

# DÉNOUEMENT OF THE HUMAN SECURITY ACT: TREMORS IN THE TURBULENT ODYSSEY OF CIVIL LIBERTIES

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## OUTLINE

- I. THE CLASH OF OPPOSING RIGHTS
- II. THE QUEST FOR THE “HOLY GRAIL”:  
SEARCHING FOR THE ELUSIVE DEFINITION OF THE LOGOS  
*“Sowed and Created a Condition of Widespread  
and Extraordinary Fear and Panic among the Populace”  
“Unlawful Demand”*
- III. VOID FOR VAGUENESS DOCTRINE: A RE-VISIT
- IV. PENULTIMATE PERIL:  
TURBULENT ODYSSEY OF CIVIL LIBERTIES  
*Desaparecidos: Shadows of Unlawful Arrests and Detentions  
Unreasonable Searches and Seizures: Moments of Disgrace  
Dominion of Big Brother  
Death of the Bright Consummate Flower of All Liberty*
- V. FINAL WORDS  
LOOKING AT THE HUMAN SECURITY ACT THROUGH ITS  
SHADOWS IN HISTORY

*Human Rights in the Philippines metaphorically are like buds to bloom still to the fullest.*

*They are flowers zealously nurtured in the midst of adversity - beautiful and rare.*

*Take away human rights and human existence and dignity  
are turned to nothing but illusions.*

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68 B.C., Ostia, a port in Rome was set on fire, the consular war fleet was destroyed, and two prominent senators were kidnapped. Gnaeus Pompeius Magnus, considered the greatest soldier in Rome, got the Roman Forum to agree to give him free use of the entire contents of the Roman Treasury, some 144 million *sesterces*, to pay for his *war on terror*. In their retaliation, the Roman people made decisions that set them on the path to the destruction of their constitution, democracy, and liberty.<sup>1</sup>

On the morning of September 11, 2001, the *Al-Qaeda* terrorists hijacked four United States commercial airliners. Thousands of innocent people were killed, and the twin towers of the World Trade Center and a portion of the Pentagon were deliberately destroyed. It was probably the worst attack on the U.S. soil in modern history, perpetrated against the defenseless civilians, not merely to end lives, but to disrupt and end a way of life.<sup>2</sup> In the aftermath of the 9/11 attack, the world though remained yet divided, found sympathizing with the United States, others empathizing. Every nation, in every region, had a decision to make, for in the words of President George Bush, “either you are with us, or you are with the terrorists.”<sup>3</sup> The majority of the States has chosen

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<sup>1</sup> Senator A. PIMENTEL, *THE MAKING OF THE HUMAN SECURITY ACT OF 2007: THE PHILIPPINE ANTI-TERRORISM LAW, PERCEPTIONS & REALITY, A GUIDE FOR THOSE WHO BELIEVE IN UPHOLDING THE RULE OF LAW*, 19, (2007). Also cited in his document, *Amending the Anti-Terrorism Bill: For Good or Ill* at 8, citing Robert Harris, *Imperium, and Opted letter* published in the New York Times, Sept. 20, 2006.

<sup>2</sup> “On September the 11th, enemies of freedom committed an act of war against the United States of America. Americans have known wars -- but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war -- but not at the center of a great city on a peaceful morning. Americans have known surprise attacks -- but never before on thousands of civilians. All of this was brought upon us in a single day -- and night fell on a different world, a world where freedom itself is under attack... These terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, because we stand in their way.” Address of President George Bush to the Joint Session of Congress and the American People, September 20, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010920> (last accessed Nov. 1, 2007).

<sup>3</sup> “Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.” Address of the

to be one with United States, in a saga between good and evil that would defy even territorial boundaries. A coalition<sup>4</sup> of freedom and peace loving nations was formed and a crusade against the 'axis of evil' emerged for after all, "it is not just America's fight. And what is at stake is not just America's freedom. It is the world's fight, a fight against civilization. It is the fight of all who believe in progress and pluralism, tolerance and freedom."<sup>5</sup> Supposedly, it was. A war was waged in Afghanistan against the *Taliban* to exterminate Osama Bin Ladin and his *Al Qaeda*, and subsequently in Iraq, the latter for allegedly harboring weapons of mass destructions.<sup>6</sup> In a borderless fight against terror and in the name of freedom and democracy, anti-terrorism laws were enacted by different states in the world. The United States enacted, the Patriotic Act of 2001. New Zealand has Terrorism Suppression Act of 2002. Australia inserted a new definition of terrorist act in its Criminal Code. The United Kingdom, on the other hand, has the Terrorism Act of 2000. The Philippines enacted the Human Security Act of 2001, which took effect on 15 July 2007.<sup>7</sup> Years after the 9/11 attack, the

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President George Bush to the joint Session of Congress and the American People, September 20, 2001, <http://www.whitehouse.gov/news/releases/2001/09/2001> (last accessed Nov. 1, 2007).

<sup>4</sup> "We are putting together a coalition that is a coalition dedicated to declaring to the world we will do what it takes to find the terrorists, to rout them out and to hold them accountable. And the United States is proud to lead the coalition." "Define Spirit of America" Remarks of the President George Bush to Employees at the Pentagon on Sep. 17, 2001, <http://www.whitehouse.gov/news/releases/2001/09> (last accessed November 1, 2007).

<sup>5</sup> Address of the President George Bush to the Joint Session of Congress and the American People, September 20, 2001, <http://www.whitehouse.gov/news/releases/2001/09/2001> (last accessed Nov. 1, 2007).

<sup>6</sup> "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." Address of the President George Bush to the Joint Session of Congress and the American People, September 20, 2001, <http://www.whitehouse.gov/news/releases/2001/09/2001> (last accessed November 1, 2007).

<sup>7</sup> The House of the Representatives approved on third reading House Bill No. 4839 otherwise known as the "Anti-Terrorism Act of 2005" on April 4, 2006. On Feb. 8, 2007, the Senate of the Philippines approved on third reading Senate Bill No. 2137 otherwise known as the "Human Security Act of 2007." On the same day of the Senate's approval of its own version, a bi-cameral conference committee was formed to reconcile the disagreeing provisions of HBN 4837 and SBN 2137. And still on the very same day, Senator Enrile, the sponsor of SBN 2137 informed the Body that the two panels met in full and free conference at three o'clock that afternoon and agreed to adopted *in toto* his own sponsored bill. The said conference committee report was approved by the Senate on that same day too, February 8, 2007, and by

supposedly legendary battle of good and evil seemed to have turned into a war between two evils. The alliance of the crusaders has fallen apart. The leaders of the states, found themselves in war not just against the terrorists but worse, against their very own people whom they were and are defending for. Trading diplomacy for war, governments seem to have forgotten that persuasion and not persecution is the means for winning the allegiance of free men.<sup>8</sup>

The horrible scenarios of terrorist attacks have not spared the Philippines. From the year two thousand alone, 40 major bombings have been perpetrated in the different parts of the Philippines, killing and injuring over 1,700 casualties, displacing around 60,000 people in Mindanao alone.<sup>9</sup> Terrorists have killed civilians indiscriminately in the cities and even in jungles, killing and beheading

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the House of the Representatives on February 19, 2007.

On March 6, 2007, President Gloria Macapagal Arroyo signed Human Security Act into Law.

