the observation that the framers bestowed upon the Supreme Court a very significant power not found in prior Constitutions: the expanded rulemaking power in the enforcement of constitutional rights.[17] In his keynote speech delivered at the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances, Chief Justice Reynato S. Puno explained the rationale for the grant of this expanded rule making power, *viz:*

> The 1987 Constitution is the most pro human rights of our fundamental laws. It ought to be for it was a robust, reactive document to the trivialization of human rights during the authoritarian years, 1972 to 1986. Indeed, it was written by those whose common thread is their bountiful bias in favor of human rights. This pre-eminent prejudice in favor of human rights induced our constitutional commissioners to reexamine the balance of power among the three great branches of government—the executive, the legislative, and the judiciary. The reexamination easily revealed that under the then existing balance of power, the Executive, thru the adept deployment of the commander-in-chief powers, can run roughshod over our human rights. It further revealed that a supine legislature can betray the human rights of the people by defaulting to enact appropriate laws, for there is nothing you can do when Congress exercises its power to be powerless. It is for this reason and more, that our Constitutional Commissioners, deemed it wise to strengthen the powers of the Judiciary, to give it more muscular

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(1985) entered into force July 18, 1978: "No one shall be arbitrarily deprived of his life."; Article 4 of the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force Oct. 21, 1966: "Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."; and article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950) entered into force Sept. 3, 1953: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Similarly, article 3 of the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 provides, "Everyone has the right to life, liberty, and security of person."

[16] International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) entered into force Mar. 23, 1976, ratified by the Philippines in 1986.

[17] CONST. art. VIII, §5(5).

> strength in dealing with the non-use, misuse, and abuse of authority in government.[18]

On July 27, 2007, in one of the conference rooms of the Supreme Court, Chief Justice Puno, opened the meeting of the Committee[19] with the following statement:

> CHIEF JUSTICE PUNO: [W]e can begin now. We are all aware [that] we just concluded the National Summit called for the purpose of searching for solutions on this problem of extrajudicial killings and enforced disappearances. The Summit has brought forth lots of suggestions and proposals on how the judiciary can promulgate new rules to enhance the protection of our constitutional rights... So it remains for us to consider these various proposals pertaining to the judicial department and for this purpose, we are meeting today to discuss on how we shall go about our efforts to give effect to this proposal of [looking into the possibility of adopting] the writ of *amparo*. Off hand, I have asked our legal researchers to research on this subject and the efforts will include researching on the models available in Europe, in the American States and in Africa. It is only in Asia where there is still no Asian Human Rights Commission or there is no regional declaration of human rights. But according to the papers this is going to be the subject of the ASEAN meeting which will be held in Manila. Well, anyway, as I said we are now researching on different models, we are concentrating on the Latin American countries. If you look at the history of these enforced disappearances and extrajudicial killings, you will see that they originated in Latin American countries in the year 1960's and in 1970's, and that is the reason why the Latin American countries are more advanced in their laws as well as their procedures in meeting this problem. But there is no one way of meeting this problem. The writs of *amparo* available in these different countries vary from one country to another. In other words, the writ of *amparo* in Mexico is different from the writ of *amparo* in Argentina, in Peru, in Chile, in certain aspects. We'll be borrowing from these various writs of *amparo* and of course, we shall be customizing [their principles] in accordance with our own needs. I hope you all read the different suggestions arrived at during the Summit and lot of these suggestions can be incorporated in this remedy, the writ of *amparo*. So in this initial meeting, let us just be tossing ideas around... can we have suggestions on how we shall proceed and what rights should be included in this writ, what the procedure [should be] to enforce these rights, and what ought to be the limits of the judgment of the *amparo* court. We shall be discussing all these, but maybe we

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[18] PUNO, *supra* note 3.

[19] The Committee is composed of the following: Chief Justice Reynato S. Puno (chairperson), Senior Justice Leonardo A. Quisumbing, Justice Ma. Alicia A. Martinez (co-chairperson), Justice Adolfo S. Azcuna, Justice Dante O. Tinga, Justice Minita V. Chico-Nazario, Justice Antonio Eduardo B. Nachura, Justice Jose Y. Feria (ret.), Senior Justice Flerida Ruth P. Romero (ret.), Senior Justice Josue N. Bellosillo (ret.), Justice Bernardo P. Pardo (ret.), Justice Jose C. Vitug (ret.), Justice Romeo J. Callejo, Sr. (ret.) and Justice Oscar M. Herrera (ret.).

