THE WRIT OF AMPARO: A NEW LIGHTHOUSE FOR THE RULE OF LAW IN THE PHILIPPINES?*

*Paulo Cardinal***

> SERGEANT: *Habeas corpus. Do you know what habeas corpus is, Miss?*
> ANNE: *Of course… of course I do.*
> SERGEANT: *Well, it doesn't exist anymore. It's gone. We can keep you as long as we want, wherever we want. Don't need to ask a judge anymore, don't need to ask anybody. Don't even need to tell anyone where you've gone.* [1]
> -GLORIOUS 39, written and directed by Stephen Poliakoff

I. INTRODUCTORY NOTES

This paper attempts, from abroad and with all the risks that distance may imply, some analysis on the Philippine Writ of Amparo.[2] It simultaneously brings a comparative law approach as well as a historical account of the noble idea of Amparo while not forgetting some apex principles that underline and walk hand in hand with it. In Amparo, one also can detect the dichotomy of the *should be* opposed to the *is*.

---

* Cite as Paulo Cardinal, *The Writ of Amparo: A New Lighthouse for the Rule of Law in the Philippines?*, 86 PHIL. L.J. 230, (page cited) (2012).

** Invited Lecturer, Faculty of Law, Macau University. Senior Legal Adviser, Macau Legislative Assembly. The author expresses his gratitude to Dean Raul Pangalangan for his support as well as to Deborrah Cardinal in providing important bibliography, without which this piece would not be able to properly achieve its purposes. We also thank Luis Pessanha for his valuable comments and suggestions.

[1] GLORIOUS 39 (The British Broadcasting Corporation 2009).

[2] Phil. Sup. Ct., A.M. No. 07-9-12-SC (2007), Rule on the Writ of Amparo; Phil. Sup. Ct., A.M. No.08-1-16-SC (2008), Rule on the Writ of Habeas Data.

We start with an introductory note in order to understand the context of the Philippine remedy, then proceed with a comparative law approach by addressing both the aura of the Amparo — the idea of an implicit good— and its connection to underlying principles of the modern State with the Rule of Law as a central principle. The geography and history of Amparo will also be discussed. Finally, we dedicate our words to the genesis of the Philippine Writ of Amparo, a contextualization of connatural issues, and an overview of its main traits.

A note to recall what Amparo is: Amparo is an autonomous judicial mechanism envisaged to protect a plurality of fundamental rights and a substantive fundamental right *per se*.

Contrary to traditional popular belief, Amparo has become an irradiating hope in new corners of the world. It is no longer confined to the realms of Latin America and a few European States. This previous geopolitical confinement (and *criticism* in order to play down efforts to its consecration in other legal orders) is no longer a reality. On the contrary, Amparo mechanisms— whether with this christened name proper or not— are becoming solidly established in virtually all Latin America, in many European countries, in some African States and it is continuing discovering its way to Asia, namely to Macau, South Korea, and most recently to the Philippines.

The number of jurisdictions that are creating Amparo mechanisms is steadily increasing, besides touching new latitudes, and there is no news of receding jurisdictions — with one possible exception (Macau, and only as a result of a change of sovereignty exercise of powers)— meaning that, once you have it (Amparo) you will not want to let it go. The tastes of freedom, the aura of the rule of law, are true companions to creation, effective implementation, and development of this noble defender of fundamental rights. The Amparo claims a special place in the universe of the *jurisdiction of freedom*.

To recall the words of former President of the Inter-American Court of Human Rights, Héctor Fix-Zamudio, "I can declare, without any exaggeration, that the Amparo in its several modalities and designations… presents itself as contribute [sic] to the human rights procedural law… of the

same magnitude as the habeas corpus, the constitutional courts and the ombudsman."[3]

It is true, however, that the mere inexistence of Amparo in a given legal order does not brand such legal order as being outside the real of the *Rechtsstaat* club.[4] Several examples can attest to this: Portugal, Holland or Luxembourg, just to name few examples of States belonging to the continental legal family and that are undoubtedly members of the *Rule of Law Nationhood* and do not have the Amparo.

This does not impair, in any way, the extreme relevance and the emblematic power that is carried by the Amparo institutions nor undermines the Amparo consecration as a very important element in determining and/or pointing to the existence of the rule of law in a given legal order.

On a first note, when Amparo is in crisis, the solution is not the elimination of the remedy, but instead its reform— its adaptation to the growing attraction it unfolds. One of the problems faced by Amparo is the huge numbers of writs filed, flooding competent courts.[5]

---

[3] HÉCTOR FIX-ZAMUDIO AMPARO Y TUTELA: ENSAYOS SOBRE EL DERECHO DE AMPARO 696 (3rd ed. 2003).

[4] ANA ESPINOSA DÍAZ, EL RECURSO DE AMPARO: PROBLEMAS ANTES, Y DESPUÉS, DE LA REFORMA 2 (2010).

[5] *See* Aragón Reyes, *Problemas del Recurso de Amparo, available at* hdl.handle.net/10486/3108; Pablo Pérez Tremps, *Tribunal Constitucional, Juez Ordinario y Una Deuda Pendiente del Legislador*, *in* LA REFORMA DEL RECURSO DE AMPARO, TIRANT LO BLANCH 145, 177 (2004). *See, e.g.,* for Spain: Jutta Limbach, *Función y Significado del Recurso Constitucional en Alemania*, in CUESTIONES CONSTITUCIONALES 67 (2000); for Germany: Héctor Fix-Zamudio, *La Reforma en el Derecho de Amparo*, *in* ENSAYOS SOBRE EL DERECHO DE AMPARO (2003); for Mexico: Carlos Natarén, *Breves Reflexiones Sobre las Funciones del Amparo para Efectos y Las Propuestas de su Reforma, in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL [PAGES CITED] (Pons ed., 2008); for Argentina: Jorge Reinaldo Vanossi, *La Expectativa de Una Nueva "Ley de Amparo", in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL PAGES CITED] (Pons ed., 2008), *also available at* biblio.juridicas.unam.mx/libros/6/2561/29.pdf; for Nicaragua: Francisco Rosales Arguello, P*ropuesta de Reforma a la Ley de Amparo de Nicaragua*, *in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL [PAGES CITED] (Pons ed., 2008), *also available at* biblio.juridicas.unam.mx/libros/6/2561/27.pdf; SAMUEL YUPANQUI & PABLO PÉREZ TREMPS, LA REFORMA DEL PROCESO DE AMPARO: LA EXPERIENCIA COMPARADA [PAGES CITED] (2009); Gianluca Gentili, *A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court*, 29 PENN ST. INT'L L. REV. 709 (2011).

A good example would be the Spanish case, in which, before the reform, the load of Amparo cases were sometimes over 97% of the total amount of cases in the Constitutional Court.[6] The law, LO 6/2007, introduced reforms to the organic law of the Constitutional Court and to the Amparo proceedings by making it possible for the Court to ascertain, via a new added requisite, the *special constitutional transcendence* of the Amparo case at stake. This introduced apparently *cum grano salis* some objective tone[7] with a hint of *certiorari*[8] to the basically subjective Amparo.[9] But, one has again to underline, the Amparo survived, albeit somehow reshaped, and was not eradicated. The results of the reform are considered by some to still be underachieved in its main goal of reducing the number of Amparo appeals.[10]

A second note that is proper to present here is the fact that the *Idea* of Amparo is translated into legal texts, mostly of constitutional nature, under varied names. Be it Amparo, and in here we can have attached designations, in legal texts and in doctrine, such as appeal, recourse, action, remedy, *Juicio*, Writ, proceeding, be it other designations such as *Tutela*, Protection, or, somehow implying a different design, constitutional action of defence, constitutional complaint,[11] constitutional petition, security mandate, extraordinary appeal of unconstitutionality. All are tools that are designed for an *upgrade* judicial mechanism envisaged exclusively for defending, protecting, upholding a set of fundamental rights, be it of a large number or of a relatively reduced number

---

[6]Constitutional Court of Spain, *Estadisticas, available at* www.tribunalconstitucional.es/en/tribunal/estadisticas/Pages/Estadistica.aspx (last modified Sept. 2008).

[7] Mario Hernández Ramos, *La Especial Trascendencia Constitucional del Recurso de Amparo y Su Aplicación en la Jurisprudencia del Tribunal Constitucional: Luces y Sombras de Cuatro Años de Actividad*, REVISTA ARANZADI DOCTRINAL 3 (2011).

[8] Aragón Reyes, *La Reforma de la Ley Orgánica del Tribunal Constituciona*, 85 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 19-20 (2009).

[9] *See supra* note 4. *See also* Ramos *supra* note 7; Reyes *supra* note 8 at 85; Mario Hernandez Ramos, *Propuesta de desarrollo del nuevo trámite de admisión del recurso de amparo: aspectos materiales y procedimentales*, 73 REVISTA DE LAS CORTES GENERALES 31 (2008); Manuel Pulido Quecedo, *El Requisito de "La Especial Trascendencia Constitucional" en el Recurso de Amparo*, REVISTA ARANZADI DOCTRINAL, (2009). *See infra* note 10.

[10] *See supra* note 4 at 17.

[11] Jutta Limbach, *Función y Significado del Recurso Constitucional en Alemania*, *in* Cuestiones Constitucionales 3, 69 (2000); Héctor Fix-Zamudio, *El Juicio de Amparo Mexicano y el Derecho Constitucional Comparado, in* ENSAYOS SOBRE EL DERECHO DE AMPARO 667 (2003).

of fundamental rights endowed with this possibility of judicial protection.[12] Hence, it is not a mechanism built around and purporting to defend only a sole type of fundamental right, as is the most notable case of *habeas corpus vis-à-vis* freedom.

Under the umbrella of the Amparo in general, or other terminology used such as constitutional complaint, when one dives into the specific rules in place in a given jurisdiction one will find a multitude of concrete solutions. "As practised, Amparo has been found so flexible to the particular situations of each country that, while retaining essence, it has developed various procedural forms."[13]

The application of the Amparo in a variety of situations raises not only technical questions but also basic structural considerations.[14] For example, the scope of the Amparo— does it cover all fundamental rights or does it limit itself to the formal constitutional rights? Does it apply only to a certain group of constitutional rights inserted in a given chapter of the constitution? Does it confine itself to only a reduced number of fundamental rights established in the constitutional text?

Also, what are the competent courts? Any of the existing ones irrespective of their standing within the judiciary organization? Only the Constitutional Court, where it exists, or the Supreme Court? Or, regarding some cases, a certain kind of courts like administrative ones whereas in other cases, the competence rests in the Supreme Court?

Against whom can Amparo be brought — against the acts of public authorities only, or, in some circumstances, can it be used against private persons? Who are the subjects of Amparo— only individuals or collective

---

[12] Allan Brewer-Carías, *The Latin American Amparo Proceeding and the Writ of Amparo in the Philippines*, 1 CITY.U. L.R. 1, 73 (2009). He writes that the Latin American Amparo is "an extraordinary judicial remedy specifically conceived for the protection of constitutional rights".

[13] Adolfo Azcuna, *The Writ of Amparo: a Remedy to Enforce Fundamental Rights*, 37 ATENEO L.J. 2, 15 (1993).

[14] Jorge Tinoco, *Domestic and International Judicial Protection Of Fundamental Rights: A Latin American Comparative Perspective*, *in* ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS PERSPECTIVES OF EVOLUTION: ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 343 (Cardinal & Oliveira eds., 2009). He says: "Although the term Amparo is widely known in many countries, when it comes to explaining its variations, the precision of a surgeon is likely to be needed."

persons? Even within the ambit of public authorities one can find different rules. For example, in some jurisdictions, the Amparo can be used against judicial decisions that are reported to be in direct violation of fundamental rights whereas in some other, Amparo can be directed only against acts of the executive realm. Some other distinctions operate in order to reduce the scope of the Amparo relating not (only) to the body that enacts the act but also considering the nature of the act at stake. One more possibility that one can find in some legal systems, is the Amparo against normative acts deemed to be unconstitutional.

Who can file the Amparo— only the person affected in its fundamental right, or can someone else petition for the writ in cases when the subject whose right is violated is in a situation that makes him incapable to assume his own defense personally?

Can the Amparo be used only in cases of actual violation of fundamental rights, or can it extend to threats of violations? Can it only repair, or can it also prevent? If the Amparo is granted, what is the set of powers that the court can use? And what is the range of powers? Can it be used directly to *solve* the problem, or only send the case back to a lower court to decide upon the problem? Is the Amparo an immediate answer to the violation of a fundamental right, or does it operate as a last resort, requiring previous exhaustion of normal remedies?[15]

Is the Amparo an immediate answer to the violation of the fundamental right or, on the contrary, it operates as a sort of last resort hence imposing the previous exhaustion of normal remedies?

One can find different rules and treatment across jurisdictions. In some, the Amparo is used against judicial decisions that are reported to be in direct violation of fundamental rights. In others, Amparo is directed only against acts of the executive realm. Sometimes other distinctions are made by the body that issues the writ to reduce the scope of the Amparo, such as

---

[15] *See supra* note 3, at 3; note 12; Gentili, *supra* note 5, at 705; Tinoco, *supra* note 14, at 339. *See also* ALFONSO HERRERA GARCÍA, SINOPSIS COMPARATIVA SOBRE EL DERECHO DE AMPARO EN EL MUNDO 1223 (YEAR); Paulo Cardinal, *O Amparo de Direitos Fundamentais no Direito Comparado e no Ordenamento Jurídico de Macau*, 3 REVISTA JURÍDICA DE MACAU 51(YEAR); Hector Fix-Zamudio, *The Writ of Amparo in Latin America*, 13 LAWYER OF THE AMERICAS 361 (1981).

distinguishing the nature of the act at stake. The Amparo is also used against normative acts deemed to be unconstitutional.

One can find different rules and treatment across jurisdictions. In some, the Amparo is used against judicial decisions that are reported to be in direct violation of fundamental rights. In others, Amparo is directed only against acts of the executive realm. Sometimes other distinctions are made by the body that issues the writ to reduce the scope of the Amparo, such as distinguishing the nature of the act at stake. The Amparo is also used against normative acts deemed to be unconstitutional.

On a final note, in many legal systems the Amparo is not only a mechanism for the protection of fundamental rights, but also a fundamental right in itself.

II. THE AURA OF AMPARO AS HOLDING AN INTRINSIC GOOD

The Amparo carries an aura of uncommon magnitude associated with principles and values, such as the rule of law, the principle of constitutionality, and safeguarding fundamental human rights,[16] promoting effective implementation of fundamental rights,[17] and the judiciary as the bastion of fundamental rights.

The existence of the Amparo in a given jurisdiction is an important indicator of a society built on the paramount values of human dignity and democracy and a legal system endowed with a *pro libertate* and *pro homine* regimen, having some referring to it as showing "the undeniable expansive strength and an institution that goes hand in hand with the consolidation of

---

[16] *See* Gonzalo Aguilar Cavallo, *Derechos Fundamentales-Derechos Humanos. ¿Una Distinción Válida En El Siglo XXI?*, in BOLETÍN MEXICANO DE DERECHO COMPARADO 127, 15 (2010). One is aware of possible distinctions between human rights and fundamental rights, but for the purpose of this paper we use both expressions as synonyms and can use it interchangeably unless otherwise stated.