Human Security Act, R.A. 9372 §62. *Special Effectivity Clause* – “After the bill shall be signed into law by the President, the Act shall be published in three newspapers of national circulation; three newspaper of local circulation, one each in Ilocos Norte, Baguio City and Pampanga; three newspapers of local circulation, one each in Cebu, Iloilo and Tacloban; and three newspapers of local circulation, one each in Cagayan de Oro, Davao and General Santos.

The Title of the Act and its provisions defining the acts of Terrorism that are punished shall be aired everyday at primetime for seven days, morning, noon and night over three national television and radio networks; three radio and television networks, one each in Cebu, Tacloban and Iloilo; and five radio and television networks, one each in Lanao del Sur, Cagayan de Oro, Davao City, Cotabato City and Zamboanga City. The publication in the newspapers of local circulation and the announcements over local radio and television networks shall be done in the dominant language of the community.

After the publication required above shall have been done, the Act shall take effect two months after the elections are held in May 2007.

Thereafter, the provisions of this Act shall be automatically suspended one month before and two months after the holding of any election.”

Hence, the effectivity of R.A. 9372 should have been “two months after the May 14, 2007 elections” or on July 13, 2007, Friday, but since the mandated publication was complied with only on July 8, 2007, **the Act took effect on July 15, 2007.**

<sup>8</sup> Justice Mendoza, concurring in *Ebralinag v. Division Superintendent of School of Cebu* 251 SCRA 569 (1995), at 588.

<sup>9</sup> Collier Kit & Sifton, John, *Lives Destroyed: Attacks Against Civilian in the Philippines*, HUMAN RIGHTS WATCH, July 2007, at 3.

by-standers, workers, missionaries, Christians and Muslims. The Ozamis City ferry bombing on 25 February 2000, killed 39 civilians; the Manila Rizal Day multiple Bombings in the year 2000 killed 22; not to forget is the Superferry bombing outside Manila Bay on February 27, 2004 that killed 116 passengers and crews.<sup>10</sup> The assaults against the innocent and defenseless victims continue on buses, airports, public markets, and even in the malls. One could not help but be moved by the sight of the seven beheaded workers in Parang, Jolo, while their heads were recovered in a sack. The *Abu Sayaff* decapitated them on April 16, 2007.

Members of the *Abu Sayyaf Group* and *Rajah Solaiman Movement*, based in Mindanao, have claimed responsibility for many of these crimes. *Abu Sayyaf* is a radical Islamist group whose members broke away in the 1990's from more established ethnic *Moro* insurgent groups.<sup>11</sup> *Rajah Solaiman Movement*, a group composed of converts to Islam, is closely related to *Abu Sayaff*. The two groups purportedly aim to push Christians out from Mindanao and the Sulu islands and to "restore" Islamic rule over the Philippines.<sup>12</sup> Both *Rajah Solaiman* and *Abu Sayaff* maintain links with current or former members of *Jemaah Islamiyah*, the violent Indonesian Islamist group responsible for the 2002 Bali bombings.<sup>13</sup>

In October 2005, *Rajah Solaiman* founder Ahmed Santos was arrested. He was subsequently charged with rebellion. A year thereafter, *Abu Sayaff* leader Khadafi Janjalani was killed during military operations on Jolo Island. On 6 December 2007, fourteen *Abu Sayaff* terrorists accused of kidnapping an American missionary couple at the Dos Palmas in Puerto Princessa were convicted by a Pasig City Regional Trial Court.<sup>14</sup>

## I. THE CLASH OF OPPOSING RIGHTS

Section 2 of the Human Security Act provides:

It is a declared policy of the State to protect life, liberty, and property from acts of terrorism, and to condemn terrorism as

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<sup>10</sup> *Id.*, at 2.

<sup>11</sup> *Id.*, at 3.

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

<sup>13</sup> *Id.*

<sup>14</sup> The Philippine Star, December 7, 2007, at A1.

inimical and dangerous to the national security of the country and to the welfare of the people, and to make terrorism a crime against the Filipino people, against humanity, and against the law of nations.

In the implementation of the policy stated above, the state shall uphold the basic rights and fundamental liberties of the people as enshrined in the Constitution.

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Notwithstanding the declaration of the above-mentioned policy as its opening *salvo*, opposition to the Republic Act 9372, the Human Security Act (HSA) of 2007 is snowballing. Days after the law took effect, concerned citizens and groups voiced oppositions, challenging its constitutionality before the Supreme Court.<sup>15</sup> The resonant voice of the petitioners manifests a departure from the outlook in the aftermath of the 9/11 attack, when every state and citizen seemed more than just willing to surrender a great deal of sovereignty and liberty in exchange of national defense and security. In an apparent swing of the pendulum to the other direction, the petitions now pending before the Supreme Court, seek to strike the balance between authority and liberty, vigilant not to repeat the same loopholes where others have stumbled in safeguarding civil liberties. For though living in a republican state signifies that the people have to surrender part of their freedom to the government, the same people are not willing to divest themselves totally of the liberties engraved in the Constitution which solely belong to them. The rights zealously guarded in the Bill of Rights, the fundamental rights which are the very ligaments that bind every civilized society, cannot be compromised. For never could it be overemphasized that the rights enshrined in the Bill of Rights are the very mechanisms by which the delicate balance between governmental power and individual liberties is maintained.<sup>16</sup> The tug-of-war between authority and liberty, demands a delicate balancing of interests' approach, which is fundamental postulate of constitutional law.<sup>17</sup> Constitutional issues after all do not take the form of right versus wrong, but right versus right.<sup>18</sup> This is not to say that liberty and authority are irreconcilable enemies. The two must in fact co-exist, for only in a well-ordered society can rights be properly enjoyed, as the highest function of authority is to

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<sup>15</sup> Philippine Daily Inquirer, July 18, 2007, at A1.

<sup>16</sup> Justice Cruz, dissenting opinion in *Guanzon v. de Villa* 181 SCRA 623 (1990).

<sup>17</sup> *Secretary of Justice v. Lantion*, 343 SCRA at 390 (2000).

<sup>18</sup> Justices Castro and Barredo in their concurring opinion in *Lansang v. Garcia*, 42 SCRA at 498 (1971).

insure liberty.<sup>19</sup> Thus, a person cannot be stripped off his constitutional rights in exchange of security, for he who chooses security over liberty, does not deserve either. “Security and human rights are not alternatives; they go hand in hand. Respect for human rights is the route to security, not an obstacle to it. The route to security is through respect for human rights, not their violations.”<sup>20</sup> “These rights are borne not by the whims of convenience but by the stressful need to insulate any urbane society from the clutches of barbarism, chaos, and lawlessness. For without the Bill of Rights, man is stripped of his humanity and society becomes a putrid dump of lost lives.”<sup>21</sup> And “where liberty is debased into a cruel illusion, all of us are degraded and diminished. For liberty is indivisible, it belongs to every one. And when the bell tolls the death of liberty for one of us, “it tolls for thee” and for all of us.”<sup>22</sup>

The Human Security Act of 2007 was enacted in the exercise of the police power of the state. Such inherent power however, though ever growing and expanding cannot grow faster than the fundamental law of the state, nor violate the express inhibition of the people’s law - the Constitution.<sup>23</sup> It will be an irony if through the Human Security Act, the Filipino people would rather lose the well-treasured liberty. As the UN Secretary General Kofi Annan once stressed, while there is certainly a need for vigilance to prevent terrorism, it will be self-defeating if other priorities such as human rights will be sacrificed in the process.<sup>24</sup> It is important to underscore therefore, that the Bill of Rights remains the bedrock of a constitutional government, and that if the people are denied of their rights, democracy cannot survive and government would become meaningless. This explains why the Bill of Rights occupies a position of primacy in the fundamental law way above the articles on governmental power.<sup>25</sup>

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<sup>19</sup> Justice Cruz, dissenting opinion in *Guanzon*, note 16 at 623.