> can have some preliminary thoughts on this. May we call on the father of *amparo*, Justice Adolf. [20]

Justice Adolfo S. Azcuna, who proposed the adoption of the legal mechanism during the 1971 Constitutional Convention, who also discussed its possibility with the members of the 1986 Constitutional Convention, and who wrote a paper on the Writ of Amparo a few years back,[21] briefly reintroduced the concept of the writ of amparo:

> JUSTICE AZCUNA: Thank you Chief. Well, as [has been] stated, the remedy of *amparo* is different totally from jurisdiction to jurisdiction; and when I first proposed this, I really intended a flexible remedy to enforce and protect the constitutional rights. It was in the present Constitution that it was finally embodied through the suggestion of Chief Justice Roberto Concepcion. We put it under the rule making power of the Supreme Court so that it is [intended as] a power for the Court which is to exercise [it through] the adoption of rules to protect and enforce constitutional rights. The idea is to protect and enforce constitutional rights other than physical liberty— because this is already provided for by *habeas corpus*. All other rights under the Constitution, if they are immediately enforceable, can be enforced through *amparo*. We say this because there are problematic rights that need legislation to become "enforceable."[22]

After introducing and discussing the constitutional basis of the Rule, the Committee discussed several policy issues. Justice Azcuna proceeded to guide the policy direction of the Committee as to the drafting of the rule, to exclude those rights which are not enforceable and to focus on the special problems that affect constitutional rights. This also paved the way for the discussion on the evolutionary nature of the writ.

> JUSTICE AZCUNA: So we have to distinguish between problematic rights and self-executing constitutional rights. In the recent decision of the Court in *Tondo Medical Center*[23], it was pointed out that certain rights found under the Constitution are not self-executory. They need legislation to be enforceable... and those rights cannot be enforced through *amparo*. On the other hand, there are decisions of the Court with respect to certain rights, *i.e.* the right to a healthy environment - there is no need for legislation and therefore it is covered by the writ - so assuming that a right under the Constitution... is enforceable then the Court can enforce it through rules adopted for the enforcement of such right. The rights given under the

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[20] 1 RECORD OF THE SUPREME COURT COMMITTEE ON RULES 1 (2007); compiling the transcripts of the Deliberations of the Committee (on file with the authors).

[21] Adolfo S. Azcuna, *The Writ of Amparo: A Remedy to Enforce Fundamental Rights*, 37 ATENEO L.J. 15 (1993).

[22] 1 RECORD, *supra* note 20, at 2, July 27, 2007.

[23] Tondo Medical Center Employees Ass'n v. Court of Appeals, 527 SCRA 746, G.R. 167324, July 17, 2007. The general rule is that provisions are self-executing, however there are many provisions which are non-self-executing and are in need of legislation. In this case, the petitioners invoked health sector reform agenda provisions which, as the Court stated, were not self-executing.

> Constitution cannot be left without remedy and if Congress or any other body that is supposed to provide for a remedy fails to do so, it can be enforced by the courts. The other thing is, since [the *amparo*] is a flexible writ that varies from country to country, [it] is for us to shape our own Filipino *amparo* to meet our needs [and] special situation. [24]

B. A BRIEF CONSTITUTIONAL COMPARATIVE ANALYSIS

The word *amparo* comes from the Spanish word "*amparar*" which literally means "to protect." The writ traces its origins to Mexico[25] and later on spread throughout the regions of the Western Hemisphere where it has gradually evolved into various forms, depending on the experiences of each country in the area. Starting as a protective writ against acts or omissions of public authorities in violation of constitutional rights, it later on blossomed as a remedial tool having several purposes:

(1) For the protection of personal freedom, equivalent to the habeas corpus writ (called *amparo libertad*);

(2) For the judicial review of the constitutionality of statutes (called *amparo contra leyes*);

(3) For the judicial review of the Constitutionality and legality of a judicial decision (called *amparo casacion*);

(4) For the judicial review of administrative actions (called *amparo administrativo*); and

(5) For the protection of peasants' rights derived from the agrarian reform process (called *amparo agrario*).

In the Philippines, several of the *amparo* protections are available under our Constitution. Under Article VIII, Section 1, judicial power is defined as "... the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, *and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.*" The second clause, otherwise known as the *grave*

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[24] 1 RECORD. *Supra* note 20, at 2, July 27, 2007.
[25] Constitution of the State of Yucatan (1841).

abuse clause,[26] accords the same general protection given by the *amparo contra leyes*, *amparo casacion* and *amparo administrativo*.