[17] The Venice Commission, the Council of Europe's advisory body on constitutional matters, already stated: "The function of constitutional complaint is in principle the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions.", 024 CDL-AD (2004).

the democratic freedoms."[18] However, it is only an indicator, not a watertight proof of those values actually set in place.[19]

As Allan Brewer-Carías cautions, "[t]he formal regulations of Amparo are important but not enough to assure the effectiveness of the said remedy, which really depends on the existence of an effective independent and autonomous judiciary which may only be possible in democratic societies."[20] The same author states:

> This is the basic condition for the enjoyment of constitutional rights and for their protection, to the point that the judicial protection of human rights can be achieved in democratic regimes even without the existence of formal constitutional declarations of rights or of the provisions for extraordinary means or remedies. Conversely, even with extensive declarations of rights and the provision of the Amparo proceeding in the constitutions to assure their protection, the effectiveness of it depends on the existence of a democratic political system based on the rule of law, the principle of the separation of powers, the existence of checks and balances between different branches of the government, and on the possibility of the State powers to be effectively controlled, among others, by means of the judiciary. Only in such situations is it possible for a person to effectively have his rights protected.[21]

Bearing in mind these cautions, one should nevertheless underline the importance of the concept from several stances: historically, symbolically,

---

[18] Diego Valadés, *Exordio*, EL DERECHO DE AMPARO EN EL MUNDO 12, (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006). As [AUTHOR QUOTED] puts it: "Systems of direct access to constitutional and supreme courts are generally considered positively, as they can supplement the existing avenues for access to constitutional or supreme courts and provide protection of fundamental rights in so-called "grey areas" not covered by these types of remedies." *See* Gentili, *supra* note 5.

[19] Giancarlo Rolla, *Técnicas de Garantia y Cláusulas de Interpretación de los Derechos Fundamentales: Consideraciones Sobre Las Constituciones de América Latina y de la Unión Europea*, (2006), *available at* www.crdc.unige.it/docs/articles/messico.pdf (last visited Mar. 2013). He writes: "The recognition of the fundamental rights must be accompanied by the codification of instruments of institutional guarantee that can as much be general, as of sectorial nature."

[20] Brewer-Carías, *supra* note 12, at 90.

[21] *Id.*

legally, academically, and practically. It is a concept proven to have an uncommon capacity to be exported as a globalized phenomenon.[22]

The concept of Amparo is a strong motivating item for academic research in the field of comparative constitutional law. European academics studying the Latin American constitutional justice systems are most attracted by the concept of Amparo.[23] On the other hand, as already said elsewhere, the Amparo is involved in many operations of circulation between legal systems interacting, influencing and re-influencing, being a paradigm of import/export and also of re-importation of the institution proper and the concrete solutions and adaptations to the legal systems in general and to the fundamental rights and constitutional review systems.[24] It is thus a recurrent institution in transplanted constitutionalism.[25]

It seems relevant, and of good use, to bring in here some general considerations on the Amparo and its impact on constitutionality in general and on fundamental rights in particular.[26]

Some authors have used plastic expressions labelling the institute such as the magic that is associated to its name, the strong fascination that irradiates,[27] or the Writ of Amparo as a legal remedy that "could pierce the veil of impunity,"[28] or a undoubted proved capacity in the defence of the

---

[22] Eduardo Ferrer Mac-Gregor, *Breves Notas Sobre el Amparo Iberoamericano (Desde el Derecho Procesal Constitucional Comparado), in* EL DERECHO DE AMPARO EN EL MUNDO 12 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006).

[23] Giancarlo Rolla & Eleonora Ceccherini, *Sritti di Diritto Costituzionale Comparato* 167 (3rd ed. 2005).

[24] Paulo Cardinal, *La Institución del Recurso de Amparo de los Derechos Fundamentales y La Juslusofonia: Los Casos de Macau y Cabo Verde*, *in* EL DERECHO DE AMPARO EN EL MUNDO 892 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006). *See also*, Tinoco, *supra* note 14, at 339; Rolla & Ceccherini, *supra* note 23.

[25] Raul Pangalangan, *Transplanted Constitutionalism: The Philippine Debate on the Secular State and the Rule of Law*, 82 PHIL L.J., 1-23 (2008).

[26] Paulo Cardinal, *Revisiting the Macanese Amparo of Fundamental Rights: A Quest under the Searchlight of the Principle of Continuity with a Stopover in Comparative Law,* 83 PHIL L.J. 833, 833-849 (2009).

[27] Garrido Falla, *Tratado de Derecho Administrativo*, 368 (11th ed.); Alexandre Sousa Pinheiro & Mário Brito Fernandes, *Comentário à IV Revisão Constitucional*, 104 A.A.F.D.L. (1998).

[28] Alexander Remollino, *The Writ of Amparo and A.O. 197,* BULATLAT, Oct. 20, 2007, ¶ 1, *available at* bulatlat.com/main/2007/10/20/the-writ-of-Amparo-and-ao-197 (last visited Mar. 2013).

fundamental rights and a evident operationally and efficacy.[29] or a reference[30] emphasizing that constitutional Amparo is one of the most relevant contemporary juridical institutions in the defense of the human rights, democracy and the Rechtsstaat.[31]

In relation to specific jurisdictions one can find depictions such as, for Spain, undoubtedly one of the key institutions of the constitutional order,[32] regarding Germany, as the "Queen" of the ways of access to the Federal Constitutional Court and being closely linked to the development of the Idea of the Rechtsstaat, [33] and also "the constitutional complaint (Article 93 Section 1 Subsection 4 of the Basic Law): it turns the Federal Constitutional Court into a "citizens' court." The access granted by the Federal Constitutional Court to everyone has profoundly increased the awareness of the citizens of the role of the Court vis-à-vis public authority.[34]

Turning to the Latin American model of constitutional justice, the Amparo takes outstanding status as a privileged mechanism of judicial guarantee of constitutional rights.[35] In South Korea, it is well underlined the

---

[29] Wladimir Brito, *O Amparo Constitucional*, Special Issue REVISTA JURÍDICA DE MACAU 87, 94 (Cardinal ed., 1999).

[30] Carlos Ayala Corao & Rafael Chavero Gadzik, *El Amparo Constitucional en Venezuela*, *in* EL DERECHO DE AMPARO EN EL MUNDO 649 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006).

[31] The common law concept of the Rule of Law, also known as *État de Droit*, *Estado de Direito*, and *Estado de Derecho*, is extensively discussed in academic literature. *See* Barry Hager, THE RULE OF LAW: A LEXICON FOR POLICY MAKERS 3, 7 (2000). Hager writes: "Other linguistic terms arose that more closely track the "the Rule of Law" formulation, notably the Rechtsstaat of German law and the *etat de droit* in French thought" and, yet, "Something more is intended by the words used in European legal traditions than simply saying that governments too are bound by the laws that govern individuals." *See also* Diego Valadés, *The Rule Of Law as a Cultural Problem*, 5 MEXICAN LAW REVIEW 1 (2006). He writes: "In this text, the expression "Rule of Law" does not correspond to what is commonly understood in English terms, but in the sense of the Spanish *estado de derecho* or in the German *Rechtsstaat*."

[32] Encarna Carmona Cuenca, LA CRISIS DEL RECURSO DE AMPARO: LA PROTECCIÓN DE LOS DERECHOS FUNDAMENTALES ENTRE EL PODER JUDICIAL Y EL TRIBUNAL CONSTITUCIONAL 23 (2005).

[33] Peter Haberle, *El Recurso de Amparo en el Sistema de Jurisdicción Constitucional de la República Federal de Alemania*, *in* EL DERECHO DE AMPARO EN EL MUNDO 726 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006).

[34] Peter Haberle, *El Recurso de Amparo en el Sistema Germano-Federal de Jurisdicción Constitucional*, Special Issue REVISTA JURÍDICA DE MACAU 182 (1999).

[35] *See, e.g.,* Fix-Zamudio, *supra* note 11, at 847; Tinoco, *supra* note 14, at 339.

importance of the constitutional petition in strengthening the fundamental rights, curving abuses of public powers and fulfilling the effective implementation of (the) fundamental rights.[36] Or, shifting continents, a superior valourative intention *ex vi* its creation by the Cape Verde Constitution.[37]

We could— virtually in an unending way and with plenty of beautifully putted words — borrow more from so many other authors from several varied geo-political contexts or could simply endorse a *personal* statement but we do believe that the previous references *speak for volumes* in so many ways that are already enough *per se* to convey what we propose to.

One could just add that the Amparo can be seen as a sort of branded perfume that exhales a fragrance of enchantment when it comes to promoting and protecting fundamental rights[38] and, by the end of the day, in effectively contributing to the affirmation and consecration of human dignity.[39] A dignity that all humans are entitled to have and to enjoy irrespective of the jurisdiction they are subjected to.

---

[36] Ahn Kyong-Whan, *The Constitutional Court and Legal Changes in Korea: Post 1987 Development*, *in* DERECHO COMPARADO ASIA-MÉXICO CULTURAS Y SISTEMAS JURÍDICOS COMPARADOS, 59 (Serna de la Garza ed., 2007).

[37] José Lopes da Graça, *O Recurso de Amparo No Sistema Constitucional Cabo-Verdiano*, 2 DIREITO E CIDADANIA 200 (1998).

[38] Naturally, as with all perfumes, by itself it does not singly guarantees that the subject is with good odor. It contributes too, decisively, but singlehanded cannot guarantee it.

[39] The literature is virtually unending and it does not fit *per se* in the present paper. One however cannot but recall the words of Immanuel Kant, "Humanity is itself a dignity, since Man cannot be utilized merely as a means by other Man neither by others nor by himself, having to be always utilized as an end, and, in this, it precisely consists its dignity", as translated from A METAFÍSICA DOS COSTUMES 413 (2005). On this apex principle structuring a fundamental rights system (and the organizatory one), Haberle, tells us that the human dignity is a anthropological-cultural premise of the Constitutional State. PETER HABERLE, EL ESTADO CONSTITCIONAL 169 (2003). GOMES CANOTILHO & VITAL MOREIRA, CONSTITUIÇÃO ANOTADA, 198 (4th ed., 2007). Canotilho and Moreira state that this principle constitutes a standard of universal protection, a pre-condition and basis of the Republic and the basis of consecration of many fundamental rights endowing them with an inherent personality among other functions. LUIS DIEZ-PICAZO, SISTEMA DE DERECHOS FUNDAMENTALES 68 (2nd ed., 2005). Picazo states: "The constitutional democracy is not considered viable if it does not adopt as permanent criteria of guidance the dignity of the human person…". Rolla notes as well the principle's normative value. GIANCARLO ROLLA, EL VALOR NORMATIVO DEL PRINCIPIO DE LA DIGNIDAD HUMANA, [PAGES CITED] (YEAR).

III. THE GEOGRAPHY AND HISTORY OF AMPARO

It seems adequate to attempt to provide in a concise nutshell way both the geography and the history of the Amparo— encompassing all modalities as seen in the introductory notes, namely pointing out the increasing globalization of the idea of Amparo and the two main epicentres of its irradiation, the Mexican one and the German one.

The Amparo has irradiated to an increasingly number of states and expanded its traditional geography notably to the Eastern Europe area in a manner that in what concerns the "individual constitutional appeal" the openness of the constitutional jurisdiction systems is remarkable most specially when compared with the western European countries.[40]

In fact, besides covering the vast majority of Central and South America,[41] the Amparo— although using different *nomen iuris* and specific procedural and substantive designs, thus varying in shape and depth— is to be found in western Europe like in Spain and Germany,[42] and also in many central and eastern European states such as Russia, Slovenia, Poland,[43] in Asia[44] as in

---

[40] Michele Mistó, *La Giustizia Costituzionale nei Paeisi dell'Europa Centro-orientale*, *in* LA GIUSTIZIA COSTITUZIONALE IN EUROPA 321 (Olivetti & Groppi eds., 2003).

[41] *See supra* note 12, at 78. The Writ of Amparo exists in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. With the sole exception of Cuba, the Writ of Amparo is regulated as a special judicial means exclusively designed for the protection of human rights, as Brewer-Carias explains.

[42] Further examples include Switzerland, Austria, Liechtenstein, and Andorra. *Compare with* France. *See* Ann Creelman, *US-Style Judicial Review for France? A Major Reform of French Constitutional Law: the QPC,* [JOURNAL NAME] [PAGES CITED] (YEAR), *also available at* www.primerus.com/files/US-Style%20Judicial%20Review%20for%20France(2).pdf; Gerald Neuman, *Anti-Ashwander: Constitutional Litigation As A First Resort In France*, 43 JOURNAL OF INTERNATIONAL LAW AND POLITICS 15 (2010).

[43] *See* Gentili, *supra* note 5. Aside from Poland, the Writ of Amparo can be found in Albania, Armenia, Czech Republic, Croatia, Estonia, Georgia, Hungary, Latvia, Macedonia, Montenegro, Poland, Russia, Serbia, Slovakia, Slovenia, and Ukraine. *See also* [AUTHOR], EL DERECHO DE AMPARO EN EL MUNDO [PAGES CITED] (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006). One also includes Turkey in the list of countries that have included the Writ of Amparo. *See, e.g.,* Council of Europe, *Opinion On The Law On The Establishment And Rules Of Procedure Of The Constitutional Court Of Turkey*, adopted by the

South Korea, Taiwan,[45] or, very recently, the Philippines, and in Africa, Cape Verde or Angola.[46]

With respect to Asia, Macau is a special case since although the general Amparo is considered by the judiciary to be extinguished, some authors believe otherwise and some specific Amparos do exist beyond doubt for fundamental rights and freedoms of assembly and demonstration and privacy and data protection.[47]

It is of relevance to leave here some extra words on other Asian cases, that is, South Korea and Taiwan, namely to dismantle possible lines of argumentation and denial of the adequacy of such mechanisms of protection

---

Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011); Law No. 5982 (2010). Though some authors have included Greece and Belgium to the list of countries that have adopted the Writ, we do not, yet at least, fully concur with those *inclusive* opinions, for a number of reasons—mostly for, generally speaking, a too strong objective procedure—defending the legal order—rather than a subjective one—primarily defending one's subjective fundamental rights.

[44] Macau is a special case since although the general Amparo is considered by the judiciary to be extinguished, some authors believe otherwise and some specific Amparos do exist beyond doubt for fundamental rights and freedoms of assembly and demonstration and privacy and data protection. *See supra* note 26.

[45] The cases of Nepal, India, and Sri Lanka can also be included. *See* Cardinal, *supra* note 15, at 51; António Katchi, AS FONTES DO DIREITO EM MACAU 172 (2006); Bipin Adhikari & B.P. Bhandari, *Quest for Additional Substance and Procedures Towards Protection of Fundamental Rights in Developing Countries*, Special Issue REVISTA JURÍDICA DE MACAU 119 (1999). In the case of Azerbaijan, *see* The Law of Azerbaijan Republic on Constitutional Court, art. 34. Complaints. Art. 34.1: "Any person who alleges that his/her rights and freedoms have been violated by the normative legal act of the Legislative and Executive, act of municipality and courts may submit complaint to Constitutional Court to resolve matters provided for by paragraphs 1-3 of part III of Article 130 of the Constitution of Azerbaijan Republic in order to restore his/her human rights and freedoms".

[46] In South Africa, the Writ of Amparo exists by virtue of Article 167 (6)(a) of the Constitution and of Article 18 of Rules of the Court. *See* Rules of Court, GN RI675 (2003), *available at* www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm#18. *See, e.g.*, Gianluca Gentili, *A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court,* 29 PENN ST. INT'L L. REV. 705, 733 (2011). In the case of Cape Verde, *see* [AUTHOR] La Institución del Recurso de Amparo de los Derechos Fundamentales y la Juslusofonia – los casos de Macau y Cabo Verde [PAGES] (YEAR). In the Angola case, the nature of Amparo as an "extraordinary appeal of unconstitutionality" is established through the Organic Law of the Constitutional Court and the Organic Law of Constitutional Procedure. *See* JOSÉ MELO ALEXANDRINO, ELEMENTOS DE DIREITO PÚBLICO LUSÓFONO, 204 (2011).

[47] *See supra* note 24.

of fundamental rights in the Asia geo-political context and its own cultural and juridical different background that would rather deny the accommodation of Amparo institutes in their legal systems.[48]

But first, it is adequate to point out the forces behind the increasing globalization of the concept by concisely providing the geography and history of Amparo, beginning with its birth in the Mexican and German legal systems.

