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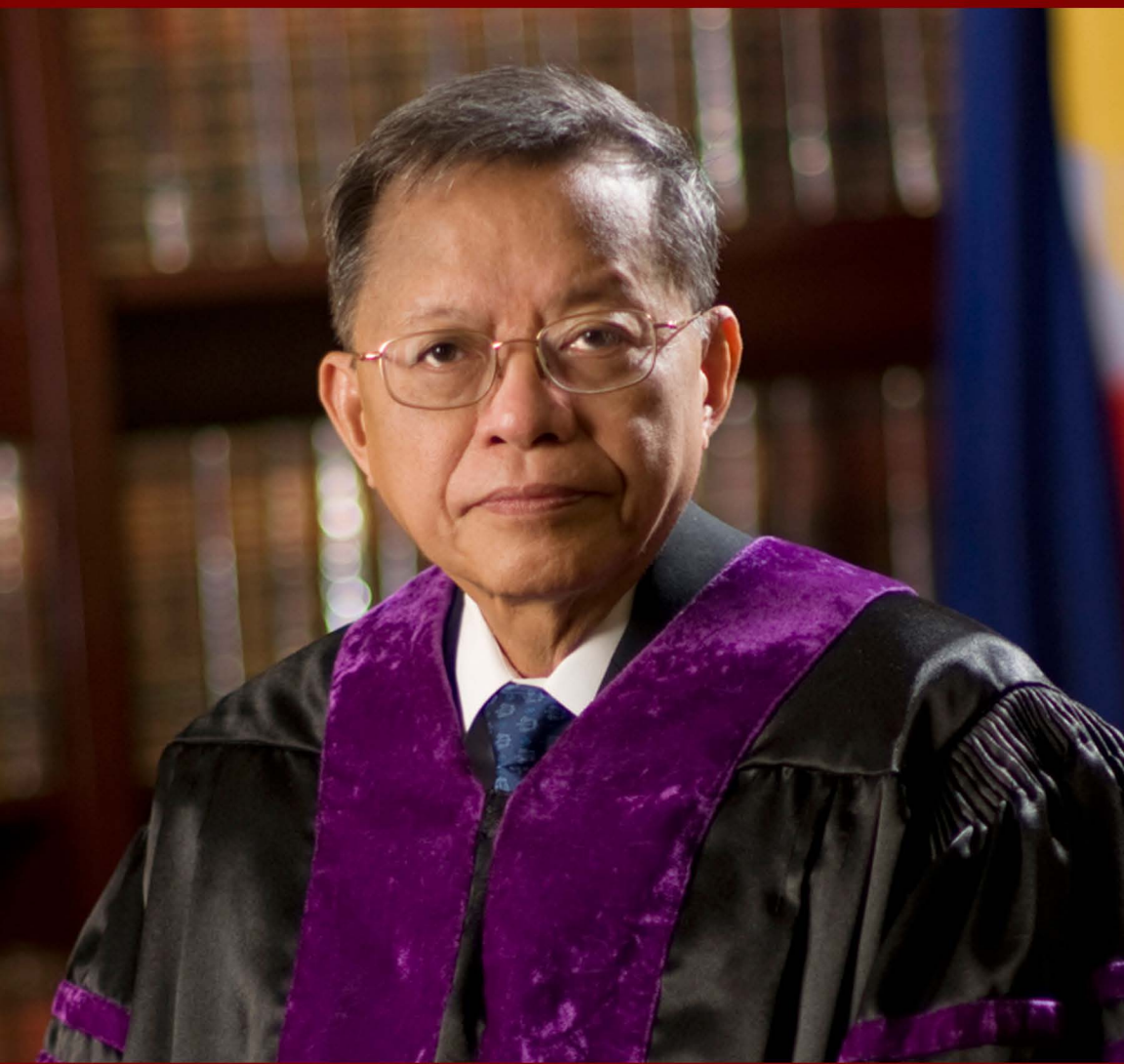

# Chief Justice Reynato S. Puno Distinguished Lectures

## Series of 2007

The PHILJA JUDICIAL JOURNAL

JANUARY-JUNE 2008 VOL. 10, ISSUE NO. 29

# CHIEF JUSTICE REYNATO S. PUNO DISTINGUISHED LECTURES SERIES OF 2007

## I. FIRST DISTINGUISHED LECTURE

## II. SECOND DISTINGUISHED LECTURE

## III. THIRD DISTINGUISHED LECTURE

## The PHILJA Judicial Journal

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# THE PHILJA JUDICIAL JOURNAL

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## Acknowledgment

The Supreme Court of the Philippines would like to thank the officials, faculty, staff, and student body of the University of San Carlos, the Ateneo de Davao University, and the University of the East for their generous and committed support that contributed to the success of the series.

**Supreme Court of the Philippines**
**Philippine Judicial Academy**
**Philippine Association of Law Schools**
*in cooperation with the*
University of San Carlos
College of Law

*present*

***The First Distinguished Lecture Series of 2007***

# COMPARATIVE STUDY OF PHILIPPINE AND GERMAN LAWS ON SUCCESSION

*by*

**His Excellency Axel Weishaupt**
*Ambassador Plenipotentiary*
*of the Federal Republic of Germany in the Philippines*

*Friday, June 29, 2007, 3:00 P.M.*
*Theodore Buttenbruch Hall, University of San Carlos*
*Main Campus, Cebu City*

# *Program*

**Invocation**
**Fr. Samuel D. Clarin, SVD**
*University Chaplain*

**National Anthem**
*University of San Carlos Choristers*

**Supreme Court Hymn**

**Greetings**
**Fr. Roderick C. Salazar, Jr., SVD**
*President, University of San Carlos*

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**Mr. Justice Antonio T. Carpio**
*Associate Justice, Supreme Court*

**Musical Number**
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**Introduction of the Lecturer**
**Mr. Justice Adolfo S. Azcuna**
*Associate Justice, Supreme Court*

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**His Excellency Axel Weishaupt**

**Presentation of Plaque of Recognition to**
**His Excellency Axel Weishaupt**
*by Fr. Roderick C. Salazar, Jr., SVD, and Dean Alex L. Monteclar*

**Presentation of Plaque of Appreciation to**
**His Excellency Axel Weishaupt**
*by Chief Justice Reynato S. Puno and Fr. Roderick C. Salazar, Jr., SVD*

**Closing Remarks**
**The Honorable Reynato S. Puno**
*Chief Justice*

**USC Hymn**
*University of San Carlos Choristers*

**Philippine Judiciary Hymn**

**Master of Ceremonies**
**Justice Minita V. Chico-Nazario**
*Associate Justice, Supreme Court*

# GREETINGS*

*Fr. Roderick Salazar, Jr., SVD* **

Good afternoon, ladies and gentlemen
Your Excellency, Ambassador Axel Weishaupt
Chief Justice Reynato S. Puno
Associate Justices of the Supreme Court
and of the Court of Appeals
Guests and friends,

On behalf of the University of San Carlos, I welcome you all.

By "welcome," we mean we are glad that you have come, we hope you are well. Welcome.

It is to the Buttenbruch Hall that I welcome you. But I assure you that we did not hurriedly baptize this hall with a German-sounding name just to match the name of our guest. (Although, Your Excellency, I must tell you that the religious superior of our Congregation, the Society of the Divine Word, popularly called in Germany Steyler Missionar, is himself German. And I had to ask him, and I hope I learned well, how precisely to pronounce your name: WEISHAUPT, which, to those interested to know, means White Head, white cover for the head.)

Theodore Buttenbruch, dear friends, was the religious superior of the Society of the Divine Word back in the 1930s.

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* Delivered at the *First Distinguished Lecture, Series of 2007,* held on June 29, 2007, at the Theodore Buttenbruch Hall, University of San Carlos, Main Campus, Cebu City.

** President of the University of San Carlos.

Our society, with the initials SVD, for *Societas Verbi Divini*, was founded in 1875 in Steyl, a town in Holland. Our founder was German, Arnold Janssen, now a saint. He wanted to found a German missionary congregation, but because of the *Kulturkampf*, he was forced to found it, not on German soil but on Dutch soil, in that place called Steyl.

The SVD came to the Philippines in 1909, first to Abra in Northern Luzon. In 1935, Archbishop Gabriel Reyes of Cebu asked the SVDs if they could come and take over what was then Colegio de San Carlos. The superior in the Philippines then was Theodore Buttenbruch. He said yes, and here we still are. And in gratitude to the prime movers of our coming to Cebu, the building where we now are is called Archbishop Reyes building, and this hall, Theodore Buttenbruch Hall.

San Carlos is San Carlos Borromeo, an Italian priest who became cardinal, and who himself was a Doctor of Laws. Because of his insistence that future priests should have formal academic training, many seminaries came to be named after him, including our school which for a time was known as Seminario-Colegio de San Carlos.

Since 1948, we have been known as the University of San Carlos (USC).

We are honored and thankful to the Supreme Court that we have been chosen to host this *First Distinguished Lecture, Series of 2007*, here in Cebu and at USC.

Given our political situation in the country, the topic to be discussed by our special guest should surely be not just informative but also interesting.

May we, from what we learn today, improve our relationships, among us Filipinos, and between us and the people of Germany.

As a wise man had said, "People do not care how much you know, unless they know how much you care."

Let there be knowing, then, and caring. Now.

Welcome.

# Opening Remarks*

*Justice Antonio T. Carpio***

Chief Justice Reynato S. Puno
My esteemed colleagues in the Court
Ambassador Axel Weishaupt
Fr. Roderick C. Salazar, Jr., SVD
    President of the University of San Carlos
Chancellor Ameurfina A. Melencio Herrera
    and other officials of the Philippine Judicial Academy
Dean Mariano F. Magsalin, Jr.
    of the Philippine Association of Law Schools
Dean Alex L. Monteclar
    of the College of Law of the University of San Carlos
Justices of the Court of Appeals
Judges of the first and second level courts
Officials, faculty members,
    and students of the University of San Carlos
My co-workers in the judiciary, distinguished guests, friends,

A pleasant afternoon to all.

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* Delivered at the *First Distinguished Lecture, Series of 2007,* held on June 29, 2007, at the Theodore Buttenbruch Hall, University of San Carlos, Main Campus, Cebu City.

** Born in Davao City, Philippines, Justice Antonio T. Carpio was sworn in as member of the Supreme Court on October 26, 2001. He obtained his law degree from the College of Law of the University of the Philippines (UP) where he graduated valedictorian and *cum laude* in 1975. He placed sixth in the 1975 Bar Examinations. He earned his undergraduate degree in Economics from Ateneo de Manila University in 1970.

On behalf of the Supreme Court of the Philippines, I warmly welcome everyone to this First Distinguished Lecture for the year 2007. This Lecture is jointly sponsored by the Supreme Court, the Philippine Judicial Academy, and the Philippine Association of Law Schools, in cooperation with the College of Law of the University of San Carlos.

This is the first time that the Distinguished Lecture Series of the Supreme Court is being held outside of Metro Manila. The venue chosen is appropriately this historic, beautiful, and

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While a student, Justice Carpio was Chair of the Editorial Board of the Philippine Law Journal of the UP College of Law; Editor in Chief of *The Guidon*, the school paper of Ateneo de Manila University; and Managing Editor of *The Philippine Collegian*, the school paper of the University of the Philippines.

Fresh out of law school, Justice Carpio went into private practice until 1992. He was a Professorial Lecturer of the UP College of Law from 1983 until 1992 when he was appointed Chief Presidential Legal Counsel of the Office of the President of the Philippines. In 1997, he was Executive Director of the ASEAN Business Law program of the UP College of Law.

Justice Carpio also held other important government positions before assuming office as Supreme Court Justice. He was a Member of the Board of Regents of the University of the Philippines (1993-1998) and of the Technology Transfer Board of the Department of Industry (1978-1979). He served as Special Representative of the Department of Trade for textile negotiations (1980-1981). He also held numerous prestigious posts: President, Integrated Bar of the Philippines Pasay-Makati Chapter (1985-1986); Director, UP Law Alumni Association (1984-1989); and Director, Philippine Bar Association (1989-1990).

bustling Queen City of the South. And of course, we are overwhelmed by the extremely gracious and friendly people of Cebu.

The Distinguished Lecture Series of the Supreme Court is the most prestigious law lecture in the Philippines. The lecturers are Chief Justices, members of the highest court of various countries, or well-known legal scholars. For this year, a legal scholar, Dr. Axel Weishaupt, is our distinguished lecturer this afternoon. On July 19, 2007, less than a month from now, our distinguished lecturer will be the Deputy Chief Justice of the Supreme Court of Egypt who will deliver his lecture at the Ateneo de Davao University. In September 2007, our distinguished lecturer will be the Chief Justice of Spain, who will deliver his lecture at the University of Santo Tomas.

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For his "distinguished and exemplary service" to the Republic, Justice Carpio was awarded the Presidential Medal of Merit in 1998 by then President Fidel V. Ramos. In 1991, Justice Carpio received the Outstanding Achievement Award in Law from the Ateneo de Manila Alumni Association. In 2002, he was also the recipient of the Distinguished Alumnus Award from the Ateneo de Davao Alumni Association. Justice Carpio is the Working Chair of the First Division, Chair of the Committee on Strengthening the Institutional Capacity of the Judiciary, and Co-Chair of the Oversight Committee on Halls of Justice. He is Vice Chair of the Committees on Legal Education and Bar Matters, Public Information, and Knowledge Sharing and Regional Cooperation. He is a member of the Committees on Legislative–Executive Relations, Management for Judicial Reform Support Project, Zero Backlog Cases, Security for the Judiciary, and of the Senate Electoral Tribunal. Justice Carpio is also Chair of the Project Board for the *Judicial Reform Handbook* of the Asia Pacific Judicial Reform Forum.

The Distinguished Lecture series started in 2001 when the Supreme Court celebrated its 100th year anniversary. The Supreme Court has continued the Distinguished Lecture as one of its knowledge sharing activities under its judicial reform initiatives. Outstanding jurists, foreign and local, are invited to address a select audience of Philippine jurists, law academics, practicing lawyers and law students.

In the past, the Distinguished Lectures covered topics such as judicial reform, recent legal trends and issues, and the judicial legacies of our Chief Justices. This afternoon, we continue this unique and evolving academic tradition with a discourse on a comparative study of Philippine and German Laws on Succession.

The Supreme Court is very pleased and delighted to hold this Distinguished Lecture in the University of San Carlos, the oldest academic institution in the country, founded 412 years ago in 1595. This historic and leading university in the South lends an aura of timelessness to academic discourses like our topic this afternoon.

We thank all the Carolinians present here today for joining us in this intellectual exercise geared to achieve the noble objective of *mens sana in corpore sano* – a sound mind in a sound body.

Once again, on behalf of the Supreme Court, a warm welcome to everyone.

# COMPARATIVE STUDY OF PHILIPPINE AND GERMAN LAWS ON SUCCESSION*

*His Excellency Axel Weishaupt*

**Dr. Axel Weishaupt** was born in Lennep, Germany, on April 23, 1945.

After receiving his high school diploma in 1965, he enrolled at the Universities of Hamburg, Bonn, Berlin, and Strasbourg for studies in law and foreign languages. In 1970, he graduated from Bonn University with a Bachelor of Laws degree. He continued to take language courses in Mozambique and Indonesia from 1971-1974, while working on his Master of Laws degree at the University of Hamburg, which he received in 1974. In the same year, he was admitted to the Bar. He also took his Ph.D. in International Law in 1980 from the same University.

After his studies at the Diplomatic Academy in Bonn (1974-1976), he embarked on his diplomatic career as Consulate General of the Federal Republic of Germany in Porto Alegre (1976-1979), then to Moscow (1981-1982), and Warsaw (1982-1985).

He also taught Law (1985-1988) at the Diplomatic Academy while on

assignment at the Federal Foreign Office in Bonn, where he was also Special Inspector from 1999 to 2001.

He continued to serve as Chargé d' Affaires at the Embassy of the Federal Republic of Germany in Aden (1988), in Khartoum (1990-1992), and in Alma-Ata in Kazakhstan (1992-1996).

Before his assignment as Ambassador of the Federal Republic of Germany to the Philippines in 2004, he was Consul General in Saratow in Russia (2001-2004) and special envoy to West Afghanistan (2003-2004).

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* Delivered at the *First Distinguished Lecture, Series of 2007,* held on June 29, 2007, at the Theodore Buttenbruch Hall, University of San Carlos, Main Campus, Cebu City.

The subject for this afternoon is a Comparative Study of Philippine and German Laws on Succession.

This is not a very easy material, not an easy subject matter. But I hope it is interesting and, after all, of practical interest for the following reasons: In Germany, there are more than 30,000 Filipino nationals living and working, and we have about 4,000 German nationals living here permanently in the Philippines. So all these people live, work, go on retirement, get married, and one day will also pass away. And then the question will arise from the judicial point of view on which law has to be applied and how the estate is to be distributed when the normal Filipino worker or nurse in Germany who upon death leaves an account in the bank, and the question will be how their relatives here in the Philippines can claim their money. Few leave wills or testaments; mostly what will apply is hereditary or succession *ab intestato* without the will.

Before I come to that, I just want to mention quickly that our laws, especially family law, and law of succession, have common roots in civil law because we all go back to the Napoleonic Code or French Civil Code which is based on Roman Law. So the old code still has some effects up to this day. The French Civil Code is based, first of all, on the Spanish Civil Code, the old one, but the new one still shows strong similarities. And most Latin American laws from Argentina to Mexico are also almost all based on the same source. The same applies to the German Civil Code.

So we have this common basis in civil law, at least in family law and succession. In private international law, both

Philippines and Germany apply the same principle. To illustrate, if a Filipino national dies in Germany, according to our conflict of laws, we apply the law of last citizenship or nationality, and you do the same. So in this case, there is no discussion, the German courts have to apply the Philippine law, either the family code or civil code, or the Code of Muslim Personal Laws. In the other way around, if a German national passes away here, the Philippine courts have to apply, from their own point of view also, the German Civil Code.

There is one difference between our systems, if I may say so. In the Philippines, as I learned from the books, foreign law has to be pleaded. But in Germany, it is the other way around; the courts have to apply the foreign law ex officio. They have to do that themselves and if they can not do it themselves, which is often the case, they have to rely on expert opinion. I was working for some years in a specialized institute in Hamburg which has laws and common rulings of almost all countries in the world. It may not be complete but is large enough, and it was sometimes an intellectual pleasure to find out about the laws of very distant countries. Just to mention one case, we had to travel to find out about Tibet law. The Tibet nationals who fled to India died, and the authorities had to find out if they were still married by the laws of their religion or divorced by a priest. This was a question which took months and months to solve.

Anyway, German courts have to apply the foreign law ex officio. The Filipino courts sometimes do it by themselves. We encounter, twice or three times a month, a Regional Trial Court normally asking what is the succession according to German law *ab intestato* or when the man has left a will. But with the application of policy, it is easy to get different solutions sometimes,

and it may happen that laws or solutions of another country may be contrary to public policy. The situation can occur in both countries. I shall come back to this later on.