Amparo libertad is comparable to the remedy of *habeas corpus*. Under the present procedural rules, there is an adoption of the old English rule on the writ of *habeas corpus* to protect the right to liberty of individuals. There are constitutional provisions recognizing *habeas corpus*, i.e. Article III, Sections 13[27] and 15;[28] Article VII, Section 18;[29] and Article VIII, Section 5, Paragraph 1.[30]

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[26] Also known as "expanded *certiorari* jurisdiction" clause, *see* Francisco v. House of Representatives, G.R. No. 160261, 10 November 2003.

[27] CONST. art. III §13. All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.

[28] CONST. art. III §15. The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety requires it.

[29] CONST. art. VII, § 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it. The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call. The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus or the extension thereof, and must promulgate its decision thereon within thirty days from its filing. A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of habeas corpus. The suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion. During the suspension of the privilege of the writ of habeas corpus, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.

[30] CONST. art. VIII, § 5 (1). The Supreme Court shall have the following powers:

1. Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.

The Rules of Court provide the procedural rules for the grant of these constitutional protections. Rule 65 embodies the *grave abuse clause*,[31] while *habeas corpus* is provided for under Rule 102.[32] Notably, the various socio-economic rights enjoyed by individuals are also adequately protected by specific provisions under the Rules of Court, such as the rules on injunction[33] and prohibition.[34]

The Committee saw that these remedies were already sufficient to protect the rights contemplated, and a decision was made to limit the coverage of the Philippine version of the writ of amparo to cases of extrajudicial killings and enforced disappearances – which had yet no existing remedies under our rules.

> CHIEF JUSTICE PUNO: The question really is whether the writ of *amparo* should merely supplement the existing remedies that are already in place protecting constitutional rights or whether this writ should supplant the existing remedies. For instance, the readings will show that the writ of *amparo* provides a larger remedy and that the writ of *habeas corpus* is only a subset of the writ of *amparo*. We have existing remedies against violation of constitutional rights... injunctions, prohibitions, the different ways by which the constitutionality of a law or an act or omission of the president or even members of congress can be tested and struck down in violating the Constitution. In other countries, the writ of *amparo* is available even to correct judicial errors. In the case of extrajudicial killings and enforced disappearances, it is obvious that the remedy is very inadequate. It is only the remedy of *habeas corpus* so perhaps in that particular area we can go ahead and provide for the writ of *amparo*.[35]
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> JUSTICE VITUG: I think it would be a very ambitious project if we were to consider [all constitutional rights] in the coverage of the writ of *amparo* and it may no longer be timely to address the present problem [of extrajudicial killings and enforced disappearances]... and therefore I would appreciate the Chairman's suggestion that perhaps we should take up the most [pressing problem of extrajudicial killings and enforced disappearances first] and allow the writ to evolve.[36]

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[31] Rule 65, §2. *Petition for prohibition.*. When the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, are without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent to desist from further proceedings in the action or matter specified therein, or otherwise granting such incidental reliefs as law and justice may require.

[32] Rule 102, §§1-19.

[33] Rule 58, §§1-9.

[34] Rule 65, §2.

[35] 1 RECORD, *supra* note 20, at 4, AUGUST 10, 2007.

[36] *Id.* at 3.

> JUSTICE CALLEJO: I agree with the observation of Justice Vitug after all this writ is supposed to be an extraordinary remedy, akin to a writ of *habeas corpus* or even more extensive than the writ of *habeas corpus*. But we should not supplant the present rules now; we have rules on injunction, prohibition, etc.[37] So this very extraordinary remedy is applicable only to specific incidents of extrajudicial killings and enforced disappearances...[38]

> JUSTICE TINGA: I am amenable to the idea of confining the proposed rules only to cases [of extrajudicial killings] and enforce disappearances. All violations of the Constitution are wrongs, they are actionable wrongs and there are remedies. But in view of the times there is a need... to make the remedy more attuned to what is needed, the present remedy [of *habeas corpus*] is not adequate enough, it is not expeditious enough and responsive. That is why we have to revise the rules, so the rules have to be confined to the phenomenon of extrajudicial killings and enforced disappearances.[39]

And so it was decided that the Rule would initially cover only cases of extrajudicial killings and enforced disappearances. Otherwise, it was feared that without such qualification, the Rule will become too broad too soon - and might lose some of its effectivity. However, it was agreed that on the basis of experience, the coverage of the Rule may be expanded later on to cover other constitutional rights, including the second generation of human rights, the social and economic rights; and the third generation, the right to the environment, which is no longer an individual right but a collective right, as the need arises.

III. EXTRAJUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES

The Committee focused their attention in crafting a rule that would be uniform and applicable throughout the judicial hierarchy. The first problem encountered was the definition to be accorded to the concept of extrajudicial killings and enforced disappearances.

> JUSTICE MARTINEZ: I believed that first and foremost we should come up or formulate a specific definition [for] extrajudicial killings and enforced disappearances. From that definition, then we can proceed to formulate the rules, definite rules concerning the same.[40]

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[37] Rule, §25. "The Rules of Court shall apply suppletorily insofar as it is not inconsistent with this Rule."

[38] *Supra* note 20, at 3.

[39] *Id.* at 4.

[40] *Id.*

> CHIEF JUSTICE PUNO: ... As things stand, there is no law penalizing extrajudicial killings and enforced disappearances... so initially also we have to [come up with] the nature of these extrajudicial killings and enforced disappearances [to be covered by the rule] because our concept of killings and disappearances will define the jurisdiction of the courts. So we'll have to agree among ourselves about the nature of killings and disappearances for instance, in other jurisdictions, the rules only cover state actors. That is an element incorporated in their concept of extrajudicial killings and enforced disappearances. In other jurisdictions, the concept includes acts and omissions not only of state actors but also of non state actors. Well, more specifically in the case of the Philippines for instance, should these rules include the killings, the disappearances which may be authored by let us say, the NPAs or the leftist organizations and others. So, again we need to define the nature of the extrajudicial killings and enforced disappearances that will be covered by these rules. And well, Justice Flery also discussed the courts where these cases should be filed. Presently we have these special courts, but that need not bind us when we finally promulgate this rule. Of course, we shall be, in connection with that, discussing where the petition shall be filed, who are entitled to the writ and other considerations... the parties who are entitled to the right, who may file, can there be intervention and so on and so forth... [41]

The policy of considering private actors within the coverage of the Rule was elicited by the following discussion by Justice Minita Chico-Nazario:

> JUSTICE NAZARIO: ... Chief, this is in regard to your just concluded observations as to the definition of extrajudicial killing. Well in our group, initially we had to struggle with the real definition of extrajudicial killings. So in the end we categorized the term extrajudicial killings into three kinds – the first category was political killings due to the political affiliations or advocacies of the victim, or the method on top or involvement of the state in the commission of the killings. The second category was the summary killings and enforced disappearances committed by non-state actors without recourse to or disregard of legal and judicial processes. Finally the third category was summary killings or "salvagings" committed by institutionalized person or individuals who are suspected criminals. Now, I just don't know whether what the reaction will be, of the committee regarding this categorization of extrajudicial killings.[42]

The Committee later adopted the term "*extralegal killings*" so that the one-sided definition of extrajudicial killings to include only government actors would be dissuaded. This resulted in a balanced Rule that would cover killings or forced disappearances perpetrated not just by state actors but also those committed by non-state actors.[43]

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[41] *Id.*

[42] *Id.*

[43] Report of the Secretary-General, Extra-legal, Arbitrary and Summary Executions and Measures for Their Prevention and Investigation, U.N. Doc. E/AC.57/1988/5, at 21 (1988). *See* Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc.

In including both public and private individuals within the coverage of the Rule, the Committee recognized the need for adopting a difference in the standard of diligence required for state and non-state actors. The reason for this is that public officials or employees should be charged with a higher standard of conduct because it is their mandate[44] to protect and enforce the Constitution, especially its provisions protecting the right to life, liberty and security.[45]

IV. INTERNATIONALIZATION OF HUMAN RIGHTS

If law is more of experience than logic, then the crafting of international legal documents were crafted from international experience. Many international human rights instruments were enacted precisely as a multilateral, indeed, global attempt to enforce the right to life.[46] The U.N. General Assembly has on several occasions expressed alarm at the incidence of arbitrary executions occurring throughout the world and has sought to establish international standards to deal with such killings.[47]

E/CN.4/1984/14, at 46 (1983). For further discussion of involuntary "disappearances" see N. Rodley, *Disappeared Prisoners: Unacknowledged Detention*, in THE TREATMENT OF PRISONERS IN INTERNATIONAL LAW 191 (1987); Fitzpatrick, *U.N. Action with Respect to "Disappearances" and Summary or Arbitrary Executions* in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988, at 35 (Amnesty International U.S.A., 1988); *see also* Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, 37 U.N. GAOR, Supp. (No. 51), U.N. Doc. A/37/53 (1983).