A close look at the basic structural principles of Amparo allows us to differentiate two main currents within the general concept. The Latin American current, which originated in Mexico, extends to Central and South America as well as Capo Verde.[49] The other concept is centred on the German constitutional complaint and found its way to the Central and Eastern European States as well as South Korea. [50]

The origin of the Amparo is generally considered to be nineteenth century Mexico.[51] It emerged first in 1841 in the state constitution of Yucatan, and later in the federal constitution by virtue of the Reforming Act of 1847. It was further established in the 1857 Constitution, and finally solidified in the 1917 Constitution laying down the structural basis of Amparo in its articles 103 and 107.[52] Mexico directly or indirectly influenced other Latin American countries in several phases. Even though much of the Mexican Amparo solutions were not adopted by the other countries,[53] the uncontested fact is

---

[48] *See also* Hager, *supra* note 31, at 13; Valadés, *supra* note 31; Haberle, EL ESTADO CONSTITUCIONAL, 1, 21 (2003).

[49] *See supra* note 14 for a brief history on the influence of the Mexican Writ of Amparo in Latin America.

[50] *See supra* note 19.

[51] Eduardo Ferrer Mac-Gregor, *Breves Notas Sobre el Amparo Iberoamericano: Desde El Derecho Procesal Constitucional Comparado, in* [TITLE OF BOOK] 15 (2006), *also available at* www.redalyc.org/articulo.oa?id=72001513 (last visited Mar. 2013).

[52] The current law is complex and extensive, with approximately 240 articles. It was regulated for the first time in November 1861.

[53] One should be a bit cautious in referring to expansion since the model created in Mexico was never imported by any country in some of its rather relevant traits, such as the existence of five clearly different sectors: the *habeas corpus* look alike, the agrarian or social one, the Amparo against judicial decisions via a French *casssation* model, the Amparo against laws and the administrative Amparo.

that "the Mexican Amparo remains the most commonly referred to proceeding outside Latin America."[54]

The Mexican Amparo is said to be the result of the influence of the North American system of judicial review of constitutionality of statutes. The legal concept was transplanted from the United States into a Hispanic environment influenced by some French law. Thus, Héctor Fiz-Zamudio refers to the creation of Amparo as being the confluence of the common law and the continental legal family.[55]

Going further back in time, Spanish law played a decisive role in formulating the concept of Amparo. Even if indirectly, Aragon law *ex vi* the *procesos forales* and the *Justicia Mayor* of the mid-13th century influenced the Amparo, particularly in its textual formation.[56] Besides the use of the Spanish language to name the concept, for *Amparo* means "protection" or "help" in Castilian,[57] Spain introduced the *colonial Amparo* or *royal Amparos*. Portuguese ancient laws also influenced the Brazilian institutes of *habeas corpus* and *security mandate*, a modality of Amparo, which can be traced to the institute of security provided by a mandate established in both the *Ordinations of the Kingdom of Portugal* and the *Philippines Ordinations*.[58]

If one examines the construct of constitutional complaint, one can find possible antecedents within the German legal system, specifically with the German *Verfassungbeschwerde*. As Jutta Limbach points out, these forms of constitutional complaint include the *Reichkammergericht* of the Holy Roman-German Empire — possibility of presenting a complaint against a Prince that denied juridical protection— and the Saint Paul Church Constitution in the mid-19th century— the never enforced possibility of reacting to the violation of a citizen constitutional right before the *Reichgerischt*.[59] The direct antecedent of the modern constitutional complaint was the creation in the Bavaria Constitution of 1919 of a judicial mechanism in the Court of the State dealing

---

[54] *See supra* note 12, at 77-79. *See also* Hector Fix-Zamudio, *Evolución y Perspectivas del Derecho de Amparo Mexicano y Su Proyección Supranacional*, *in* ENSAYOS SOBRE EL DERECHO DE AMPARO 795 (2003).

[55] Fix-Zamudio *supra* note 11, at 425.

[56] *See supra* note 28-29

[57] *Id.*

[58] *See* Cardinal, *supra* note 24, at 893-4; Marcello Caetano, *As Garantias Jurisdicionais No Direito Comparado de Portugal e do Brasil*, *in* ESTUDOS DE DIREITO ADMINISTRATIVO 342 (1974).

[59] Limbach, *supra* note 5, at 3, 69.

with a violation of a right by any public authority. Some authors also add a possible Austrian influence via the *Beschwerde* found in the fundamental law of the Austro-Hungary Empire Supreme Court from 1867 onwards.[60]

Before we focus on the Amparo in the Philippine context, it is necessary to delve further into Asian cases in order to pre-empt the argument that the Amparo is an inadequate mechanism for the protection of fundamental rights because Asia has an inherently different geo-political and cultural background from Latin America and Germany.

In South Korea, constitutional complaints are a constitutional litigation that was adopted when the Constitutional Court was created. Under the Constitutional Court Act, any person whose constitutionally guaranteed fundamental rights have been infringed through the exercise or omission of governmental powers may petition the said court for relief. If a legislative act, presidential decree, ordinance or other law directly infringes upon an individual's fundamental rights, said individual may file a constitutional complaint against the law itself. Since the Korean Amparo is viewed as a special and supplemental remedy for fundamental rights, those who want to file a constitutional complaint must exhaust all prior procedures to remedy the situation, if any is provided for by law. However, the Court has established some exceptions to this principle. For instance, if a case contains a significant constitutional issue, the merit of the case can still be heard, despite the fact that the petitioner did not exhaust all procedures.[61] As to the success of this new mechanism one can say that currently in Korea, "the proportion of constitutional complaint cases in comparison to the total number of all cases has been the highest."[62]

---

[60] *See supra* note 28, at 682.

[61] As [AUTHOR] said, "*Today, the constitutional complaint plays a role that is very important in order to guarantee the human rights and freedoms in Korea.*" Jeon Hak-Seon, *L'application du Principe de Proportionnalité dans la Justice Constitutionnelle en Corée*, 7th World Congress of the International Association of Constitutional Law (2007), *available at* www.enelsyn.gr/papers/w15/Paper%20by%20Prof.%20JEON%20Hak-Seon.pdf (last visited Mar. 2013). *See also*, Chee Youn Hwang, *Critics on the Constitutional Complaint against the Ordinary Courts' Judgments in Terms of Balancing and Proportionality Test in Korean Constitutional Review*, 7th World Congress of the International Association of Constitutional Law (2007), *available at* www.enelsyn.gr/papers/w15/Paper%20by%20Dr.%20Hwang,%20Chee%20Youn.pdf; Ahn Kyong-Whan, *supra* note 36.

[62] Chee Youn Hwang, *supra* note 61.

In Taiwan, the role of the Judicial Yuan Court, the highest judicial organ, in improving the human rights through the Amparo is widely acknowledged.[63] The Constitutional Interpretation Procedure Act of 1993, establishes:

> A petition for an interpretation of the Constitution may be filed under one of the following circumstances:
>
> (2) Where an individual, a legal person, or a political party, having exhausted all judicial remedies provided by law, alleges that her/his/its constitutional rights have been infringed upon and thereby questions the constitutionality of the law or order applied by the court of last resort in its final decision.

The judicial activism of the high court has been considered a precious tool in the advancement of rule of law and the protection of fundamental rights, gaining widespread public support.[64]

Besides domestic constitutional and legal orders, Amparo also exists in international law, namely in the scope of the Inter-American system, i.e., the 1969 American Convention on Human Rights and the Inter-American Court of Human Rights.[65] As it was written:

> The American Convention on Human Rights … has played an important role regarding the consolidation of the Amparo proceeding. In this sense, Amparo is conceived in the Convention as a 'right to judicial protection,' that is, the right of everyone to have 'a simple and prompt recourse, or any other effective recourse, before a competent court or tribunal for protection (*que la ampare*) against acts that violate

---

[63] CHANG-FA LO, THE LEGAL CULTURE AND SYSTEM OF TAIWAN 26-27, 50 (2006). *See also* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 123 (2003).

[64] *See* Tsung Fu Chen, *The Rule of Law in Taiwan*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 110 (2000).

[65] *See* Sergio García Ramírez, *La Protección de Derechos y Libertades en el Sistema Jurisdiccional Interamericano: El Amparo Interamericano*, *in* EL DERECHO DE AMPARO EN EL MUNDO [PAGES CITED] (Fix-Zamudio & Eduardo Ferrer Mac-Gregor ed., 2006); Brewer-Carías, *supra* note 12, at 73; Allan Brewer-Carías, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 163 (2009).

> his fundamental rights recognised by the Constitution or laws of the State or by this Convention. [66]

Returning now to the present, a closer look to the basic structural principles can allow us to detect that one can try to differentiate within the big Amparo idea, two main currents, one that can be labelled the Latin American one that exists in central and South America, but also for example in Cape Verde, and usually expresses itself in Spanish and was originated in Mexico, and another one that is centred around the German constitutional complaint and found its way basically to the Central and Eastern European States but also in, for example, South Korea.

On the other hand, it is obvious that the Amparo remedy strives mostly in jurisdictions within the continental legal family, also named Roman-German legal family, and, usually from a common law stand point, the civil law legal family. The genuine cases of generic Amparo ideas and institutions in common law legal systems are scarce as well as in the so-called mixed or hybrid legal systems.

In short, one can assure that the Amparo is gaining ground. It is present in all continents except maybe for Oceania,[67] spreading to different geopolitical contexts. It is a popular institute— so popular that it provoked serious crisis in some countries by flooding the competent courts with cases, but never to a point in which its elimination was an option. On the contrary, in jurisdictions where the mechanism does not exist, there is a tendency to establish or, in the case of Macau,[68] to formally reinstate the concept in the legal system.[69]

---

[66] *See supra* note 12.

[67] Although one can possibly assert the existence of an Amparo case, in Western Samoa, Constitution (1960): "Article 4. Remedies for enforcement of rights. (1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part. (2) The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Part."

[68] *See, e.g.*, Paulo Cardinal, *The Judicial Guarantees of Fundamental Rights in the Macau Legal System: A Parcours Under the Focus of Continuity and of Autonomy*, *in* ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS: PERSPECTIVES OF EVOLUTION: ESSAYS ON MACAU'S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 264 (Cardinal & Oliveira eds., 2009); Jorge Novais, *As Restrições Aos Direitos Fundamentais na Ordem Jurídica de Macau*, paper presented at the *Segundas Jornadas de Direito e Cidadania da Assembleia Legislativa Direitos Fundamentais Consolidação e Perspectivas de Evolução (*2008); Jorge Godinho & Paulo Cardinal,

The noble idea of Amparo is alive and expanding.[70] It is reforming and adapting to the surrounding circumstances. It is in no way being sentenced to death, but carries the light of hope with it especially in jurisdictions where the rule of law is suffering.

IV. THE GENESIS OF THE PHILIPPINE WRIT OF AMPARO

In the Philippine Constitution there is no establishment of the Writ of Amparo, nor there was in previous constitutions.

The genesis and history of the Philippine Writ of Amparo (and the writ of *habeas data*) is dramatic.[71] People were being assassinated. People were

---

The Macau Court of Final Appeal: The First Decade, forthcoming in HONG KONG'S COURT OF FINAL APPEAL: THE ANDREW LI COURT 1997-2010 (Ghai & Young eds., 2013). The press has suggested the creation of the Writ of Amparo. *See, e.g.,* SEVERO PORTELA, DEMOCRATAS, TEMPERADOS E REALISTAS, HOJE MACAU 13 (2008).

[69] For example in Portugal there are many scholars advocating the introduction of the Amparo and there were formal attempts to introduce it in the Constitution albeit to no success up to now. In fact, a strong recent movement in Portugal can be seen claiming the introduction of the Amparo, even if with the necessary adaptations including changes in the constitutional review mechanisms *maxime* in the non-abstract or concrete one. *See, e.g.,* Jorge Novais, *Em Defesa do Recurso de Amparo Constitucional*, 10 Themis 91 (2005); José Alexandrino, *A Estruturação Do Sistema de Direitos, Liberdades e Garantias na Constituição Portuguesa*, 2 Almedina 487-88 (2006); Alexandrino, *supra* note 46, at 172.; Paulo Cardinal, *Direitos Desamparados?*, *in* BOLETIM DA ORDEM DOS ADVOGADOS DE PORTUGAL 21, 60 (2002); Jorge Miranda, *A Fiscalização da Constitucionalidade: Conceitos e Problemas Gerais*, *in* O Direito de Amparo em Macau e em Direito Comparado, Special Issue, REVISTA JURÍDICA DE MACAU 78 (Cardinal ed., 1999); GOMES CANOTILHO, CONSTITUIÇÃO DIRIGENTE E VINCULAÇÃO DO LEGISLADOR, 181-82 (2001); Carla Amado Gomes, *À Espera de Ulisses*, REVISTA DO MINISTÉRIO PÚBLICO 84, 66 (2000); CATARINA SANTOS BOTELHO, A TUTELA DIRECTA DOS DIREITOS FUNDAMENTAIS 135 (2010); Anabela Leão, *A Intimação Para a Protecção de Direitos, Liberdades e Garantias*, *in* ESTUDOS DE DIREITO PÚBLICO 444 (2006). For authors who discuss the quasi-Amparo, *see* CARLOS BLANCO DE MORAIS, JUSTIÇA CONSTITUCIONAL 989, 1040 (2nd ed., 2005); FERNANDO ALVES CORREIA, DIREITO CONSTITUCIONAL 22 (2001); RUI MEDEIROS, A DECISÃO DE INCONSTITUCIONALIDADE 352 (1999).

[70] Alexandrino, *supra* note 46 at 203.

[71] *See* Vicente Mendoza, *A Note on the Writ of Amparo*, 82 PHIL L.J. 1 (2008); Felipe Gozon Jr. & Orosa, *Watching the Watchers: A Look into the Drafting of the Writ of Amparo*, 82 PHIL. L.J. 8 (2008); RENE SARMIENTO, TOWARDS MORE JUSTICE AND MORE LIBERTY: UNDERSTANDING WRIT OF AMPARO AND WRIT OF HABEAS DATA (2008); Adolfo Azcuña,

being abducted. Lives were being jeopardized. One could say that in no other example, at least in recent times, was the creation of Amparo in a given jurisdiction attended with such pressure and such amount of dramatic need as in the case of the Philippines.