The other principle which applies to common law countries is the principle of domicile in international law. I learned here from an old precedent case, *Aznar v. Garcia, 1963*, that if a US national from California has his domicile here, the Supreme Court follows the remission or *renvoi* to Philippine law and applies Philippine law, if it is still valid. We will do the same. To use the same example, if one has been living in Germany for a long time, Germany will be treated as the domicile of choice and, in this case, our own law will apply. On another note, with the British or English *renvoi,* remission is a bit more difficult. We were taught in the university that the court once decided that a man from Scotland who had lived in England for 50 years still had his domicile of origin in Scotland because he was reading Scottish newspapers everyday. I doubt it if it still applies to this day. But anyway, that was the way we were taught in the university. Be very cautious with *renvoi* or remission when English conflict of law rules are involved.

A last example under German law is the application of the principle of transmission and even the law of a third country. This is a personal family case. A native-born Hungarian lady who fled to Brazil, became a Brazilian national, and moved later on to Buenos Aires where she died, had a bank account in Germany. German law says the last nationality was Brazilian. Brazilian law follows the principle of habitual residence; her habitual residence was Argentina, and so that was followed and the Argentinian law was applied. I read the books of Paras who opined that it goes too far. He also explained why one should not apply it. One day,

the Supreme Court may be confronted with a complicated case like that which will be very interesting.

So far, on conflict of laws, if we come now to intestate succession (without a will), we find similarities in the first degree as in both countries in the direct descending line of children. And if they have already died, i.e., predeceased, they are followed by other descendants like grandchildren and great grandchildren without limitation in degree. This we have in common, but one important difference is that here in the Philippines illegitimate children inherit only half the share of legitimate offspring. To be fair, or honestly, we had the same principle before until 1970. This was even tougher, they had no *ab intestato* hereditary right at all for illegitimate children. Now it has changed, and finally, nowadays the illegitimate children and the legitimate offspring get the same share.

In the second degree, if there are no descendants, then the parents had the right to inherit. In the Philippines, if both survive, they inherit equal shares. If only one survives he or she shall succeed to the entire estate. And if both parents are dead, then brothers and sisters inherit and they can be represented only by their children which means nephews and nieces of the deceased, not the grandchildren or more distant relatives. In Germany, it is a bit different. In this case, if both parents survive they inherit equal shares, but if only one survives he or she may be represented by his or her children or descendants, and in default of them the surviving spouse inherits the whole estate. And if they are both dead, brothers and sisters inherit but they are represented not only by their children, meaning nephews and nieces, but also by grandchildren, theoretically by distant relatives, and this might really complicate the distribution of the assets. But sometimes,

the lawyers spend months looking for still distant relatives and so they get more money, thus the whole inheritance becomes smaller and smaller and significantly diminishes. Sometimes only the lawyers gain, which is not very good. There are also trends to change this line of succession to narrow the number of those who represent the parents, but until now the law remains the same.

In the third degree, ascendants in the direct line, which means grandparents and more distant relatives here in the Philippines, we have divisions in lines and the descendants in the nearest degree inherit. And if there are more than one of the same line of equal degree, the assets are divided per capita. If they are of equal degree in different lines, one goes to each line. So, if one pair of grandparents is predeceased, the other pair inherits the corresponding share and there is no representation. Thus, these predeceased grandparents are represented by their children and descendants without limitations. So we have the same story again, they have to search for their distant relatives. Sometimes they cannot be found and the only rule is that there might be more and finally the assets cannot be distributed. I think it is a wrong conception, an outdated one which should be changed. For the relatives and great grandparents they have the same rule that the nearer degree is preferred to the more remote one.

Substantial differences concern the right to inherit of the surviving spouse. Here in the Philippines these are different rules and it depends upon with whom they concur. Here, if they are legitimate children, they have the same share. If they are illegitimate children, they get half the share of the legitimate offspring and the spouse. If legitimate parents, the spouse inherits

half of the estate. If illegitimates survive, the sharing will be one-half for the parents, one-fourth for the spouse and one-fourth for the illegitimate offspring. The spouse does not exclude brothers, nieces, nephews or sisters, and gets one-half. So this is pretty complicated, from my point of view at least, and the degrees or the shares sometimes look quite different.

In Germany, the system is the following: the surviving spouse, whether with legitimate/illegitimate children there, inherits one quarter. What is important now is the right to property regime between the spouses. If there is no pre-nuptial contract, the property regime is called community of gains. And if one of the spouses dies, instead of liquidating the assets of this community of gains, the surviving spouse gets one quarter more which means there is no distribution of assets according to the property regime where each has one quarter more. This means, with children, he/she inherits half; with parents, the descendants, grandparents, three quarters. And if none of them is alive, the spouse is the sole heir, excluding the descendants of the grandparents; excluding distant descendants; all the collateral relatives—the nieces, brothers, sisters and nephews; and of course the state. This is a very strong position of the spouse. It was a reaction to the article in the constitution demanding that the rights of the women have to be strengthened. If this principle or conception does not dissolve the property regime, that gives the surviving spouse one quarter more. Normally, it works well, but it becomes extremely complicated if the foreign law applies the property regime; but this seems remote. This is one of the researches of the institute. We produced a thick book with legal opinions on that problem. Unfortunately, the Supreme Court has not decided this issue.

Experts gain a lot of money, but again, they can still write their opinions because there is no final decision.

Let me turn to other collateral relatives – brothers and sisters, nephews and nieces in the Philippines–who have no right to inherit *ab intestato* beyond the fifth degree. In Germany, they have this unlimited right to inherit, and as I mentioned before it is a debatable concept. I remember once myself, I was a member of a community of heirs, numbering about 60. The assets altogether were roughly about $50,000.00 and the lawyers got $30,000.00 because they spent almost five years looking for us. The rest of the amount was divided among us 60 and we still had to pay the taxes. At the end, I earned a marvelous amount of $150. Therefore, once again, it is my opinion, that this must not go beyond where the degree is debatably the fifth or the sixth, because this unlimited right does not help anybody, like I said, except the lawyers.

So far, that is all for succession *ab intestato*, and now a short look at testamentary succession. Like I said, Filipinos in Germany normally do not leave a will. I do not know why. The same is true here. If he leaves a will, of course, we have to apply Philippine law. And if the testament or the will is valid according to Philippine law, it is also recognized and respected in the Federal Republic, and the other way around. There is one difference which is important – Philippine law prohibits contracts on future inheritance and joint wills, but both are allowed in Germany according to German Law. But once again, we apply the law of nationality. If Filipinos are involved and they make the mistake of making one of these contracts, it is null and void according to Philippine law, and we respect that.

The other way around, if Germans make a joint will or contract in future inheritance of law, as far as I know, according to the books I have, it is valid if they are both foreigners. If one is a Filipino, then it is applicable to the foreigner and not to the Filipino. But these are different conceptions which can easily be recognized.

We share common concepts or wills, such as public wills and holographic wills. Holographic wills are also recognized in Germany without witnesses. The problem is how to prove that the will was really done or written up by the deceased. As in the Philippines, at least one witness has to confirm that this was written and signed by the deceased.

The compulsory heirs, in both countries, are children, their descendants. Both exclude the ascendants, meaning the parents and grandparents, and the other one is the spouse. The difference is that here the so-called *legitime* or compulsory portion of legitimate children and descendants consist of one-half of the assets. Meanwhile in Germany, the compulsory portion amounts always to one-half of the legal share. In this case, sometimes they have problems: if there are legitimate children, they get one half; if illegitimate they get one quarter and half of it, and the surviving spouse gets also one quarter. And if there are four children, the whole estate is not enough to satisfy the compulsory portion, so those of the illegitimate children have to be reduced. I am always referring to the book of Balane; I think it is the best one, at least for me. He writes very clearly and the examples are from his book.

So these are the main differences; the rest of the structures is pretty similar. You can really see once again, what I said from the beginning, the common roots we have with the Code Civil Napoleon and its rules go as far back to Roman Law.

There is one important point I would like to mention before I conclude. I will not call it a clash of cultures but we have a confrontation of different public policies. The first one is, as I have already mentioned, about the conflicts on future inheritance and joint wills. Like I said, this will be respected if the law here will respect it. There are two others. The first one is Article 176 of the Family Code stating that illegitimate children get only half the share of legitimate children. We had that before but nowadays, if the case has a strong connection with Germany, this principle will not be recognized and will be contrary to public policy, from our point of view. I am not saying that we always have better solutions but that is our policy. Let us say, if the Filipino who dies was the only one living in Germany, the rest of the family is here, and there is only the bank account, the connection with German Law is not strong enough and so it will be done like in Article 176. If the whole family lives there, any court would say this distribution cannot be done in that way and that they all should get equal shares.

The other article written by Balane is a critique of Article 1992 of the Civil Code, that an illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives and vice versa. From my point of view, this is outdated and no court in Germany will apply that. I have no precedent case but I am pretty sure we have precedent cases, not for that, but for Muslim Laws on succession. You have your own statutes on Muslim

Personal Law; in Germany, we do not have one. But we apply once again their national Law, Syrian Law, or Egyptian Law, but then we have problems. For one, the male gets more than the widow, the daughters get only half the share of sons, the non-Muslim is excluded from the inheritance after Muslim. These other rules apply, for example, in Egypt. Perhaps your next speaker on the subject will maybe mention that.

Then we have precedent cases. If there are strong connections with Germany, if their family members are all really living there, this outdated formula is not accepted and is considered as contrary to public policy. The daughters will have the same share as the sons, and the wives, when they become widows, will get the same share as the widower.

So, altogether, as you can see, we have many things in common. There are some differences, though, based on social effects. I hope it was not too complicated and not too boring. I tried to at least give you some examples to elucidate my views.

Thank you very much for your attention.

# Conferment Address*

## *His Excellency Axel Weishaupt*

I can honestly say this is a very moving moment for me. It is the first time that I have received the very high degree of Doctor of Laws honoris causa. I acquired the other degree by hard work which took four years to finish. In Germany, it is not easy to do that.

I have always been dedicated to law not only for formal reasons but especially because of my work in consulates and embassies where we are always confronted with problems on the laws of the country where we are working, be it civil law or others. Besides, before I joined foreign service, I was working in a specialized institute in the city of Hamburg for private international and foreign civil law, which specialized in these laws from all over the world, including Philippine law, which are contained in more than 100,000 volumes, all of the decisions of the Supreme Court, and so on. So the three conditions were positive in my dedication to my work; but to receive such a high degree today, as I said, is a very emotional moment.

I have been serving in the Philippines for three years now. Most probably, I will have to leave this country soon, officially speaking, for another posting in Africa where we have to comply with writ law, codified law, tribal law; so it would be interesting again from the legal point of view. It is quite flattering, because

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* Delivered at the *First Distinguished Lecture, Series of 2007,* held on June 29, 2007, at the Theodore Buttenbruch Hall, University of San Carlos, Main Campus, Cebu City.

everybody in this country is so helpful. It might even be that after three years I probably will have to retire and I might come back to the Philippines on a private basis.

So for all of that, I really would like to thank you, the Filipinos, starting from the Supreme Court which provided the Embassy with sophisticated advice about the difficulties of Philippine Law, the congress, and the administration. I can only say that we have always had excellent relations, and I am sure this will continue. I am very thankful for the good time that I have had in this country especially until now and hopefully in the future, and most thankful especially for this high degree awarded to me.

Finally, which is always my small task, although we are here in a Cebuano-speaking area, I would like to end with a few words in Filipino.

*Isang malaking karangalan para sa akin ang maging bahagi ng Pamantasan ng Cebu sa pamamagitan ng katibayang ipinagkaloob ninyo sa akin sa araw na ito. Ang institusyong ito ay mananatiling mahalaga sa akin saang dako man ng mundo ako makarating. Daghang salamat.*

# Closing Remarks*

*Chief Justice Reynato S. Puno***

We would like to thank His Excellency Axel Weishaupt for the lecture that he presented to us on the comparative study of Philippine and German laws on succession. We would also like to thank the University of San Carlos (USC), its faculty and students for hosting this distinguished lecture series. The choice of USC was not accidental. We wanted the venue to be a respectable intellectual center, and USC has the best ambiance for the purpose.

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* Delivered at the *First Distinguished Lecture, Series of 2007,* held on June 29, 2007, at the Theodore Buttenbruch Hall, University of San Carlos, Main Campus, Cebu City.

** Chief Justice Reynato S. Puno was appointed the 22nd Chief Justice of the Philippines by then President Gloria M. Arroyo on December 7, 2006. He is also the concurrent chair of the SC First Division and ex officio Chair of the Judicial and Bar Council (JBC) and the Presidential Electoral Tribunal (PET).

Prior to his appointment to the High Court in 1993 by President Fidel V. Ramos, he served as: Associate Justice of the Intermediate Appellate Court and the Court of Appeals (CA), Deputy Minister of Justice, acting Chair of the Board of Pardons and Parole, Solicitor in the OSG (1971), Assistant Solicitor General in 1974, and City Judge of Quezon City. He holds the distinction of being the youngest appointee to the CA at the age of 40 in 1980.

As Chief Justice, he chairs the Court's First Division, the *Court Systems Journal,* and the Supreme Court Committee that digests the Court's decisions for distribution to members of the Judiciary. He also heads the High Court's Committee on Revision of the Rules of Court that

This is the *First Distinguished Lecture Series*, in this year 2007, sponsored by the Supreme Court of the Philippines and the Philippine Judicial Academy. The goal of this lecture series is to deepen and broaden our understanding of the law

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has drafted the Rules of Procedure in Election Contests Before the Courts Involving Elective Municipal and Barangay Officials, among many others.

Chief Justice Puno obtained his Bachelor of Science Degree in Jurisprudence and his Bachelor of Laws Degree from the University of the Philippines in 1962. He served as Editor in Chief of *The Philippine Collegian*. He pursued his post-graduate studies in the United States on a full scholarship. He obtained his Master of Comparative Laws degree at the Southern Methodist University, Dallas, Texas, with high distinction and as class valedictorian; his Master of Laws at the University of California, Berkeley; and completed all the academic requirements for the degree of Doctor of Juridical Science at the University of Illinois, Champaign, Urbana. In 2005, he became the first Filipino to receive the Distinguished Global Alumnus Award from the Dedman School of Law, Southern Methodist University, Dallas, Texas. He has been conferred honorary doctorates by five of our universities and by the Hannam University, South Korea.

While a post-graduate student, Chief Justice Puno received five American Jurisprudence Prizes for Excellence awards given by the Lawyers Cooperative Publishing Co. of New York and the Bancroft Whitney Publishing Co. of California.

In 1962, he started professional practice at the Gerardo Roxas and Sarmiento Law Office as Assistant Attorney. Upon his return from the United States in 1969, he joined his brother, the late Judge Isaac S. Puno, Jr., in law practice.

On August 1, 1986, Chief Justice Puno was reappointed to the Court of Appeals. In 1993, then President Fidel V. Ramos appointed him as Associate Justice of the Supreme Court. He was Chair of its Second Division.

by inviting legal scholars to give discourses that shall not only consider the realism and the pragmatism of contemporary legal principles, but also the theoretical and the transcendental issues that will complete our vision of what the law is and ought to be.

As our first distinguished lecturer, we congratulate our speaker for his great intellectual input.

Indeed, our laws on succession are very similar. German law, like Philippine law, was also heavily influenced by its progenitor—Roman law.

We know that legal scholars known as the Pandectists revived the formalities of Roman law as set by Justinian in the *Corpus Juris Civilis*. It developed as common law (*Gemeines Recht*)

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He served as Bar Examiner in Criminal Law in 1970, Mercantile Law in 1989, and Taxation in 1993. He was also a Lecturer of the UP Law Center, Institute of Judicial Administration, and a Professor of Law at the Far Eastern University from 1969 to 1973. He now lectures at the Philippine Judicial Academy (PHILJA).

Among Chief Justice Puno's most prestigious awards are: Ten Outstanding Young Men Award (TOYM), Araw ng Maynila Award as Outstanding Jurist, UP's Most Outstanding Law Alumnus, Grand Cross of Rizal from the Order of the Knights of Rizal, Grand Lodge Gold Medal from the Grand Lodge of Free and Accepted Masons of the Philippines, and Centennial Awardee in the field of law given by the United Methodist Church on the occasion of its 100th anniversary.

The Chief Justice is active in civic and church activities as a lay preacher of the United Methodist Church and Chairman of the Administrative Council of the Puno Memorial United Methodist Church.

Chief Justice Puno was married to the former Supreme Court Clerk of Court Atty. Luzviminda D. Puno with whom he has three children.

in many parts of the German-speaking world and prevailed deep into the 19th century.

After the French July Revolution of 1830, revolutionary ideas of the French Revolution and Napoleon's laws as the *Code Civil, Code Penale* and the *Code d' Instruction Criminelle* strongly influenced the German legal tradition. With the establishment of the Deutches Reich in 1871, a great wave of legal standardization set in, beginning with criminal law and processual law and culminating in the *Burgerliches Gesetzbuch* or BGB[1] (Book of Civil Law). All these developments took 20 years of creative process.

Our Civil Code was taken from the Spanish Code, which in turn was also derived from Roman law. The German (Book of Civil Law) is a near replica of the Philippine Civil Code. They both consist of five major parts: the general provisions part, the law of obligations, property law, family law, and law of succession.

It is considered that the most important principle of the BGB is private autonomy. Its essence is that all citizens have the right to rule their own affairs without interference from the state, especially in the disposal of their property according to their will and the creation of contracts with partners and with the contents they like.

Rainer Maria Rilke, a great German poet and philosopher once wrote:

> I hold this to be the highest task for a bond between two people: that each protects the solitude of the other.

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[1] Pronounced in German phonetics as "Beh-Dzey-Beh."

As it is with the bond between two individuals, so too should it be for the social contract between the State and the individual.

The learned disquisition of His Excellency Axel Weishaupt showed us the similarities between two seemingly different jurisdictions on the law of succession. The discussion also showed us how dissimilar we are, yet one in achieving the universal objectives of the law on succession.

We end this first lecture with great gratitude to Ambassador Axel Weishaupt for his intellectually stimulating discourse on the Philippine and German laws on succession.

Supreme Court of the Philippines
Philippine Judicial Academy
Philippine Association of Law Schools
*in cooperation with the*
Ateneo de Davao University

*present*

***The Second Distinguished Lecture Series of 2007***

# INTERPRETING ISLAMIC SHARI'A IN MODERN AGE— THE CONTRIBUTION OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT

***by***

**Dr. Adel Omar Sherif**
*Deputy Chief Justice*
*Supreme Constitutional Court of Egypt*

*Thursday, July 19, 2007, 2:00 P.M.*
*Finster Hall, 7th Floor*
*Ateneo de Davao University, Davao City*

# *Program*

**Processional**

**Invocation**

**National Anthems**
*Republic of the Philippines*
*Arab Republic of Egypt*

**Greetings**
**Fr. Antonio S. Samson, S.J.**
*President, Ateneo de Davao University*

**Opening Remarks**
**Honorable Antonio T. Carpio**
*Associate Justice, Supreme Court*

**Reading of Citation**
**Atty. Manuel P. Quibod**
*Assistant Dean, College of Law*
*Ateneo de Davao University*

**CONFERMENT HONORARY DOCTORATE OF LAWS DEGREE**

**on**

**Dr. Adel Omar Sherif**

**Musical Intermission**
*Alumni of Ateneo de Davao University*

**LECTURE**
**Dr. Adel Omar Sherif**

**Presentation of Plaque of Appreciation**
*by Chief Justice Reynato S. Puno, Fr. Antonio S. Samson, S.J.,*
*Justice Angelina Sandoval-Gutierrez,*
*Justice Ameurfina A. Melencio Herrera (ret.) and Dean Mariano F. Magsalin, Jr.*

**Closing Remarks**
**Honorable Reynato S. Puno**
*Chief Justice*

**Ateneo De Davao Blue Knight Hymn**

**Philippine Judiciary Hymn**

**Recessional**

**Master of Ceremonies**
**Honorable Antonio Eduardo B. Nachura**
*Associate Justice, Supreme Court*

# GREETINGS*

*Fr. Antonio S. Samson, S.J.* **

Friends, ladies and gentlemen. On this 19th day of July in the year of Our Lord Two Thousand and Seven, and of the Ateneo de Davao University, its 60th, in the presence of our students, administrators, faculty and staff, members of the Board of Trustees; of honored guests, including judges of Municipal, Shari'a and Regional Trial Courts, public prosecutors, Justices of the Court of Appeals and the Supreme Court of the Philippines and the Chief Justice of the Supreme Court; and of our distinguished honoree, the Deputy Chief Justice of the Supreme Constitutional Court of Egypt, I hereby declare in session this Special Academic Convocation of Ateneo de Davao University.