<sup>20</sup> Senator J. Madrigal her negative vote to the HSA. Legislative Journal, Senate of the Philippines, 13<sup>th</sup> Congress, February 7, 2007.

<sup>21</sup> *People v. Legaspi*, 331 SCRA, at 124 (2000).

<sup>22</sup> Justice Cruz, dissenting opinion in *Guanzon*, *supra* note 16 at 623.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> Quoted by Senator Madrigal in her explanation why she voted against HSA, Legislative Journal, Senate of the Philippines, 13<sup>th</sup> Congress, February 7, 2007.

<sup>25</sup> *People v. Tundud*, 412 SCRA, at 168 (2003).

## II. THE QUEST FOR THE “HOLY GRAIL:” SEARCHING FOR THE ELUSIVE DEFINITION OF THE LOGOS

The problem of defining terrorism has vexed the international community for years.<sup>26</sup> Until now, no internationally acceptable definition has been formulated. The lack of consensus on what constitutes terrorism led even others to point to its inescapably political nature, perhaps best encapsulated in aphorism that ‘one person’s terrorist is another person’s freedom fighter.’<sup>27</sup> The apparent contradiction or lack of consistency in the use of the term “terrorism” may further be demonstrated by the historical fact that leaders of national liberation movements such as Nelson Mandela in South Africa, Habib Bourguiba in Tunisia, or Ahmed Ben Bella in Algeria, to mention a few, were originally labeled terrorists, by those who controlled the territory at the time, but later became internationally respected statesmen.<sup>28</sup> The abused cliché though, posits danger. It is simply unimaginable that Osama Bin Laden can also be called an internationally respected statesman and a freedom fighter after the infamous 9/11 attack. There is a milestone difference between Osama Bin Laden and Nelson Mandela. The difference is clear enough so as not to confuse who a terrorist is and what terrorism is. The subjectivity of the criterion being employed by the individual state cannot be obfuscated by an objective criterion of the horrifying nature of terrorism. It is rather the quest for the demarcation line between a freedom fighter and a terrorist that makes the search for its definition complicated. The world is not in definitive shades of black and white. Gray zones do exist. So difficult is the search for the dichotomy may be that it led Rosalyn Higgins, the first woman President of the International Criminal Court to infer, that “terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of states or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.”<sup>29</sup> The lack of the legally acceptable definition of terrorism even led to its exclusion as a crime justiciable by the International Criminal

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<sup>26</sup> B. Golder & G. Williams, *What is Terrorism, Problems of Legal Definition*, UNSW Law Journal Vol. 27(2), at 273 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> *David v. Arroyo*, 489 SCRA 60 (2003). Quoting Hans Köchler, Professor of Philosophy at the University of Innsbruck (Österreich).

<sup>29</sup> R. Higgins & M. Flory, *The General International Law of Terrorism*, (eds.) Terrorism and International Law, 14, 28 (1997) cited in B. Golder & G. Williams, *What is ‘Terrorism’ Problems of Legal Definition*, UNSW Law Journal Vol. 27(2), 271 (2004).

Court.<sup>30</sup> For the majority of time and indeed, in contemporary discussions, international consensus on what constitutes terrorism has been frustrated, not that there is no terrorism to be defined, but by the divergent political positions of some states on questions such as whether the actions of the States can be characterized as ‘terrorist’, and whether the violent actions of national liberation movements merit the label.<sup>31</sup> Inasmuch as there is no international consensus on the legal definition of terrorism, it is clear, that acts of terrorism cannot in anyway be justified, as long as the rule of law adheres that the end does not justify the means.

The absence of the internationally- acceptable definition of terrorism does not hinder one state from criminalizing such act. It does not diminish a sovereign state like the Philippines to exercise its inherent police power. More than anything, it is the Legislature’s duty to criminalize an act if it be necessary to protect the people from lawlessness and violence. Whether such exercise meets the substantial and procedural requirements of the due process clause is another question. Criminal statutes must define criminal offenses in precise, unequivocal, and unambiguous terms.<sup>32</sup> Well-defined parameters and comprehensible guides are necessary to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, so as not to leave room for arbitrary and discriminatory enforcement.<sup>33</sup> As enunciated in the case of *Lanzetta v. New Jersey*, no one may be required at peril of life, liberty, or prosperity to speculate as to the meaning of the penal statutes,<sup>34</sup> otherwise, it will run contrary to the fundamental right, that no person shall be deprived of life, liberty, or property without due process of law.<sup>35</sup> To be sure, there can never be due process in the absence of such fair notice informing him of the nature and the cause of the accusation against him.

Section 3 of the Human Security Act does not define terrorism by *genus*

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<sup>30</sup> [http://en.wikipedia.org/wiki/International\\_Criminal\\_Court](http://en.wikipedia.org/wiki/International_Criminal_Court). Many states wanted to add terrorism to the list of crimes covered by the Rome Statute; however, the states were unable to agree on a definition for terrorism. To date, the ICC recognize only Genocide, crimes against humanity, war crimes, and crimes against aggression, our four most serious crimes of concern to the international community as a whole.

<sup>31</sup> *Supra* note 26 at 270.

<sup>32</sup> UN COVENANT ON CIVIL & POLITICAL RIGHTS. Art. XV.

<sup>33</sup> *Chicago v. Morales* 527 U.S. 41, 144 L Ed 2d 67, 119 S Ct. 1849 (1999).

<sup>34</sup> *Lanzetta v. New Jersey*, 306 US 451, 453 (1939), cited in the case of *Chicago v. Morales*.

<sup>35</sup> CONST. Art. III, § 1.

*et differentia*. Rather, it enumerates specific acts constitutive of acts of terrorism, thus:

Section 3 *Terrorism* – Any person who commits an act punishable under any of the following provision of the Revised Penal Code:

- A. Article 122 (Piracy and Mutiny in the High Seas or in the Philippine Waters);
- B. Article 134 (Rebellion or Insurrection);
- C. Article 134-a (*Coup d’Etat*), including acts committed by private persons;
- D. Art. 248 (Murder);
- E. Article 267 (Kidnapping and Serious Illegal Detention);
- F. Article 324 (Crimes Involving Destruction);  
or under
  1. Presidential Decree No. 1613 (The Law on Arson);
  2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
  3. Republic Act No. 5207 (Atomic Energy Regulatory and Liability Act of 1968);
  4. Republic Act 6235 (Anti Hijacking Law);
  5. Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974);

and,

6. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives).

Thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act. No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.<sup>36</sup>

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<sup>36</sup> R.A. 9372, § 3.

The law also punishes *conspiracy to commit terrorism*, an *accomplice* or an *accessory* to terrorism. Thus:

§ 4. *Conspiracy to Commit Terrorism*. – Persons who conspire to commit the crime of terrorism shall suffer the penalty of forty (40) years of imprisonment.