To better illustrate the above, we borrow the words of then Chief Justice of the Supreme Court of the Philippines Reynato Puno:

> Recently, the Supreme Court *En Banc* promulgated the Rule on the Writ of *Amparo*. The Philippine version of the Writ of Amparo is designed to protect the most basic right of a human being, which is one's right to life, liberty and security guaranteed by all our

---

The Philippine Writ of Amparo: A New Remedy for Human Rights, paper presented at the World Conference on Constitutional Justice, Venice Commission of the Council of Europe (2009), *available at* www.venice.coe.int/WCCJ/Papers/PHI_Azcuña_E.pdf; Bryan Tiojanco & Leandro Aguirre, *The Scope, Justifications And Limitations Of Extradecisional Judicial Activism And Governance In The Philippines*, 84 PHIL L.J. (2009); Maria Luisa Isabel Rosales, *New Frontiers in the Application of the Writ of Amparo: Is the Philippines Ready?*, 55 ATENEO L.J. [PAGES CITED](2011); Joan Gamboa, *Creative Rule-Making in Response to Deficiencies of Existing Remedies*, 52 UST L.R. 43 (2010); Anna Lorem Ramos, *The Writs of Amparo and Habeas Data: Judicial Approaches to Human Rights Implementation in the Philippines,* LAW ASIA J., (2011); Flerida Ruth Romero, *The Writ of Amparo: Judiciary's Sword Unsheathed*, *available at* www.newsflash.org/2004/02/hl/hl106302.htm; REYNALDO AGRANZAMENDEZ, QUESTIONS AND ANSWERS IN REMEDIAL LAW: 1997 RULES OF CIVIL PROCEDURE, 1991 REVISED RULE ON SUMMARY PROCEDURE, REVISED KATARUNGANG PAMBARANGAY LAW, RULE ON THE WRIT OF HABEAS CORPUS, RULE ON THE WRIT OF AMPARO, RULE ON THE WRIT OF HABEAS DATA, 519 (2008); Javier Colmenares, *Initial Analysis On The Philippine Amparo*, CODAL, 2007; Ed Albano, *Primer on the Rule on the Writ of Amparo, A.M. NO. 07-9-12-SC, available at* www.batasnatin.com/notes-vault-downloads/111/140-primer-on-the-writ-of-Amparo.html; Jose Maidas Marquez, *The Writ of Amparo and Habeas Data: Seven Months After*, paper delivered at the National Workshop on The Writ of Amparo and Writ of Habeas Data, NUPL (2008) *available at* nupl.net/home/?p=121. *See also supra* note 2; Remollino, *supra* note 28; Brewer-Carías, *supra* note 12, at 79-80; Cardinal, *supra* note 24; *infra* note 74; Orosa, *infra* note 76. *See also* opinions and data found in various blogs and newspaper articles Rodel Rodis, *Writ of Amparo, available at* pinoywired.com/2009/05/27/writ-of-Amparo; Claire Delfin, *Is the Writ of Amparo Effective?, available at* pinoypress.net/2009/04/16/just-how-effective-is-the-writ-of-Amparo; Bruce van Voorhis, *The Hope of 'Amparo' in the Philippines*, *available at* www.upiasia.com/Human_Rights/2007/10/24/commentary_the_hope_of_Amparo_in_the_philippines/2364; Christopher Diaz Bonoan, *The Writ Of Amparo: RP Style*, *available at* http://chrisbonoan.blogspot.com/2009/05/writ-of-Amparo.html. *See also* Raul Pangalangan, *Marcos-Arroyo: Déjà vu on Human Rights,* unpublished (2010). It speaks of Amparo as "an effective and inexpensive instrument for the protection of constitutional rights".

> Constitutions starting with the 1898 Declaration of Philippine Independence and the Universal Declaration of Human Rights of 1948. We are studying further how to strengthen the role of the judiciary as the last bulwark of defense against violation of the constitutional rights of our people especially their right to life and liberty by the use of *habeas data*. It is our fervent hope that with the help of the writ of *habeas corpus*, the Writ of Amparo and the writ of *habeas data*, we can finally bring to a close the problem of extralegal killings and enforced disappearances in our country, spectral remains of the Martial Law regime.[72] (Emphasis omitted)

Again, as mere external observers, we will have to resort to the words written by others that better illuminate the chaotic and undignified status of human rights, prevalent at the time in the Philippines, that made the Supreme Court act,[73] in the face of the astounding silence of the legislative and executive powers,[74] on this important issue.

> The problem of extrajudicial killings and enforced disappearances is widely recognized to have had been quite rampant in the height of the Martial Law regime under former President Ferdinand Marcos in the 1970s. But two decades after his regime was toppled by People Power in February 1986, the Philippines remained in the watch list of many international organizations including the United Nations. Domestic organizations, especially those coming from the left of the political spectrum and those representing minority groups in the House of Representatives (e.g. Anakpawis, Bayan Muna and Gabriela, etc.) and international organizations have issued reports and

---

[72] Reynato Puno, *The Writ of Habeas Data*, Speech delivered at the UNESCO Policy Forum and Organizational Meeting of the Information for all Program (IFAP), Philippine National Committee (Nov. 19, 2007), *available at* jlp-law.com/blog/writ-of-habeas-data-by-chief-justice-reynato-puno/

[73] *See* Supreme Court, The Rationale for the Writ of Amparo, 43.

[74] "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." *See* Gozon & Orosa, *supra* note 72, at 10. "The problems of the Executive arising out of questions concerning its legitimacy, and the political deadlocks stalling the legislative machinery191 no immediate solutions were forthcoming, the Court decided that it was no longer enough for it to indulge in its traditionally passive role and that a pro-active stance was necessary." *See* Tiojanco & Aguirre, *supra* note 72, at 103. *See also* Ramos, supra note 72, at 88.

> statements detailing the problems in the Philippines. Amnesty International issued a report in August 2006 called 'Philippines: Political Killings, Human Rights and the Peace Process' detailing the linkages between the problems that beset the country and spoilers of the peace processes.[75]

Another author affirms:

> Cases of extra judicial killings, enforced disappearances and other human rights violations in the Philippines have not only been marked by the heinousness of the crime but also by the impunity with which they were committed. Many of the extra judicial killings and enforced disappearances were committed openly, in public places, near police stations or military camps but no serious investigation of and prosecution for these crimes have been conducted by the government. The various Habeas Corpus petitions filed by human rights lawyers to stem enforced disappearances remain unsuccessful as the respondent-state security forces merely deny custody of the victims resulting in the dismissal of these petitions. Attempts by human rights groups to gather and preserve evidence are met with very little cooperation from government investigating agencies making it exceedingly difficult for human rights cases to prosper in court. Worse, many human rights advocates and lawyers have been the target of attacks themselves further curtailing the victims' access to the judicial processes. This is the context under which the Supreme Court called for a consultative summit on extra judicial killings and enforced disappearance on July 16-17, 2007.[76]

The first author quoted then proceeds by resorting to a famous 2007 report by Special Rapporteur Philip Alston of the United Nations Human Rights Council ("UNHCR"):

> In his report to the UNHRC, Mr. Alston noted how the killings have eliminated civil society leaders, human rights defenders, trade unionists, land reform advocates and others who are categorized to be

---

[75] Theoben Orosa, *The Role of Judiciaries in Promoting Human Rights: The Promulgation of the Writ of Amparo and the Writ of Habeas Data and the Role of the Philippine Supreme Court in Human Rights Protection against Extrajudicial Killings and Enforced Disappearance*, paper delivered at the 1st ICIRD (International Conference on International Relations and Human Rights) Bangkok (May 2011), *available at* www.icird.org/files/Papers/ICIRD2011_Theoben%20Jerdan%20C.%20Orosa.pdf.

[76] Javier Colmenares, *The Writ of Amparo as Mechanism to Curb Impunity: The Case of the Philippines*, 1 (2009).

> in the left of the political spectrum and numbers, depending on who one talks to, ranges from 100 to 800 over a six year period (2001-2007). Reported killings of journalists were also noted with an increase from 2-3 in 1986-2002, to somewhere between 7-10 from 2003 to 2006.[77]

The paper we are now following presents the problem of the extrajudicial killings, its evolution, attempts to remedy it (such as the criticized Melo Commission), and the designation by the Supreme Court of certain courts to be political killing courts.[78]

In light of the aforementioned disastrous situation, the Supreme Court called for an unprecedented conference entitled *National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: Searching for Solutions.* The summit was "unparalleled in its impact, it brought together members from the rightmost to the leftmost together in a clinical and dispassionate setting before Supreme Court justices to try and work some of the issues out."[79] This summit heralded a new stage in several ways. It presented itself as the immediate source or precedent act of the approval of the rules establishing the Writ of Amparo[80] as well as the writ of *habeas data*, signalling a strong move by the judiciary towards strong *regulatory* activism, particularly with respect to environmental writs,[81] and blurred the lines that established the borders of

---

[77] *See infra* note 79.

[78] Philip Alston, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions (Feb. 2007), *available at* www.karapatan.org/files/English_Alston_Report_Mission_to_the_Philippines_HRC8.pdf; Supreme Court, *The Rationale for the Writ of Amparo* 41 (2007). *See also*, Al Parreño, The Asia Foundation, Report on Philippine Extrajudicial Killings 2001-August 2010 (2011).

[79] *Id.*

[80] Supreme Court Annual Report 4, 10 (2007) *available at* sc.judiciary.gov.ph/publications/summit/summation2.pdf. Consider the recommendation to "undertake a serious study of the writ of Amparo to see how it can be availed of, as protective and remedial tool, for the greater protection of the constitutional rights of the victims" and "One fruit of the Summit is the passage of the Rule on the Writ on Amparo, the most powerful weapon yet in the judicial arsenal to protect the constitutional rights to life, liberty, and security of our people."

[81] "The Supreme Court in its exercise of judicial activism and governance has deemed too restrictive the confines of an actual case and controversy, and has ventured outside the canals of decision-making and into the yet uncharted oceans of rulemaking and convening." *See* Tiongco & Aguirre, *supra* note 72, at 152. Besides the Amparo and the *habeas data*, one might add the Writ of Kalikasan, which reinforces human rights judicial protection since its approval on Apr. 23, 2010. *See* Rules of Procedure for Environmental

each of the three powers within the system of separation of powers: judicial, legislative, and executive.[82]

It is undeniable that, *prima facie,* one could question the legitimacy of a court creating rules that seem to be substantive and not merely procedural, even if apparently based on a constitutional norm of competence. Comparative law provides very little examples of such rule-creation. This will be further examined in the next chapter.

Turning back to the genesis of the Philippine Amparo, it is of relevance to again resort to words, compelling and at times embodying a certain poetic idea of justice, of the protagonists— in this case, the former Chief Justice Puno:

> I have been asked the reason for blowing the trumpet call for this Summit on Extrajudicial Killings and Forced Disappearances. In the beginning, the question did not bother me and with the patience of Job, I tried my level best to explain its rationale. It seems, however, that the question has a long life and it [sic] kept on hounding me whenever I meet people. It dawned on me that the persistence of the question has its salience for it shows at the very least the surprise with which people greet the Summit. If you scratch the surface further,

---

Cases, A.M. No. 09-6-8-SC (2010); Roderick Salazar, Understanding the Mechanics and Defense Strategies for Rules of Procedure for Environmental Cases, *available at* www.chamberofmines.com.ph/b/download/Mining%20Philippines%202011%20Presentation/Session%206/21%20-%20Roderick%20Salazar.pdf; Francis Tolentino, *An Environmental Writ: The Philippines Avatar*, 35 IBP JOURNAL 117 (2010); Risa Halagueña, *Developments in Philippine: Access to Environmental Justice*, *available at* www.effectius.com/yahoo_site_admin/assets/docs/Risa_Halague%C3%B1a_Newsletter11.5424002.pdf (last visited Mar. 2013). Halagueña stated: "The Philippine judiciary is currently riding a wave of change in providing access to justice. It is but apt that it has been actively pursuing this transformation in the area of environmental justice." The Writ of Kalikasan finds its basis in the 1987 Philippine Constitution's Declaration of Principles and State Policies: ""The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." *See* CONST. art. II, § 16.

[82] Jay Rempillo, *Rule on the Writ of Amparo Takes Effect* (Oct. 2007), *available at* sc.judiciary.gov.ph/publications/benchmark/2007/10/100701.php. Rempillo wrote: "Chief Justice Puno, in his opening remarks… described the writ of Amparo as the Judiciary's humble offering to the altar of human rights in the Philippines, saying that critics 'can criticize the Judiciary with real and imagined complaints, but they cannot charge it with inertness, with paralysis and with amnesia in protecting the constitutional rights of our people'."

> you will discover that a large slice of our people appear to have their concern over these killings and disappearances already interred by time. Their sense of shock has been anasthesized [sic] by the escalation of the killings and disappearances despite the size of the space given to them by the print media. If there are compelling reasons for this Summit, one of them is 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. At this moment, we may not know how to solve this problem, but we do know that the sure way to lose its solution is to be immobilized by doubt, to be terrorized by the thought that any effort to lick the problem will no more than amount as an effort to square the circle. This Summit is envisioned to thus provide a broad lens, synoptic perspective on our problem of extrajudicial killings and forced disappearances. We have summoned the most authoritative scholars representing the rainbow of interests of the different stakeholders of the justice system, including international experts, all of whom, we hope, can lead us in this journey, for certainly we do not expect this journey to be an easy one, a no brain, follow the dot journey. By calling this Summit, we are affirming our belief in human rights not only in the abstract; we are affirming that before the universal altar of human rights there can be no atheism, nor agnosticism on our part.[83]

This speech, delivered at the summit in mid-July 2007, can thus be regarded as the anteroom of the main chamber of a building that was being built. In fact, not more than two months later,[84] the Supreme Court adopted A.M. No. 07-9-12-SC, setting forth the rule on the Writ of Amparo,[85] to take effect on October 24, 2007.

A new era thus began with respect to human rights in the Philippines. "The end product blossomed into a new set of rules that could and were

---

[83] Reynato Puno, *View from the Mountaintop*, Keynote Speech, National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: Searching for Solutions, Manila Hotel, Philippines, (July 17, 2007), *available at* sc.judiciary.gov.ph/publications/summit/EJK%20Summit%20CJRSP%20Keynote%20Speech.pdf.

[84] Approval date of the original rule is on Sept. 25, 2007. The rule was later amended on Oct. 16 of the same year.

[85] The writ of habeas data followed soon after, on January 22, 2008, A.M. No. 08-1-16-SC. Full text *available at* www.supremecourt.gov.ph/rulesofcourt/2008/jan/A.M.No.08-1-16-SC.pdf.

designed to change the game,"[86] and thus the writ became "a mighty sword unsheathed by the Supreme Court to meet head-on the evils of extralegal killings and disappearances."[87]

In the interim, in September 16, 2007, Chief Justice Reynato Puno, in a Message to the National Union of People's Lawyers ("NUPL"), announced the impending approval of the Amparo writ, "The SC Committee on Revision of the Rules is drafting the first ever rule that will implement the Writ of Amparo in our country."

After explaining the pragmatic and immediate genesis of the creation of the Writ of Amparo in the Philippines, it is now important to trace back its academic genesis in the country's doctrines — without forgetting at this point the role of comparative law in this process.[88]

A first doctrinarian piece that is usually presented as the starting point of this creation process is the paper by former Supreme Court Associate Justice Adolfo S. Azcuña: *The Writ of Amparo: A Remedy to Enforce Fundamental Rights.*[89] In that short but dense piece, not only is a novel concept presented and comparative law data produced, but, very interestingly, it shows that constitutional lawyers around the world believe that it is necessary to establish procedural devices to protect human rights, and the Philippine Constitution actually provides for the basis of the Writ of Amparo. This is seen in Article VIII, Section 5(5) that empowers the Supreme Court to promulgate "rules concerning the protection and enforcement of constitutional rights."[90]

In a paper written by yet another former Supreme Court Chief Justice, the people's right to access the courts was examined.[91] The Writ of Amparo therein was characterized as an instrument of the judicial system that serves as a refuge for the rights of Filipinos. One does not know, however, what impact

---

[86] *See supra* notes 83 & 85.

[87] Sarmiento, *supra* note 72, at 6.

[88] *Id,* at 15. *See also* Supreme Court, *supra* note 74; Javier Colmenares, *The Writ of Amparo: A Comparative Review,* (Nov. 15 2007), *available at* www.pinoypress.net/2007/11/15/the-write-of-Amparo-a-comparative-review/(last visited Mar. 2013); Bernas, *infra* note 93.

[89] Azcuña, *supra* note 72.

[90] CONST. art. VIII, § 5(5).

[91] Marcelo Fernan, *The Judiciary and the Challenges of the Times*, 34 ATENEO L.J. 1 (1990).

this piece had on prevailing doctrine and on political discourse regarding the establishment of Amparo in the legal system.