A pleasant afternoon to all.

In the name of the Ateneo de Davao University and in my own name, I am pleased and honored to welcome all of you to this Special Academic Convocation for the awarding of an honorary doctorate of laws on a distinguished intellectual, jurist, and public servant from the Arab Republic of Egypt.

The Ateneo de Davao University is honored to co-host this gathering with the Supreme Court of the Philippines, the Philippine Judicial Academy, and the Philippine Association

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* Delivered at the *Second Distinguished Lecture, Series of 2007,* held on July 19, 2007, at the Finster Hall, Ateneo de Davao University, Davao City.

** President, Ateneo de Davao University.

of Law Schools. The University is honored to co-host the *Second Distinguished Lecture of the Supreme Court and its Knowledge-Sharing Committee, Series of 2007*, to be delivered by our honoree from Egypt.

I especially welcome the Honorable Reynato S. Puno, Chief Justice of the Philippine Supreme Court, and the Associate Justices of the Supreme Court and of the Court of Appeals. I welcome many judges of regional, Shari'a and municipal trial courts, public prosecutors, and other public officials, local and national. I welcome the many lawyers and students of the law.

I especially welcome Her Excellency Salwa Moufeed Kamel Magarious, Ambassador of Egypt to the Philippines.

I welcome the Ateneo de Davao University trustees, administrators, faculty, staff, students and alumni. I welcome all who have come to honor the University and the Supreme Court with your presence today.

May this award to Deputy Chief Justice Sherif confirm and further greater friendship and cooperation between our nation and Egypt. May this award and his lecture on Shari'a Law promote greater understanding, mutual trust, and peace among all of us in Mindanao.

To all present, a warm welcome from me and the Ateneo de Davao University community. I hope all enjoy their visit to the University. I hope all of you enjoy your stay in our beautiful City of Davao.

# Opening Remarks*

*Justice Antonio T. Carpio*

Chief Justice Reynato S. Puno
My esteemed colleagues in the Court
Deputy Chief Justice Adel Omar Sherif of the
Supreme Constitutional Court of Egypt
Fr. Antonio S. Samson, S.J.
President of the Ateneo de Davao University
Chairman Paul Dominguez
of the Ateneo de Davao University Board of Trustees
Ambassador Salwa Moufeed Kamel Magarious of Egypt
Chancellor Ameurfina A. Melencio Herrera
of the Philippine Judicial Academy
Dean Mariano F. Magsalin, Jr.
of the Philippine Association of Law Schools
Dean Hildegardo Iñigo
Assistant Dean Manuel P. Quibod
of the College of Law of the Ateneo de Davao University
Court Administrator Christopher O. Lock
Justices of the Court of Appeals
Judges of the first and second level courts, officials, faculty members
and students of the Ateneo de Davao University
Members of the Integrated Bar of the Philippines
My co-workers in the judiciary, distinguished guests,

A pleasant afternoon to all.

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* Delivered at the *Second Distinguished Lecture, Series of 2007,* held on July 19, 2007, at the Finster Hall, Ateneo de Davao University, Davao City.

On behalf of the Supreme Court of the Philippines, I warmly welcome everyone to this *Conferment of the Honorary Doctorate of Laws Degree and Second Distinguished Lecture* for the year 2007. The conferment of the Honorary Degree is an academic convocation of the Ateneo de Davao University while the Lecture, by way of response to the Conferment of the Honorary Degree, is jointly sponsored by the Supreme Court, the Philippine Judicial Academy, and the Philippine Association of Law Schools, in cooperation with the College of Law of the Ateneo de Davao University.

The Distinguished Lecture Series of the Supreme Court is the most prestigious law lecture in the Philippines. The lecturers are Chief Justices or members of the highest court of various countries, or well-known legal scholars. For this year, our first lecturer was a scholar on German Civil Law, Dr. Axel Weishaupt, who delivered his lecture last June 29, 2007, at the University of San Carlos in Cebu City. Today, our distinguished lecturer is the Deputy Chief Justice of the Supreme Constitutional Court of Egypt. In September 2007, our distinguished lecturer will be the Chief Justice of Spain who will deliver his lecture at the University of Santo Tomas.

The Distinguished Lecture Series started in 2001 when the Supreme Court celebrated its Centennial Anniversary. The Supreme Court has continued the Distinguished Lecture as one of its knowledge sharing activities under its judicial reform initiatives. Outstanding jurists, foreign and local, are invited to address a select audience of Philippine jurists, academicians, practicing lawyers, and law students.

In the past, the Distinguished Lectures covered topics such as judicial reforms, recent legal trends and issues, and the judicial legacies of our Chief Justices. This afternoon, we continue this evolving academic tradition with a discourse on Shari'a Law. The lecture this afternoon highlights the rich legal history of the Philippines.

The Philippines has a unique legal system in that the three great legal systems of the world co-exist in this country. We have Roman Law firmly embedded in our legal system, a legacy from Spain. We have Anglo-Saxon or common law as our legal system, a legacy from America. And, we have Islamic Law in our legal system, a legacy not from our former colonizers but from our own Filipino-Muslim brothers in Mindanao.

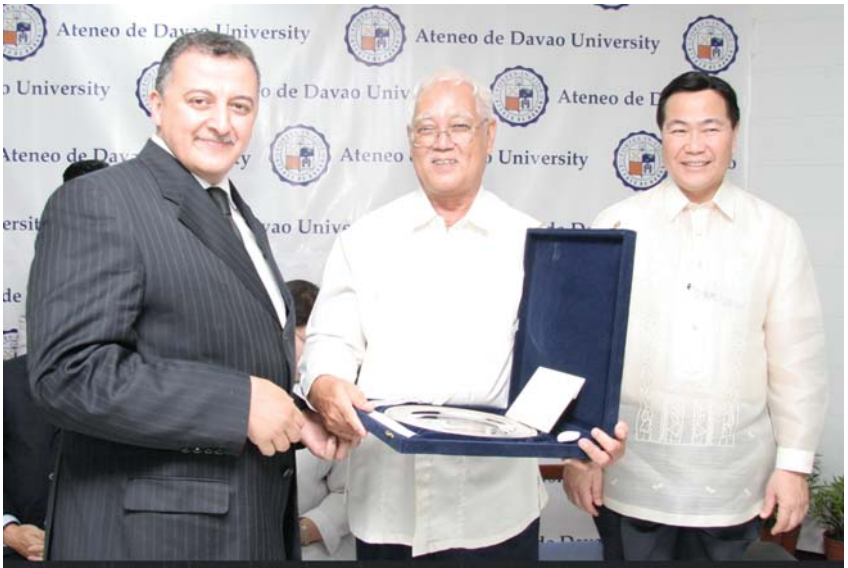
The lecture this afternoon is also unique. A senior member of the Supreme Constitutional Court of Egypt, the center of learning on Shari'a Law in the Islamic world, is delivering a lecture on Shari'a Law at this Jesuit-run Catholic university, while the College of Law is recognized as one of the leading law schools in the country. And this Catholic university is about to bestow the highest honorary degree it can give to our distinguished lecturer.

Indeed, the Distinguished Lecture this afternoon may one day be viewed as planting the seeds of the Dialogue of the Great Legal Systems of the world. For the topic and setting are most appropriate – a lecture on the Interpretation of Shari'a Law in the Modern Age by a leading jurist, in a most Catholic university, in perhaps the only country on this planet where the three great legal systems of the world harmoniously co-exist.

The lecture also foreshadows the implementation of the Judicial Cooperation Agreement between the Philippine Supreme Court and the Supreme Constitutional Court of Egypt that was signed on November 5, 2006, in Cairo, Egypt. This Judicial Cooperation Agreement calls for an exchange of visits by judges, professors, and court personnel on topics such as comparative studies of the legal systems of both countries.

We thank all the Ateneans present here, my co-alumni of this distinguished university, for joining us in this intellectual exercise geared to achieve what our Jesuit mentors of this university always love to remind us – *mens sana in corpore sano* – a sound mind in a sound body.

Once again, on behalf of the Supreme Court of the Philippines, a warm welcome to everyone.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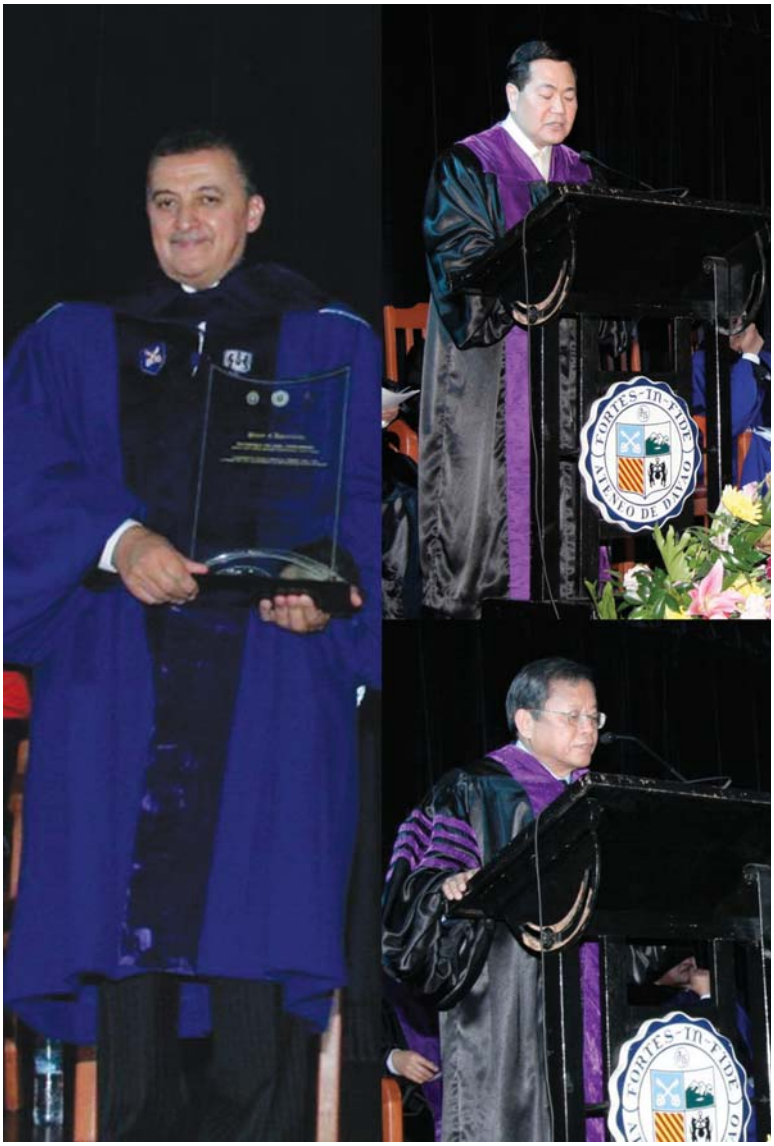
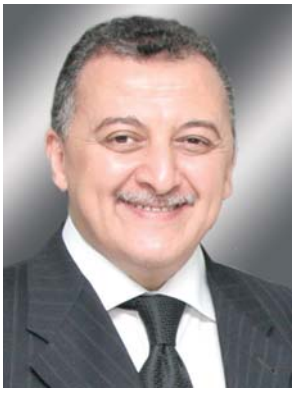


# INTERPRETING ISLAMIC SHARI'A IN MODERN AGE–THE CONTRIBUTION OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT*

*Dr. Adel Omar Sherif*



**Dr. Adel Omar Sherif** is the Deputy Chief Justice of the Supreme Constitutional Court of Egypt. He earned his LL.B., Advanced Studies Diplomas in Public Law and Administrative Law, and Ph.D. in Constitutional Law from Cairo and Ain Shams Universities in Egypt. After private practice, he was appointed to the Council of the State (1980-1992) serving in various positions within the judicial sector and its other departments. In 1992, he moved to the Supreme Constitutional Court as Assistant Counselor for the Commissioners' Body; was promoted to full Counselor in 1993; and was assigned Acting Head that same year. He was named Deputy Chief Justice in 2002.

Justice Sherif also served as legal adviser to government agencies: the Prime Minister's Office, the Egyptian Antiquities Organization, the Cultural Palaces Organization, the Real-Estate Bank of Egypt, and the Cairo Regional Center for International Commercial Arbitration. He is a faculty member at Helwan University Law School in Cairo, and a member of many legal associations and institutions. He is a member of the Board of International Advisers to the International Judicial Academy in Washington D.C., a member of the Centre of Islamic and Middle Eastern Law at the School of Oriental and African Studies of the University of London, and a member of the International Board of Judicial Advisers for the Judges Newsletter of The Hague Conference on Private International Law. He is a member of the judicial advisory board to the United Nations Environment Programme and the specialist judicial group at the International Union for Conservation of Nature. He is at present the Secretary General for the Arab Supreme Courts Union for the Protection of the Environment, and Member of the Executive Planning Committee of the International Network for Environmental Compliance and Enforcement in the USA.

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For me, this is a great experience. I had not expected to encounter a country that warm and impressive. It is certainly a great pleasure to be given this opportunity to address you.

First and foremost, I would like to acknowledge those who have made this event possible – the Honorable Chief Justice Reynato S. Puno, the Associate Justices of the Supreme Court, Supreme Court officials, Department of Shari'a and Islamic Jurisprudence, the Philippine Judicial Academy, Court of Appeals Justices who are here today, President of the Association of Law Schools Dean Mariano Magsalin, the officials of the University headed by its President, Antonio Samson, also to the First and Second Level Court Judges of Davao City, Shari'a Court Judges, and the IBP Davao City chapter. To all of them, I am certainly very grateful for all you have done for me, to make this event possible.

I would like to start my presentation with some brief remarks about the relationship between our countries not only in the judicial field but even beyond that. I have been fortunate myself being able to meet over the past five years the three Chief Justices of this country – Justice Davide, Justice Panganiban, and Justice Puno. I have been impressed with the delivery of justice in your country and how accomplished these courts have become to the extent that we are now looking at the use of an electronic communication system to try to find out how the court will deal with certain issues at certain times in a way that might be of benefit to us in Egypt and your country.

I have also been impressed by the work of the Court in implementing judicial reform and how such involvement of the Supreme Court and the Chief Justice has brought the whole country together, where the different branches of government and the judiciary are all standing on the same foot with common understanding on what issues have to be dealt with to move the country forward. We in Egypt are very much privileged to have such a good relation that was recently established with our fellow justices of the Supreme Court, with the signing of the memorandum of understanding by the Chief Justices of the two countries last year. This will certainly lead the way for the justices and the members of the judiciary, even by professors and students of law of the two countries, to get together for consultations and to interact through training programs and exchange visits.

We look forward to the implementation of this program, perhaps even by bilateral consultation and the bilateral arrangement in the culture area which had been signed back in 2003, which will hopefully provide opportunities for some of our brothers and sisters to come over for training courses at the center in Cairo. We have had a cooperation movement growing between the two countries. We acknowledge here the efforts exerted by Her Excellency Salwa Magarious, the Ambassador of Egypt to the Philippines. Under her leadership and active role in the Philippines since she arrived only a year ago, I am confident that the relationship between the two countries will hopefully grow and flourish.

Now to the substance of the issue. The importance of this topic, perhaps, comes from the stereotype notion that exists in the western society about Islamic Law, and how awkward and how incompetent we are, to the extent that we have seen courts of law in some countries, perhaps in Turkey and perhaps also in

the European court of human rights back in 2005, determine that Islamic Law is the antithesis of democracy, and that Islamic culture is incompatible with democratic culture. For us in the Muslim world, we believe this is a false assessment and declaration. Nonetheless, we have to face this academy in a civilized way and try to refute whatever allegations that have been directed against our religion and Muslim beliefs.

You must have heard that I come from Egypt, a country where the State Constitution indicates that Islam is the religion of the state and Islamic Shari'a the branch and source of legislation. I have been trained in both secular law and Islamic law, and became a career judge performing a wide range of judicial functions. Throughout my career I had served in different tiers of courts of law in my country and, finally, was appointed to the Supreme Constitutional Court where I have been serving for the past few years. I therefore feel that I have roots in constitutional law as well as Islamic Law which encouraged me today to share with you some of my thoughts on Islamic Shari'a, bearing in mind that my professional involvement in constitutional law remains, and which increasingly affects the way I address and deal with any legal issues including those related to Islamic Shari'a.

I belong to a judicial family and have grown up in a purely legal environment. Within such atmosphere, I have been taught that a fair and just legal system in any democratic country, including Islamic states, should respect human rights and freedom. It should endeavor to preserve what is generally acknowledged as a safe haven for the effective protection of indisputable human rights. I have learned to appreciate the many fundamental differences and view them as center to any sound system of government, which led me to realize the following premises:

First, human rights will not actively or adequately survive except in an environment comprising a civil society capable of providing adequately safe courses and straightforward channels for protecting rules of human rights and freedoms. Second, the base of all human rights lies in encouraging the dignity of all individuals irrespective of their race, nationality, ethnic or social order, and regardless of their poverty, purse, or any other bases for unjustified discriminatory treatment. Third, an individual person's integrity is strictly interweaved with his dignity and provision for his right to privacy, and right to not be exposed to unwarranted seizure and search or be threatened with cruel or unusual punishment. Fourth, the freedom of expression plays a decisive role in promoting democratic values and, therefore, it should always be guaranteed. Fifth, the rule of law is an essential prerequisite for establishing correct practices of government where individual human rights are recognized and further guaranteed.

Ladies and gentlemen, in a society of order and liberty, even a legal system is much affected by modern church. My belief is that it is incumbent of the court system to strike a balance between the conflict in interest at stake, by looking at the constitution as a whole and not in fragments; taking into account flexibly or rigidly, what were effectually envisioned by the framers, without prejudice to a proper and radical evolution of that document, in order to meet the required level of synthesis for reaching aspirations. However, such an understanding should not be implemented in a way that leads the court system through the art of constitution but only to achieve a proper and viable understanding of its context along with the mandatory commands**.** This shows us how important judicial interpretation in all legal tradition is. I would think that any imitation of any legal order in a way that strikes

the required balance between the state and its subjects and upholds the rule of law is much dependent on the sound interpretation of policies of legal norms and instruments in force. There have always been raised recent positions of legal philosophies that indeed affect our understanding of law through the process of judicial interpretation.