From the foregoing, the elements of the act of terrorism are:

- 1.) That the person has committed any of the acts punishable under:
  - i.) a.) Art. 122; b.) Art. 134; c.) Art. 134-A; d.) Art. 248; e.) Art. 267; f.) Art. 324, (of the Revised Penal Code).
  - ii.) g.) PD 1613; h.) RA 6969; i.) RA 5207; j.) RA 6235; k.) PD 532; l.) PD 1866 (Special Penal Laws).
- 2.) Any of the acts committed sowed and created a condition of widespread *and* extraordinary fear and panic among the populace;
- 3.) The felony or offense and the resultant condition of widespread and extraordinary fear and panic among the populace were for coercing the government to give in to an unlawful demand.

The commission of any of the crimes lifted from the Revised Penal Code,

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There is conspiracy when two or more persons come to an agreement concerning the commission of the crime of terrorism as defined in Section 3 hereof and decide to commit the same.

§ 5. *Accomplice.* – Any person who, not being a principal under Article 17 of the Revised Penal Code or a conspirator as defined in Section 4 hereof, cooperates in the execution of either the crime of terrorism or conspiracy to commit terrorism by previous or simultaneous acts shall suffer the penalty of from seventeen (17) years, four (4) months one day to twenty (20) years of imprisonment.

§ 6. *Accessory.* – Any person who, having knowledge of the commission of the crime of terrorism or conspiracy to commit terrorism, and without having participated therein, either as principal or accomplice under Articles 17 and 18 of the Revised Penal Code, takes part subsequent to its commission in any of the following manner: (a) by profiting himself or assisting the offender to profit by the effects of the crime; (b) by concealing or destroying the body of the crime, or the effects, or instruments thereof, in order to prevent its discovery; (c) by harboring, concealing, or assisting in the escape of the principal or conspirator of the crime, shall suffer the penalty of ten (10) years and one day to twelve (12) years of imprisonment.

Notwithstanding the above paragraph, the penalties prescribed for accessories shall not be imposed upon those who are such with respect to their spouses, ascendants, descendants, legitimate, natural, and adopted brothers and sisters, or relatives by affinity within the same degrees, with the single exception of accessories falling within the provisions of subparagraph (a).

or any of crimes lifted from the special penal laws, coupled with the other elements would qualify such commission as act of terrorism. The enumerated crimes therefore, are just predicate crimes.<sup>37</sup> The enumeration is exclusive, following the maxim *expressio unius, exclusio alterius est*.<sup>38</sup> It can also be inferred based on the elements enumerated that for the crime to be committed, the act must always be consummated. There is no attempted or frustrated terrorism. The effective elements of terrorism that sets it apart from those penalized under the Revised Penal Code is that the violence in the Human Security Act is intended to sow and create a condition of widespread and extraordinary fear and panic. “It is not just fear, but a condition of widespread and extraordinary fear. It is not just panic for anybody but among the populace – in order to coerce the government to give in to an unlawful demand.”<sup>39</sup> In other words, even if the crime of murder has been committed, unless the other constitutive elements of terrorism are present, the crime of terrorism would not occur. Therefore, for the crime to be consummated, it is indispensable that a violent act leads to an objective which is to coerce the government as an indirect primary subject through the injury inflicted to the direct object which is the population injured by such act in order to pressure the government to accede to an unlawful demand. Such is the nature of the crime punished in Human Security Act. Absence of such demand, or absence of panic inflicted on the populace, there is no terrorism.<sup>40</sup> And since terrorism is inherently evil, it is a crime *mala in se* and not *malum prohibitum*, notwithstanding that it is a special law.<sup>41</sup>

**“Sowed and Created a Condition of Widespread and Extraordinary Fear and Panic among the Populace”**

Additionally, to constitute the crime of terrorism, it is required that any of

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<sup>37</sup> Transcript of Senate Proceedings, 13<sup>th</sup> Congress, December 20, 2006, at 406.

<sup>38</sup> R. AGPALO, STATUTORY CONSTRUCTION, at 224 (2003).

<sup>39</sup> *Supra note 37*, December 20, 2006, at 442.

<sup>40</sup> *Id.* at 107.

<sup>41</sup> *From Anti-Graft and Corrupt Practices to Plunder Law* 369 SCRA, at 612 (2001).

The distinction between offenses *mala in se* and *mala prohibita* was recognized at least as early as the fifteenth century. It has been criticized repeatedly. About a century and a half ago the distinction was said to be ‘one not founded upon any sound principle’ and which has long since been exploded. The Supreme Court, however, has shown that “it is just as firmly entrenched today as it was in 1495.” BLACK’S LAW DICTIONARY (7<sup>th</sup> ed. 1999), citing ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 880 (3<sup>rd</sup> ed. 1982).

the acts committed *sowed and created a condition of widespread and extraordinary fear and panic among the populace*. Although there are uncertainties as to when those specified felonies or offenses deemed to have sowed and created a condition of widespread and extraordinary fear and panic among the populace. The law does not define nor provide any standard. The senate deliberation regarding this matter is instructive:

SENATOR PIMENTEL. Let us now discuss, Mr. President, the wording of *sowing and creating fear and panic*. To create a condition of widespread and extraordinary fear. Now, what is “fear?”

SENATOR ENRILE. “Fear” is fear... I cannot measure it. But I think public opinion would be indicative of that.

SENATOR PIMENTEL. Public opinion, Mr. President, is not a legal measure...

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SENATOR PIMENTEL. ...when are fear and panic considered widespread?

SENATOR ENRILE. That is why I said, “a condition,” Mr. President. That is a function of the court as a matter of evidence that will be a function of proof. A condition of widespread and extraordinary fear is the function of the court to determine.

SENATOR PIMENTEL. All right. Mr. President, there are more than 40,000 barangays throughout the country. Some barangays have only one to two houses. Supposing there is fear among let us say, residents of that barrage composed of 10 people...

SENATOR ENRILE. Let us take the case of Abu Sayaff, Mr. President. I think we had a law at that time when the Abu Sayyaf was rampaging Basilan. It is easy to say that there is widespread fear in Basilan although we cannot measure it.

SENATOR PIMENTEL. Yes, that is true. It is very difficult to measure it. Nonetheless, I am trying to figure out what would happen if, let us say, a small barrage with only two or three houses there are would not be sufficient to bring it – assuming that the other elements are present- under the term anti terrorism bill.

SENATOR ENRILE. I doubt whether in a given circumstance, I doubt, if just simply because somebody is threatening to burn the four barangays that the government will be pressured to accede to a given demand. It has the full force of the armed force to contain that situation.

SENATOR PIMENTEL. In other words, aside from the fact that

fear is created or panic which is considered fairly widespread, we have to consider also the fact that the impact of the fear and panic on the government itself before the matter can be considered as an act of terrorism, would that be correct, Mr. President?<sup>42</sup>

SENATOR ENRILE. First, the purpose of the act is to sow fear and not only to sow fear but also to create a condition of widespread and extraordinary fear. A panic among the populace to coerce the government not the public, but for the government to give in to the demand.