The genealogy of the Amparo in the Philippines can and, we assume, should also be traced back to other forums (such as bar examinations), which may somehow be surprising and humorous. In the words of the constitutionalist Father Joaquin Bernas: "[s]everal bar examinations ago the first item in the Bar Examination Questions for Political Law was: What is a Writ of Amparo? There was a lot of head scratching among the examinees upon seeing the question. Almost nobody knew anything about the animal or had ever heard about it."[92] The former Chief Justice of the Supreme Court Renato Corona has this to say:

> The very first question of the 1991 Bar Examinations dumbfounded the whole legal community: "What is a Constitutional Writ of Amparo and what is the basis for such a remedy under the Constitution?"
>
> For weeks thereafter, members of the Bar were talking of nothing else but Amparo and what "she" had done to tatter further the examinees' already frayed nerves, and what they had in the first place done to Amparo to deserve such an excruciating interrogation.[93]

After these initial confusions about the "animal" and the "lady" in the 1991 examinations, one can move a step further, again by engaging the help of others:

> Sixteen long years later, the legal community was again abuzz with that enigmatic Amparo, this time because the Supreme Court en banc, on October 16, 2007, had issued a Resolution establishing the Rule on the Writ of Amparo. All of a sudden, it became the fashionable and favored intellectual phrase to drop in téte-a-tétes among lawyers. The mind behind that inscrutable question, and the spirit behind that noble [r]ule, clearly belongs to a man way ahead of his time in a profession whose cornerstone is dogma: Justice Adolfo Azcuña.[94]

---

[92] Joaquin Bernas, *Sounding Board: The Mexican Amparo*, PHIL. DAILY INQUIRER, Sept. 3, 2007, *available at* opinion.inquirer.net/inquireropinion/columns/view/20070903-86232/The-Mexican-Amparo.

[93] Renato Corona, *A Tribute to Justice Adolfo S. Azcuña*, BENCHMARK ONLINE Feb. 2009, *available at* sc.judiciary.gov.ph/publications/benchmark/2009/02/020922.php.

[94] *Id.*

> But now the Writ of Amparo has become a front-page subject and might be an important item in the Bar Examinations after this year. Chief Justice Reynato Puno has shown himself to be passionately committed to the protection of human rights. In his effort to find ways of strengthening the protection, he has started exploring the potential of the Writ of Amparo to fill the gaps in the mantle of protection offered by current law and jurisprudence. For this purpose I understand that he has commissioned my classmate and friend Justice Dolf Azcuna to study what the Supreme Court can do about making a Writ of Amparo effective in the Philippines. Fittingly so, since it is no secret that it was Justice Azcuna as Bar Examiner several years ago who surprised the examinees with the question about the Writ of Amparo.[95]

Besides the above, one should also resort to other data and regarding more formal constitutional forums. Rene Sarmiento summarizes the genesis of the Amparo in the Philippine legal context in this manner:

> The idea of Amparo was first introduced to the Philippines by Delegate Adolfo Azcuña in the 1971 Constitutional Convention and in the 1986 Constitutional Commission. Despite his best efforts, he did not succeed in convincing the two bodies to include in our fundamental law an explicit reference to the Writ of Amparo.
>
> The allure of Amparo as a judicial remedy was irresistible so that captivated the fine legal mind of international law professor Adolfo S. Azcuña. Twice a framer of the Philippine Constitution, first in 1971 and the second in 1986, he introduced in the Constitutional Convention of 1971 and the Constitutional Commission of 1986, the remedy of Amparo. In both historic assemblies, Prof. Adolfo S. Azcuña, planted the seeds of Amparo. It was a blessing in disguise, a providential synchronicity, that when Prof. Adolfo S. Azcuña became Associate Justice of the Supreme Court and Senior Justice Reynato S. Puno became the Chief Justice, two democrats and libertarians, together with their supportive colleagues, now collectively known as the Puno Court, approved the Rule on the Writ of Amparo.[96]
>
> Justice Azcuna said that he had first proposed the adoption of the Writ of Amparo when he was a delegate to the 1971 Constitutional

---

[95] *See supra* note 93.

[96] Sarmiento, *supra* note 72, at 5, 16-17.

> Convention and later in 1986 when he was among the delegates to the Constitutional Commission. "For 20 years, it (referring to the Writ of Amparo) was in hibernation because it was felt that it was not needed since we had remedies to protect human rights such as certiorari, prohibition, mandamus, and injunction," he said.[97]

From the above, one can detect a clear *communis* opinion regarding the material authorship of the Amparo in the Philippines being attributable to Justice Adolfo Azcuña.[98] And, along with the driving force of then Chief Justice Reynato Puno and support of the Supreme Court en banc, the Amparo found its way to a much discredited legal system.

It is possible still to very briefly bring in here a few more precedent pieces of the historical puzzle. In fact, Marcelo Fernan, at that time Chief Justice, stated in a speech that the Supreme Court would issue rules for the Writ of Amparo; at the International Labor Organization, then President Corazon Aquino mentioned the Amparo as a mechanism to protect human rights in the country.[99] Rene V. Sarmiento, in a paper entitled *Rights, Obligations and Remedies: International and Domestic Experiences* presented in 2001, stated that it would be a boon for democracy and good governance should the Supreme Court, consistent with its libertarian tradition and judicial creativity, promulgate rules on "ley de Amparo."[100]

V. CONTEXTUALIZATION ISSUES OR INTERROGATIONS

Having gone through the historical road of the Philippine Amparo and before proceeding to an overview of its legal regime, it is of relevance to address two issues proper to legal theory. The first, easy to answer, is related to geopolitical and legal family contexts. The second, far more difficult to deal with, is the question of constitutional organic competence to promulgate the rules, i.e., to analyze if the Supreme Court acted within its competence or if its

---

[97] *See supra* note 83.

[98] That seems to be the conclusion in face of the evidence produced, even if taking into consideration the possible use, here and there, of perhaps a laudatory overtone. Hence, one can conclude that Azcuña is the "father of Writ of Amparo". *See* Florangel Rosario Braid, *Justice Azcuña; Prospects for Peace*, MANILA BULLETIN, Feb. 21, 2009, *available at* mb.com.ph/node/196825.

[99] *Id.*

[100] *Id.*

act is *ultra vires,* surpassing its competence and thus invading fields reserved by law to other governmental departments.

As for the first issue, we deal with two sub-issues of context: the Asian connection, and the fact that the Philippines is not a member of the Romano-Germanic legal family.

As we have already emphasized,[101] the idea of Amparo has spread to parts of Asia despite the argument of sceptics that such mechanism of protection is unfit for its social and cultural background. And we do have the already aforementioned cases of South Korea, Taiwan, and, formerly Macau, attesting to the fact that Asia is in no way pre-inoculated against the "virus" of Amparo.

As to the second issue, it must be remembered that the berth and focal points of irradiation of the Amparo are located within clear-cut legal systems belonging to the continental legal family, while the Philippines is a mixed legal system,[102] such as Scotland or South Africa.[103] In spite of this, we do have at least one case of a mixed legal system consecrating the Amparo idea in South Africa. This is aside from the above-mentioned possibilities within common law legal systems (e.g., Nepal, India, or Samoa).

It might be said that the procedural formats of the mechanism[104] and its links with other judicial institutions adjust better to a civil law legal system, but that does not prevent other legal systems from obtaining the same results, more so now in a globalized world. At the end of the day, what really matters is the embracement of the rule of law, the placement of fundamental rights as

---

[101] *See supra* Part II.

[102] *See* RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LOS GRANDES SISTEMAS JURÍDICOS CONTEMPORÁNEOS, 53 (Sánchez Cordero ed., 11th ed. 2010).

[103] On mixed legal systems, its concept, intersections and classifications, *see* Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 478 (Reimann & Zimmermann eds., 2006).

[104] Not forgetting that common law, especially from the United States to Mexico, did probably contributed to the creation of the Amparo, mostly by the institute of the writ – although, as already seen, the Amparo is nor reducible to a mere writ, "The Amparo proceeding is a Latin American extraordinary judicial remedy specifically conceived for the protection of constitutional rights… it has always been configured as a whole judicial proceeding that normally concludes with a judicial order or writ of 'protection'. That is why, in Latin America, Amparo is not merely a writ or a judicial protective order but a whole judicial proceeding" *See supra* note 12, at 73-74.

effective priority, and the principle of constitutionality as a reality, among other things.

The Philippine legal system, neither common law nor civil law, will not by that characteristic alone reject the transplant. It may have some degree of difficulty in adapting to these rather specific and technical issues[105]—after all, it is a novel legal concept in the Philippines[106]—but that surely does not impair, *per se*, the successful establishment and implementation of the Amparo remedy.

Turning now to the second contextualization problem, as already said above, it is undeniable that, *prima facie,* and without any intention of pronouncing non-academic judgment, one could immediately question the legitimacy or the appropriateness of a court creating rules that are substantive and not merely procedural (even if apparently based on a constitutional norm of competence) such as those respecting the Amparo writ, *vis-à-vis* the principle of separation of powers. It is true that the Supreme Court *ex vi* the Rules states that it does not diminish, increase, or modify substantive rights recognized and protected by the Constitution, but this is merely a declaratory statement pursuant to what is established in the Constitution, lacking in itself any substantive content.[107]

---

[105] Something that must be seen as natural and understandable, and in fact it is assumed: "Its Committee on Revision of the Rules of Court agreed that the Writ of Amparo should not be as comprehensive and all-encompassing as the ones found in some American countries, especially Mexico. These nations are understandably more advanced in their laws as well as in their procedures with respect to the scope of this extraordinary writ", Supreme Court, *Annotation to the Writ of Amparo,* 2-3. For example, in the Macau case, the situation was afflicted for years with far more regulatory deficit, with solely one article with just two numbers (short) establishing and regulating two different types of Amparo!

[106] The Asia Foundation, *Strengthening Human Rights in the Philippines Program Quarterly Report (January 1, 2008 — March 31, 2008)* 2 *available at* pdf.usaid.gov/pdf_docs/PDACL540.pdf.

[107] A.M. No. 09-6-8-SC, *Rules of Procedure for Environmental Cases* 49-50, *available at* sc.judiciary.gov.ph/Environmental_Rationale.pdf. One can add that some years later, the Supreme Court took the opportunity to reemphasize, "The Constitution bestows upon the Supreme Court of the Philippines a peculiar form of authority. Specifically, the Court can enact rules to enforce constitutional rights, the power of which maybe typically lodged in the legislative bodies or branches of other jurisdictions."

We also acknowledge that, after some initial raised eyebrows, there is now in place a *common* doctrinarian view affirming the constitutionality of the Supreme Court's Writ of Amparo rules.[108]

Perhaps one can be tempted, also in *prima facie* mode, to say that it was a sort of minor wrong to produce a great(er) good (right). That may indeed be so, but one can never be too cautious in upholding the rule-of-law principle, or, one might say, in upholding the *rule of the Constitution*. The ground to produce such creative rules must be reasonably and adequately sound, even if not totally crystal clear, and must be proportionally used. We will get back to the issue later and address the issue and the *peculiarity* of powers constitutionally allocated to the Supreme Court.

We already know that no other branch of the political system decided to do anything in terms of protective and effective creation of norms regarding the calamity and the absolute indignity of the extra-judicial killings for decades. This is an important fact, and a fact well substantiated as seen here, albeit in a summary fashion. The utter disapproval to such hideous cases is never at stake, one must add.

Let us start with the beginning, that is to say, the Constitution:

> Judicial power includes 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.[109] (Emphasis supplied)

> The Supreme Court shall have the following powers: . . . (5) **Promulgate rules concerning the protection and enforcement of constitutional rights**, pleading, practice, and procedure in all courts, (…). Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of

---

[108] "When the Rule on the Writ of Amparo took effect last October 24, 2007, quick opposition emerged when "some have decried that the Supreme Court has become an 'activist court,' contrary to its traditional mandate of 'passivity.' This objection, however, was quickly muted because of the majority consensus that the current rule to protect the right of the people to life, liberty and security, in place at that time, was viewed as inadequate." *See* Tolentino, *supra* note 82, at 125.

[109] CONST. art. VIII, §1.

> the same grade, and **shall not diminish, increase, or modify substantive rights**.[110] (Emphasis supplied)

From the above constitutional normative narrative, one can immediately formulate some important conclusions: (1) the courts have a constitutional duty to provide justice to all by protecting constitutional rights and settling disputes involving fundamental rights; and, (2) the Supreme Court is endowed with a judicial rule-making function, meaning it has normative power,[111] albeit in limited areas, that might be somehow viewed as traditional[112] in certain legal systems with common-law roots.[113]

This normative function bestowed upon the Supreme Court, considered *auxiliary* to its broad judicial power,[114] meant that the powers of the Supreme Court were strengthened in the 1987 Constitution. Even more so because, as Bernas underlines, both the 1935 and the 1973 Constitutions provided that rules promulgated by the Supreme Court may be *repealed, altered, or supplemented* by the legislature and, no similar provision appears in the 1987 Constitution.[115] However, he immediately asks, "Are rules of Court beyond the reach of Congress?"[116] providing a history of the specific constitutional process and concluding that Congress may act just as in the previous Constitutions.[117]

---

[110] CONST. art. VIII, §5.

[111] *See* JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 969 (2003 ed.); HECTOR DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES 578 (2004 ed.); HECTOR DE LEON, TEXTBOOK ON THE PHILIPPINE CONSTITUTION 256 (2005 ed.); ROLANDO SUAREZ, PRINCIPLES, COMMENTS AND CASES IN CONSTITUTIONAL LAW I 258 (1999); Juan Paolo Fajardo, *The Judicial Rule-Making Function: a Non-Interpretative Perspective of the Role of the Judiciary*, 83 PHIL L.J. 749 (2009); Susan Rose-Ackerman, Diane Desierto, & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines*, 29 BERKELEY J. INT'L L. 246, 321 (2011); Diane Desierto, *A Universalist History of the 1987 Philippine Constitution (II) in* HISTORIA CONSTITUCIONAL 427 (2010). *See also* Sarmiento; Gamboa, *supra* note 66.

[112] Bernas, *supra* note 111. One should point the traditional adjective only to some areas, such as administrative supervision of the courts.

[113] Rose-Ackerman, et. al., *supra* note 111. They wrote: "The 1987 Constitution also gives the Supreme Court the completely new authority to promulgate rules "concerning the protection and enforcement of constitutional rights."

[114] Bernas, *supra* note 111.

[115] "A formulation unique to the 1987 Constitution, nowhere found in the rule-making power of the Court as expressed in the 1973 Constitution and the 1935 Constitution." Bernas, *supra* note 111 at 972; Desierto, *supra* note 111 at 435.

[116] Bernas, *supra* note 111 at 969,

[117] De Leon, *supra* note 111 at 258, 592. "Congress retains the power to repeal, alter or amend such rules of court promulgated by the Supreme Court. While it is the

One imagines that the issue at stake might be more of an emblematic issue rather than one that deals with a denial of legislative power by the Congress or any consecration of a system instating a set of reserved normative powers allocated to the Supreme Court, and, hence, subtracted from any other organ.

Concentrating now on the rule-making power regarding fundamental rights, one can recall that "Philippine Supreme Court Chief Justice Puno has publicly declared that the framers of the 1987 Constitution purposely expanded the Court's rule-making power in view of the fundamental importance of protecting individuals' constitutionally-guaranteed rights."[118]

One must again resort to words pronounced by actors in this process, in this case, former Chief Justice Puno:

> I respectfully submit further that the framers of the 1987 Constitution were gifted with a foresight that allowed them to see that the dark forces of human rights violators would revisit our country and wreak havoc on the rights of our people. With this all-seeing eye, they embedded in our 1987 Constitution a new power and vested it on our Supreme Court— the power to promulgate rules to protect the constitutional rights of our people. This is a radical departure from our 1935 and 1972 Constitutions, for the power to promulgate rules or laws to protect the constitutional rights of our people is essentially a legislative power, and yet it was given to the judiciary, more specifically to the Supreme Court. If this is disconcerting to foreign constitutional experts who embrace the tenet that separation of powers is the cornerstone of democracy, it is not so to Filipinos who survived the authoritarian years, 1971 to 1986. Those were the winter years of human rights in the Philippines. They taught us the lesson that in the fight for human rights, it is the judiciary that is our last bulwark of defense; hence, the people entrusted to the Supreme Court this right to promulgate rules protecting their constitutional rights.[119]

---

inherent power of the Supreme Court to promulgate its rules of procedure, it is equally the inherent power of Congress to legislate in all matters not withheld from it expressly or by clear implication by the Constitution…" De Leon also references a Supreme Court ruling that states: "[t]he 1987 Constitution took away the power of Congress to repeal, alter or supplement rules concerning pleading, practice and procedure."