You are all aware that in performing legal interpretation, we really adopt certain legal philosophies that would eventually influence our understanding and views. As the Honorable Chief Justice Reynato Puno once explained in an address *"All these legal philosophies have distinct merits on their own. Our social culture and religious background and bias largely determine which philosophy will attract us; but whichever philosophy we use to give a light towards our path, we will fare better in having one rather than being without."*

The building up of legal mentalities and legal thinking throughout the history of Arabian Law has been very much influenced by various legal philosophies that developed over time, including school of natural law, legal positivism, legal realism, social relations and culture, legal studies movements. Today, we see many legal traditions existing together in common law, civil law, Islamic Law, and others. All these schools of movement have strongly contributed to the culture of law and have been shaping legal mentalities throughout the world. Interpretation of legal norms is, in fact, a necessary task in any given society, without excluding undeclared ones; a task that should be exercised in the light of the fact that there are those who are trying to regulate the relationships in their society. And if the good Lord intended for their being overall at hand in the movements of the universe, then obviously laws will have to be developed. And

when laws are developed they need to be interpreted; and when they are interpreted they also need to be the subject of review of the manner in which they are interpreted. Then we obviously have the need, as evolution of humankind progresses, for the development of new laws, which also have to be reviewed not only for their content but also for their application.

Therefore, in a rather simplistic sense, one can say that perhaps the practice of judicial interpretation has developed in the course of time and throughout different parts of the world as part of the process of evolution of the history of law. Indeed, if we look at the sources of what faith is, and through the spread of the evolution of divine revelations culminating with the Qur'an as the last of these divine revelations, it is quite evident that the ideas co-exist; that the idea ought to be interpreted and applied by judges; and therefore the notion of a system of judgment, one that is particularly developed, and the notion of final judgment and divine judgment of an individual belief.

In the history and evolution of law in its various cultural contexts, for example, it is quite clear that there are various tracts. It is also quite clear that there is a migration of legal ideas from one civilization to another. Yet, at the same time, there are some parallel ideas which may not have necessarily migrated; but because they emerged from the same value base, had necessarily found their expression in the same way. Today, one of the demanding questions that continuously irritate those of us who have devoted their lives to law and justice is to determine the true meaning of law. In fact, law is not and should not be seen as abstract text. Following what it really means may require us to go beyond the text, perhaps by taking into account practical realities and examining comparative legal experiences; more importantly, by taking into

consideration the social dimension that law always reflects social values. And as law reflects social values, it also reflects certain social experiences; as such, those social experiences encourage change. This is quite an obvious concept. However, law is not only designed to limit the conduct of individuals; law is also designed to establish a limitation of power. It is the limitation that one seeks not only in terms of the exercise of power by one individual, but rather by the exercise of any form of power.

It was very interesting, if I can make a contemporary analogy, that in his inaugural speech, Umar, the Second Muslim Caliph, holding a sword in his hand, was saying that his life was going to be one which he would want to be strong enough with the weak, in order to be able to address the right of the weak in front of the strong and the powerful.

That is the essence of what we wish, to quiet the first signs of evil who may find themselves in a power relationship where one may be more powerful than the other. With the effect of contrary forms of government it was quite clear that the secular power had moved from the familiar or the *fiqh,* or whatever form of social system exists, to the powerful centralized governments who have the ability to control this apparatus and others that are not likely only to exercise but also to abuse power either against individuals or against categories of individuals. It is at that point that we see a constant tension, one that would continue to exist between those who have the power and those who, not having the power, only have at their disposal the law as a means of trying to balance cooperation between them.

Indeed, the initial interpretation in modern societies has become an important activity and a necessary measure of equalizing human rights and freedoms and protecting them from

any undesirable illegal interference. A sound legal interpretation especially developed in countries, including Islamic states, could further advance the protection of human rights and help establish a better constitutional system of government and rule of law responding to the welfare of the people. Another important factor to be taken into account in this perspective is that various existing legal systems should not be allowed to act in their traditional form as providing for an extreme semblance of legal science divorced from historic considerations. Rather, they should obviously interpret and assess in context of this historical consideration. All that also apply to a religious system of government including those of Islamic countries that consider Shari'a as their positive law and chief source of legal codification; which requires us now to find out what is the Islamic perception of law and how has Shari'a developed over time to reflect such perception.

Well, like all other human beings, Muslims are asked to follow certain rules in their life and measure the rightness of their acts and behaviors, and also of others, in accordance with these rules. These rules are the Islamic Shari'a; and the term Shari'a literally means laws or paths which one moves in or follows. This is stated in the Qur'an that belongs to Islam that God has set down the Shari'a which Muslims are obliged to stick to in their relations with God as well as among themselves. It has been established in the Islamic soul that God has placed every conceivable act on a five-point moral scale ranging from mandatory (*Fard wajeb*), to recommended (*mandub*), to morally naturally permissible (*mubah*), to reprehensible (*makruh*), down to prohibited (*haram*). Individuals are required to perform the mandatory and refrain from the prohibited, and God would punish those who fail to obey these commands. In addition, whenever possible, individuals

should perform the recommended and refrain from the reprehensible. In doing so, God will aptly reward them but will not punish them in case they fail to do so. Hence, Muslims have always been concerned where on the five-point scale every conceivable human act is enforced so that they could identify and reform the act itself, whether mandatory and recommended, and abstain from the acts that are prohibited or reprehensible. They have also understood that God had established a body of rules and recommendations and that human salvation depends on their ability to identify and obey these rules.

All these clarifications must seem to be so simple, but we should not consider that Islamic Shari'a is repulsive to our system. Rather, Islamic Shari'a, by its very nature and history, is an extremely complex and difficult subject, the discussion of which will take a lot of time and even fill many volumes. Perhaps that explains how it is difficult to be here today in such a way. Indeed, though Shari'a is commonly referred to, for the sake of simplicity, as Islamic Law, even by Muslims, it is not just a legal system that is generally understood but, rather, a code based on judicious principles that is meant to regulate the conduct of all Muslims in all aspects of life including social, commercial, domestic, criminal and political affairs, as well as devotional practices. The ongoing trial about Shari'a has always been and will continue to be about a correct understanding of its rules, commands, and prohibitions, and therefore much connected with its interpretation.

During, rather, after the revelation of the holy message from the Almighty to his Prophet Muhammad, there would have been, as history shows us, not much controversy or conflict of their understanding or meaning. Prophet Muhammad, being the Supreme religious authority and later on the leader of the

emerging state, would ever always authoritatively give the truth and exact meaning of any Shari'a rule whenever ambiquity or conflict of views lay before him. The debates, however, over Shari'a rules and their interpretation gradually emerged shortly after the passing of Prophet Muhammad. With the breaking-up of Muslim society into the two major institutions – Sunni and Shia – uncountable various sectors rose against each one of them, and adopted somewhat a different use of Shari'a. It was a turning point when Muslims had actually realized by that time that a lot of them had basic knowledge of Shari'a laws which encouraged them to strive to find out the best methodology to interpret God's law and commands and to understand Islamic Shari'a. They realized that God had certainly revealed an indication of his laws to the prophets but, unfortunately, this indication, in some cases, did not give a clear or complete picture of God's Law or, in this case, over Shari'a. Since that time, the process of interpretation of Shari'a has become a necessary measure in understanding and even in the development of Islamic Law.

Distinguished audience, the debate about Shari'a, in fact, can be held from what you have just seen, and by the very nature, is a debate only on interpretation, encouraging derivations and provoking different views and understanding of text and how such process should be exercised. Therefore, the process of interpreting Shari'a is seen as a basic component in the course of development of Islamic law, that led the Muslims to establish a branch of juristic knowledge known as *Usul al Fiqh* which is literally translated as Science of Rules of Understanding God's Law. Almost at all times, Moslem scholars have been in agreement that only highly trained jurists would be capable of understanding Shari'a Laws, by studying Scripture and logic, and could come up

with rulings representing their interpretation of Shari'a. The scholarly interpretation of God's Law, referred to as *fiqh,* which means understanding, usually might be at any time, severed from leading bodies of understanding. That is because equally competent Moslem scholars could disagree in their interpretation of text or their expansion of established *scripture* rules and therefore it would be impossible to know which scholar was correct.

One point to ask here is to particularly learn about the scholars who are authorized and competent to interpret Islamic Law. We have seen from the establishment of Islamic States that most of the scholars were judges. Actually, there was no straight rule about it, but it was simply because the scholars were the ones who really were more capable of interpreting the law. They were at the same time able to serve as judges and were asked to do this job, although some of them did not really accept it; but they were even forced by rulers to judge cases between and among individuals simply because they were seen as the most capable people to dispose of such cases in terms of Shari'a Law.

Most of the jurists technically recognized two approaches in interpreting Shari'a and development of *fiqh*. The first way is the *Ijtihad,* the other one is the *Taqlid*. Initially, the first was considered for a long period of time the preferred method but, over time, classical jurists came to rely more heavily on *Taqlid*. Whatever the methodology is, it is widely recognized that the judicial practice of interpretation of Shari'a is that only a limited portion of the Scriptures and commands are certain with respect to both their authenticity and meaning. The rest of the commands that represent the majority are only certain with respect to one, and a true representative with regard to the other and therefore indefinitive. Nonetheless these rules clearly reflect as law and, in

the absence of evidence to the contrary, should be accepted as binding. This is the classical approach to protect the Shari'a but the modern theories have gone different ways. Modern theory interpreting Shari'a, however, suggests Muslims should respect the interpretation of Islamic Law only to the extent that each interpretation follow inevitably from commands that are certain with respect to their authenticity and meaning. Furthermore, impervious of law where there is no scripture that is certain to suspect to oppose its authenticity or meaning, there shall be a space for using matters of legal interpretation that rely heavily on one scripture and source of law such as custom. Whatever method has there been in interpreting Shari'a, it has always been established that scholars must consider the rules of Shari'a, the preservation of religion, reason, order, property, and body of human beings.

This seems to be a little bit complicated but I will try once again to simplify the two ways to interpret Shari'a historically. First, we have to identify those who are capable of interpreting Shari'a Law, those who are for example scientists—*mujahideen*—you name them. Most of them are judges actually, those people who have special capabilities, very much into language, very much into the history and signs and articulation of the Qur'an or Hadith and other sources of Islamic Law. The scholars should be recognized as capable of these sciences and sources of Islamic Shari'a in order to be able to interpret.

There have been, I have said, two different ways to interpret Shari'a. One is the *Ijtihad* and the other one is the *Taqlid.* The *Ijtihad* was first broken into God-knowledge and the four methods of interpreting Shari'a. First, it would look into the Qur'an and then to the Prophet's acts or *Sunnah* and then to concepts of Muslim scholars that have been established, and finally to the

exercise of analogy (*Qiyas*) over the things, if it permits such. There was a time when the *Ijtihad* approach meant the confrontation between the scholar, the *Mujtahid*, and the text in a way that he can produce rulings from the text directly. The next step is the *Tacqlid*, wherein the schools within the *Sunnah* branch of Shari'a were established, and they have already established a great body of knowledge about Islamic Law; so later the scholars, instead of exercising *Ijtihad* from the very beginning, went to imitate other scholars in previous times and necessarily measured what they did and tried to accommodate that in future cases in imitation or the *Taqlid*. These have always been the two ways in the early century in the development of Islamic States.

At modern times now, there are certain quite impressive developments in this regard simply because a modern Moslem center has now a different way; some of them with skills, I believe, in *Ijtihad*. Nonetheless, I believe at the same time you do not have so many people really capable of introducing a gap into the rule from immediate sources. And also there are groups among the modern theorists trying to affect or develop the *Tacqlid* approach in a way that would still rely on the past experiences of the four existing guilds, but will really not be that restricted with their interpretations with regard to indefinitive sources; and will be able to build up a new approach and even find out new rules out of their established jurisprudence. This is, in brief, how both classical and modern theories go in interpreting Shari'a.

In Egypt, the problem takes a very interesting shape. Egypt was one of the first countries invaded by Muslims, since the spread of the Moslem religion that started back in the seventh century until the 18th century, almost 11 centuries. During that period,

the prevailing rule was the Shari'a rule so the Egyptian Laws were very much on Islamic Law. With the beginning of the 19th century, particularly by 1804, the royal Mohammad Ali family took over Egypt and they reigned until 1952. During their 150 or so years of reign, there had been so many developments. They tended to adopt codifications of the Napoleonic Code and forgot about Islamic practice. As far as reforming the legal system in the country, they established two types of courts: one where they tried disputes between Egyptians and non-Egyptians, and a national court system where they tried cases between and among Egyptians. Most categories lent a certain codification; they were mixed and national codifications, all tailored and shaped in a way that they reflected the Napoleonic Code. Nonetheless, throughout this time, this Napoleonic experience adopted in Egypt was somehow influenced by Islamic Shari'a, simply because Shari'a, from a historical perspective, has been observed in the courts for a century.

At that time, there has been also a movement among the intellectuals of Egypt as to what extent should Islamic Shari'a be adopted; and to do so, how we could really develop our interpretation of Shari'a to make it somehow compatible with the prevailing courts of law. At that time, so many Egyptians were dispatched to study abroad; many Egyptians late in the 19th and early 20th century were sent to France, England, and in the continent of Europe, and all of them came back with these new ideas on how to reform the system, how to modernize our legal system including the Islamic Law as well. Under such pressure, I believe, the Egyptian view of Islamic Law has somehow developed over time to the extent we preach it today. Today, the constitution,

since it was first promulgated in 1971, contains a provision that the religion of the country (Egypt) is Islam and the principles of Islamic Shari'a are the chief sources of legislation. Later on, this provision was amended in 1980 to provide that Islamic Shari'a is the main source of legislation which, in some interpretations, meant that any piece of legislation enacted in Egypt would have to be 100 percent compatible with country norms.

Well, this brief towards the case of the Supreme Court of Egypt was really intended to say a word here and to adopt a new policy and new methodology on how to face the Islamic Shari'a, how to deal with them, how to rate them with the constitutional order of an Islamic country. In order to do that, the Court was faced with some really practical problems because before the court involvement, the final word in any Islamic Shari'a issue legally somehow had to be the Islamic institution, either the Mufti or the chancellor of the university, to decide on these Islamic issues. There has never been a vital issue on whether an advice is to be referred to this Islamic constitution to see what they think about it and what their reason is for saying that.

And then we had a very brave and intellectual Chief Justice who came to the Court with a sort of modernized approach. He believed that Islamic Shari'a is what we believe in so we have to receive and interpret it the right way. And the right way for us is to deal with the international community, not to the exclusion of the international community; and in order to do so we have to develop our approach, our thinking. We even have to be somehow flexible to apply techniques, not in a rigid but in a flexible manner that would accommodate our people's needs from time to time, and create a sort of rapport with different civilizations so we

would really be doing our business in a manner compatible with other practices prevailing in civilized parts of the world. This indeed, does not mean that we would give up the mandate or commands of our religion or just throw them away. Rather, we still respect them. Nonetheless, we will adopt any interpretation that would accommodate whatever circumstances that would be good for the sake of our people.

The court established three foundations in developing jurisprudence combined with the interpretation of the meaning of Islamic Shari'a under the constitution. The first of these is that the constitutional provision on Islamic Shari'a together with the rest of the constitution form a unified doctrine. Secondly, that the constitutional provision rule that Islamic legislature uphold Islamic Shari'a is prospective and not retroactive or retrospective in nature. Thirdly, the application of Shari'a principles in constitutional litigation must be based on a distinction between definitive and indefinitive sources. As to the first component as the court's new policy, the unity of the constitution has become the prevailing theme throughout the jurisprudence of the Supreme Constitutional Court. The court believes that the exercise of the power of judicial review requires provisions of the constitution ensuring the supremacy of special rules over other inferior rules. In principle, a constitution is perceived as a viable instrument copying western advances in a democratic system for taking individual liberties; laying down grounds for their development; balancing power between the different branches of government within the framework of checks and balances; advancing social values; and promoting openness, talented behavior and scientific research.

Hence, a constitution does not simply reflect rules of mandatory character but to some extent advances concepts which in their entirety and taken together are expected to enhance new patterns of behavior established in the older forms to the rule of law. Constitutional limitation, if adequately observed, shall face all aspects of power on the public wealth, further their effectiveness and eliminate their deviation therefrom. A constitution may ensure a better understanding of the relationship between the state and its citizens. It may also fail to muster expected aspirations. However, in most cases, the constitution shall remain at the apex of all other rules being the paramount law of the land. This principle has been incorporated into the preamble of the constitution. This view of the constitution led the court to deny the supremacy of a particular constitutional text over the rest of the constitution. Instead, the court had insisted that constitutional provisions do not collide with each other but collectively form an interrelated organic unit accomplished by coordinated efforts of co-instruction that can serve society-oriented values. So, in that case, whenever we are faced with a situation where one of the Islamic Shari'a laws is in conflict with another constitutional law, we will have to interpret it in such a way that the two provisions go together and we will consider that as a new find in constitutional law. I will give you an example. Under Shari'a, a rule mandates that a non-Muslim has no power over a Muslim. If you really check the application of this ruling, the Moslem state will require you not to appoint to offices or to any leading position a non-Muslim. Well, this is not the case in Egypt. Muslims and non-Muslims are treated equally and alike, simply because we have the equality clause in our constitution that requires all Egyptians, whether Muslims or non-Muslims, black or white, to be treated equally. This would make this point clear.

The second base of this court's *logic* is the prospective nature of a constitutional clause. The Court ruled that the binding obligation to derive legislation from the principle of Islamic Shari'a applies only to the future. Legislation passed before the amendment can not, therefore, be contested on constitutional ground as a violation of Islamic Shari'a. The Court's approach in this case was somehow controversial within the Islamic community but later on it became very much accepted by all observers. Legal observers sitting at the court understand either way. Nonetheless, the court has since then, really back in 1980, established this firm stand on this prospective; so we would contest, we look into this conflict on Islamic Shari'a as to the legislation adopted before the constitutional amendment and not after that. Nonetheless, the non-retroactivity of the article still foregoes some restrictions over the designation of the court. The court was really very clear in declaring this principle and to also declare that it was possible for the legislature to read all these legislations of the country and try to amend them in accordance with Islamic Laws in case they find any contradiction. It is not their job to go back to the past but to look to the future. Meanwhile, the legislation is applied to clear up whatever matters are in contradiction with Islamic Law and existing legislation.

The third and most important point in court jurisprudence in the Shari'a is the distinction the court established between definitive and indefinitive laws of the Shari'a. In essence, the court has held that Shari'a laws have different styles. Such laws are either definitive and indefinitive. There are some cases that reflect this understanding. The definitive principles are Islamic norms which are not debatable either with respect to their source or their precise meaning. Such definitive rules must be

applied. All other Islamic norms are indefinitive in that they are susceptible to different interpretations, due to their nature, and changeable in response to the exigencies of time, place, and circumstances. Such flexibility does not reflect a defect in the Shari'a in that the courts are strengthened because a lot of Shari'a principles are to be adopted to changing realities that ensure their continued validity and eccentricity or, in the realm of Islamic indefinitive laws made in the legislature, to interfere totally with matters of common concern and achieve related interests. It must do so consistent with basic Islamic norms that aim towards the preservation of tradition, reason, honor, property and body. The legislature might develop different practical solutions to satisfy variable social needs. The court regards the bulk of Islamic indefinitive norms as highly developed, intersecting in harmony with changeable circumstances, repulsive of rigidity, and incompatible with absoluteness and fairness. In no way may an Islamic indefinitive norm which is fading, whether due to time or pertinent situations, be mandated by the court or the constitution. In the court's rulings, *Ijtihad* governance is a good thing that governs the process of determining the best interpretation of definitive rules and indefinitive norms. *Ijtihad*, within the indefinitive and definitive provisions of the Shari'a, is a process of reasoning to use these practical rules to relate to the lives of the people and achieve their interests. It should therefore go with the context prevailing at the time.