[44] CONST. art. 10, §1. "Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives."; *See* DE LEON & DE LEON, JR., THE LAW ON PUBLIC OFFICERS AND ELECTION LAW 3 (2000): "A public official or employee, therefore, occupies a very delicate position which exacts from him certain standards which generally are not demanded from or required of ordinary citizens."

[45] CONST. art. 2, §1 ("No person shall be deprived of life, liberty... without due process of law... "). The right to security, *see discussion infra*, is one that is recognized by Article 3 of the 1948 Universal Declaration of Human Rights which provides that "Everyone has the right to life, liberty and security of person," as adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[46] The Charter of the United Nations requires the United Nations to promote human rights and their universal respect, as well as to promote their observance. U.N. Charter arts. 1(3), 55(c), 56 and 62(2). For this purpose, the Economic and Social Council was empowered by the Charter to set up a commission for the protection of human rights. *Id.* art. 60. The Commission on Human Rights was established by the Council in 1946. E.S.C. Res. 5(I), 1 U.N. ESCOR 163 (1946). For a detailed discussion of the history and work of the U.N. Commission on Human Rights see H. TOLLEY, THE U.N. COMMISSION ON HUMAN RIGHTS (1987).

[47] *See* G.A. Res. 22, 36 U.N. GAOR Supp. (No. 21) at 168-69, U.N. Doc. A/36/645 (1982); G.A. Res. 143, 40 U.N. GAOR Supp. (No. 53) at 251-52, U.N. Doc. A/40/100 (1986); G.A. Res.

In drafting the Rule, a problem that was encountered by the Committee was the extent of deference that should be accorded to the Legislature, a coordinate branch of government.

> JUSTICE NACHURA: Chief, [we should observe] the constitutional constraint on the power of the Court since we are limited to simply rule making. There are instances in the past when Congress followed a definition, a statement made by the Supreme Court and enacted those statements into law. What I am saying simply is that maybe we should encourage the legislature to come up the necessary law, so that whatever constraints or limitations we feel may be removed by legislation.[48]

However, it was decided that the Committee should not be limited by domestic laws in the protection and enforcement of Constitutional rights. In one of his earlier speeches, the Chief Justice has had the occasion to discuss this trend towards internationalization of human rights:

> Until the Second World War, the roots of human rights grew country-by-country. The growth was necessarily uneven, for the seeds of human rights sprout on different grounds differently. Some grounds were more suited than the others, considering the readiness of their people's culture and experience. At this stage, the protection of human rights depended largely on the will and pleasure of the sovereign ruler of each country. The horrors of the Holocaust, however, shattered this dependency, for Hitler showed to the world that the States themselves could be the predators of human rights.
>
> Hence, in the second half of the 20th century, human rights became a concern, not only of national law, but of international law. This internationalization of Human Rights started in 1948, with the United Nations Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man drafted by the Organization of American States. Two years later, or in 1950, the first multilateral treaty on human rights - the European Convention on Human Rights - burst into being. In 1966, the UN adopted two international covenants: one involving civil and political rights; and the other involving economic, social and cultural rights.
>
> A most significant part of the International Covenant on Civil and Political Rights is its imposition upon the signatory States, which includes the Philippines, the duty to adopt the necessary laws to give effect to the rights enumerated in the covenant. Articles 2 and 3 mandated the signatory States-

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144, 41 U.N. GAOR Supp. (No. 53) at 197-98, U.N. Doc. A/41/874/Add.1 (1987); G.A. Res. 43/151, 43 U.N. GAOR, Supp. (No. 49) 428-29, U.N. Doc. A/43/49, (1989).

[48] *Supra* note 20 at 5.