[118] *See supra* note 116.

[119] Reynato Puno, speech delivered at Silliman University, Dumaguete City (Aug 25, 2007). *See also* Desierto, *supra* note 111 at 435-36; Albano, *supra* note 72, at 15.

It is important to underline that the interpretation of the Supreme Court's expanded rule-making power under the provisions of the 1987 Constitution appears to have been adopted *outside of specific jurisprudential pronouncements.*[120] As affirmed by Bernas, the "Constitution has one open-ended provision which, in tandem with the Bill of Rights and the Covenant on Civil and Political Rights, can accommodate expansion. The provision says that the Supreme Court shall promulgate rules concerning the protection and enforcement of constitutional rights."[121]

Fallible as it may be, one can resort to historical and memory data to further understand the rationale of this normative competence on fundamental rights in general, and on the Amparo in particular.

First one can go back to the Supreme Court's own annotation on the Writ of Amparo:

> The 1987 Constitution enhanced the protection of human rights by giving the Supreme Court the power to "[p]romulgate rules concerning the protection and enforcement of constitutional rights…" This rule-making power unique to the present Constitution is the result of our experience under the dark years of the martial law regime. Heretofore, the protection of constitutional rights was principally lodged with Congress through the enactment of laws and their implementing rules and regulation. The 1987 Constitution, however, gave the Supreme Court the additional power to promulgate rules to protect and enforce rights guaranteed by the fundamental law of the land.[122]

And, more specifically related to the Amparo, one can indeed find some curious references. In fact, one author adds:

---

[120] Desierto, *supra* note 111 at 436. "There is no case, to date, that interprets the Constitutional intent behind the expansion of the Court's rulemaking power under the 1987 Constitution."

[121] *See supra* note 93. Bernas states: "This is the seed that the Chief Justice hopes to nurture into a Philippine recurso de Amparo that is fast, simple and efficacious"

[122] *See supra* note 106, at 2. *See also* Desierto, *supra* note 111 at 437; Gozon & Orosa, *supra* note 72, at 14. As [AUTHOR] writes, "Significantly, the annotation does not refer to any portion of the Record of the 1986 Constitutional Commission that explains the expansion of the Court's rule-making power."

> In the 1986 Constitutional Commission, the Committee on Judiciary headed by former Chief Justice Roberto Concepcion explained that the Writ of Amparo is deemed included in the provision that empowers the Supreme Court to "[p]romulgate rules concerning the protection and enforcement of constitutional rights…" and "[T]he Committee on the Judiciary of the Constitutional Commission of 1986 . . . without objection from the committee members, was unanimous in its position that the provision in the Article of the Judiciary . . . included the Writ of Amparo.[123]

Naturally, one is dealing with a constitutional question involving several issues, all of great relevance, such as the separation of powers; the nature, scope, and boundaries of given rule-making powers; and the effectiveness of fundamental rights.

The principle of separation of powers lies in the heart of any true democratic system. This is dogma, and it is well known. No further words or references — be it with respect to actual, historical, juridical, or political philosophy— are necessary here.

One must also add a truism— that the doctrine of separation of powers in the modern State is no longer viewed, consecrated, and practiced in a hermetical mode. On the contrary, more and more space is granted to the principles of institutional interdependence between the organs of State, along the separation of powers. What is at stake, in accordance with modern constitutional doctrine, is no longer just the division of the sovereign power (that rests in the People), but also the separation of the functions of the State. Among such functions are the ordinance of the distribution among the several sovereign bodies and the establishment of checks and balances involving plural bodies in the establishment and guarantee of fundamental rights. This leads to the transformation of the classical formulations of the principle of separation of powers, which conventionally seeks to prevent abuse of power resulting from the concentration of powers and functions in a sole organ or person.[124]

---

[123] Sarmiento, *supra* note 72, Of particular note is footnote 7 on page 13, with respect to page 5, which reads: "Author's personal recollection, 1986 Constitutional Commission."

[124] *See* GOMES CANOTILHO & VITAL MOREIRA, CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA ANOTADA 44-45 (2007 ed.).

There is no longer a pure separation of powers,[125] with the exception of the primary and traditional judicial function of rendering justice with respect to specific cases brought to court.

The principle of effectiveness of fundamental rights[126] is also undoubtedly a cornerstone of the modern constitutional state, which operates under the Rule of Law. One has to establish rights, for example, by virtue of the adoption of the Bill of Rights, adherence to human rights treaties, and the enactment of legislation. However, the State must also create mechanisms for its popularization and guarantee, be they non-judicial (*e.g.*, the Office of the Ombudsman or the Commission on Human Rights) or judicial in nature.

One has to declare, to establish in detail, announce to all, and guarantee each and every fundamental right, both outside and before the court. In this light, any move clearly made to produce effectiveness of or the upgrading of fundamental rights is, in itself, a positive move.

A different issue is the methodology used— for instance, if it was in line with the constitutional powers, or if it did not entail the erosion of other fundamental principles. This sends us to the other constitutional question posed: the nature, scope, and boundaries of the given rule-making powers of the Supreme Court.

The filigree of this constitutional question rests basically on one point alone: promulgate rules concerning the protection and enforcement of constitutional rights *that shall not diminish, increase, or modify substantive rights.*

The Writ of Amparo rules enacted by the Supreme Court do concern the protection and enforcement of constitutional rights, with one possible exception— the right to security.

Regarding the right to security, we can tentatively assume that it is a fundamental right that is connatural and *prescient* of the right to life. It is a natural emanation from the apex right to life.

---

[125] *See* MIRIAM DEFENSOR-SANTIAGO, CONSTITUTIONAL LAW VOL. 1, 528 (2000). She writes: "However, the separation of powers, under the Constitution, is not absolute. What is more, it goes hand in hand with the system of checks and balances."

[126] Héctor Fix-Zamudio, *Effectiveness Of Human Rights Protection Instruments*, 1 MEXICAN LAW REVIEW (2004), *available at* info8.juridicas.unam.mx/cont/mlawr/1/arc/arc3.htm.

On the other hand, the emergence of a generic right to security can be seen in the Bill of Rights under the Constitution:

> No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.[127]

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[128]

> Section 12(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.[129]

It must be remembered that one should have an integrated approach, which considers both the Universal Declaration on Human Rights as well as the International Covenant on Civil and Political Rights in force in the country. The right to security, though not prominent and not deserving of an autonomous titled consecration, presents itself as a fundamental right embodied in the Constitution and, together with the right to life and the right to liberty, is protected by the Writ of Amparo rules. Thus far, one constitutional requisite is present and accounted for. [130]

Even more complicated is the issue regarding the final constitutional words: "shall not diminish, increase, or modify substantive rights." That the rule increases rights is beyond debate; it creates new and upgraded access for courts to defend a triumvirate of constitutional rights. The problem, not new

---

[127] CONST. art. III, §1.

[128] CONST. art. III, §2; for similar discussion, *see* Sarmiento, *supra* note 72, at 7.

[129] CONST. art. III, §12(2).

[130] Other requisites are also accounted for without further a due: the rules do provide a simplified and inexpensive procedure for the speedy disposition of cases and are uniform for all courts, as demanded by section 5 of article VIII of the Constitution.

in this regard,[131] is to determine if those new rights have a substantive nature or a procedural one, or both. One can immediately resort to the following certifications, "[I]n some cases, however, a right cannot be neatly classified as substantive or procedural."[132]

In our opinion, as already stated or hinted before, both the Amparo in general and the Philippine Amparo in particular have a structural dual nature. That is to say, a set of procedural rules aimed at the defense of fundamental rights while being a fundamental right in itself, much in the same way that access to justice is a fundamental right in itself, as are the constitutional rights of the accused.[133] People do now have consecrated their right to Amparo strictly saying.

In adopting a trinity of the *traditional* political and civil rights into rights, freedoms, and guarantees, Amparo presents itself in the sub-order of the guarantees.[134] The Amparo is a fundamental right of guarantee. Guarantee of what, one may ask? Of other fundamental rights, namely the rights *stricto sensu* and other freedoms.

As Wladimir Brito concisely and appropriately wrote, the Amparo is "an institution with a substantive dimension and a procedural one, thus being a fundamental right-guarantee,"[135] and as another author stated, "the right of Amparo or protection of fundamental rights are part of the constitutional bloc of rights in Latin America."[136] So, we must ask, accepting Amparo as an

---

[131] *See supra* note 111.

[132] "The distinction between remedy and substantive right is incapable of exact definition." De Leon, *supra* note 111 at 259. *See also* Bernas, *supra* note 111 at 970; Tiojanco & Aguirre, *supra* note 72, at 112. The latter concur with the former, stating: "There, however, remains considerable disagreement with the idea that substance and procedure can be so easily separated."

[133] De Leon, *supra* note 133. "This is particularly true with respect to the constitutional rights of the accused, which are implemented by the Rules of Court.

[134] Cardinal, *supra* note 24, at 893. *See also* Paulo Cardinal, *O Amparo Macaense de Direitos Fundamentais vis-à-vis as Decisões Judiciai, in* O Direito de Amparo em Macau e em Direito Comparado, Special Issue REVISTA JURÍDICA DE MACAU 359 (Cardinal ed., 1999).

[135] Paulo Cardinal, *O Amparo Consitucional, in* O Direito de Amparo em Macau e em Direito Comparado, Special Issue REVISTA JURÍDICA DE MACAU [PAGES CITED] (Cardinal ed., 1999).

[136] Humberto Alcalá, *El Derecho y Acción Constitucional de Protección (Amparo) de los Derechos Fundamentals en Chile a Inicios del Siglo XXI, in* EL DERECHO DE AMPARO EN EL MUNDO 160 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006). One also should point out that, besides a right that is substantive, it is also procedural proper, and not a mere writ.

institute with a dual nature, a right that simultaneously is substantive and procedural, was the Supreme Court within its constitutional powers or not? One cannot possibly answer partially yes and partially no, thus impossibly splitting the Amparo and its rules. Let it be stressed that there is no question of the constitutionality of the rules in themselves, that is to say regarding its substantive content. The sole issue is the question of the constitutional competence of the Court to enact rules that create a new right. Hence, we are not dealing with constitutionality regarding substance but form/organic competence.

The answer herein provided— although not totally exempted from some *remains-of-the-day* doubts, and again underlining that it does not intend to pass any political judgment — is yes. The Supreme Court acted within its constitutional boundaries.

Apart from some of the arguments already presented, we wish to bring in here some added items of argumentation such as historical data, which are not necessarily compatible with each other or of the same discursive weight.

First, the Amparo is both substantive and procedural. Hence, since it is not possible in this case to impose a clear-cut division, one must balance contesting values and opt to consider effective judicial protection principles and the *pro homine* principle as relatively prevalent in the *adjudicated* case, as well as to appeal to a certain idea of constitutional necessity — in light of other powers inaction— that will be proportionally addressed and realized.

Second, one believes that besides the power expressly granted by Section 5, Article VIII of the Constitution, it is possible to find in the constitutional narrative other important rules and principles that can lend a helping hand. We are specifically referring to Section 1 of the same constitutional article — that judicial power includes 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.[137] However, we can also summon another provision: "[t]he State values the dignity of every human person and guarantees full respect for human rights."[138] This principle can be

---

[137] Sarmiento, *supra* note 72 at 27. *See also* Desierto, *supra* note 111 at 430.

[138] CONST. art. II, §11.

an important anchor to horizontally support and reinforce fundamental rights. One cannot overemphasize the structural role of human dignity in relation to fundamental rights. The State has, by virtue of this norm, a clear responsibility to protect human rights and to respect and uphold the human dignity of all.

Third, there is the existence of some precedents dealing precisely with rights that are really both substantive and procedural in nature and that are also creations of the Court, such as the rules on the constitutional rights of the accused.[139]

Fourth, it may be argued that the foundation of the Amparo can be traced to the writ of *habeas corpus*, expressly provided for in the Constitution, bearing in mind the insufficiency of the said writ and the need to *find* something more suitable.

Fifth, one may also invoke the apparent acceptance of the rules of validity and enforceability in a peaceful and generalized way not only by society, but also by authorities and officials when served with the Amparo—government, police, military, etc. This allows us to consider the possible creation of a customary rule. One can refer to this as *something* that would have become *transmutated* into a sort of a constitutional customary rule.

Sixth, it may be argued that the Supreme Court rules of Amparo (originally suspected of being *ultra vires*) have been *ratified* by way of a formal act of Congress — precisely by the constitutional organ that would have more legitimacy to feel its sphere of reserved legislative powers invaded. Republic Act No. 9745 states:

> A writ of habeas corpus or Writ of Amparo or writ of habeas data proceeding, if any, filed on behalf of the victim of torture or other cruel, degrading and inhuman treatment or punishment shall be disposed of expeditiously and any order of release by virtue thereof, or other appropriate order of a court relative thereto, shall be executed or complied with immediately.[140]

As one author states, "it must be noted that Congress has seen fit to legitimize the Writ of Amparo and habeas data when it promulgated Republic Act No. 9745" and, "[b]y virtue of Republic Act No. 9745, albeit indirectly,

---

[139] *See* De Leon, *supra* note 111 at 259.

[140] Rep. Act No. 9745, §10 (2009). This is the Anti-Torture Act of 2009.

Amparo and Habeas Data remedies are now no longer mere judicial creatures but are congressionally recognized as well."[141] The same acceptance can be seen *ab initio*, since when the Rule on the Writ of Amparo was promulgated and about to take effect, "the Executive Government through the Solicitor General's Office petitioned modifications to the Rule. The petition was granted and the Rule on the Writ of Amparo was modified."[142]

One could add a *seventh* reason, resting on the pillars of comparative constitutional law. It may be useful to resort to comparative law and provide certain specific instances, especially those that are characterized by somehow similar circumstances of non-protective and absent States leading to repeated violations of human rights without an adequate judicial remedy available to their citizens.

Probably the most similar and quoted example is a historical one: the Argentinian case. In fact, by the 1950s, the Amparo was not specifically established in the Argentinean Constitution, although it was in some constitutions, such as the ones of Santa Fe and Mendoza. However, the Amparo had been previously recognized by the Supreme Court in the leading cases of *Siri* and *Kot SRL*.[143] The Amparo was later regulated by a special statute in 1966 and subsequently included in the 1994 national Constitutional reform.

Nestor Pedro Sagués, after mentioning that the right to Amparo was considered an *implicit* constitutional right emerging from Article 33 of the National Constitution (basically stating that the constitutional declaration of rights cannot be viewed as negating other fundamental rights not enumerated — a consecration of the open clause), refers to a praetorian creation of the Amparo at the national level — an example of *meritorian* judicial activism in the

---

[141] Orosa, *supra* note 72.