SENATOR PIMENTEL. It must go together in other words.<sup>43</sup>

The failure of the legislature to define categorically the offense to afford persons of ordinary intelligence sufficient understanding of the proscribed acts exposes the law to possible constitutional challenge for being vague, and thus void.<sup>44</sup> The difference between the extraordinary fear and the ordinary fear is not well defined. It is unclear as to whether it should be the whole *barangay*, whole town, city, province, or whole archipelago, which must be stricken with extraordinary fear and panic. The determination of the existence of such condition is left to the sound discretion of the court.

### “Unlawful demand”

In a whole page press release, Ricardo Blancaflor stated, “that a member of a proscribed organization can be held liable for an act of terrorism even if he himself did not express an *unlawful demand* to coerce the government to give in, **for the intent of his act to coerce the government to give in to an unlawful demand is implied already from his membership alone in such illegal association.**”<sup>45</sup> The statement posits dangerous consequences. Nevertheless, it is an erroneous reading of the law and to insist that the statement is correct is to open the provision of the law to numerous constitutional questions.

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<sup>42</sup> Senator Pimentel claims that when he suggested to Senator Enrile, to tighten the meaning of the phrase “*sowing and creating fear and panic*,” “the sponsor *peevishly* dismissed the suggestion by counter suggesting that they were engaged in philosophizing.” A. PIMENTEL, *supra* note 1, at 76.

<sup>43</sup> *Supra* note 37, December 20, 2006, at 457.

<sup>44</sup> Petition for Certiorari and Prohibition, *Bayan et.al. v. Gloria Macapagal-Arroyo* at 21.

<sup>45</sup> Ricardo Blancaflor, Defense undersecretary and spokesperson of the Anti-Terrorism Council, *Antiterror Council Rebuts FLAG Claims*, The Philippine Daily Inquirer, 29 July 2007, at A14.

It was not the intent of the legislature, that once an organization is outlawed, such organization can already be held liable for an act of terrorism even if he himself did not express an unlawful demand. Worse, unlawful demand cannot and should not be 'implied' just by being a member of an outlawed organization. Section 17 only gives authority for a competent Regional Trial Court to declare that a person is a terrorist or that the organization, an outlawed one, after having proved that it engages in terrorism or actually uses the acts to terrorize. So that as a consequence, the organization and members thereof, can now be subject to surveillance, interception as provided for in Section 7, and their bank accounts as an exception to R.A. 1405, otherwise known as the Law on the Secrecy of Bank Deposits, shall be examined, seized, sequestered and frozen as provided in Sections 27 and 39, respectively. The 'fruits' of the surveillance and examination of bank deposits shall serve as evidence in the prosecution of the members of the outlawed organizations, unless it be the 'fruit of the poisonous tree.' Essentially, there is a need to declare an organization outlawed to make the gathering of intelligence data more efficient and to deter future terrorist attacks. But to imply that mere declaration of outlawed organizations, members thereof can already be liable for acts of terrorism, without the need to prove the constitutive element of 'unlawful demand' would be to stretch so much meaning of the law. People should not be punished for their political beliefs. Punishment should only be directed to overt acts, which are unlawful. As stated in *Umil v. Ramos*,<sup>46</sup> mere suspicion of being a Communist Party member or a subversive is absolutely not a ground for the arrest of a suspect. The intent of the Legislature not to punish mere membership of an outlawed organization is evident in the following:

SENATOR DRILON. Mr. President, we propose to delete Section 18. Section 18 proposes to impose a penalty for mere membership in a terrorist organization.

We propose to delete Section 18 because it imposes a penalty. However, the law enforcement officers would be authorized to secure an authorization to listen and tap conversation of the members of a terrorist organization. But we believe that mere membership there should not give rise to a penalty of imprisonment as proposed in the present section 18 because the policy in Republic Act No. 1700, the anti-subversion law, we repealed that because mere membership in a proscribed organization should not be penalized.

SENATOR ENRILE. Well, anyway, I just want to explain the import

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<sup>46</sup> Motion for Reconsideration, 202 SCRA 252 (1991).

of this provision, Mr. President.

SENATOR DRILON. Yes.

SENATOR ENRILE. It says here: "Any person who, by overt acts, willfully and knowingly becomes or remains a member of judicially declared and outlawed terrorist organization," shall be punished.

But, be that as it may, I will accept the amendment. It does not make any difference. Because at that point, if he remains a member and he is an active participant in a conspiracy to commit terrorism, he will be penalized just the same.<sup>47</sup>

### III. VOID FOR VAGUENESS DOCTRINE: A RE-VISIT

There is an ever-increasing clamor among legal scholars in the Philippines pushing for a re-visit of the *status quo* of the 'void for vagueness' doctrine being applied limitedly to cases involving freedom of speech. *Raison d' etre* is the "chilling effect" upon protected speech - a rationale which does not apply however to penal statutes. The case of the Human Security Act is once more an occasion to re-visit this doctrine in order to cater to the possibility of making it applicable even to cases penal in nature.

In *Romualdez v. Sandiganbayan*, Justice Panganiban, the *ponente*, mentioned that the strict scrutiny, overbreadth, and vagueness doctrines have special application only to free-speech cases.<sup>48</sup> "Strict scrutiny is used to test the validity of laws dealing with the regulation of speech, gender, or race, and facial challenges are allowed for this purpose."<sup>49</sup> "But criminal statutes, like the

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<sup>47</sup> *Supra* note 37, Dec. 5, 2005, at 370-371.

<sup>48</sup> 435 SCRA 371, at 382.

<sup>49</sup> In *Estrada v. Sandiganbayan*, 369 SCRA at 463 the Court elucidated:

"Strict scrutiny is used to test the validity of laws dealing with the regulation of speech, gender, or race, and facial challenges are allowed for this purpose. But criminal statutes, like the Anti-Plunder Law, while subject to strict construction, are not subject to strict scrutiny. The two (i.e., strict construction and strict scrutiny) are not the same. The rule of strict construction is a rule of legal hermeneutics which deals with the phrasing of statutes to determine the intent of the legislature. On the other hand, strict scrutiny is a standard of judicial review for determining the quality and the amount of governmental interest brought to justify the regulation of fundamental freedoms. The focus is on the presence of compelling, rather than substantial (as in intermediate review), governmental interest

Anti-Plunder Law, while subject to strict construction, are not subject to strict scrutiny.”<sup>50</sup> True to words, the Court up to this date has not declared any penal law unconstitutional on the ground of ambiguity. While mentioned in passing in some cases, the void for vagueness concept has yet to find direct application in our jurisdiction.<sup>51</sup> Justifying the reason for not applying it, the Court iterated that, “Criminal statutes have general *in terrorem* effect resulting from the very existence, and, if the facial challenge is allowed for this reason alone, the State may well be prevented from enacting laws against socially harmful conduct.”<sup>52</sup>

The ‘void for vagueness’ doctrine holds that a law is facially invalid if men of common intelligence must necessarily guess as to its meaning and differ as to its application.<sup>53</sup> It is subject to the same principle governing the ‘overbreadth’ doctrine. For one, it is also an analytical tool for testing “on their faces” statutes in free speech cases. They are inapt for testing the validity of penal statutes. It is believed that a litigant may challenge a statute on its face only if it is vague in all its possible applications. That the overbreadth doctrine is limitedly applicable to Section 4 Article III of the Constitution<sup>54</sup> seems to have been accepted by the legal scholars in the Philippines and abroad. There is a general consensus about

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and on the absence of less restrictive means for achieving that interest. It is set opposite such terms as deferential review and intermediate review.