While the legislature may choose specific interpretation as the basis of legislation, it can not give that interpretation the status of binding doctrines except on those who will accept it. The court's jurisprudence is based on viewing such multiple possibilities such as a sign of divine mercy that encourages Muslims

to share and discuss, diminishing the possibility of human error. The existence of indefinitive norms also is taken to make sure that Islamic Shari'a always develops and displays flexibility to accept *Ijtihad*—responsible people to achieve the public interest. When invoking Islamic Shari'a, the court therefore first searches for definitive norms, and finding one, looks to *Ijtihad* that it is really consistent with the challenged legislation and in achieving the interests of the people. Then the Court examines the purposes of this legislation and, at the outset, the Court determines whether the challenged provision is consistent with the interests of the people or not and decides its constitutionality based on this conclusion. The court uses Islamic Shari'a principles mainly as they exist. This is evident from the distinction the Court adopted to determine what norms of Islamic Shari'a are definitive and what are not in accordance with this court's policy in this area since the space occupied by definitive norms of Shari'a is considerably limited. The majority of Shari'a rules would be derived from these indefinitive norms. That is, in fact, a discretionary power left to a ruler, but this power is not absolute; it finds its limitations in the public welfare of the society. If the ruler misuses this power or selects an *Ijtihad* that is not consistent with public interest in a specific time, this legislation or act then becomes a violation of Islamic Shari'a. The court may therefore decide whether this selected *Ijtihad* is consistent or in contradiction with social needs and interests.

Despite its initial silence, the court therefore has the potential to play a significant role in determining what is meant by Islamic Shari'a principles. Differences in Islamic Shari'a principles within the limits prescribed by the court does not mean that these principles have become the sole source of legislation. Nor do

these differences elevate them to a higher status than that of the constitution itself. The rulings of the Supreme Constitutional Court are clear that other sources may be employed and consulted in the legislative process. They also adhere to the principle that the amended Article bears the same binding force as the other articles of the constitution which consequently preserves the applicability of the Islamic Shari'a principles and would eventually be understood in the context of other commands ensured in the constitution.

From the beginning, the court has showed to you the power of judicial review in a restrained manner but it has also taken up the task of assessing the peaceful integration of Islamic Shari'a principles in the constitutional order and daily life of Egyptian citizens. Although its spirit has yet to develop, it has sought to rule, over the past two decades, that Islamic Shari'a principles, as a legal system, had met to a great extent the needs and wishes of a vast majority of Egyptian people. This is indeed a developed experience that we present to our colleagues in the Moslem jurisdiction to look at and perhaps adopt if they find it compatible and suited to the preferential circumstances in their society.

Let me conclude now with a brief remark. As Muslims, belonging to Muslim societies, we have come under attack from different parts of the world that believe that we as Muslims have contributed badly and negatively in this campaign directed against us and simply because, for obvious reasons, we have lost vital communication with others. We have lost this peaceful and civilized dialogue that would really put us together on the same level with our counterparts in different cultures and religions. We as Muslims should really get into a civilized dialogue with those who claim that we are uncivilized, that we are terrorists; to

explain to them how developed our legal system is and how decent a people we are; and that Muslims are still human beings, and that as human beings in any part of the world, should be treated equally. The fact that there have been some misconceptions about Islam and Islamic law does not mean necessarily that these misconceptions will stay forever. Rather, we should take an active role to abolish this misconception through hard work. We should exhort ourselves and try to convey a peaceful message to our attackers whoever they are; and therefore promoting intellectual towers among us is a must. To do this is just to forget about the traditional classroom approach in dealing with religious law. I am talking in general, not only about Islamic Law but any other sort of law. Traditional theories, though they have great value, have proven over time that they are not really the appropriate ones for the developing times simply because the modern era would require us to look into the future in a different way.

Today, the world has become really one, a single unit, and nobody's nation's theme is prevailing wherever you go. We have become really a unified world and, in that sense, each single country has to be somehow incorporated in the whole composition of this world. To do so is to live in a peaceful way, in order for the people in any given country to communicate and be connected with others to speak the same way, as speaking the same way does not mean only the language but the common values we share in this world by nature. As we had said earlier, human beings share the same values such as liberty and equality, among others, which have found their way from one culture to another. We should really tailor our interpretation, whether religious law or secular law, along these main guides that would fall under the same league

and principle, the same values we share, in order that our own interpretation be accepted not only within our societies but also in our interaction and relations with the international community. In that sense, I do not mean again, that we should give up our religion and traditions. Nonetheless, we should be a little bit flexible to accommodate the international order whenever it is necessary and whenever we see it does not influence our basic norms. And therefore, we would need to increase knowledge and better our capacities as Moslems on Shari'a Law and in its interpretation.

For those who have not been to the Arab world, the least you could do is to learn more about the Arab language—Islamic soul and Islamic literature—and whoever really wants to go into this must be capable of reading the language. We in Egypt have always been willing to lend support to other countries in terms of religious education and religious training. And perhaps today, while my business here takes place, I acknowledge again what I have received not just for my personal wants but also for my judicial institution and for my country as well, with the hope that the relations between my Supreme Court and your institution will prosper. I look forward to more cooperation with the Philippine Judicial Academy and to seeing a lot of you in my country in Egypt where we can even get into a serious discussion about Shari'a and where some of you may want to receive training on this very important field.

Thank you very much, ladies and gentlemen, and have a good day.

# Closing Remarks*

*Chief Justice Reynato S. Puno*

First, we would like to thank the Ateneo de Davao University, especially its President, Father Antonio S. Samson, S.J., for hosting this *Second Distinguished Lecture Series* of the Supreme Court, circa 2007. The venue of this lecture series was not chosen by the Supreme Court through lottery. It was the subject of careful deliberation, for the continuing objective is to have each lecture delivered in an epicenter of learning with the most encouraging intellectual ambiance. Certainly, Ateneo de Davao University has that invigorating climate and, more than that, the warmth of friendship of its faculty and its students. Again, please accept our profuse gratitude for hosting a wrinkle-free Distinguished Lecture Series.

Second, we extend our gratitude to our distinguished lecturer, Mr. Justice Adel Omar Sherif, the Deputy Chief Justice of the Supreme Constitutional Court of Egypt. We used to hold this Distinguished Lecture Series as a highlight when our Chief Justice retires from service. I thought, however, that the Lecture Series is one event that provides the legal and nonlegal community an enervating intellectual stimulant and, therefore, should be given on a regular basis. Hence, starting this year, the Supreme Court through the Philippine Judicial Academy and the Philippine Association of Law Schools, will conduct this cerebral exercise every year as part of our Judicial Reform Program.

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* Delivered at the *Second Distinguished Lecture, Series of 2007,* held on July 19, 2007, at the Finster Hall, Ateneo de Davao University, Davao City.

Dr. Sherif is our second distinguished lecturer this year. He comes from Egypt, the land of the pyramids, which holds the secret of higher knowledge; the country where you find the best of the best experts on Islamic Law and Shari'a courts. Dr. Sherif's lecture certainly elevated our knowledge of Shari'a Law and, hopefully, that fresh breeze of new knowledge will serve not merely as additional information in our warehouse of jurisprudence but, more importantly, lead us to a better understanding of the legal tradition of our Muslim brothers. Again, thank you, Dr. Sherif, for your generous gift of knowledge; and thank you Ambassador Magarious, for the goodwill of your country.

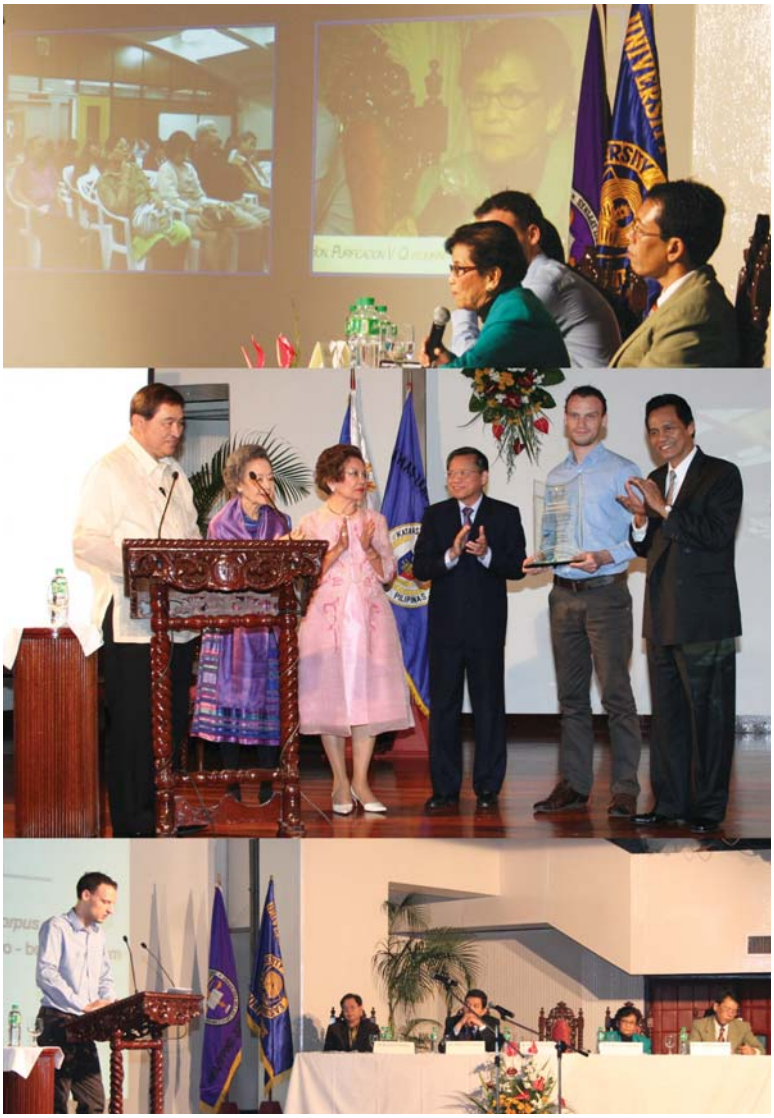
The lecture highlighted the similarities and differences of Islamic Law in relation to other major bodies of law. The Philippines is a Christian country, and its people are part of the Judaeo-Christian world. But before Christianity set foot in the Philippines, Islam was already anchored on our shores and for some time provided our norms of life, including life in Manila and our earliest centers of civilization. The chronology of the coming of Islam and Catholicism to the country may be different, but I hope we remember that classical Islamic Law is also rooted in a monotheistic outlook, in which every idea and deed revolves around the Divine Sovereign. Islam holds God to be the ultimate sovereign from whom all rights begin and end. Humanity's affairs and its destiny both in this world and the next are entirely in the hands of the Divine Sovereign. Such religiosity is easily appreciated by Christians who share the same faith in the Divine Sovereign.

The differences that distinguish Shari'a Law from our laws are derived from the fact that we follow the civil law and Anglo-Saxon tradition. We cannot equate "Shari'a" with the term "law,"

for while Shari'a includes law, it is more than law. The English word "law" is a western concept more commonly associated with the positivist notion of human laws. In the words of Austin, law is the "command of a sovereign," and he described that sovereign to be a "person (human) who received the habitual obedience of members of a non-independent political society, and who did not owe such obedience to any other person." Shari'a, as we noted, recognizes a different sovereign, the Divine Sovereign.

However it may be, it is this variance that gives life to a democracy. In a democratic hall, there is no singular table for a particular viewpoint – except the welcoming desk of liberty, the liberty to be different, yet together. In the smorgasbord of ideas offered by democracy, we are free to partake or not to partake of the food of thought that pleases or displeases us; we are free to choose the drink that will nourish our souls. For in a democracy, there is a right to be different, but there is also the obligation to be one. The obligation to be one is the epoxy that holds us together as a nation.

Good day to all.



Supreme Court of the Philippines
Philippine Judicial Academy
*in cooperation with the*
Philippine Association of Law Schools
University of the East – College of Law

*present*

***The Third Distinguished Lecture Series of 2007***

# THE WRIT OF AMPARO— AN INTERNATIONAL PERSPECTIVE

*by*

**Ms. Abigail Hansen-Goldman**
*European Commission*

*Friday, December 7, 2007, 3:00 P.M.*
*University of the East Conference Hall*
*Claro M. Recto Avenue, Manila*

# *Program*

**Invocation**
**Dean Joe Santos Bisquera**
*Secretary General, Philippine Association of Law Schools*
*College of Law, Manuel L. Quezon University*

**National Anthem**

**Supreme Court Hymn**

**Greetings**
**Dean Amado D. Valdez**
*College of Law, University of the East*

**Opening Remarks**
**Honorable Angelina Sandoval-Gutierrez**
*Associate Justice, Supreme Court*
*Chairperson, Committee on Knowledge Sharing and Regional Cooperation*

**Musical Intermission**
*UE Chorale Ensemble*

**Introduction of the Lecturer**
**Honorable Conchita Carpio Morales**
*Associate Justice, Supreme Court*

**LECTURE**
**Ms. Abigail Hansen-Goldman**

**Panel of Reactors**

**Dr. Purificacion C. Valera Quisumbing**
*Chair, Commission on Human Rights*
*Chair, Department of International and Human Rights Law*
*Phillippine Judicial Academy*

**Honorable Alberto C.E. Valenzuela, Jr.**
*Undersecretary for Legal Affairs and Special Concerns*
*Department of National Defense*

**Dr. Edgardo O. Gonzaga**
*Professor, Department of Political Science*
*College of Arts and Sciences*
*University of the East*

**Atty. Jose Manuel I. Diokno**
*Private Practitioner*
*Chairman, Free Legal Assistance Group*

**Presentation of Plaque of Appreciation**
*by*
*Chief Justice Reynato S. Puno*
*Justice Angelina Sandoval Gutierrez*
*Justice Ameurfina A. Melencio Herrera (ret.)*
*Dean Perry Pe*
*Dean Amado D. Valdez*

**Closing Remarks**
**Honorable Reynato S. Puno**
*Chief Justice of the Philippines*

**Philippine Judiciary Hymn**
**UE Hymn**

**Master of Ceremonies**
**Honorable Adolfo S. Azcuna**
*Associate Justice, Supreme Court*

# Greetings*

*Dean Amado D. Valdez* **

Mr. Chief Justice
Our Justices of the Supreme Court and Court of Appeals
Our Chairman
The President
The rest of the guests,

Good afternoon.

When I received a call from Justice Ameurfina A. Melencio Herrera, on the possibility of our University's hosting the *Third Distinguished Lecture for 2007,* the feeling was mixed. It was a great honor because it was a call from a colossus in the legal profession. Initially, there was a burden on me because I felt that hosting the lecture was a great responsibility. But her motherly voice eased the pressure, so I easily said, "Okay, we will host the lecture." It had been seven years since we hosted a big enterprise, the centennial lecture sponsored by the Supreme Court. The title of that lecture then was *Life Technologies and the Rule of Law.*

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* Delivered at the *Third Distinguished Lecture, Series of 2007,* held on December 7, 2007, at the University of the East Conference Hall, University of the East, Manila. *Transcribed.*

** Dean Amado D. Valdez served as Government Corporate Counsel in 2001; as Senior Undersecretary at the Office of the President, and concurrently as Executive Director of the Presidential Commission on the Visiting Forces Agreement (VFACOM). In 1986, he served as Director, Bureau of Agrarian Legal Assistance, and also served as a Member of the Cabinet Assistance System. He was cited for his

Hosting this activity is a welcome duty. It is not work for us at the College of Law of the University of the East. This is a pleasant experience. That is why we welcome your presence today. I am sure Chairman Panfilo O. Domingo will not reverse me when I say that we welcome hosting this activity, and are grateful that you have visited us during the past two days. Please enjoy your stay with us and, from the bottom of our hearts, thank you for coming to the University of the East.

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"Barefoot Lawyers Program" which unclogged the dockets of the Department of Agrarian Reform.

As the National Legal Aid Director of the Integrated Bar of the Philippines in 1999, he successfully implemented its nationwide legal aid program and initiated remarkable projects like decongestion of jails, training of paralegals, program for the protection of abused women and children, seminars on the barangay justice system, and the IBP Drug Watch.

As a Senior Executive in the Office of the President in charge of enforcing the VFA, he insisted that members of the US Armed Forces submit to Philippine jurisdiction, thus setting a precedent on the high standard of respect required of US visiting forces for Philippine laws and sovereignty.

Prior to his stint in government, he was Dean of the University of the East (UE) College of Law which he reassumed in 2005. Under his incumbency, the UE College of Law initiated, and maintains, a Legal Aid Clinic Office that provides legal advice and representation to indigents in the City of Manila.

He taught Constitutional and Civil Law subjects, and is a bar reviewer in Private International Law and a lecturer on local government at the UP Law Center.

# Opening Remarks*

*Justice Angelina Sandoval-Gutierrez* **

Mr. Chief Justice Reynato S. Puno
My colleagues in the Supreme Court
Madam Abigail Hansen Goldman
represented now by Secretary Matej Dornik
Madam Ester A. Garcia
Dean Amado D. Valdez
Chancellor Ameurfina A. Melencio Herrera
The panel of reactors, trial judges, court officials, officers, faculty members and students of the University of the East
Distinguished guests, friends, ladies and gentlemen,

Good afternoon.

Judge Learned Hand in his *Discourse on Liberty* aptly said, "Right knows no boundaries and Justice no frontiers. The brotherhood of man is not a domestic institution."

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* Delivered at the *Third Distinguished Lecture, Series of 2007,* held on December 7, 2007, at the University of the East Conference Hall, University of the East, Manila. *Transcribed.*

** Justice Angelina Sandoval-Gutierrez was the first recipient of the prestigious *Cayetano Arellano Award* as an Outstanding Regional Trial Court Judge of the Philippines, and the first annual *Best Written Decision/Judicial Essay Contest* among RTC women judges sponsored by the Philippine Women Judges Association. She was a Bar Examiner in Criminal Law in 1994 and 1998, and chaired the Bar Examinations in 2006. She is an *Ulirang Ina Awardee*, her three children being all lawyers. She is a member of the Senate Electoral Tribunal and Chair of several Supreme Court committees.

This means that the protection of rights and the proper dispensation of justice are not merely local concerns; they are the concerns of the world. Thus, today we have in our midst a distinguished lecturer from Australia to discuss the Writ of Amparo from an international perspective. On behalf of the Supreme Court, I welcome everyone to this *Third Distinguished Lecture for the year 2007*.

This lecture is being sponsored by the Supreme Court, the Philippine Judicial Academy and the Philippine Association of Law Schools, in cooperation with the College of Law of this university. The Distinguished Lecture Series started in 2001 when the Supreme Court celebrated its 100th year anniversary. Since then, it has continued the lecture as one of its knowledge sharing activities. Indeed, the lecture is hailed as the most prestigious lecture on law and the judiciary in the Philippines. Most of the lecturers are either renowned legal scholars or Chief Justices or members of the highest courts of other countries.