[142] *Id.*

[143] *See* Corte Suprema de Justicia de la Nación [CSJN] 27/12/1957, "Siri Ángel / hábeas corpus," Fallos (1957-239-459); Corte Suprema de Justicia de la Nación [CSJN] 05/09/1958, "Kot, Samuel S.R.L. / hábeas corpus," Fallos (1958-241-291). The first is related to the freedom of press and of work and its violation by public authorities and the other one relates to a violation perpetrated by private person. *See also* Alemjandro Verdaguer, *Las circunstancias políticas y sociales al momento del reconocimiento del Amparo en Argentina. Una relectura de los casos "Siri" y "Kot", in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO 653 (Ferrer Mac-Gregor & Zaldívar eds., 2008).

midst of a military regime — and to the big polemic on discussing the possible advantage in legislating or not legislating on the Amparo.[144]

Another comparative law example is Chile, where the Amparo proper (named *Recurso de Protección*) is expressly established in Article 20 of the Constitution. The ordinary regulation however, instead of being enacted by formal law, is found in administrative rules enacted by the Supreme Court—via the *Autoacordados* ("AA"), in the years 1977, 1992, and 1998. The unconstitutionality of those rules, most prominently the ones other than the 1977 one, is considered a *given fact* under the Chilean doctrine.[145] The creation of the AA was originally attributed to political inertia and a lack of a formal reservation of law. After 1980, however, when the Amparo was given constitutional domicile, the enactment of the AA was deemed in violation of the constitutional principles and rules on the reservation of law. This notwithstanding, the AA was tolerated by the legislative bodies perhaps due to their negligence and non-fulfillment of their responsibilities. It must be noted that the 1998 version of the AA, in tacitly reducing effective access to the Amparo, may be said to distort the nature and aim of the Amparo, thus contradicting international norms in force, specifically, the 1969 American Convention on Human Rights.[146]

Finally, one last example is Dominican Republic. In this state, the Supreme Court admitted *ab origine* the Amparo action in 1999, that is to say, before the enactment of formal legislation and in the absence of any reference to the Amparo in the Constitution.[147] Later, in 2006, the Amparo was finally

---

[144] [AUTHOR], *El derecho de Amparo en Argentina*, *in* EL DERECHO DE AMPARO EN EL MUNDO 42-43 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006).

[145] *See, e.g.,* Alcalá, *supra* note 137, at 202; Diego Palomo Vélez, *Recurso de protección en Chile: luces, sombras y aspectos que requieren cambios*, *in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO PROCESOS CONSTITUCIONALES DE LIBERTAD 513 (Ferrer Mac-Gregor & Zaldívar eds., 2008).

[146] Alcalá, *supra* note 137, at 202.

[147] *See* Samuel Arias Arzeno, *Amparo en la República Dominicana: su Evolución Jurisprudencial*, paper presented at Seminario — Régimen Legal y Perspectiva del Derecho de la Competencia en la RD, *available at* www.coladic-rd.org/cms/wp-content/uploads/2008/07/sa_Amparo_rd_evolucion-jurisprudencial.pdf; Allan Brewer-Carías, *La admisión jurisprudencial de la Acción de Amparo, en Ausencia deRregulación Constitucional o Legal, en la República Dominicana*, 29 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 95 (2000).

regulated by a special statute, Law No. 437-06, and very recently, it was also included in the new Constitution of 2010.[148]

With everything said and done, one must nevertheless always be cautious in order to avoid establishing bulldozers to cut through the scope of constitutionally allocated powers to other organs, and prevent the creation of the so-called government of judges that goes beyond the constitutional democratic design of a given State.[149] The good intentions of a specific policy might later easily be turned to bad ones. In any event, Congress should expressly *adopt* the Supreme Court rules on Amparo and expand its reach when deemed adequate or even necessary, by means of legislation, especially with regard to the scope of rights that will fall under the protective umbrella of the writ. We will not discuss here the general issues pertaining to this point nor will we engage in reflections on juristocracy, counter-majoritarianism, etc., since such would be beyond the scope of this paper.

VI. THE RULE ON THE WRIT OF AMPARO: AN OVERVIEW

> *The Writ of Amparo is the most potent remedy available to any person whose right to life, liberty, and security has been violated or is threatened with violation by an unlawful act or omission by public officials or employees and by private individuals or entities.*[150]

We do not aim to present in this paper an annotated Writ of Amparo rule scrutinized section by section. Others have already rightly done so.[151] We will limit ourselves to only pinpointing some issues or doubts that we deem of

---

[148] Art. 72.

[149] *See also* Raul Pangalangan, *Passion for a Reason, 'Judicial Activism and its limits'*, PHIL. DAILY INQUIRER, Feb. 1, 2008 *available at* opinion.inquirer.net/inquireropinion/columns/view/20080201-116069/Judicial-activism-and-its-limits; Raul Pangalangan, *Government by Judiciary in the Philippines: Ideological and Doctrinal Framework, in* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES (Ginsburg & Chen, eds., 2009); Fajardo, *supra* note 106; Orosa, *supra* note 70.

[150] Secretary of National Defense v. Manalo, G.R. No. 180906, 568 SCRA 1, Oct. 7, 2008.

[151] Supreme Court, *Annotation to the Writ of Amparo, available at* sc.judiciary.gov.ph/admin%20matters/others/annotation.pdf; FLAG, *Primer on the Writ of Amparo*, *available at* philippines.ahrchk.net/pdf/PrimerOnWritOfAmparo.pdf; Albano, *supra* note 72; Colmenares, *supra* note 72; Ramos, *supra* note 72, at 89.;Brewer-Carías, *supra* note 12.

more relevance. However, even before starting the *Rule* analysis, we must confess that, when we first stumbled upon the Philippine Amparo, we regarded it as no more than a mere upgrade of the writ of *habeas corpus*.[152] However, with a closer look one can affirm that this Amparo is more than an enhanced *habeas corpus*.

First, contrary to what normally happens in comparative law,[153] nowhere in the Amparo Rule can one find the specific requirement of previous exhaustion of remedies that must be complied with relating to the aggrieved right. On this extraordinary aspect, it was written elsewhere:

> One of the most important liberal provisions of the rule is that unlike many other Amparos, the Philippine Amparo does not expressly require exhaustion of remedies before an Amparo court acquires jurisdiction. This possibly stems from the lessons learned in many of the Amparos in Latin America which were circumvented by the exhaustion requirement and was generally used by state security forces to delay petitions for the writ thereby rendering the remedy ineffective.[154]

Let us proceed then and to the beginning, that is to say with the first section:

> The petition for a Writ of Amparo is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity.
>
> The writ shall cover extralegal killings and enforced disappearances or threats thereof.[155]

These first norms merit several comments or annotations since they immediately establish most of the structural profile of the Philippine Amparo.

---

[152] In contrast, when reading the *habeas data* writ, we had the distinct impression that we were dealing with a legal institution designed in a way that surpasses traditional *habeas data*.

[153] Eduardo Ferrer Mac-Gregor, EL DERECHO DE AMPARO EN EL MUNDO (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006).

[154] Colmenares, *supra* note 77. *See also* Albano, *supra* note 72.

[155] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §1 (2007).

The remedy is available to any person without any discrimination whatsoever and, as seen historically, the *Rule* makes an express clarification—even if technically unnecessary — that it applies to extralegal killings and enforced disappearances. A question to pose is whether the writ is available to collective persons or not. The nature of the rights protected do leave some room to consider, for instance, a right to security to be enjoyed not only by natural persons but also by a juridical persons, such as unions, human rights organizations, or NGOs. With that consideration in mind, and as long the nature of the right allows it, we believe that the Amparo is also applicable to juridical persons.[156]

This broadens the passive standing, that is, the scope of entities against which an Amparo can be brought may now encompass both private individuals and juridical entities.[157] Thus, it is not limited to acts, omissions, or threats by public authorities or personnel and/or by private persons, if and when endowed with public powers, such as when practicing acts of public power or service within public concessions.[158]

One can consider the following:

> It is true that the Amparo proceeding was originally created to protect individuals against the State; and that is why some countries like Mexico remain with that traditional trend; but that initial trend has not prevented the possibility for the admission of the Amparo proceeding for the protection of constitutional rights against other individual's actions. The current situation is that in the majority of Latin American countries the admission of the Amparo action against individuals is accepted, as is the case in Argentina, Bolivia, Chile, the Dominican Republic, Paraguay, Peru, Venezuela and Uruguay.[159]

---

[156] *See* Colmenares, *supra* note 89, at 11. The *extension* to juridical persons of the Amparo remedy can be found in, for example, Austria, Slovakia, Slovenia, Spain, Hungary, Brazil, Uruguay, Angola, and partially, Argentina and Poland, whereas in Mexico, Macedonia, or Cape Verde, do not extend the Amparo. *See also* Ferrer Mac-Gregor, *supra* note 54; Herrera Garcia, *supra* note 15, at 1223.

[157] As occurs in Argentina, Bolivia, Paraguay and Peru, Costa Rica, Nicaragua, the Dominican Republic, Uruguay or Venezuela. *See* Herrera Garcia, *supra* note 15; Brewer-Carías, *supra* note 12, at 87-88.

[158] *Id.* The legal systems that narrow the Amparo in this aspect are, namely, Cape Verde, Macau, Germany, Spain, Austria, Hungary, Poland, Angola, Colombia, Ecuador, Honduras, Brazil, El Salvador, Guatemala, Mexico and Panama.

[159] Allan Brewer-Carías, *Constitutional Litigation in Venezuela: General Trends of the Amparo Proceeding and the Effects of the Lack of Judicial Independence*, Presentation delivered at the

This broad spectrum is a very positive trait.

It must also be noted that it applies to both actual violations and threats. This aspect must be underlined, since it is not so generalized, and carries the potential to become much more effective than if it were merely limited to actual violations.[160] Again, this broad latitude is a rather positive aspect of the Philippine Amparo.

Idem, as to what regards the specific consecration of omissions and not just the acts or actions, subjected to the Amparo.[161]

The system of a closed list of protected rights, in the case of the rights to life, liberty, and security, is meant to underline the fundamental importance of such rights. This rather limited scope is not entirely new in the realms on comparative law — quite the contrary. However, the closed lists in other legal systems, albeit limited, are more extensive in quantity. The same fundamental rights are constitutionally established, or the same formulation thereof, but with some few added exclusions.[162] In many legal systems, the Amparo covers all fundamental rights constitutionally established, plus rights that are created by international norms and/or ordinary legislation,[163] thus extending the protective web of the Amparo to virtually all and any fundamental right in force in a given legal system.

This reductionist aspect, albeit understandable in light of specific historical motivations, can be seen as one of the weaker traits of the Rule on the Amparo writ. It was stated:

Seminar on Constitutional Litigation: Procedural Protections of Constitutional Guarantees in the Americas and Beyond, Duquesne University School of Law, Pittsburgh (Nov. 5, 2010).

[160] *See* Ramos, *supra* note 72, at 91.This trend is also found in Argentina, Bolivia, Costa Rica, Chile, Ecuador, Guatemala. In many other legal systems there are no specific provisions covering the mere threat. *See* Hererra Garcia, *supra* note 15.

[161] Including specifically the omissions one finds, for example Cape Verde, El Salvador, Argentina, Venezuela, but not in Slovenia, Croatia or Macedonia, as it is usual in the legal systems that were influenced by the German model of Amparo.

[162] *See, e.g.,* the cases of Spain, Austria, Peru, Germany, Nicaragua, Poland, and Panama.

[163] This is the case in Argentina, Bolivia, Costa Rica, Ecuador, Paraguay, Venezuela, Slovakia, and Slovenia. *See supra* note 157.

> 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. 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.[164]

This does not totally convince us since, by the measure of rights already enforced by other remedies, one should also point to the triumvirate of rights that were formally already *protected* by other remedies, namely the writ of *habeas corpus*. The point at stake is different: it is to know if the other remedies are effective or not, and if the enhanced capacity of the Amparo should be extended, or not, to other fundamental rights.[165]

A point to note is that, in August 2008, at a forum on economic, social, and cultural rights, Chief Justice Puno said, "We are also studying the possibility of widening the coverage of the Writ of Amparo by providing protection to economic, social, and cultural rights, including protection against demolitions and bringing the judiciary closer to the poor."[166] So far, this was not done, and Puno is no longer Chief Justice. If this had been done, the Amparo would have undoubtedly been enthroned as a transversal guarantee of all fundamental rights; thus, crossing the original libertarian genesis. Such would have, we believe, a considerable social and juridical impact.

In any event, one may ask if, by way of a so-called friendly interpretation towards fundamental rights, the scope of rights can already be considered broader. In truth, from important fundamental rights such as the right to life, freedom, and security, and always bearing in mind the constitutional command of human dignity as an illuminating tool, one believes that it is possible to ascertain a flow of rights that are connected naturally and functionally to any of the above three rights, hence being also protected by the

---

[164] Supreme Court, *supra* note 152.

[165] Gozon & Orosa, *supra* note 72.

[166] Abigail Kwok & Tetch Torres, *SC Studying Expansion of 'Writ of Amparo' Chief Justice*, PHIL. DAILY INQUIRER, Aug. 28, 2008, *available at* newsinfo.inquirer.net/breakingnews/nation/view/20080828-157306/SC-studying-expansion-of-writ-of-Amparo--Chief-Justice *See also* Rosales, *supra* note 72, at 1037.

Amparo.[167] One quick look at the Bill of Rights inspires us to consider as possible candidates, for example, the right to property, the right to free of speech, expression, and a free press, and the right of the people to peaceably assemble and petition. As already said elsewhere: "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."[168]

Moving on to the second point, one finds next the establishment of who can file the Amparo petition in Section 2 of the Rule. The petition may be filed by the aggrieved party or — this aspect is especially relevant due to the nature of the violations[169] — by a number of persons, in a given order of precedence, that can act on behalf of the victim.[170] Such persons being family members, relatives, or any concerned citizen, organization, association or institution, but only if there is no known member of the immediate family or relative of the aggrieved party.[171] This last aspect is also deemed positive although, in a possible future revision of the rules, the requisite of no known member of the family could be eliminated or reduced, which should allow for a broader sense of active legitimacy (or standing), as well as a more *de facto* effective guarantee,[172] as long as that "*any person*" acts in the interest of the aggrieved party,[173] particularly if the aggrieved party is not in a position to introduce the petition.

Regarding the venue, that is to say, where to file, the Rule provides an ample overture of competent courts. The petition may be filed with the Regional Trial Court of the place where the threat, act or omission was committed or *where any of its elements occurred*, or with the Sandiganbayan, the

---

[167] *Id. See also* Marquez, *supra* note 72. . "The Amparo remedy was also successfully used in a child custody case when the RTC of Tagudin, Ilocos Sur, granted the privilege of the writ, and the minor, an illegitimate child was awarded to the mother, and the respondent, the biological father was allowed occasional visitorial rights."

[168] Gozon & Orosa, *supra* note 72, at 27-28.

[169] Supreme Court, *supra* note 152. "However, in cases where the whereabouts of the aggrieved party is unknown, the petition may be filed by qualified persons or entities enumerated in the Rule (the authorized party)."

[170] As illustrated in the cases of Costa Rica, Honduras, and Uruguay.

[171] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §2 (2007).

[172] Supreme Court, *supra* note 152.

[173] *See* Ruben Hernandez Valle, *El Recurso de Amparo en Costa Rica*, *in* EL DERECHO DE AMPARO EN EL MUNDO 282 (Fix-Zamudio & Ferrer Mac-Gregor eds., 2006).

Court of Appeals, the Supreme Court, or any justice of such courts.[174] The Rule also provides that the writ shall be enforceable anywhere in the Philippines.[175]

The petition may be filed on any day and at any time. This has been attributed to "the extraordinary nature of the writ which protects the mother of all rights—the right to life."[176]

A rather relevant norm, especially given the fact that the Philippines has a population of many economically debilitated people,

> [I]s the absence of any requirement for the payment of docket fees under Section 4, which makes the remedy accessible to the victims insofar as it relieves them of the financial burden to prosecute their case. Docket fees are usually beyond the reach of the families of victims, especially since the victim of disappearance or extra-judicial killings are usually the bread winner.[177]

In fact, the Rule establishes that the petitioner shall be exempted from the payment of the docket and other lawful fees when filing the petition, and the court, justice, or judge shall docket the petition and act upon it immediately.[178]

Section 5 deals with the necessary contents of the petition. It establishes a set of required data related to the identification of the aggrieved party and of the respondent, the fundamental right at stake, and the relief that is sought.[179] Note that the petition may simply include a general request for other just and equitable reliefs.