Under deferential review, laws are upheld if they rationally further a legitimate governmental interest, without courts seriously inquiring into the substantiality of such interest and examining the alternative means by which the objective could be achieved.

Under the intermediate review, the substantiality of such interest and examining the alternative means by which the objectives could be achieved. Under intermediate review, the substantiality of the governmental interest is seriously looked into and the availability of less restrictive alternatives are considered.”

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 383.

<sup>52</sup> *Id.* See. *Estrada*, at 441.

<sup>53</sup> The void for vagueness doctrine states that “ a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.” Separate Opinion of Justice Mendoza in *Estrada v. Sandiganbayan*, 369 SCRA 394 (2000), cited in *Romualdez* at 382.

<sup>54</sup> CONST. Art. III §4. “No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.”

its limited applicability to speech cases. But while the U.S. Supreme Court has not recognized ‘overbreadth’ doctrine outside the limited context of the First Amendment, the void for vagueness has been applied further in invalidating penal statutes, at least in the United States. To cite an example, in the *City of Chicago v. Morales*, the U.S. Supreme Court declared unconstitutional for vagueness the ordinance prohibiting “criminal street gang members” from loitering in public places. It ruled that the vagueness of the enactment makes a facial challenge appropriate, and when vagueness permeates the text of such law, it is subject to facial attack.<sup>55</sup>

In *Estrada v. Sandiganbayan*,<sup>56</sup> an earlier case of *Romualdez*, the Supreme Court rejected the contention of ‘vagueness’ doctrine as applied to R.A. 7080, the Plunder Law. The same reasons for rejection were reiterated in the *Romualdez* case. The difference though, as observed by the Dissent of Justice Tinga in the latter case, is that the pronouncement in *Estrada* that penal statutes cannot be challenged on vagueness grounds being only an *obiter dictum*, did not form part of the *ratio decidendi*. Unfortunately, such *obiter* was made a *ratio* in *Romualdez*, “elevating to a doctrine level the proposition that the constitutionality of penal laws cannot be challenged on the ground of vagueness.”<sup>57</sup>

Though the Court has not yet declared any penal statute unconstitutional on the ground of ambiguity as in the cases of *Estrada v. Sandiganbayan*, *Romualdez v. Sandiganbayan* and even in *People v. dela Piedra*,<sup>58</sup> it does not mean, that the grounds for invalidating a statute for vagueness do not exist. To the contrary, American jurisprudence as in the cases of *Kolander v. Lawson* and *City of Chicago v. Morales*, made more acceptable rulings in invalidating penal statutes on the ground of vagueness – reasons more consistent with the fundamental notion of due process.

The dissent of Justice Tinga in *Romualdez* reminds one, of the vital role of the Bill of Rights in guaranteeing that no person shall be held to answer for a criminal offense without due process of law. The accused enjoys the right to be informed of the nature and cause of the accusation against him or her. If the

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<sup>55</sup> *City of Chicago v. Morales*, 527 US 41, 144 L Ed 2d 67, 119 S Ct. 1849 (1999).

<sup>56</sup> 394 SCRA 394.

<sup>57</sup> *Romualdez*, *supra* 48, at 395-396.

<sup>58</sup> *People v. Dela Piedra*, 350 SCRA 163, at 175-176 (2001), cited in *Romualdez v. Sandigan. De la Piedra* did not invalidate the statute questioned therein on the ground for vagueness. It nonetheless sustained that a penal statute may be declared unconstitutional if it goes against the due process clause.

void for vagueness doctrine is available in cases involving expression, then the more so, that it should apply to cases involving deprivation of life and liberty.<sup>59</sup> Indeed, for inasmuch as the freedom of expression is “the bright and consummate flower of all liberty,” a person who is in jeopardy of being deprived of liberty or life has more reasons to be protected by the Constitution. Penal statutes involve deprivation of the very life and liberty of the accused, and there is no other right higher and nobler than this that needs fullest measure of protection. If vagueness is applicable to speech, more so, that it should be applied to penal statutes, lest what results will be unwarranted deprivation.

The Bill of rights occupies a position of primacy in the fundamental law. It is thus sacrosanct in this jurisdiction that no person shall be deprived of life, liberty, or property without due process of law.

A challenge to a penal statute premised on the argument that the law is vague is a proper invocation of the due process clause. A statute that lacks comprehensible standards that men of common intelligence must necessarily guess to its meaning and differ as to accord its application violates due process clause, for failure to accord person’s fair notice of the conduct to avoid.<sup>60</sup>

In *People v. Dela Piedra*:

Due process requires that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions,” is void for vagueness. The constitutional vice is a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning.<sup>61</sup>

*Dela Piedra* case involved illegal recruitment and the accused raised the defense of the unconstitutionality of Article 13(b) of the Labor Code defining “recruitment and placement” on the ground of being void for vagueness and thus, a contravention of the due process clause. The Court, though affirmed the application of vagueness in penal laws, did not invalidate this particular law because the questioned section is not “perfectly vague act” which obscurity evident

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<sup>59</sup> *Romualdez v. Sandiganbayan*, *supra* note 48, at 397.

<sup>60</sup> *Id.* at 396.

<sup>61</sup> *Supra* note 58, at 175-176.

on its face. If at all, the proviso therein was couched in imprecise language that may be salvaged by proper construction. Quoting further the case of *People v. Nazario*,<sup>62</sup> “the act must be utterly so vague on its face, that is to say, it cannot be clarified by either a saving clause or by construction, for it is just defectively phrased, it may be saved by proper construction.”

In cases involving liberty, the scales of justice should weigh heavily against the government and in favor of the poor, the oppressed, the marginalized, the dispossessed, and the weak. Laws and action that restrict fundamental rights come to the courts with a heavy presumption against their constitutional validity.<sup>63</sup>

In *David*, the case questioning the validity of the Presidential Proclamation 1017 declaring a state of national emergency and the subsequent General Order No. 5 implementing PP 1017, directing the AFP and the PNP to immediately carry out the necessary and appropriate actions and measures to suppress and prevent **acts of terrorism** and lawless violence, the Court took the occasion to discuss terrorism.<sup>64</sup> In this case, however, the Court partially invalidated G.O. No. 5, only with regard to terrorism for the absence of a statute defining it; while contending at the same time that “overbreadth,”<sup>65</sup> and “vagueness,”<sup>66</sup> are not applicable to penal statutes.

Until that time though, the word “terrorism” appeared only once in Philippine criminal laws, i.e., in P.D. No. 1835 dated January 16, 1981 enacted by President Marcos during Martial Law Regime, the Anti- Subversion Law. It states that, “one who conspires with any other person for the purpose of overthrowing the Government of the Philippines... by force, violence, **terrorism**, shall be punished by *reclusion perpetua*. P.D. 1835 was repealed by E.O.167, which outlaws the Communist Party of the Philippines. The latter was enacted by President Aquino on May 5, 1985. These two laws however did not define “acts of terrorism.”<sup>67</sup>

The Court continued apropos:

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<sup>62</sup> 165 SCRA 186 (1988).