Today, we are fortunate to have with us Madam Abigail Hansen Goldman, the Judicial Guarantees Adviser to the

She earned her Bachelor of Laws degree from the University of Santo Tomas and is its first alumna elevated to the Supreme Court. She attended judicial and legal courses at the Harvard Law School, Academy of American and International Law at the University of Texas, National Judicial College at the University of Nevada, and University of Southern California.

Justice Gutierrez is a recipient of the prestigious Outstanding Thomasian Alumni Award and the *Dangal ng Batangas Award* given by the Provincial Government "in recognition of her outstanding achievements as a Lawyer, Justice, Writer, and for being a distinguished Batangueña worth emulating by the youth." She hails from Alitagtag, Batangas.

International Committee of the Red Cross (ICRC) in Geneva, Switzerland. In the past, lecturers covered topics such as judicial reform, recent legal issues, and the judicial legacies of Chief Justices. This afternoon, however, we have a very interesting and timely topic, "The Writ of Amparo–An International Perspective."

Recently, in the light of the prevalence of extrajudicial killings and enforced disappearances in this country, the Supreme Court, through Mr. Chief Justice Reynato S. Puno, resolved to exercise its power to promulgate rules to protect our people's constitutional rights, thus, the Rule on the Writ of Amparo. This Rule promotes the idea of Thomas Jefferson that the care of human life and happiness is the first and only object of good government.

The Supreme Court is very pleased to hold this distinguished lecture in this university, once described by the late President Diosdado Macapagal as the people's university, and recently tagged by the *Computer World* magazine and the *Enterprise* magazine as one of the "most wired" universities in the country. Indeed, this university is the perfect venue for this pro-people and up-to-date lecture. Thus, we thank all the UE officials and everyone involved in this important event. We also thank you students, or the Warriors, present here today for joining us in this significant and intellectual endeavor. As warriors, may you find in this lecture the true meaning of the Writ of Amparo and be vigilant against acts or omission of public authorities, especially the military, in violation of the people's constitutional rights.

Once again, on behalf of the Supreme Court, welcome everyone and *mabuhay*.

# THE WRIT OF AMPARO – AN INTERNATIONAL PERSPECTIVE*

*Ms. Abigail Hansen-Goldman*

**Abigail Hansen-Goldman**, a French and Australian national, is a barrister and solicitor qualified in the United Kingdom and Australia since 1985, with broad experience in international and domestic criminal litigation, and international humanitarian and human rights law.

As the Director of an Australian community legal centre in the 1980s, Ms. Hansen-Goldman developed a particular interest in human rights issues related to the criminal justice system. During her private legal practice in Australia, she specialized in the defense of complex criminal matters, and pursued high-profile legal actions against the police for civil rights violations.

After moving to France in 1995, Ms. Hansen-Goldman worked as a legal journalist, contributing articles on human rights and international and comparative criminal law for professional publications, and was legal consultant with Penal Reform International on reform projects– racial discrimination in criminal justice systems, access to justice in developing countries, and the abolition of the death penalty. She established the International Criminal Justice Caucus, which condemned discriminatory practices within legal systems and law enforcement agencies, in the context of the 2001 World Conference against Racism in Durban.

She has appeared as part of a defense team before the UN International Criminal Tribunal for Rwanda, and continued to act on behalf of individual defendants. She was consultant to the European Commission, principally on the International Criminal Court

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ratification and implementation program, and other human rights and international justice initiatives.

Her latest position was as Judicial Guarantees Adviser to the International Committee of the Red Cross in Geneva, where she provided legal, policy and strategic advice on torture, extrajudicial executions, procedural guarantees for detainees, development and invocation of norms and standards in accordance with ICRC policy; and support to field strategy and activities. She also contributed external initiatives (e.g., draft Inter-American Declaration on the Rights of Detainees, OSCE Human Dimension initiatives, etc.), and provided in-house training in humanitarian and criminal law.

Ms. Hansen-Goldman is a Board Member of the *International Ethical, Political & Scientific Collegium*, and of the French organization *Sherpa*, devoted to the legal representation of victims of human rights abuses by multinational companies. She has also made many international presentations on criminal justice, humanitarian and human rights concerns, and teaches humanitarian law at the *Université de Paris 8*.

*Liberty consists, not only of the right accorded, but of the power given to man to exercise it x x x under the sovereign authority of justice and with the safeguard of the law.*[1]

Louis Blanc, French politician and writer (1811-1882)

I wish to thank the members of the Supreme Court of the Philippines and the Philippine Judicial Academy for initiating this event, and in particular His Honor, Chief Justice Reynato S. Puno, for his commitment to ending impunity for extrajudicial killings in the Philippines. I also wish to thank the Philippine Association of Law Schools and the University of the East College of Law for hosting us today.

I am truly honored to speak today, where I participate with the support of the European Commission. The Delegation of the European Commission in Manila has had a significant and continuing involvement in combating extrajudicial killings in the Philippines, and they too are deserving of our thanks.

I am truly honored to speak today, where I participate with the support of the European Commission (EC). The Delegation of the European Commission in Manila has had a significant and continuing involvement in combating extrajudicial killings in the Philippines, and they too are deserving of our thanks.

I was also honored to have had the opportunity to speak at the *National Summit on Extrajudicial Killings* in July of this

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[1] *La liberté consiste, non pas seulement dans le droit accordé, mais dans le pouvoir donné a l'homme d'exercer x x x sous l'empire de la justice et sous la sauvegarde de la loi.*

year, where I emphasized the need for a comprehensive, multilateral approach in our efforts to end these atrocities. Since that historic event, the Supreme Court has continued in this vein, drawing on the vast pool of expertise and the collective will of the national and international human rights and legal communities, and transforming theory into concrete reality.

In response to the Melo Commission Report,[2] to the preliminary report by Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, to the European Parliament Resolution of April 26, 2007, and to the Philippines' formal request to the European Union to provide technical assistance, the European Commission has been cooperating with the Commission on Human Rights of the Philippines and the Philippine Judicial Academy concerning the EC's participation in the National Summit and the Current Lecture Series.

In addition, the European Union sent a team of experts in June 2007, which undertook a comprehensive needs assessment with a view to identifying potential assistance measures aimed at improving the investigation and prosecution of cases.

These initiatives demonstrate the European Union's ongoing commitment to assist the Philippines in its efforts to end impunity for these human rights violations.

## I. Introduction

I have been invited to speak today about the Writ of Amparo from an international perspective.

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[2] The Report of the Independent Commission to Address Media and Activist Killings.

The word "international" here can have several meanings, and I shall touch on them in varying degrees.

*First*, there is international from a ***comparative*** point of view, looking at the rights and mechanisms available in other countries.

*Secondly*, there is international from the ***international*** *and regional* perspective, in particular the obligations and powers of States to accord victims comprehensive justice and breathe life into human rights principles.

*And finally*, there is the international perspective of the **external observer**, of someone coming from a different legal context and culture.[3]

## II. Philippine Writ of Amparo – An Overview

### *A. Supreme Court Rule on the Writ of Amparo (Administrative Matter No. 07-9-12-SC)*

In July 2007, the *National Summit on Extrajudicial Killings and Enforced Disappearances* recommended that a study be undertaken as a matter of urgency as to the feasibility and desirability of creating a Philippine Writ of Amparo.

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[3] *Important:* While I have read numerous reports from national and international human rights organizations concerning the killings and disappearances which have occurred in the Philippines, many of which draw certain factual conclusions, I do not wish to impute any specific responsibility for these crimes, this being clearly a matter for judicial process. In particular, in this presentation I do not seek to imply that any criminal or other responsibility exists in law or in fact relative to any individual, group, or institution in the Philippines.

On September 25, 2007, Chief Justice Reynato S. Puno officially announced the Philippine Supreme Court's promulgation of the Rule on the Writ of Amparo. He stated:

> This rule will provide the victims of extralegal killings and enforced disappearances the protection they need and the promise of vindication for their rights. This rule empowers our courts to issue reliefs that may be granted through judicial orders of protection, production, inspection and other reliefs to safeguard one's life and liberty. The *writ of amparo* shall hold public authorities x x x to a high standard of official conduct and hold them accountable to our people.

This prerogative writ was created pursuant to the power given to the Supreme Court by Article VIII, Section 5, of the Philippine Constitution:

> 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 [x x x]. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases [x x x], and shall not diminish, increase, or modify substantive rights [x x x].

The Supreme Court's initiative was intended to complement existing *habeas corpus* provisions under Rule 102 of the Revised Rules of Court, since it was considered that existing provisions were in practice not sufficiently exigent.

Specifically, the Rule on the Writ of Amparo was designed to add to the legal arsenal available to victims seeking information, accountability and redress for extrajudicial killings and enforced disappearances.

## *B. Writ of Amparo – Introduction*

The *Writ of Amparo* (from the Spanish meaning "protection") is a mechanism to provide direct and immediate protection of fundamental rights, and complements, and in some jurisdictions encompasses, the writ of *habeas corpus*.

The two writs differ however, in that *habeas corpus* is designed to protect the freedom of the person, whereas *amparo* protects fundamental human rights protected by national or international law, but which are not otherwise protected by *habeas corpus*.

The Annotations to the Philippine Writ of Amparo state that its model was borrowed from Mexico, where it has been enshrined in various forms in Constitutions since the mid-nineteenth century, as an extraordinary legal remedy for the enforcement of fundamental rights. The *recurso de amparo* consists of the judicial review of governmental action, to empower state courts to protect individuals against state abuses.

Various forms of *amparo* have been subsequently adopted in a majority of South American legal systems.

## *C. Essential Elements of the Philippine Writ of Amparo*

The petition for a writ of amparo in the Philippines 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.

Its essential elements include:

1. The writ covers extralegal killings and enforced disappearances or threats thereof.

2. The petition may be filed by aggrieved parties in the following order:

    a. Any member of the immediate family; or
    b. Any ascendant, descendant or collateral relative of the aggrieved party within the fourth civil degree of consanguinity or affinity; or
    c. Any concerned citizen, organization, association or institution.

3. The writ may be filed on any day and at any time.

4. The petitioner is exempted from paying filing fees.

5. The respondent shall file a written return within five working days of service of the writ, containing:

    a. The lawful defenses;
    b. The steps taken by the respondent to determine the fate or whereabouts of the victim(s) and the person(s) responsible;
    c. All information in the respondent's possession relating to the act;
    d. If the respondent is a public official or employee, the return shall state the actions that have been or will be taken to:

        i. verify the identity of the victim and recover and preserve evidence related to the death or disappearance of the victim;
        ii. identify witnesses and obtain statements;
        iii. determine the cause, manner, location and time of death or disappearance;
        iv. identify and arrest persons involved in the death or disappearance, and bring the suspects before a competent court.

6. A general denial of the allegations is not permitted.
7. All defenses shall be raised in the return, otherwise, they are deemed waived.
8. Relief possible:
    a. Temporary Protection Order (protection by a government agency or an accredited person or institution);
    b. Inspection Order (entry onto a property to inspect the property or any object);
    c. Production Order (designated documents or things to be produced and inspected);
    d. Witness Protection Order (State Witness Protection Program, government agencies, accredited persons or institutions).
9. Penalty for refusal, failure to respond, false returns, etc. – contempt (imprisonment or fine).
10. The parties establish claims by substantial evidence. *Private respondents must prove ordinary diligence* was observed in the performance of duty. *Public official respondents must prove extraordinary diligence* was observed in the performance of duty; they cannot invoke the presumption of regular performance of duty.
11. The court shall render judgment within 10 days.
12. Any party may appeal to the Supreme Court on questions of fact or law or both. The appeal shall be given the same priority as in *habeas corpus* cases.

13. The court shall not dismiss the petition, but shall archive it, if it cannot proceed for a valid cause such as the failure of petitioner or witnesses to appear due to threats. A periodic review of the archived cases shall be made. The archived petition shall be dismissed upon failure to prosecute the case after two years.

14. The new rule shall not diminish, increase or modify substantive rights recognized and protected by the Constitution.

In addition, Supreme Court Administrative Circular No. 118-2007 requires the monthly submission of reports on the status of pending *writs of amparo*.

These provisions provide considerable protection to victims of killings and enforced disappearances.

For example:

1. The time frames for response, both by the respondents and the Court, are very narrow, thereby reflecting the urgency of such matters;
2. It provides accessible relief, both in the pecuniary and the physical sense, with the waiving of fees and the ability to file a petition at any time;
3. It provides physical protection of witnesses, and requires the production of evidentiary protection.
4. It imposes an equal onus of proof for both petitioner and respondent, but requires an increased diligence on the part of officials (extraordinary diligence) reflecting the very real imbalances of power between institutions and individuals.

## III. International Law and Mechanisms

I wish to first emphasize that there exists a vast body of international law dealing with victim's rights and remedies for violations of human rights and humanitarian law. For this lecture, I have selected certain instruments and guidelines that have relevance to the situation in the Philippines; they are not intended to be exhaustive.

Where possible, I will specifically examine the rights and mechanisms that provide support to the concept of the *writ of amparo*. More generally, I will examine provisions that support the right of victims and their families to broad-ranging remedies that do not simply provide redress, but also serve a role in the prevention and cessation of human rights violations.

### *A. International Human Rights Law*

#### 1. International Covenant on Civil and Political Rights

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) is the cornerstone of the enforcement of the right to personal liberty, as follows:

> (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

This however does not protect the full range of rights provided for by the Covenant as a whole, and can be more

accurately seen as the expression in international law of the *habeas corpus* requirement.

Nevertheless, other more general provisions in the ICCPR do impose responsibility upon States to give full expression to the rights accorded under the Covenant, for example Article 2:

> (2) Each State Party x x x undertakes to take the necessary steps x x x to adopt *such laws or other measures as may be necessary to give effect to the rights* recognized in the present Covenant. *(italics mine)*
>
> (3) Each State Party x x x undertakes:
>
> > (a) To ensure that any person whose rights x x x are violated shall have an *effective remedy,* notwithstanding that the violation has been committed by persons acting in an official capacity.

The Covenant does not limit the measures to be taken by States to the exercise of its legislative functions, but rather refers to "other measures," thus including non-legislative acts of any organ of the State.

The Convention also does not try to define "remedy," nor at what stage of proceedings any remedy must be provided.

The clear intention is therefore to impose upon States a very broad responsibility to give full effect to the rights under the Covenant, extending to administrative measures by the judiciary, as well as interim, emergency or preemptive remedies, which would include the writ of amparo.

## 2. Convention Against Torture

Extrajudicial killings, enforced disappearances, and torture are, only too tragically, inextricably linked and we should therefore examine the provisions of the Convention Against Torture.

Article 2(1) provides that each State Party shall take *effective legislative, administrative, judicial or other measures* to prevent acts of torture in any territory under its jurisdiction.

Article 13 creates the right of a torture victim to complain, and to have his case promptly examined by the competent authorities. It also provides for steps that shall be taken to protect the complainant and witnesses from any ill-treatment or intimidation.

Article 14 requires States to ensure that a torture victim "obtains redress" and has an enforceable right to compensation.

Article 17 establishes the **Committee Against Torture,** with Article 20 giving the Committee the power to invite a State Party to cooperate in the examination of "well-founded indications that torture is being systematically practiced in the territory" and to submit observations. Under Article 17(2) the Committee may designate its members to make a confidential inquiry, which may include a visit to its territory, and to report to the Committee urgently.

Article 22(1) allows the Committee to receive communications from or on behalf of individuals, but only where the individual has exhausted all available domestic remedies, except where the domestic procedures are unreasonably prolonged or unlikely to bring effective relief.

The Convention therefore requires State Parties to take measures to prevent torture, without exhaustively listing what such measures should comprise. In addition, the reference to "redress" is not defined, leaving open the possibility for interim, preventive and emergency relief – indeed the spirit of the Convention would appear to positively require the possibility of such measures.

The Optional Protocol of the Convention also provides for inspection mechanisms of places of detention, and is thus a crucial development in the protection of victims of enforced disappearances.

### 3. Convention for the Protection of All Persons from Enforced Disappearance

The Preamble to the Convention for Protection from Enforced Disappearance (not yet in force) emphasizes *inter alia* the determination of States to combat impunity for the crime of enforced disappearance, and the right of victims to justice and to reparation.

Article 12 requires "appropriate steps" to be taken to ensure that victims and other persons are protected against ill treatment or intimidation.

Article 17 prohibits secret detention, and requires State Parties to guarantee access by authorities to places where persons are deprived of liberty. It also provides that any detainee or persons with a legitimate interest shall be entitled to take proceedings before the court, in order to determine the lawfulness of the detention.

Article 18 also guarantees access for any person with a legitimate interest to certain information, including the detaining authority, the date, time and place of detention, the whereabouts of the detainee and his state of health, and the circumstances and cause of any death. Article 18 also requires "protection measures" to be afforded to persons requesting or investigating such information.

Article 20(2) requires States Parties to guarantee persons referred to in Article 18 the right to a prompt and effective

judicial remedy as a means of obtaining such information. This right to a remedy may not be suspended or restricted in any circumstances. Article 22 provides sanctions for non-compliance with Article 17 and Article 20 remedies.

The Convention therefore allows for "appropriate steps" and "protection measures" to be taken to protect certain persons: it requires access to places of detention, and it also provides for a *habeas corpus* procedure. It also goes further in requiring access to certain crucial information and provides for sanctions in the event of failure to comply. The Convention therefore provides probably the strongest support in international law for the concept of the *writ of amparo*, and we can see very strong echoes of this in the Philippine provisions.

The Convention also provides for its own accountability mechanism, establishing a **Committee on Enforced Disappearances** to carry out the functions provided for under the Convention (Article 26). Article 30(1) provides for a request that a disappeared person should be sought and when found be submitted to the Committee "as a matter of urgency," but this is significantly limited under Article 31(2), which provides that no communication is admissible unless all effective available domestic remedies have been exhausted, except where the application of the remedies is unreasonably prolonged.

Once again, we can see that the direct powers and remedies of the Committee will be somewhat lifted. The Committee can request the State Party to provide it with information concerning the person sought, and may then give recommendations to the State Party. The Committee is therefore limited in its enforceable scope; however, it will nevertheless provide an essential inquiry and political function at the international level.

### 4. Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary, and Summary Executions

Principle 4 of the Principles provides that effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extralegal executions, including those who receive death threats.

Principle 6 requires Governments to ensure that detainees are held in officially recognized places of custody, and that information on their custody and whereabouts is made available to their relatives. These provisions create powerful preventive mechanisms, including the power to intervene preemptively, and the means to access information concerning victims.

Other preventive measures are referred to in Principle 8, including improved access to justice for victims. It encourages the use of intergovernmental mechanisms to investigate reports of any such executions and to take effective action against such practices.

Principle 15 provides for protective measures for witnesses, and also requires those "potentially implicated" in extralegal executions to be removed from any position of control or power. This final provision is very interesting, since it does not require the final determination of responsibility, but rather allows for the preliminary identification and removal of culprits, providing a strong deterrent aspect and preventing further abuses.

Again, therefore, the provisions of the Philippine Writ of Amparo are entirely consistent with the spirit and scope of these Principles.

## 5. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims (Commission on Human Rights Resolution 2005/35)

The Preamble of the Principles on the Right to a Remedy for Victims reaffirms the established principle that victims of human rights violations should have their right to redress fully respected.