> (a) to ensure that persons whose rights or freedoms x x x x are violated shall have an **effective remedy**, even if the violation has been committed by those acting in an official capacity;
>
> (b) to ensure that persons claiming such a remedy shall have their rights thereto determined by **competent judicial**, administrative or legislative authorities, or by any other competent authority provided by the legal system of the State, and to develop the possibilities of a judicial remedy; and
>
> (c) to ensure that when granted, the competent authorities **shall enforce such remedies**.
>
> Complementing the movement towards the internationalization of human rights was the broadening of the scope to include those responsible for their violation. Originally, human rights were protected only from violations by the State; hence, in international covenants, the bearer of the duty was always the state. In other words, the right of an individual citizen is not protected from an unlawful act or omission by another individual, but only from State intrusion. There was a right to sue, but only against the State.
>
> Stated otherwise, the internationalization of rights resulted in a change of concepts as to the holders of the right and the bearers of the duties or the personalities of those who could sue and who could be sued. Take for instance, the third-generation human rights, which include the right to a healthy environment. This right does not belong only to an individual; it belongs to the entire populace and can be claimed even by the international community. Correspondingly, the duty to preserve a healthy environment is demandable by the people as a collectivity against a State, an individual, a group, or a community. Pollution, for example, prejudices individuals, communities, and the State; its ill-effects could even cross over to other countries. For these reasons, the irreversible trend now is to hold both the State and individuals accountable for violation of international human rights.[49]

The intent to use the models in other countries was also prevalent. Such that specific international instruments were sought to help craft the rule that shall be imposed in the country.

> CHIEF JUSTICE PUNO: We're trying to get [ideas from] [the various] writs of amparo. And of course we shall be incorporating to this new rule the United

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[49] Chief Justice Reynato S. Puno, *No Turning Back on Human Rights*, delivered at the Luce Auditorium, Silliman University, Dumaguete City, during its University Convocation and Presentation of the 2007 Outstanding Silliman University Law Alumni Association (SULAW) Award to Prof. Rolando V. del Carmen and 19th SULAW General Assembly and Alumni Homecoming, August 25, 2007. *See* M. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); *see also* Jose Alvarez, *International Law: Some Recent Developments*, 46 J. LEGAL EDUC. 557 (1996).

> Nations Standard. For instance the UN Standard on Investigation,[50] we can incorporate this standard in order to determine whether the actions undertaken by state actors [conform] to it, if not then sanctions would follow. We are looking at the different standards set forth in the different documents by the United Nations.[51]

Having focused the policy on the "right to life, liberty and security"[52] of the person, the Committee considered to propose that the petition for a writ of *amparo* remedy be made available to "any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity." And to specifically point out that its coverage targets extrajudicial killings, another sentence was added declaring that: "The writ shall cover extralegal killings and enforced disappearances or threats thereof."[53]

As the term is used in United Nations Instruments, "extralegal killings" are killings committed without due process of law, *i.e.* without legal safeguards or judicial proceedings.[54] As such, these include the illegal taking of life, regardless of the motive, summary and arbitrary executions, "salvagings" even of suspected criminals, and threats to take the life of persons who are openly critical of erring government officials and the like.[55] On the other hand, "enforced disappearances"[56] are attended by the following characteristics: an arrest, detention or abduction of a person by a government official or organized groups or private individuals acting with the direct or indirect acquiescence of the government; the refusal of the State to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of liberty which places such persons outside the protection of law. The United Nations Rapporteur on Summary or Arbitrary Executions and the United Nations High Commission on Human Rights defined

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[50] UN Manual on the Effective Protection and Investigation of Extralegal, Arbitrary and Summary Executions, ST/CSDHA/12-1991; Model Protocol for a Legal Investigation of Extralegal, Arbitrary and Summary Executions *available at* http://www.icrc.org (last accessed August 8, 2007).

[51] *Supra* note 20, at 3.

[52] The word "security" was taken from international human rights instruments. Note that Article 3 of the 1948 Universal Declaration of Human Rights provides that "Everyone has the right to life, liberty and security of person." This word is not textually present in the due process clause in Section 1 of the 1987 Philippine Constitution albeit its spirit has been argued to be part of the constitutional rights of the Filipino people, *see* Allan Verman Y. Ong, *Upholding the Right to Freedom from Fear*, 48 ATENEO L.J. 1260 (2004).

[53] Rule, §1.

[54] See in particular, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989).

[55] The Committee deliberated on the possible targets and reports from the past, which included not only prominent vocal political dissenters but also journalists and even religious officers.