<sup>63</sup> *David v. Arroyo*, 489 SCRA 60, at 198.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Since there is no law defining “acts of terrorism,” it is President Arroyo alone, under G.O. No. 5 who has the discretion to determine what acts constitute terrorism. Her judgment on this aspect is absolute, without restrictions. Consequently, there can be indiscriminate arrest without warrants, breaking into offices and residences, taking over the media enterprises, prohibition, and dispersal of all assemblies and gatherings unfriendly to the administration... Certainly, they violate the due process clause of the Constitution.<sup>68</sup>

The Court in *David* deemed it more appropriate to safeguard the civil liberties to the extent of making the President incapable of addressing any problem on terrorism in the absence of a definition of terrorism under Philippine penal laws.

However, Justice Tinga in his dissent even pushed the issue forward when he asked:

“Does the majority seriously suggest that the President or the State is powerless to suppress acts of terrorism until the word ‘terrorism’ is defined by law? Terrorism has a widely accepted meaning that encompasses many acts already punishable by our general penal laws. Even without an operative law specifically defining terrorism, the State already has the power to suppress and punish such acts of terrorism, in so far as such acts are already punishable, as they almost always are, in our extant general penal laws. It would have been a different matter had G.O. No. 5 attempted to define “acts of terrorism” in a manner that would include such acts that are **not** punished under our statute books, but the order is not comported in such a way. The proper course of action should be to construe ‘terrorism’ not in any legally defined sense, but in its general sense. So long as it is understood that ‘acts of terrorism’ encompasses only those acts which are already punishable under our laws, the reference is not constitutionally infirm.”<sup>69</sup>

Interestingly, Justice Tinga pointed out that the majority, by taking the issue with the lack of definition and possible broad context of ‘acts of terrorism,’ seems to be positively applying the argument of the ‘overbreadth’ or ‘void for vagueness’ arguments which they earlier rejected as applicable only in the context of free expression cases.<sup>70</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

#### IV. PENULTIMATE PERIL: TURBULENT ODYSSEY OF CIVIL LIBERTIES

##### *Desaparecidos: Shadows of Unlawful Arrests and Detentions*

That no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge, is fundamentally the only guarantee that a person cannot be deprived of his or her liberty unreasonably. It is a guarantee of the fundamental right of a person against unlawful arrest, a protection of the person. Until and unless sufficient reasons exist based on probable cause, no warrant of arrest may be issued, and the liberty of a person shall not be impaired. Thus, Article III of the Constitution provides:

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

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Justice Panganiban, in his rather poetic and strong worded concurring opinion, rebutting Justice Tinga stated:

“Let us face it. Even Justice Tinga concedes that under PP 1017, the police – “to some minds” – “may have flirted with power.” With due respect, this is a masterful understatement. PP 1017 may be a paper tiger, but – to borrow the colorful words of an erstwhile Asian leader – it has nuclear teeth that must indeed be defanged.

Some of those who drafted PP 1017 may be testing the outer limits of presidential prerogatives and the perseverance of this Court in safeguarding the people’s constitutionally enshrined liberty. They are playing with fire, and unless prudently restrained, they may one day wittingly or unwittingly burn down the country. History will never forget, much less forgive, this Court if it allows such misadventure and refuses to strike down abuse at its inception. Worse, our people will surely condemn the misuse of legal *hocms pocms* to justify this trifling with constitutional sanctities.

And even for those who deeply care for the President, it is timely for this Court to set down the parameters of power and to make known, politely but firmly, its dogged determination to perform its constitutional duty at all times and against all odds. Perhaps this country would never have had to experience the wrenching pain of dictatorship; and a past president would not have fallen into the precipice of authoritarianism, if the Supreme Court then had the moral courage to remind him steadfastly of his mortality and the inevitable historical damnation of despots and tyrants. Let not this Court fall into that same rut.

particularly describing the place to be searched and the persons or things to be seized.”<sup>71</sup>

The Constitutional guarantee though is not absolute. It admits exceptions. Any statute or rule on arrests without warrant shall be strictly construed. In the name of national security and in the exercise of its police power, Section 18 of the Act allows arrest and detention without a warrant.<sup>72</sup> Further, it authorizes

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<sup>71</sup> CONST. Art. III § 2.

<sup>72</sup> R.A. 9372, § 18.

*Period of Detention without Judicial Warrant of Arrest* - The provisions of Article 125 of the Revised Penal Code to the contrary notwithstanding, any police or law enforcement personnel, who, having been duly authorized in writing by the Anti-Terrorism Council has taken custody of a person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism shall, without incurring any criminal liability for delay in the delivery of detained persons to the proper judicial authorities, deliver said charged or suspected person to the proper judicial authority within a period of three (3) days counted from the moment the said charged or suspected person has been apprehended or arrested, detained, and taken into custody by the said police, or law enforcement personnel: *Provided, That the arrest of those suspected of the crime of terrorism or conspiracy to commit terrorism must result from the surveillance under Section 7 and examination of bank deposits under Section 27 of this Act.* (italics supplied)

The police or law enforcement personnel concerned shall, before detaining the person suspected of the crime of terrorism, present him or her before any judge at the latter's residence or office nearest the place where the arrest took place at any time of the day or night. It shall be the duty of the judge, among other things, to ascertain the identity of the police or law enforcement personnel and the person or persons they have arrested and presented before him or her, to inquire of them the reasons why they have arrested the person and determine by questioning and personal observation whether or not the suspect has been subjected to any physical, moral or psychological torture by whom and why. The judge shall then submit a written report of what he/she had observed when the subject was brought before him to the proper court that has jurisdiction over the case of the person thus arrested. the judge shall forthwith submit his/her report within three (3) calendar days from the time the suspect was brought to his/her residence or office.

Immediately after taking custody of a person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism, the police or law enforcement personnel shall notify in writing the judge of the court nearest the place of apprehension or arrest: *Provided, That where the arrest is made during Saturdays, Sundays, holidays or after office hours, the written notice shall be served at the residence of the judge nearest the*

any police or law enforcement personnel to arrest and detain a person *suspected* of the crime of terrorism or one who has been charged with the said crime, pursuant to the authority given in writing by the Anti-Terrorism Council.<sup>73</sup> The Act has given the Anti-Terrorism Council a judicial authority, to determine who should be arrested on mere suspicion of terrorism. *Caveat*, it is a warrantless arrest. While the Constitution lays down the general rule that arrests should be made with a warrant based upon probable cause to be determined personally by the judge, the Human Security Act alienated the judge from his judicial function in the determination of the existence of probable cause with the emergence of the new role of the Anti-Terrorism Council.

The warrantless arrest being the exception to the general rule should be construed *strictissimi juris*. There are three (3) instances of lawful warrantless arrest as provided by the Rules of Court.

RULE 113, Section 5. *Arrest without a warrant* – A peace officer or a private person may, without a warrant, arrest a person:

- (a) When in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
- (b) When an offense has just been committed and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and
- (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place, where he is serving final judgment or is temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraph (a) and (b) above, the person arrested

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place where the accused was arrested.

The penalty of ten (10) years and one day to twelve (12) years of imprisonment shall be imposed upon the police or law enforcement personnel who fails to notify any judge as provided in the preceding paragraph.

