A NOTE ON THE WRIT OF AMPARO

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My concern in this paper is with such questions as the nature of the writ of *amparo* as this is provided in the resolution of the Supreme Court of September 25, 2007 and amended in its resolution of October 16, 2007,[1] the reliefs that it affords for the protection and vindication of personal rights, and whether, like the privilege of the writ of *habeas corpus*, it can be suspended by the President of the Philippines whenever in his judgment such suspension is required by public safety because of an invasion or rebellion.

I will leave to others such other matters procedure as who can file a petition for the writ, what must be averred in the petition, in what court the petition may be filed, how the writ should be served, what the return to the writ must contain, within what time the return must be filed and within what time the court must render its decision, will be discussed by the other speakers in the panel.

I. SCOPE OF THE WRIT

Let me begin by noting that the writ of *amparo* covers not all violations or threatened violations of constitutional rights but only those of the right to "life, liberty, and security," that is to say, the right against unreasonable searches and seizures, the privacy of communication and correspondence, the liberty of abode and of travel, the right to counsel and other Miranda rights during custodial interrogation, the right not to be subjected to torture, force, violence, threat, intimidation or coercion, and other means of extorting confessions, or not to be placed in solitary confinement and held incommunicado, and the right to just and right humane treatment of prisoners. The writ of *amparo* is not available as a remedy for the violations, for example, of the rights of expression and religious worship and other so-called intellectual freedoms or for the violations of any of the

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[1] RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC.

social and economic rights. Such violations or threats of violations are beyond the scope of the Rule. Sec. 1 of the Rule clearly states that "the writ shall cover extralegal killings and disappearances or threats thereof." Read that as "the writ shall cover only extralegal killings and enforced disappearances," and you will still be right.

Indeed, as the impetus for the adoption of the writ is the number of abductions and summary executions (so-called "salvaging") of suspected rebels, militants, journalists, government critics, and student activists and the cases of tortures, coercion and other forms of abuses of persons under arrest or detention. Although these cases are not limited to those committed by agents of the state but include as well those committed by private individuals, it is to the problem of adequacy of existing remedies for human rights violations committed by government agents that the Rule on the Writ of Amparo appears to be particularly addressed.

II. NATURE AND FUNCTION OF THE WRIT

Now what is the writ of *amparo*? Perhaps it would be better if I start by saying what I believe the writ is not. The writ is not an independent action. It is not an extraordinary writ or a prerogative writ like *habeas corpus*, certiorari, prohibition, mandamus or quo warranto. It is an auxiliary remedy designed to aid a court in the exercise of jurisdiction already granted to it to try cases involving violations of personal freedoms and security.

In *Villavicencio v. Lukban*,[2] the Court indicated three remedies which any person suffering from arbitrary personal restraint has: civil actions, criminal prosecutions, and petition for the writ of *habeas corpus*. Later cases mention a fourth remedy, and that is, administrative proceedings against public officers, who are guilty of abuse of authority.[3] By adopting the Rule on the Writ of Amparo, I do not think the Supreme Court thereby added a separate and independent remedy for violations or threatened violations of individual liberty but only a remedy ancillary to any of the existing remedies.

The writ of *amparo* cannot be regarded as a new action without making it duplicate existing forms of actions like *habeas corpus* and mandamus. More than that, the writ of *amparo* cannot be regarded as a new action because the constitutional power of the Court to adopt rules of procedure is subject to the limitation that the

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[2] 39 Phil. 778, 787 (1919).

[3] *e.g.*, Moncado v. People's Court, 80 Phil. 1 (1948).

rules do not "diminish, increase, or modify substantive rights."[4] A new action can only be provided or created by law or the Constitution by conferring jurisdiction for this purpose on the courts. To consider the writ of *amparo* an independent action would be to say either that it increases or that it modifies substantive rights. The Rule in fact disclaims any intention to do so. Sec. 24 expressly provides that "[it] shall not diminish, increase or modify rights recognized and protected by the Constitution."

III. ADEQUACY OF EXISTING REMEDIES

Indeed, the existing remedies for violations or threatened violations of individual freedoms are quiet adequate. Civil actions partake of actions for damages under Art. 32 of the Civil Code. Criminal actions take the form of prosecutions under the Revised Penal Code for arbitrary detention or expulsion under Arts. 124-127, serious and less serious physical injuries under Arts.263 and 265, threat or coercion under Art. 286-285; or murder under Art. 248, as well as prosecutions for violations of the provisions on coercion and killing of suspected terrorists inthe recently enacted Human Security Act.[5]

Civil and criminal prosecutions may take time to prosecute given the burden of proof required to establish the guilt or liability of the defendant and the presumption of innocence which the accused enjoys, but they are not inadequate for that reason. If at all, what is needed is to amend the substantive laws in order to add bite to their sanctions, whether these be in the form of damages or penalties.