---

[174] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §3 (2007).

[175] This ample and distributed competence can be seen for example in Argentina, Colombia, and Paraguay. The normal trend, however, is to concentrate the competence in solely the Constitutional Court or Supreme Court or Constitutional Section of the Supreme Court in States where the Amparo modality is inspired by the German model, *e.g.,* Austria, Croatia, Slovenia, Hungary, Russia, Spain, Cape Verde, Costa Rica, and El Salvador.

[176] *See supra* note 152.

[177] *Id.* "The Committee exempted petitioners from payment of docket and other lawful fees in filing an Amparo petition, for this extraordinary writ involves the protection of the right to life, liberty and security of a person. The enforcement of these sacrosanct rights should not be frustrated by lack of finances."

[178] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §4 (2007).

[179] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §5 (2007).

Concerning the issuance of the Writ, it deserves to be mentioned that the provisions clearly require the setting of a hearing date, no later than seven days, in order to expedite the resolution of the writ.[180] This shows that "[t]he Amparo proceedings enjoy priority and cannot be unreasonably delayed."[181]

Section 9 of the Rule is considered to be where the heart of Amparo lies.[182] It establishes that within 72 hours after service of the writ, the respondent shall file a verified written return together with supporting affidavits, which shall, among other things, contain 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; 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; all relevant information in the possession of the respondent pertaining to the threat, act, or omission against the aggrieved party. If the respondent is a public official or employee, the return shall further state the actions that have been or will still be taken such as 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, to identify witnesses and obtain statements, to identify and apprehend the person or persons involved in the death or disappearance, and to bring the suspected offenders before a competent court.[183]

Of special note is also the fact that a general denial of the allegations in the petition shall not be allowed.[184] The Supreme Court emphatically affirms, "[n]o general denial is allowed. The policy is to require revelation of all evidence relevant to the resolution of the petition. Litigation is not a game of guile but a search for truth, which alone is the basis of justice."[185]

---

[180] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §6 (2007).

[181] *See supra* note 152.

[182] Fajardo, *supra* note 72, at 759. "One of the most difficult hurdles for the military and PNP respondents in an Amparo petition is the provision on 'return' under Section 9. And this is where human rights lawyers should hammer the respondents ensuring that no 'false returns' or templates are submitted. In fact, prayer for contempt must be lodged before the Supreme Court in case a false return is submitted." *See also* Colmenares, *supra* note 77.

[183] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §9 (2007).

[184] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §9 (2007).

[185] Colmenares, *supra* note 77.

The Rule also establishes the prohibition of certain pleadings and motions, such as a motion to dismiss, motion for extension of time to file return, opposition, affidavit, position paper and other pleadings, dilatory motion for postponement, counterclaim or cross-claim, motion to declare respondent in default, motion for reconsideration of interlocutory orders or interim relief orders, or petitions for certiorari, mandamus or prohibition against any interlocutory order.[186] This is done in order to expedite the procedure: "[t]he enumerated pleadings and motions are prohibited, so that the proceedings in the hearing shall be expedited. The Committee noted that since the right to life, liberty and security of a person is at stake, the proceedings should not be delayed."[187] The same rationale explains Section 12 on the effect of the respondent's failure to file a return.

Section 13 basically attests to the nature of the Amparo as a summary speedy procedure.

The always important interim relief,[188] "available to the parties are distinct features of the Writ of Amparo,"[189] are dealt with in Section 14, which states that upon the filing of the petition or *at anytime* before final judgment, the court, justice or judge may grant any of the following:

> (1) *Temporary Protection Order* — the court, be it upon motion or, importantly, *motu proprio,* may order that the petitioner or the aggrieved party and any member of their immediate family be protected in a government agency or by an accredited person or private institution capable of keeping and securing their safety. If the petitioner is an organization, association, or institution the protection may be extended to the officers thereof involved.

---

[186] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §11 (2007).

[187] *See supra* note 152.

[188] *See* Ferrer Mac-Gregor, *supra* note 154; Herrera Garcia, *supra* note 15.

[189] *See supra* note 152. Colmenares wrote: "The interim relief provided by the writ will predictably be a major battleground in Amparo petitions, and will test the will of the courts and human rights lawyers to battle the recalcitrant attitude of the government and the AFP against court orders and rules. Every interim relief granted will surely discourage the commission of abduction since there is now a risk that the abduction will be discovered especially if the 'disappeared' is brought to a military camp." Albano, on the other hand, wrote: "while the rule abandons not-so-helpful legal principles, it adopts new legal paradigms that will enhance the protective character of the writ. These new legal paradigms are the interim reliefs that are available."

> (2) *Inspection Order* — the court, upon verified motion and after due hearing, may order any person in possession or control of a designated land or other property, to permit entry for the purpose of inspecting, measuring, surveying, or photographing the property or any relevant object or operation thereon. The inspection order shall specify the person or persons authorized to make the inspection and the date, time, place, and manner of making the inspection and may prescribe other conditions to protect the constitutional rights of all parties. The order shall expire five days[190] after the date of its issuance, unless extended for justifiable reasons.
>
> (3) *Production Order* — the court may order any person in possession, custody, or control of, *e.g.*, any designated documents, papers, books, accounts, letters, photographs, objects, even if in digitized form which constitute or contain evidence relevant to the petition or the return, to produce and permit their inspection, copying or photographing by or on behalf of the movant. It was elsewhere noted that
>
> [o]ne of the main functions of the writ is to force evidence from uncooperative government investigation agencies. The evidence gathered through inspection orders will not only be important in Amparo petitions, but even in the prosecution or the filing of administrative and civil cases against the perpetrators of human rights abuses.[191]

Note that the motion may be opposed on the ground of national security or of the privileged nature of the information, in which case the court, justice, or judge may conduct a hearing in chambers to determine the merit of the opposition.

> (4) *Witness Protection Order* — the court, upon motion or *motu proprio*, may refer the witnesses to the Department of Justice for admission to the Witness Protection, Security and Benefit Program, and may also refer the witnesses to other government agencies, or to

---

[190] In the original version, prior to the amendment, the expiration was two days: "When the Rule on the Writ of Amparo was promulgated and about to take effect, the Executive Government through the Solicitor General's Office petitioned modifications to the Rule (in particular, the changing of 2 days reply period to 5 days) to give some elbow room for the Solicitor General's Office to make consultations and render due service to the military or other governmental body charged with responsibility and is asked to make accountability." *See also* Orosa, *supra* note 76.

[191] Colmenares, *supra* note 77.

> accredited persons or private institutions capable of keeping and securing their safety.[192]

Section 17 merits special mention. The required burden of proof and standard of diligence set forth therein proscribes the mere invocation of the presumption that official duty has been regularly performed to evade responsibility or liability; thus, putting aside an established legal presumption. The public official or employee must also prove that— as opposed to a private respondent— extraordinary diligence was observed in the performance of their duty. An author states:

> One novel legal development in the Philippine Amparo is the inapplicability of the "presumption of regularity" rule. Blanket denials without the corresponding diligence to investigate the killing or disappearance are unacceptable under the rule. Furthermore, since there is no presumption of regularity, the respondent public officials must prove through evidence that their acts were indeed regular rather than placing the burden of proving the 'irregularity' on the complainants.[193]

Appeal is allowed provided that the decision was not from the Supreme Court, and the appeal may raise both questions of fact and of law. The appeal is also granted with priority.[194]

The Rule does not allow the dismissal of the case, but instead its archive and concomitant possibility of revival upon showing of valid cause, such as the failure of the petitioner or witnesses to appear due to threats on their lives.[195] Note that a periodic review of the archived cases shall be made by the Amparo court that shall, either *motu proprio* or upon motion by any party, order their revival when ready for further proceedings.[196]

Section 22 of the Rule is worth mentioning since it disallows the separate filing of the writ when a criminal action has been commenced, but

---

[192] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §14 (2007).
[193] *Id.*
[194] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §19 (2007).
[195] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §20 (2007).
[196] *See supra* note 152.

provides that the reliefs under the writ shall be available by motion in the criminal case.[197]

The Rule also provides that it "shall not diminish, increase or modify substantive rights recognized and protected by the Constitution."[198] This is merely a declaratory statement pursuant to what is established in the Constitution, thus, lacks any substantive content or any sort of mandatory *official* interpretation. And, as we have already said, we consider that the Amparo is, in effect, a new substantial right and not solely, and simply, a new procedural way to protect fundamental rights.

One final note in this chapter to address an unanswered issue: may the Writ of Amparo be suspended? Particularly in cases of invasion or rebellion, when the public safety requires it, as is established in Section 15, Article III of the Constitution, for the writ of *habeas corpus*? As stated elsewhere,

> [T]he question is, where the privilege of the writ of habeas corpus has been suspended, is the privilege of the Writ of Amparo likewise to be deemed suspended and therefore unavailable? I believe it should be, since it is only an auxiliary process and so cannot remain standing without the main remedy.[199]

Tentatively, one might say that, in the absence of such similar express provision, the Amparo cannot be suspended.[200] This conclusion is reinforced when one takes into consideration the important fundamental rights it is sworn to protect (*e.g.*, the right to life) and its legal construction as an autonomous procedure, the only exception being in the case of a pending criminal action. The procedural autonomy of the Amparo may be seen in its lack of dependence on other actions, such as that of *habeas corpus*.

---

[197] Brewer-Carías, *supra* note 12. He wrote on "an indirect provision as a condition of inadmissibility of the writ of Amparo".

[198] Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, §24 (2007).

[199] Vicente Mendoza, *A Note on the Writ of Amparo*, 82 PHIL L.J. 7 (2008). *Also,* a report released by the Commission on Human Rights stated that the number of extrajudicial killings has significantly dropped to by as much as 70 percent compared to that of 2005.

[200] For example, the new Dominican Republic Constitution expressly establishes in article 72 that the acts practiced in the so-called states of exception, that unreasonably affect protected rights that are suspended, are subjected to the Amparo.

However, if one considers the Amparo as capable of being suspended, the minimum standards that would apply to limit the circumstances of the suspension would be, by analogy, the ones that apply to the writ of *habeas corpus*, such as cases of invasion or rebellion, or when the public safety requires it. The same preventive mechanisms established in Section 18, Article VII of the Constitution must likewise be applied— namely, that suspension of the Amparo can never be done automatically, but only by an act of the President, with the need of submission of a report to the Congress within 48 hours, and the possibility of review by the Supreme Court.

VII. BRIEF CONCLUSIONS, SUGGESTIONS, AND WISHES

It is time, finally, to make a balance, present some conclusions and suggestions, as well as wishes.

Regarding a balance, one can read usually a positive one,[201] albeit just moderately, such as the proved diminishing of the extra-judicial killings and the release of illegally detained persons, since the Writ of Amparo has resulted in significant decrease of extralegal killing. In this regard, the Writ of Amparo may be used by other countries which suffer extralegal killing and enforced disappearances under the military dictatorship.[202]

However, there are still some international and domestic criticisms. For example, on September 2007, the Asian Human Rights Commission ("AHRC") criticized the Writ of Amparo and *habeas data* (Philippines) for being insufficient:

> 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.[203]

---

[201] *See e.g.*, Marquez, *supra* note 72; Tiojanco & Aguirre, *supra* note 72, at 116; Rosales, *supra* note 72, at 1022, 1027, 1030, 1035.

[202] Kong Hyun Lee, *Rapporteur Report for the Asian Constitutional Courts*, *available at* www.venice.coe.int/WCCJ/Papers/KOR_Kong%20Hyun%20Lee3_E.pdf.

[203] GMA News TV, *Writ of Amparo Not Enough — Hong Kong Rights Group*, *available at* www.gmanews.tv/story/62409/Writ-of-Amparo-not-enough--Hong-Kong-rights-group. *See also supra* note 107; Ramos, *supra* note 72, at 109.

It would be important to analyze judicial decisions and ascertain difficulties, inconsistencies, doubts, etc., but also to point out the positive aspects. Lawyers should also be heard on their practical difficulties and successes.

It would also be important to analyze and compare the judicial decisions of Amparo dictated by the Supreme Court on one hand, and the other courts, on the other.[204] There might be a certain tendency for the other courts, for a variety of reasons,[205] not being as *pro Amparo* and pro *libertate* and pro *homine* as the Supreme Court.

In fact, Raul Pangalangan comments on a case decided by the Court of Appeals:

> The Supreme Court deliberately fixed a lower standard of evidence for Amparo petitions to make it easier for the parties to avail themselves of this remedy, yet strangely enough, now we see this goal boomerang against the victim. The Supreme Court made it clear that the Amparo is not a criminal case that would have entailed the highest standard of evidence, namely, "proof beyond a reasonable doubt." Instead, the Supreme Court required the aggrieved party to meet only the test of "substantial evidence," which is several notches lower than that. In other words, the question was not whether Philippine National Police (PNP) Director General Avelino Razon and his group should be convicted as kidnappers, but rather whether Lozada´s right to security was threatened. The Court of Appeals had enough room to consider the totality of circumstances that led to the threat to Lozada´s right to security. [206]

He then heavily criticizes the Court of Appeals, either directly or by quoting others:

> The Court of Appeals had enough facts to deploy if it wanted to extend Amparo relief to Lozada. But the Court of Appeals says no go, despite what the Supreme Court said about the Writ of Amparo being designed to protect us precisely from such threats to our right to security. When the Court of Appeals concludes that "the instant

[204] Rosales, *supra* note 72, 1024; Tiojanco & Aguirre, *supra* note 72 at 117.

[205] Colmenares, *supra* note 77. He explains that some Regional Trial Court judges are unfamiliar with the Rule.

[206] Pangalangan, *supra* note 150.

> Amparo petition does not involve extralegal killings, enforced disappearances, or threats thereof," it ignores the plain fact that what transpired was a threat, nay an aborted attempt, at an enforced disappearance.", and more, "When the Supreme Court created the Writ of Amparo, it said that "this writ … should be allowed to evolve through time and jurisprudence." The Court of Appeals dismissal of the Amparo petition casts a cloud on the Supreme Court's activist use of its rule-making power to protect human rights. With the denial of the protective writ, the Supreme Court, in effect, was shot in the foot by its own.[207]

These actions of the lower court do spray indeed a dark cloud over the noble institution of Amparo.

One first suggestion, along with having a writ promulgated by legislative act based upon the current Rule, is to broaden the scope of rights to which the Amparo applies. This broadening can be understood in the following levels:

Minimally, extending to the rights contained in the constitutional Bill of Rights.

In medium terms, extensive to those rights and to other constitutional rights such as in the field of electoral rights, nationality, etc.

Maximally to extend to the entire above-said plus all the fundamental rights that are established by international law norms and ordinary legislation.

Other minor suggestions regarding the Rule and an eventual modification were already expressed in the previous chapter, such as in terms of broadening the terms of standing to file the writ or a clear extension to juridical persons as beneficiaries of the writ.

The modifications, in terms of upgrading the Amparo's scope, force, and efficacy, should also be used so they could abolish or strongly diminish lacunae, inconsistencies, doubts, etc., that practical implementation found wanting or even demanding. To do such is not only to technically improve the rules, but more importantly, to bring clarity and unity in applying values that should be especially cherished in the field of fundamental rights.

---

[207] *Id.*

As for the rest, the enormous sea of the rest, one cannot but underline again, and wish once more, the need of having a writ that is popularized, properly understood and respected, of having the Rule of Law at the helm, and of having effective judicial independence.

It is time to finally conclude this paper, and we will do so by resorting to words of the Supreme Court:

> The Amparo rule should be read, too, as a work in progress, as its directions and finer points remain to evolve through time and jurisprudence and through the substantive laws that Congress may promulgate.[208]

Hence, let us wish the Amparo: *vivat, crescat, floreat!*

- o0o -

[208] Razon v. Tagitis, G.R. No. 182498, 606 SCRA 598, 687 (2009).