The Principles do not impose international legal obligations, but rather identify mechanisms, modalities, procedures, and methods for the implementation of existing international legal obligations. Principle 2 provides:

> States shall x x x ensure that their domestic law is consistent with their international legal obligations by:
>
> (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
>
> (c) Making available adequate, effective, prompt, and appropriate remedies x x x.

Such remedies specifically include "effective measures aimed at the cessation of continuing violations" and "judicial and administrative sanctions against persons liable for the violations."

The intention of the Principles is therefore not merely to provide compensatory remedies, but to allow for any measure, including interim and emergency measures, to halt or prevent violations and impunity. In this respect, we can again see that the Philippine Writ of Amparo is the expression of established international norms.

## 6. Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity

Principle 1 states that:

> impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators x x x; to provide victims with effective remedies x x x; and to take x x x steps to prevent a recurrence of violations.

Principle 19 specifically refers to the duties of States with regard to the administration of Justice:

> Victims, x x x should be able to institute proceedings x x x particularly as *parties civiles* or as persons conducting private prosecutions x x x. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest.

Principle 35 requires that States ensure the non-repetition of violations, through institutional reform and other measures necessary to ensure respect for the rule of law. It states:

> Such reforms should advance the following objectives:
>
> (b) enactment of legislative *and other measures* necessary to ensure respect for human rights.

The Principles therefore reinforce the role of victims in combating impunity, while at the same time requiring States to implement reforms and other measures to ensure respect of human rights.

It is to be noted that no attempt is made to limit the scope of such measures, the intent being therefore to impose on States a broad responsibility to ensure accountability for violations.

It is therefore submitted that interim or emergency procedures, such as a *writ of amparo*, would fall squarely within the ambit of these Principles.

## 7. International Human Rights Complaints Mechanisms

### 7.1 Human Rights Council

#### 7.1.1 Special Procedures

Special procedures are the complaints mechanisms of the Human Rights Council, and aim to examine, monitor, advise and publicly report on human rights situations in specific country situations or thematic issues in all parts of the world.

Mandate holders may respond to individual complaints, conduct studies, and provide advice on technical cooperation at the country level. Special Procedures receive information on allegations of human rights violations and send urgent appeals or letters of allegation to governments asking for clarification. They also carry out country visits to investigate the situation of human rights at the national level.

The Commission on Human Rights created the mandate of the **Special Rapporteur on extrajudicial, summary or arbitrary executions** in 1982, who is guided by international legal standards. Professor Philip Alston, the current Special Rapporteur, has recently released his Report on his mission to the Philippines earlier this year; it is neither my intention nor my role to comment on his report in this presentation.

7.1.2 Complaint Procedure

A new Complaint Procedure is currently being established by the Human Rights Council to address consistent patterns of gross violations of human rights. The complaints procedure requires, however, that domestic remedies have been exhausted before complaints are admissible, and also significantly limits the standing of interested third parties, in particular, NGOs.

7.2 Other International Mechanisms

Four of the human rights treaty bodies, including the Human Rights Committee and the Committee Against Torture, may under certain circumstances consider ***individual complaints*** for human rights violations.

The Committee Against Torture may initiate ***inquiries*** if they receive information containing well-founded indications of serious human rights violations, but cannot react without the State's recognition of its competence. Article 20 of the CAT sets out procedures for the Committee to undertake *urgent inquiries,* but the term "urgent" in this context is unfortunately very relative.

7.3 Comment on Mechanisms

Access to direct, interim, emergency and speedy remedies under existing International Law mechanisms is very limited, but this is not, in any event, the role of international human rights law, which places the primary responsibility for providing relief to victims on Governments themselves. International mechanisms, however, play an essential role in providing guidance and political clout in the difficult process of ensuring accountability for violations of international law.

### *B. International Humanitarian Law*

The 1949 Geneva Conventions established the first legal obligation of States to investigate alleged unlawful killings and to prosecute their perpetrators, and is thus of some significance in this presentation.

Elaborating the general obligation to "respect and to ensure respect" for humanitarian law, the Conventions required the penal repression of violations, and in the event of a grave breach, States are legally obliged to seek out and try those responsible; and if found guilty, to impose an "effective penal sanction."

Since the adoption of the Geneva Conventions, international human rights law has supplemented its protections. The UN human rights mechanisms, however, do not apply international humanitarian law consistently, and States and victims tend to rely on human rights norms alone to establish the existence of a violation under international law, even in situations where there is armed conflict.

However, the application of humanitarian law by human rights mechanisms is increasing, particularly in the case of extrajudicial killings, where very often there are breaches of both branches of law.

Humanitarian law is therefore of special interest in the Philippines, where there exists a situation of internal armed conflict; and as a signatory to the Geneva Conventions, is obliged to uphold its principles.

While the Geneva Conventions do not provide specific mechanisms for the enforcement of its provisions, other than the general duty to prosecute, their specific provisions and their complementarity with human rights standards can be relied

upon to establish violations of both humanitarian and human rights law at the national level, thereby emphasizing the gravity of the act.

### *C. International Criminal Law*

One of the major innovations of the Rome Statute creating the International Criminal Court (ICC) is the ability of victims to participate in proceedings, not only as prosecution witnesses but also as interested parties. This is without precedent in international criminal law – the international *ad hoc* tribunals and the internationalized courts and panels have no similar provisions.

However, Article 68 Section 3 of the Statute provides that:

> where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.

This makes their true status at trial somewhat unclear.

Nevertheless, the Statute and Rules extend far in other dimensions to protect the interests of victims. Rule 68 provides for protection measures for victims and witnesses, and also provides for assistance in obtaining legal presentation.

Article 75 establishes principles relating to reparation, with Article 79 establishing the Victim Trust Fund for this purpose.

The Statutes and Rules provide for interlocutory hearings, but they are limited in their scope to essentially admissibility, evidentiary and procedural issues (Rules 133, 134), and interim appeals (Chapter 8, Section 3). They do not provide for any emergency or preemptive measures to prevent violations of international law.

Arguably, however, the Court could use its power under Articles 86 to 102 to request international cooperation and judicial assistance. Article 64 also sets out the broad powers and functions of the Trial Chamber:

> 6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
>
> *x x x*
>
> (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
>
> *x x x*
>
> (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
>
> (e) Provide for the protection of the accused, witnesses and victims; and
>
> (f) Rule on any other relevant matters.

The essential role of the ICC is not to provide injunctive and preventive relief, but rather to enforce accountability and end impunity for crimes that have already occurred. Nevertheless, nothing would specifically preclude the court from intervening in an active case, pursuant to the powers above, particularly if it were to enhance the protection of international human rights.

## IV. Regional Law and Mechanisms

### *A. European Convention on Human Rights*

The European Convention on Human Rights provides in Article 5(4) for any person deprived of his liberty to take proceedings to determine the lawfulness of his detention. This therefore creates a right to *habeas corpus* at the European level, binding on all Signatory Parties.

However, while Article 6 refers to the right to a fair and public hearing within a reasonable time "in the determination of his civil rights," and Article 13 states that any victims of human rights violations shall "have an effective remedy," there is no specific right to interlocutory, emergency, extraordinary, or other relief in order to enforce the Convention's provisions.

The European Convention on Human Rights established in Article 19 the **European Court of Human Rights** to monitor compliance by Signatory Parties. Under Article 34, the Court may receive applications from "any person, non-governmental organization or group of individuals" claiming to be the victim of a human rights violation.

The Court also provides for the constitution of *amicus curiae* briefs (Article 36[2]).

Article 35 provides however that the Court may only deal with the matter after all domestic remedies have been exhausted.

Where the Court finds that there has been a violation of the Convention, it may provide "just satisfaction" to the injured party (Article 41). Judgments are binding on State Parties, with Articles 3 and 8 of the Statue of the Council of Europe giving the Committee of Ministers the power to expel recalcitrant states.

In exceptional circumstances the Court may grant interim measures, but in practice only does so where there is a serious risk of physical harm to the applicant. Rule 39(1) of the Rules of Court states:

> The Chamber x x x may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties **any interim measure** which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

This means that if the Court considers that a violation is about to take place, it can direct the state concerned to take interim measures to prevent the violation.

A notable example of the use of Rule 39 related to the 1999 trial of the Kurdish leader, Abdullah Ocalan, in Turkey, whereby the court granted Ocalan's request that Turkey not proceed with Ocalan's execution pending the Court's determination of his application under the Convention.[4]

This procedure is of particular interest to our examination of the Philippines' Writ of Amparo, since these "interim measures" provide the Court with a wide discretion to intervene and provide interlocutory relief, which can be seen as being analogous to both *amparo* and *habeas corpus* procedures.

### *B. Inter-American Human Rights Convention*

The Inter-American Human Rights Convention is of considerable interest, since it represents the only attempt in international or regional law to recognize a specific *amparo* mechanism.

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[4] Interim Measure in the Ocalan Case, ECHR, 683 (1999).

Article 25 provides entitlement to judicial protection, whereby a victim has the right to simple and prompt recourse in a court or tribunal for protection against acts that violate fundamental rights recognized by the Convention, including acts by persons in the course of their official duties.

Under Article 25, any person claiming such remedy shall have his rights determined by a competent authority; to develop the possibilities of judicial remedy; and to ensure that such remedies are properly enforced.

Article 7(6) provides for a right to *habeas corpus*, and Article 8 provides for the right to a hearing, not only of any criminal charges, but also for "the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

The Inter-American Human Rights Convention and the Organization of American States (OAS) created the ***Inter-American Commission on Human Rights (IACHR)***, a quasi-judicial, quasi-political body. Article 44 allows any person, group or non-governmental entity to lodge petitions for violations of the Convention.

Article 46 of the American Convention on Human Rights (ACHR) and Article 31 of the Rules of Procedure of the Inter-American Commission require the exhaustion of domestic remedies for petitions to be admissible, except when the domestic legislation does not afford due process of law for the protection of rights, or the applicant has been denied access to the remedies; or there has been unwarranted delay of judgment (Article 46[2]).

Article 25(1) of the Rules of Procedure provides that:

> in serious and urgent cases x x x the Commission may x x x adopt precautionary measures to prevent irreparable harm to persons.

This is a clear recognition of the importance of emergency powers to prevent violations, and is consistent not only with Article 25 of the Convention, but also the unique legal and political culture in Latin America, as evidenced by its widespread adoption of *amparo* proceedings.

The Inter-American Court of Human Rights is a judicial body established by the ACHR. Under Article 61(1) only a state party and the Inter-American Commission have the right to submit a case to the Court, however, individuals may submit cases to the Inter-American Commission as described earlier. The Court regularly receives *amicus curiae* briefs, however, there is no specific procedure regulating their submission.

The Court has the power:

> in cases of extreme gravity and urgency x x x to avoid irreparable damage to persons, x x x to adopt such provisional measures it deems pertinent x x x.[5]

While the Court may order remedies, including damages, for violations of the Convention (Article 63[1]), and while the Court's judgments are binding upon State Parties (Article 68), the Convention does not establish any form of supervision for enforcement of the Court's rulings.

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5 American Convention on Human Rights (ACHR), Art. 63(2).

## V. Discussion and Conclusion

As we can therefore conclude, there is no unequivocal entitlement to preemptive or reactive injunctive relief provided for in international law, with the exception of the American regional system. However, there is certainly recognition in most instruments of the importance of urgent and exceptional interim measures.

We can see these international norms reflected in the Philippine Writ of Amparo, with its broad protection most closely resembling the provisions of the Inter-American Convention of Human Rights.

I note that the Supreme Court's power under the Constitution to:

> promulgate rules concerning the protection and enforcement of constitutional rights is subject to the caveat that 'such rules x x x shall not diminish, increase or modify substantive rights.'

The issue has arisen as to whether the Philippine Writ of Amparo impinges on substantive rights, which clearly only the legislature can modify. However, the very nature of *amparo* is, and historically has always been, a vehicle to implement existing rights, rather than altering their nature in any manner. Indeed, a failure on the part of the judiciary, the executive, or the legislature to make perpetrators of human rights violations responsible for their acts would constitute a far greater interference with constitutional rights.

I note also Administrative Order No. 197 ordering the Department of National Defense and the Armed Forces of the Philippines:

> to draft legislation x x x for safeguards against disclosure of military secrets and undue interference in military operations inimical to national security.

The balancing of national security and individual rights has always been a very delicate process, a fact which is well-recognized in international law, with, for example, the Rome Statute and Rules devoting considerable attention to this issue. We cannot, however, as we have increasingly seen in jurisdictions throughout the world, allow this to become a cover-all defense to avoid investigation or serious human rights abuses.

On October 25, 2007, at the Third Committee of the United Nations General Assembly, Professor Philip Alston, Special Rapporteur on extrajudicial, summary, or arbitrary executions stated:

> The national summit convened by the Chief Justice brought together civil society and representatives of the various organs of Government in a truly encouraging manner. The Supreme Court's decision to establish a *writ of amparo* to facilitate the prompt resolution of alleged extrajudicial executions and forced disappearances is also encouraging.

One month earlier, the Asian Human Rights Commission commented on the Writ of Amparo as follows:

> 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.

I share the views of both the Special Rapporteur and the Commission, and agree that much has yet to be undertaken to provide genuine protection of victims. The Supreme Court has nonetheless given a powerful lesson from which all of us can learn. Indeed, as I prepared my conclusions, I was struck by the extraordinary processes that had clearly taken place in the creation of the Philippine Writ of Amparo.

These include the Supreme Court's willingness to look beyond its own jurisdiction and legal traditions to seek creative answers to real human problems, in its exploration and use of the powers invested in the judiciary, and its seamless incorporation of an "alien" remedy onto a common law system, and its commitment to the principles of access to justice. The court has demonstrated its commitment to creating preemptive rather than merely reactive measures; it has shown its comprehension of the vital importance of the dissemination of information – to the general public, to the international community and within the judiciary itself; and finally, it has demonstrated considerable social awareness in imposing increased diligence requirements on government institutions in their responses, thereby reflecting real-life differences between the vulnerable and the powerful.

All of the measures undertaken by the Court underscore the absolute necessity of the strict separation of the executive and the judiciary to maintain the rule of law, and of the courage and independence required of the judiciary in the exercise of their functions, and can justly serve as a source of inspiration in the global fight against impunity for human rights violations.

The sharing of knowledge and experience flows in all directions, and the responsibility to protect resides in us all. The world is closely watching the Philippines as the first petitions flow in and the first judicial decisions are delivered.

# Reactions on The Writ of Amparo – An International Perspective*

*Dr. Purificacion C. Valera Quisumbing* **

Greetings to Chief Justice Reynato S. Puno
Honorable Justices of the Supreme Court
Our very dear Chancellor Justice Ameurfina Herrera
The Honorable President of the University of the East,
Ester Garcia
Honorable Dean of the UE College of Law, Amado Valdez.

Let me start by making a confession. I taught at the University of the East from 1965-1975, 10 years, at the College of Arts and Sciences and the College of Law. Ever since I left in 1975, I had not stepped actually into the campus premises. I was very surprised at the development of the campus.

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* Delivered at the *Third Distinguished Lecture, Series of 2007,* held on December 7, 2007, at the University of the East Conference Hall, University of the East, Manila. *Transcribed.*

** Dr. Purificacion Valera Quisumbing is the Chairperson of the Commission on Human Rights (CHR). She is also the Chairperson of the Department of International and Human Rights Law at the Philippine Judicial Academy. A human rights expert, she was the first Filipino and the third woman to chair the 46th United Nations Commission on Human Rights (1990) in Geneva, Switzerland, succeeding Mrs. Eleanor Roosevelt, the 1948 Founding Chairperson. She was appointed by the Secretary-General as the first Representative of the U.N. High Commissioner for Human Rights and Director of the U.N. Centre for Human Rights at the

Let me just say that the Rule on the Writ of Amparo was not yet available to those who were at that time considered activists, particularly here on campus, because during that time I was a thorn on the side of the UE administration. I was a member of the University of the East Faculty Association (UEFA). I served as the first woman on the legal council, and finally as president of UEFA. That was the time when I realized that it was indeed very important to protect the human rights

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New York Headquarters Office of the U.N. Secretariat (1995-1997). In the Philippines, she became the first woman commissioned to the Judge Advocate General's Office with the rank of Lt. Colonel. She was also the Senior Regional Adviser for External Relations and Social Mobilization for East Asia and the Pacific for the United Nations Children's Fund or UNICEF (1991-1995). In this capacity, she succeeded in campaigning for the ratification of the U.N. Convention on the Rights of the Child by all 29 countries in the region. She was also Assistant Secretary for Human Rights and Humanitarian Affairs, Department of Foreign Affairs, Manila; Chairperson of the 46th Session of the U.N. Commission on Human Rights while serving as Head of the Philippine Delegation to the Commission; Special Adviser to the Philippine Delegation to the U.N. General Assembly, representing the country before the Human Rights Treaty Monitoring Bodies; and Member of the Negotiating Panel of the Mindanao and Cordillera Peace Talks. Indeed, she drafted the executive order creating the Cordillera Administrative Region (CAR). She obtained her Associate in Arts (with honors, 1954) and law degrees (1964) from the University of the Philippines; Bachelor of Arts degree, major in Government, from Antioch College, Ohio, U.S.A. (1957); Master of Philosophy degree (1975) and Ph.D. in Public Law, major in International Law and Relations and minor in Comparative Governments (1979), from Columbia University, New York.

of individuals and particularly, to assert gender equality; because the president of the UEFA was a wife, and every time an action was filed against me in relation to my union activities, Attorney Leonardo A. Quisumbing was always a party. He had nothing to do with my activities except probably to tolerate me, but because during that time the Civil Code said that any action against the wife should also include the proceedings against her husband. So already human rights entered my life as early as then; and also that the gender perspective was equally important.

How does this relate to the Writ of Amparo? Fortunately, I did not disappear; I am still here. I did not get interrogated by the military; but it occurs to me now that all of that could have happened because during that time we were under Martial Law. And the writ would have been a very important legal remedy for a person like me who was not only active in an institution but who was also very involved in the promotion and protection of the rights of professors, teachers and staff at the University of the East. I hope things have now improved in your university.

The second thing that I would like to say is how very pleased the Commission on Human Rights is that this lecture is being held on this very auspicious week. Congress and President Arroyo, in 2003, made it possible for a law to be passed declaring December 4-10 as National Human Rights Consciousness Week. I would like to congratulate the Supreme Court, the University of the East, and the Philippine Judicial Academy for holding this most appropriate distinguished lecture. I would like to think that it was human rights consciousness that made them choose this topic during this particular week.

I would also like to congratulate our lecturer, although we are sorry she is indisposed. The coverage of her lecture is such that one could say that it could be a whole course on human rights. The scope of the lecture started with concepts, with comparative perspectives on not only the Writ of Amparo as such but also on the legal developments on human rights law, the regional perspective on human rights law and finally, the international perspective. Interestingly enough, the lecture also touched on domestic issues on human rights.

We would like to emphasize what the lecture had emphasized that there is no more question that there is an international human rights legal system which affects not only the Philippines but also the entire world. How do we know that there is indeed an international human rights legal system? (1) There are human rights norms and standards. (2) There are procedures with regard to redress of grievances. (3) There are institutions, and very strong institutions, with regard to the promotion and protection of human rights.