[56] As defined in the Declaration on the Protection of All Persons from Enforced Disappearances.

summary executions as those which take place after some sort of judicial or legal proceedings which fall short of international minimum procedural or substantive standards, and *arbitrary executions* consist in the arbitrary deprivation of life as the result of the killing of a person carried out by order of the government or with its complicity or tolerance or acquiescence without any judicial or legal process.[57]

One of the more notable instruments considered by the Committee was the third preambular clause of the Declaration on the Protection of all Persons from Enforced Disappearance,[58] which states that:

> *Deeply concerned* that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the 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.[59]

In addition, the Committee took note of Article 2 of the International Convention for the Protection of all Persons from Enforced Disappearance[60] which states that:

> For the purposes of this Convention, "*enforced disappearance*" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside of the protection of the law.[61]

The Committee, however, resolved to consider possible domestic legislations which shall define the concepts of *extralegal killings* and *enforced disappearances* and to yield to such legislative definitions when, and if, such legislation shall come to pass.[62]

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[57] *See* Annexe One, Monitoring and Investigating Political Killings *available at* http://www.codesria.org/Links/Publications/amnesty/killings.pdf (last accessed December 1, 2007).

[58] General Assembly resolution 47/133 of 18 December 1992.

[59] Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly Resolution 47/133 of 18 December 1992.

[60] International Convention for the Protection of all Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/REV.4 of 23 September 2005 *available at* http://www1.umn.edu/humanrts/instree/disappearance.html (last accessed December 1, 2007).

[61] *Id.*

[62] *See* T.S.N., July 27, 2007.

The Committee worked on the Rule first, working on the processes and the remedies, as well as the possible orders, prior to discussing the definition. In the end, the Committee decided to let the definition of extralegal killings and enforced disappearances be left without a clear textual definition, because to do so may impair the workings of legislation designed for that purpose. They took notice of the fact that several bills were filed both in the House of Representatives as well as in the Senate of the Republic regarding the matter. In the end, the Committee would decide to define the nature of the petition and its coverage (what would become Section 1 of the Rule) instead of providing an elemental definition of the concept of extrajudicial killings and enforced disappearances. The Court, may, in future cases take note of definitions available through local and international laws and in so doing, amend the Rule as it stands.

V. JURISPRUDENTIAL EVOLUTION

Since the writ of *amparo* is still undefined under our Constitution and Rules of Court, Section 1 enumerates the constitutional rights protected by the writ, *i.e.*, *only* the right to life, liberty and security of persons. In other jurisdictions, the writ protects *all* constitutional rights. As shown above, the reason for limiting the coverage of its protection only to the right to life, liberty and security is that other Constitutional rights of our people are already enforced through different remedies.

Before the writ of *amparo*, the usual remedy availed of by petitioners aggrieved by extrajudicial killings and enforced disappearances is the special proceeding of *habeas corpus* under Rule 102 of the 1997 Revised Rules of Court. The proceeding is not in the nature of an adversarial action and simply seeks the issuance of the writ of *habeas corpus*, the most famous of all the writs in common law, which extends to all cases of illegal confinement or detention by which any person is deprived of his personal liberty, or by which the rightful custody of any person is withheld from the person entitled thereto.

Presently, the writ of *habeas corpus* is unable to provide adequate protection to the right to life, liberty and security of the person since denial of custody by the respondent would usually lead to the dismissal of the petition. Moreover, the petition for *habeas corpus* is not the appropriate remedy where the person is arrested by the police who claimed to have released him but still continued to be missing.

The writ of *amparo* seeks to fill these gaps in our existing procedural remedies. It proscribes general denials, prescribes a detailed return from the respondents, and may be filed simultaneously with *habeas corpus*. These writs are not meant to be mutually exclusive and they afford different remedies to the petitioner. In *amparo*, the interim reliefs provide quick and efficient protection to the movant while the petition is pending.

The Philippine version of the writ of Amparo has a broader coverage than its counterparts in other countries because it protects not only against actual violations but also against threats of violation of such rights. Likewise, it covers not only unlawful acts or omissions of public officials or employees, but also that of private individuals or entities. The petition for the writ is made available to more persons. It may be filed not only by the aggrieved party, but also by his family members and relatives, and by concerned citizens, organizations, associations or institutions as well.

It is one that has a liberalized rule on venue. The petition for the writ may be filed all over the Philippines. The petition may be filed in the Regional Trial Courts (RTCs), as well as in the *Sandiganbayan*, the Court of Appeals, and the Supreme Court. The venue for the writ should be made accessible so that a party may not need to travel much distance to be able to seek protection from the courts.