On the other hand, the writ of *habeas corpus* as a speedy remedy for all forms of arbitrary personal restraint is universally conceded. Blackstone called *habeas corpus ad subjiciendum* "the most celebrated writ in the English law," while Justice Holmes described it as a speedy remedy that "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to other proceedings, and although every form may have preserved opens the inquiry whether they have been more than an empty shell."[6] Speaking from experience, our Court has described the writ as a "swift and imperative remedy in all cases of illegal restraint or confinement."[7]

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[4] CONST., Art. VIII, § 5(5).

[5] Rep. Act No. 9372, §§ 22 and 25.

[6] Frank v. Mangum, 237 U.S. 286 (1969) (*dissenting*).

[7] Aquino v. Ponce Enrile, 59 SCRA 183, 281, 283(1974) (Fernando, *J. concurring and dissenting*), quoting Lord Birkenhead in Secretary of Home Affairs v. O'Brien, A.C. 603, 609 (1923).

Indeed, in the Philippines, the Great Writ has found varied applications in all cases of illegal detention, and the great debate has not on its scope but on the sufficiency of the factual bases of the President for suspending its privilege.[8]

Lately, however, the debate about *habeas corpus* has shifted to whether it can be availed of to inquire into claims of the military denying responsibility for missing persons some of whom are later found to have been killed. It is said that as the writ is concerned only with the legality of detention, where the custody of missing persons is denied, the function of the writ comes to an end. This is the problem posed by extrajudicial killings and enforced disappearances, the unabated occurrence of which has cast a blot on the human rights record of this country.

This reality does not, however, justify the niggardly regard for the Writ of Habeas Corpus as the Great Writ of Liberty. If it is now perceived to be less than effective against new forms of human rights violations, it can only be because of lack of appreciation of its potentialities as a remedy and awareness of the Supreme Court's expansive view of the writ. For example, as the then Justice Fernando pointed out in a case,[9]"[the writ] is wide-ranging and all-embracing in its reach. It can dig deep into the facts to assure that there be no toleration of illegal restraint."

Mere denial by the military that they have custody of a person whose whereabouts and cause of detention are sought cannot foreclose further inquiry by the court. There are discovery procedures[10] available under the Rules of Court which can be utilized by a party in *habeas* proceedings. By express provision[11] these rules, along with other rules for ordinary actions, apply to special proceedings such as those for *habeas corpus*. In addition, Rule 135, § 6, give courts the power to issue "all auxiliary writs, processes and other means necessary to carry into effect their jurisdiction." Courts are thus given broad discretionary powers to fashion procedures for the full development of the facts.

Two cases may be cited to illustrate the reach of the Writ of Habeas Corpus and show why it deserves the encomiums paid to it as the Great Writ. The first is a decision of the U.S. Supreme Court. The other one is a decision of our Supreme Court.

In the first case, *Harris v. Nelson*,[12] a convict applied for *habeas corpus*, alleging that he had been convicted on the basis of illegally seized evidence. He asked the District Court for leave to serve interrogatories on the prison warden in

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[8] See Barcelon v. Baker, 5 Phil. 87 (1905), Montenegro v. Castaneda, 91 Phil. 882 (1952), Lansang v. Garcia, 42 Phil. 448 (1971), Aquino v. Ponce Enrile, 59 SCRA 183 (1974).

[9] Aquino v. Ponce Enrile, 59 SCRA 183, 281 (1974) (*concurring and dissenting*).

[10] e.g., RULES OF COURT, Rule 25 (interrogatories), Rule 26 (admission by adverse party), Rule 27 (production or inspection of documents), and Rule 28 (physical and mental examination of persons).

[11] *Id.* Rule 72, § 2.

[12] 304 U.S. 286 (1969).

order to prove that his arrest and the search of his dwelling were made on the basis of statements of an unreliable informant. The District Court granted his request and directed the warden to answer the interrogatories. Upon application of the warden the Court of Appeals vacated the order of the District Court. In turn the judge brought the matter on certiorari to the U.S. Supreme Court which reversed the Court of Appeals and allowed the interrogatories.

The question was whether in *habeas corpus* proceedings Rule 33 of the Federal Rules of Procedure on interrogatories can be availed of by the petitioner. In an opinion by Justice Fortas, the Supreme Court held that although Rule 33 was not applicable to *habeas corpus* proceedings, in appropriate circumstances, where a petition for *habeas corpus* establishes a case for relief, the District Court could use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as justice and law require."

Harris is of particular relevance, because there the authority of courts to apply the discovery procedures in ordinary action to *habeas corpus* proceedings was upheld even in the absence of an express grant of the power. As already noted, in our case, the various modes of discovery in ordinary actions are expressly made applicable to special proceedings, such as *habeas corpus*.