I would like also to emphasize that those of us who learned international law before 1946, probably even later, learned something that we now have to revise, that is, that actors and personalities under international law are only entities with international personality. What that meant was, and is, that only states and some special entities were the subjects of international law. Being subjects of international law, these entities could act under international law. Individuals were objects of international law and therefore needed the State to espouse any action under international law. One must agree that the cutting edge in the development of international law is in the area of human rights

law, because now individuals are not the objects of international law, but they are subjects of international law. The individual is now an actor in international human rights law; the individual can take personal and individual action under international law.

Deriving an example, you will notice that the lecture speaks of the International Covenant on Civil and Political Rights (ICCPR) which is one of the fountainheads of all the other treaties on human rights. Although it provides norms and standards on civil and political rights; it does not provide specific procedures on how these rights are to be addressed in case of abuse or violation. However, attached to the ICCPR is a Protocol, which is simply a procedure in case you need to invoke the norms and standards under the ICCPR. I am talking now about another development in international law that we must keep in mind in relation to the Writ of Amparo domestically. There are two Optional Protocols attached to the main treaty. One is on the death penalty that is Protocol 2. The optional protocols have also to be ratified. The Philippines still has not ratified the Second Optional Protocol which prohibits the imposition of the death penalty. The reason why it is not yet ratified is because, until recently, the death penalty was still imposed in the Philippines. Hopefully, we will now be able to campaign that the second option on protocol will finally be ratified by the Senate according to the Constitution.

Optional Protocol No. 1 is very important. It says that any state that is a state party to the ICCPR can also ratify separately the Optional Protocol No. 1. Why is that important to us and to the world in general? Optional Protocol No.1 says that an individual in a state who has a complaint against that state, and

that state has ratified the ICCPR and the First Optional Protocol, can bring a complaint, technically called a communication, to the international experts on human rights, which experts are actually embedded in the convention. What is the importance of this Optional Protocol in relation to the lecture and to the situation in the Philippines? It means that, if an individual in the Philippines would like to file a communication under the ICCPR, he or she has to prove that there has been exhaustion of remedies in the Philippines.

And therefore, just to close, the lecture has shown why the ICCPR and the First Optional Protocol are important to us, and why the Writ of Amparo is as important. It means that the Writ of Amparo will give the Philippine Government and the judiciary a chance to show that there are effective remedies. Without these, one individual can go to the international arena almost immediately to show that there is need for international intervention because no other remedy is available in the Philippines. This is the importance of the lecture in the development of international law in relation to the rights and freedoms, particularly, the right to life, liberty, and security here in the Philippines.

# Reactions on The Writ of Amparo – An International Perspective*

*Undersecretary Alberto C.E. Valenzuela Jr.* **

Mr. Chief Justice
The other members of the Court here present,
Your Honors
Chairman Domingo
President Garcia
Dean Valdez
Ladies and gentlemen,

Good afternoon.

The Writ of Amparo was a rather alien turf to us until just recently. The first time I ever heard of it was when it was asked during one of the Bar Examinations in the early 90s, and I doubt whether anyone got that question correct.

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* Delivered at the *Third Distinguished Lecture, Series of 2007,* held on December 7, 2007, at the University of the East Conference Hall, University of the East, Manila. *Transcribed.*

** Atty. Alberto C. E. Valenzuela, Jr. graduated from the College of Law of the University of the Philippines in 1989 and was admitted to the Philippine Bar in 1990. He started his legal career as a Junior Associate of the *Ponce Enrile Cayetano Reyes & Manalastas* Law Offices. He later became a founding Senior Associate of the *De Borja Medialdea Ata Bello Guevarra & Serapio* Law Offices. In 1992, he was admitted as an Associate of the Law Firm *Estelito P. Mendoza & Associates* until he started his own law practice in September 2005.

As a result of the summit held at the Manila Hotel sponsored by the Supreme Court, the Court came out with the Rule on the Writ of Amparo. I am glad, very happy in fact, to inform the Chief Justice and the other members of the Court, that in a forum held at the Department of National Defense (DND) where lawyers of both the Armed Forces of the Philippines (AFP), the DND, as well as the Philippine National Police (PNP) were present, Secretary of National Defense Gilberto Teodoro issued instructions, at least to the lawyers of the AFP and DND, to comply with the 5-day ruling on the filing of the return of the Writ unless there are serious reasons why the lawyers cannot do so.

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Atty. Valenzuela held corporate positions: Assistant Corporate Secretary of Ginebra San Miguel Incorporated (formerly La Tondeña Distillers, Inc.); member of the Board of Directors of United Coconut Planters Life Assurance Company, Inc.; President and Director of Equitable Machines, Inc.

Atty. Valenzuela attended the first seminar on the Rule on the Writ of Amparo held by the Supreme Court for officials of the Department of National Defense (DND), the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) with Supreme Court Associate Justice Antonio Eduardo B. Nachura as the Lecturer. He was the lecturer-moderator of the seminar-workshop on the Rule on the Writ of Amparo held by the DND for lawyers and legal officers of both the AFP and the PNP. At present, he is the Undersecretary for Legal Affairs and Special Concerns of the DND.

Atty. Valenzuela is married to the Hon. Nina G. Antonio-Valenzuela, Presiding Judge of the Regional Trial Court of Manila, Branch 28.

Secondly, I am also happy to inform that the President has recently issued Administrative Order No. 211 which creates a task force on political violence. The aim of the Administrative Order is to set up a task force which will envision and provide measures to investigate, prosecute, as well as to attempt to prevent political killings in the country. I am happy to note that our speaker has considered our Rule on the Writ of Amparo as compliant with most, if not all, of the international conventions and principles that were conveyed during the lecture .

I would elect, however, to take issue with the rather loose use of the term extrajudicial killings and enforced disappearances. If we look at the term extrajudicial killing it means a killing out of court. We have not had a judicial killing since Leo Echegaray. However, when the term is used, it is more often to mean a killing perpetrated by an agent of the government or of the state. Perhaps, a better term can be used. Similarly, on the term enforced disappearance, a kidnapping which was rather common among our Filipino-Chinese compatriots is likewise an enforced disappearance. Many of the victims of previous kidnappings never resurfaced. Perhaps, also, a better term can be used.

Finally, as I had intended to keep my reaction quite short, I view human rights not simply as a right against being deprived of life or being deprived of liberty. To me, human rights has a wider scope. All of us have a right not only to life, to liberty; we have the right to food, to a good education, to shelter. All of us have a right to rehabilitate, to be employed, or to make a living. The bottom line is that the grant of human rights to all of us is not just the concern of government or international organizations. It is a concern of each and everyone. We must help each other.

The Judiciary has taken the lead through the Writ of Amparo with respect to violations of our rights to life, liberty, and security. However, the rest of the spectrum of human rights is a matter which each and everyone of us should try to uphold.

# Reactions on The Writ of Amparo – An International Perspective*

*Dr. Edgardo O. Gonzaga* **

Good evening, Chairman, Chief Justice, Dean Valdez, the Honorable Justices who are here today, law students, visitors from other countries.

The first reactor was the professor; the last reactor is the student. Honorable Quisumbing was my professor during those days that she was relating to us. It was a class on temporary political thoughts.

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* Delivered at the *Third Distinguished Lecture, Series of 2007,* held on December 7, 2007, at the University of the East Conference Hall, University of the East, Manila. *Transcribed.*

** Dr. Edgardo O. Gonzaga obtained his Bachelor of Arts degree major in Political Science and History from the University of the East. He later obtained his Master's degree and Doctorate from the same University.

As a Professor, he taught Comparative Government, International Relations and Political Theories and had been on educational tours to observe the governments of various countries such as Russia, Czechoslovakia, India, Estonia and Baltic Republic of Lithuania. He was former Dean of the School of Arts and Sciences at the La Consolacion College in Manila.

He is, at present, a Professor of the Department of Political Science at the College of Arts and Sciences of the University of the East.

Most of the reactors are lawyers; then I will try to speak this time from a layman's perspective. I would like to use the state-level analysis and maybe touch on the nature of the state. This is not very legal, but rather, a bit political. There is a framework that says the state is the instrument of the political power of society. Like a special organization, the state system belongs to the economically dominant master of society.

Extrajudicial killings is a result of the continuing conflict in our society. It is therefore proper that we look into the nature of the State. Can we not build the State as a non-neutral entity in our society which includes also the apparatuses of that state. If there is continuing conflict in our society, where then would that State position itself? We are always told that the State is a neutral entity; but to some the State may not be, because in a society which is elitist in nature, the State could serve only as an instrument of the ruling power.

Therefore, in our case, sad to say, the courts had been an instrument of the ruling power in the past. We are replete with historical notes on this. Maybe the record of the martial law days would tell us that the judiciary had become an appendage of the ruling power at that time. The dreadful killings that happened in the past can all be part of our historical notes. Lately, we have the Alston Report in the United Nations, another historical note about human rights violations. I approved of the Writ of Amparo because it will be an attempt on the part of our judiciary to be active rather than passive as it was in the past. The judiciary now is at the forefront of this issue. So I would say that in the social conflicts that permeate our nation today,

with different groups or even classes contending, it appears that this phenomenon is an outgrowth of that social system which we have today.

In a State where the wealth of the nation has been cornered already by the so-called ruling elites, the aspirations of our people seem not to be addressed properly. And so, when this State could no longer support or address properly the continuing and ever-increasing needs of our people, and there is a reaction also on the part of the people to protest or even lead this protest to some other higher forms of struggle, it is but natural for the State to respond by using its coercive powers. These can be in the form of martial law, emergency rule, temporary suspension of liberties, or even extrajudicial killings. This happens because these are the only recourse by which the state could perpetuate itself against the mounting protests and struggle of the people for the betterment of their life. In this framework, the judiciary now is in a dilemma. Will it just play the role of an instrument for the ruling class or would it graduate from that traditional role and really act in accordance with the ideals of constitutionalism; and therefore the court now becomes an active social change for our society. On this score, I would situate this issue on extrajudicial killings and the writ.

In the words of the national association of lawyers, just like any innovation, of course, we commend the Supreme Court for this, though there are doubts which we also hear from the people on the street. Teachers and even students are trying to size up what is this judicial education we have in the Philippines today which poised to us the Writ of Amparo. How would it matter to

us? Is it really that important? Would that innovation make a difference? In the words of the lawyers, much is still to be expected from this Writ of Amparo.

According to the National Union of Lawyers, the historical lesson from the Latin experience is that the effectiveness of the Writ largely depends on the extent with which the victims assert their rights, and on the commitment of the judiciary to rule on these petitions with independence and impartiality and to implement the writ with courage and judicial will to protect, promote, and defend human rights. In the long term, this phenomenon, a product of social inequities in our present system, will be finally settled depending on how successful as a people we are able to address our social problems.

As British historian Arnold Toynbee had said, "The rise or fall of nations is dependent on how the people are able to correctly respond to the challenges of their times." Personally, this symposium is our little contribution to that perspective.

# Reactions on The Writ of Amparo – An International Perspective*

*Atty. Jose Manuel I. Diokno, Esq.* **

Mr. Chief Justice Puno
Members of the Supreme Court, Court of Appeals, members of the Bench and Bar
Dr. Garcia of the University of the East
Fellow reactors
Distinguished guests and friends.

It is rare that I get to address such an august body even if it is just as a reactor. But I would not pass up an opportunity like this because the topic at hand is human rights, which is something quite close to my heart. Ever since I became a Free Legal Assistance Group (FLAG) lawyer, in 1989 after taking the lawyer's oath, I have been handling *pro bono* cases, mostly FLAG cases. Probably by now I must have handled hundreds of cases a year. But I can say that in the last 17 years of my practice it is only now that I

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* Delivered at the *Third Distinguished Lecture, Series of 2007,* held on December 7, 2007, at the University of the East Conference Hall, University of the East, Manila. *Transcribed.*

** Atty. Jose Manuel I. Diokno was admitted to the Philippine Bar as well as the Bar of the State of Illinois in 1986. His colorful legal practice includes, among others, being a special counsel of the Board of Directors of the Development Bank of the Philippines (2004-2006), General Counsel of the Philippine Senate Blue Ribbon Committee (2001-2004), private prosecutor and Team Leader in the Impeachment Proceedings against Joseph Ejercito Estrada (2001), and a full-time Head of Litigation of the FLAG.

have seen such a revitalized Bar and Bench after the Rules on the Writ of Amparo were issued.

To me, from the unique perspective of a human rights lawyer, the judicial system was perhaps different, the way I look at it, from the traditional practitioner's. But now, with the Writ of Amparo, I can see more and more "traditional practitioners" involved in human rights. It really lightens my heart to see that there are others who are just as concerned as we are at FLAG with the subject matter. It extends not just to the members of the Bar but also to the members of the Bench. It tickles my fancy to see members of the Bench have to study a new rule and apply such international concepts as human rights and related matters.

I think that the Writ of Amparo is a living writ. It is something that must evolve for it to exist; and the minute the

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He is presently the Chairman of the FLAG, and lectures and facilitates training for FLAG lawyers, law students, paralegals and for members of the urban poor, farmers, and marginalized sectors on human rights, legal aid, the law on arrest, search and seizure and bail, constitutional law, legal writing, and handling of death penalty cases.

A former member of the Committee on Human Rights and Due Process of the Integrated Bar of the Philippines (IBP) and a member of the Presidential Human Rights Committee created under Philippine Administrative Order No. 101. He is also a celebrated lecturer and author on Human Rights.

writ stops evolving then it will really serve no useful purpose in our society. It has been said that we aspire to a high standard of conduct and public accountability. But when there are gaps in our law that allow our officers not to be held accountable then we can only make that aspiration a dream and it would never be a reality. There has been an observation that there is an "inconsistent pattern of gross violations of human rights." To me, that is a reality I see in almost every day of my practice. That is why the Writ of Amparo is very welcome to us and we are looking forward very much to other writs that we hope will be forthcoming.

From the lecture this afternoon, I learned several things, two or three that I think are very important. One is that under the convention of torture, even in international law, there is a right to inspect safe houses. No disappearances can take place without safe houses. So if we can inspect safe houses, that would go straight to solving that problem. Second is that, under Article 18 of the convention for enforced disappearances, there is a right to information and that "jibes" with our constitutional right to information, although I do not think that we have ever looked at our constitutional right in the same way that the convention looks at the right to information. Perhaps this would give us some other ideas on how we could make use of that right which, by the way, is a collective right rather than an individual right of a citizen.

I would also like to take this opportunity to make one observation that may not have any direct relation to the presentation this afternoon. To me, witness protection cannot work without witness perpetuation of testimony. I have

handled a number of cases involving serious human rights violations where the witnesses simply would not last. They were given protection and security but the cases dragged on for years and years and years and in the meantime the witnesses were not called upon to testify. If only they were able to testify specially during the early part of the case, their testimony could be placed on record. And even if the actual trial would take place many years after, at least the witnesses would be readily relocated and what they had witnessed would be put on record. To me, then, perhaps one thing that we could look into to strengthen even further is this – rules that would amend and strengthen as well the rules on perpetuation of witnesses.

Thank you very much.

# Closing Remarks*

*Chief Justice Reynato S. Puno*

I would like to commend the Philippine Judicial Academy and the Philippine Association of Law Schools for successfully holding the *Third Distinguished Lecture, Series of 2007*. It is no mean feat to organize this timely event, and I acknowledge their efforts at furthering the knowledge sharing activities of the Court. I also acknowledge the participation of the members of the Baguio City bar and bench, who are taking part in this program through the technology of video conferencing. I wish also to express my gratitude to the University of the East (UE) College of Law, headed by Dean Amado Valdez, for hosting this lecture series. The UE College of Law is fast becoming our new mecca of legal learning.

The writ of amparo has been in the public eye these past few months. The nation has recognized the writ as an effective remedy to protect the Filipino people from the problems of enforced disappearances and extrajudicial killings that have grabbed the attention even of the international community. It is, therefore, fit and proper that we continue focusing on the writ of *amparo,* this time, from the international perspective. Ms. Abigail Hansen Goldman has authoritatively given us this perspective and has deepened our understanding of the writ that has protected human rights, especially in Latin American countries.

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The ongoing trend is the universalization of human rights, for as their ardent advocates say, an attack on these rights anywhere is an attack everywhere. This trend got a big push with the Universal Declaration of Human Rights of 1948, which laid down the philosophy that:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[1]

For this reason, Jefferson said that "care of human life and happiness, and not their destruction, is the first and only object of good government."

The trend of internationalizing human rights is still gaining steam. We now see fast developments going on in the once dormant field of International Humanitarian Law. We see the birth of new transnational crimes whose cross-border effects necessitate universal jurisdiction over their perpetrators. We see the creation of special tribunals that try and decide crimes, like genocide, committed by heads of state who cannot now invoke the traditional defense of immunity from suit.

The trend is strong, and it crushes schools of thought that could diminish its speed and strength. Writes Wei Jingsheng, a human rights activist in China, *viz*:

> Another school of thought suggests that, because of differences in cultural traditions and social systems, **different** human rights standards should be applied to different countries. The most typical representative of this school of thought is the so-called **Asian values theory**, which holds that people should be content with the human rights

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[1] Universal Declaration of Human Rights, 1948, Article 1.

> such a theory were valid, however, then all human rights conditions would be reasonable, and there would be no such thing as 'human rights problems.' What, then, would be the use of talking about 'international cooperation on human rights,' condemning so-and-so for 'gross human rights violations,' 'resolutely imposing sanctions against so-and-so's apartheid,' and so forth? China, for example, is a sovereign state, but so are other states. China's leaders may say that its human rights standards are 'stipulated by law and represent the will of the government,' but is this not also true of other countries? Human rights conditions in China are, say its leaders, the consequences of 'cultural traditions, the social system, and historical changes.' But do they think that in other countries human rights conditions just fell out of the sky?

Indeed, so strong is the ongoing internationalization of human rights that those who embrace them in absolutist terms are gaining a multitude of following. And so human rights scholar Brian Orend observed, to wit:

> Contemporary rights advocates agree that a right is not merely any claim, justified by a sufficient reason, to a certain kind of treatment; rather, it is an especially powerful and weighty claim. The very word 'right' clearly connotes something serious and compelling, something that should not be taken lightly. Many rights defenders agree with Ronald Dworkin's famous declaration that 'rights are trumps.' Just as, in certain card games, a trump card beats all others, a rights claim 'beats' such competing social values as the growth of the economy, the happiness of the majority, the promotion of artistic excellence, and so on. A rights claim is thought to be heavier – a better reason for action,

> something more deserving of our attention and protection – than these other social goals. Rights stand at the very foundation of political morality in our era. A standard assertion about human rights, in this regard, is that respect for them is a necessary condition for a government to be considered minimally just and decent on the world stage. Respect for human rights is the price of admission for political respectability; it is the touchstone of legitimacy for those with ambitions to rule.

All these developments demand that we keep our antennae up to detect the latest changes in the concept and context of human rights. The changes will necessarily require a recasting of the existing remedies to enforce these rights, including the writ of amparo.

Again, we thank Ms. Goldman for enriching our knowledge about the writ of amparo, for giving us a wide-angle view of its various dimensions, especially its international perspective. Change is an immutable law of life, and that is why we have the maxim "There is no irrepealable law, no irrepealable remedy." Indeed, it is change that guards the legal system against the danger of atrophy.

A pleasant day to all of you.


SUPREME COURT