It is relatively costless and available to a pauper litigant. The writ shall be filed free of charge. There shall be no docket fees. This is in recognition of the fact that many of the possible victims are those who have less in life. Furthermore, there can be no premium to the right to life, liberty and security of a person.

The writ is an immediate remedy for threats to the right to life, liberty and security of a person. Upon the filing of the petition, the writ shall be issued immediately and a hearing shall be scheduled right away. The petition shall contain the personal information of the petitioner, the details about the respondent, the act or omission complained of, the investigations conducted if there were any, and the relief requested.

The writ of amparo imposes a higher standard of diligence (extraordinary diligence) on public officers or employees than on private individuals or entities (ordinary diligence). The reason for this distinction is because the public officer or employee is invested with some portion of the sovereign functions of the government for the benefit of the public and has a higher duty to protect the right to life, liberty and security of a person. There shall also be no presumption of regularity on the part of the public official or employee.

The writ imposes a heftier responsibility on the part of the respondents. A general denial from the respondent is not allowed. The respondent shall be required to give a full explanation and account in the return which shall be submitted to the court. This is to ensure that the respondent shall make a detailed return which will not only seek the persons liable but also help in the determination of their compliance with the standard of conduct required of them.

The hearing shall be summary in nature. This means a speedy response from the court; and this is why delaying tactics shall not be allowed. Hence, the Rule has a provision on prohibited pleadings and motions so as not to delay the proceedings. The hearing shall be from day to day and shall be given priority. The

court shall render judgment within ten (10) days from the time the petition is submitted for decision.

The Rule empowers the court to issue protective and instantaneous reliefs to the petitioner and his possible witnesses in the form of a temporary protection order (TPO), or a witness protection order (WPO), while the petition is being heard. The grant of a temporary protection to the petitioner and any member of the immediate family, as well as witnesses, is essential because their lives and safety may be at a higher risk once they file the *amparo* petition. They may be ordered to be under the safekeeping of government agencies, or persons and institutions accredited by the Supreme Court.

An inspection order for a particular place may also be issued upon motion and after being duly heard. The inspection order has a lifetime of five (5) days. The motion is required to describe the places to be inspected in particular detail. A production order for personal objects or documents, in tangible or electronic form, to enforce a party's right to seek evidence, may be granted by the court after due hearing.

The filing of the petition for the writ of amparo is not mutually exclusive with the filing of other reliefs (i.e. *habeas corpus*), as well as the filing of separate criminal, civil or administrative actions.

VI. CONCLUSION

In the study of life, as in the study of law, there is a most interesting phenomenon called *evolution.* The Supreme Court took bold steps in the promulgation of the rule on the Writ of Amparo, with the Committee on Revision of Rules looking at the drafting of the rule as an evolutionary process. As a judicial body, the Supreme Court has the primary duty to enforce rights legally demandable. How it can receive complaints, how it should go about its duty enforcing rights legally demandable – those are matters well-settled to be within the bounds of the Court's power to make rules. But given the postmodern interpretative role of the Supreme Court of its own powers, especially in the promulgation of rules that protect constitutional rights, it becomes a process worthy of examination; it becomes a phenomenon subject to legal phenomenology.

The right to freedom from arbitrary deprivation of life has long been recognized internationally and domestically. For the victims of extra-legal, arbitrary and summary executions this right hasnow found judicial safeguards despite the absence of clear positive legislation. As it is designed, the writ of *amparo* is a remedy for the protection of the right to life, liberty, and security of a person. These rights are broad enough to cover a whole gamut of constitutional rights – it remains to be

seen how the Supreme Court shall evolve jurisprudence based on a rule they promulgated.

In fine, it may be said that the true test of a rule is how well it stands the advent of the cases before the courts. But given that the Rule was enacted in a manner that can be characterized as evolutionary, there is nothing to prevent the Court from revising or even considering the promulgation of other rules pursuant to its rulemaking powers under the 1987 Constitution given a different set of circumstances and the vicissitudes and vindication of time.

In the rule on the writ of *amparo*, we may be seeing a new paradigm in constitutional law and human rights – the interpreters of the law who were once seen as passive observers, are now changing the observed behavior. Surely interesting times lie ahead and the question that will befuddle critical legal scholars, those who question the policy science behind legislation, even Remedial Law, would be the Hellenic query of "who watches the watchmen?"

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