In the second case, *Villavicencio v. Lukban*,[13] the Supreme Court found that, without any authority, the mayor of Manila had rounded up 181 women of ill repute and shipped them against their will to Davao. The mayor claimed that when the petition for *habeas corpus* was filed the women were no longer in his custody and that his jurisdiction and that of the chief of police did not extend beyond the limits of the city. In rejecting this contention, the Court, through Justice Malcolm, said:

> ". . . [I]f the respondent is within the jurisdiction of the court and has it in his power to obey the order of the court and thus to undo the wrong that he has inflicted, he should be compelled to do so. . .The respondents, within the reach of process, may not be permitted to restrain a fellow citizen of her liberty by forcing her to change her domicile and to avow the act with impunity in the courts, while the person who has lost her birthright of liberty has no effective recourse. The great writ of liberty may not thus be easily evaded." [14]

Finding that the mayor had made only "half hearted effort" to comply with the writ, "which naturally resulted in none of the parties in question being brought before the court on the day named,"[15] the Supreme Court held him guilty of contempt and fined him P100.00, an amount which in 1919, when the parity of the peso to the dollar was P2.00 to U.S.$1.00, was certainly substantial.

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[13] *Supra* note 2.
[14] *Id.* at 791.
[15] *Id.* 795-796.

IV. RELIEFS AVAILABLE UNDER THE WRIT

Nonetheless, the Rule on the Writ of Amparo is significant for its affirmation of the power of courts to adopt needful measures for carrying out their *habeas* jurisdiction or in hearing civil or criminal prosecutions for violations of rights of personal security. The reliefs that may be availed of may not amount to much, but in the fight against the menace to personal freedom and security, anything is better than nothing.

What are these reliefs? Pursuant to § 14 of the Rule, during the pendency of the action, the court may issue (1) a temporary protection order for the petitioner or aggrieved party, (2) a witness protection order, (3) an inspection order, or (4) a production order. In addition, under § 9(d), the court may order the respondent:

(1) to verify the identity of the aggrieved party;

(2) to recover and preserve evidence relating to the death or disappearance of the person identified in the petition;

(3) to identify witnesses and obtain statements from them concerning the death or disappearance;

(4) to determine the cause, manner, location and time of death or disappearance as well as any pattern or practice that may have brought about the death or disappearance;

(5) to identify and apprehend those involved in the death or disappearance; and

(6) to file charges against the suspected offenders

To be sure, these are matters that government officials, who are respondents, must allege in their return. They are also a measure, I believe, of the reliefs that a court, hearing an application for the writ of *amparo*, can grant. The court may order the production of the person in detention, but that is more in exercise of its jurisdiction over applications for habeas corpus. Congress can do much to reverse the culture of impunity by amending our criminal laws and providing stiffer penalties for human rights violations. I was particularly struck by a recent news report that, according to the National Security Adviser, Norberto Gonzales, law enforcement agents are hesitant to use anti-terror measures authorized in the Human Security Act because they are afraid of incurring heavy

penalties under the law if they are found to have abused their powers.[16] Indeed, the law prescribes penalties ranging from 10 to 12 years of imprisonment to 10 years and 1 day to 20 years of imprisonment and grants compensation of P500,000 to victims of illegal detention for every day of such detention. While the National Security Adviser appears to have made the statement to justify efforts to amend the law so as to lower the penalties for human rights abuses, the point is that the right amount of penalties may just be what is really needed to deter human rights violations whether committed by public or private individuals.

V. THE PRIVILEGE OF THE WRIT

Finally, it should be pointed out that, like Rule 102 on the writ of *habeas corpus*, the Rule on the Writ of Amparo distinguishes between the writ and its privilege. With respect to *habeas corpus*, the writ is the order requiring the person to whom it is issued to produce the body of the person alleged to be restrained of his liberty and to justify the detention. The writ issues as a matter of course, the suspension of its privilege notwithstanding.[17] On the other hand, the privilege of the writ is the further order inquiring into the cause of detention and directing the release of the person if he is illegally detained.[18]

Similarly § 6 of the Rule on the Writ of Amparo provides for the immediate issuance of the writ upon the court being satisfied that the petition is sufficient, while § 18 provides for the granting of the privilege upon proof by "substantial evidence" of the allegations of the petition.

In case of invasion or rebellion, the privilege of the writ of *habeas corpus* may be suspended if required by public safety, in which case, upon being informed of this fact, the court may abstain from ordering the release of the person detained. The 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.

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[16] 'Law enforcers hesitant to use anti-terror law', Available http://www.gmanews.tv/print64405. Accessed 14 October 2007.

[17] RULES OF COURT, Rule 102, § 6.

[18] *Id.* § 15.