<sup>73</sup> "...any police or law enforcement personnel, who, having been duly authorized in writing by the Anti-Terrorism Council has taken custody of a person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism..." The said phrase of §18 Human Security Act is rather vague and misleading. It raises a lot more questions, because in § 53, it is clear that ATC shall not be empowered to exercise judicial or quasi-judicial authority, but the former section speaks otherwise.

without a warrant shall be forthwith delivered to the nearest police station or jail and shall be proceeded against in accordance with Section 7 of Rule 112.

Only in *in flagrante delicto*, apprehension pursuant to hot pursuit, or in case of an escaped prisoner do warrantless arrests find justification. *In flagrante delicto*, requires that the crime has been committed, actually being committed, is attempted to be committed 'in the presence' of the arresting officer or private person. Mere 'suspicion' or 'reliable information,' or 'reasonable ground' does not satisfy the aforesaid requirement. In the case of hot pursuit, probable cause is based on personal knowledge of facts indicating that the person to be arrested has committed the crime. Here, it is not enough that there is reasonable ground to believe that the person to be arrested has committed a crime. "A crime must in fact or actually have been committed first. That a crime has been committed is an essential precondition. It is not enough to suspect that a crime may have been committed. The fact of the commission of the offense must be undisputed."<sup>74</sup>

Outside the exceptions laid down in the Rules of Court, the general rule is that in every arrest, a warrant is necessary in accordance with Article III, Section 2 of the Constitution, otherwise it is deemed unlawful. Thus, the Constitution requires: (1) a warrant of arrest; (2) to be issued upon the determination of probable cause personally by the judge; (3) after examination under oath or affirmation of the complainant and the witnesses he may produce; and (4) particularly describing the place to be searched and the person or things to be seized. On the contrary, Human Security Act, (a) dispenses the need of a warrant of arrest; (b) substitutes the judge with the Anti Terrorism Council, not upon probable cause but by mere suspicion to be determined by the Council; (c) based on the result of Surveillance and examination of the bank accounts.

Section 18 of the Human Security Act, paragraph 1, provides:

*Period of Detention without Judicial Warrant of Arrest* -The provisions of Article 125 of the Revised Penal Code to the contrary notwithstanding, any police or law enforcement personnel, who, having been *duly authorized in writing by the Anti-Terrorism Council has taken custody of a person charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism* shall, without incurring any criminal liability for delay in the delivery of detained persons to the proper judicial authorities, deliver said charged or suspected person to the proper judicial authority within a period of three (3) days counted

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<sup>74</sup> *People v. Burgos*, 144 SCRA 1 (1986).

from the moment the said charged or suspected person has been apprehended or arrested, detained, and taken into custody by the said police, or law enforcement personnel: Provided, that the *arrest* of those suspected of the crime of terrorism or conspiracy to commit terrorism must result from the surveillance under Section 7 and examination of bank deposits under Section 27 of this Act.

The flaw of the warrantless arrest provided in Section 18 of the Human Security Act is readily apparent. It does not fall under the aforementioned exceptions of Rule 113 Section 5 of the Rules of Court. Warrantless arrest is an expedient remedy available in compelling circumstances mentioned in the Rules of Court, as *in flagrante delicto* because one could not just stand still and observe while a crime is being committed, or in the case of hot pursuit, lest the accused may escape and thereby elude responsibility of his wrong doing, or in case of a fugitive for obvious reason that wherever he may be found, he should be brought to justice.

The warrantless arrest of the persons concerned, i.e., those suspected of the crime of terrorism or conspiracy to commit terrorism, must be based on the surveillance under Section 7, and the examination of bank deposits under Section 27 of the Act.<sup>75</sup> Despite of the requirement that surveillance and

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<sup>75</sup> R.A. 9372, § 7. *Surveillance of Suspects and Interception and Recording of Communications –*

The provisions of Republic Act No. 4200 (Anti-wire Tapping Law) to the contrary notwithstanding, a police or law enforcement official and the members of his team may, upon a written order of the Court of Appeals, listen to, intercept and record, with the use of any mode, form, kind or type of electronic or other surveillance equipment or intercepting and tracking devices, or with the use of any other suitable ways and means for that purpose, any communication, message, conversation, discussion, or spoken or written words between members of a judicially declared and outlawed terrorist organization, association, or group of persons or of any person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism.

Provided, That surveillance, interception and recording of communications between lawyers and clients, doctors and patients, journalists and their sources and confidential business correspondence shall not be authorized.

§ 27 *Judicial Authorization Required to Examine Bank Deposits, Accounts, and Records. –*

The provisions of Republic Act No. 1405 as amended, to the contrary notwithstanding, the justices of the Court of Appeals designated as a special court to handle anti-terrorism cases after satisfying themselves of the existence of probable cause in a hearing called for that purpose that (1) a person charged with or suspected of the crime of terrorism or

examination of bank accounts need written order of the Court of Appeals, such safeguard does not cure the defect of the warrantless arrest in Section 18. The written order of the Court of Appeals authorizing surveillance and examination of bank accounts, though laudable safeguards against possible abuses, cannot, in any manner, give permission to a warrantless arrest making it an additional exception or worse, an exception the exception.

The law is clear that the *arrest* of those *suspected* of the crime of terrorism or conspiracy to commit terrorism must result from the surveillance and examination of bank deposits. With this requirement, the more logical that arrest should be made with a warrant, for after such surveillance and examination, probable cause must necessarily exist to justify the arrest. And if probable cause exists, the fact that the law enforcers had time to apply for surveillance, remove the expediency that would allow an immediate arrest without applying for judicial warrant. Or at least, if indeed expedient, the warrantless arrest must necessarily fall under Rule 113, Section 5 of the Rules of Court.

In another diminution of the fundamental rights, the same Section 18 makes an exception to Article 125 of the Revised Penal Code<sup>76</sup> with respect

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conspiracy to commit terrorism, (2) of a judicially declared and outlawed terrorist organization, association, or group of persons, and (3) of a member of such judicially declared and outlawed organization, association, or group of persons, may authorize in writing any police or law enforcement officer and the members of his/her team duly authorized in writing by the anti-terrorism council to: (a) examine, or cause the examination of, the deposits, placements, trust accounts, assets and records in a bank or financial institution; and (b) gather or cause the gathering of any relevant information about such deposits, placements, trust accounts, assets, and records from a bank or financial institution. the bank or financial institution concerned shall not refuse to allow such examination or to provide the desired information, when so ordered by and served with the written order of the Court of Appeals.

<sup>76</sup> REV. PEN. CODE Art. 125. *Delay in the delivery of detained persons to the proper judicial authorities.*

The penalties provided in the next preceding articles shall be imposed upon the public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of: twelve (12) hours, for the crimes or offenses punishable by light penalties, or their equivalent; eighteen (18) hours, for crimes or offenses punishable by correctional penalties, or their equivalent; and thirty-six hours (36) for crimes or offenses punishable by afflictive or capital penalties, or their equivalent.

In every case, the person detained shall be informed of the cause of his detention and shall be allowed, upon his request, to communicate and

to the maximum period of detention without charges. Thirty-six (36) hours is the maximum period allowed by the RPC in case of the delay in the delivery of detained persons to the proper judicial authorities and such applies for crimes and offenses punishable by afflictive or capital penalties, or their equivalent. The Human Security Act extends the detention without judicial warrant to three days. It requires (1) that the law enforcement agents detaining the person concerned had been duly authorized in writing to do so by the Anti-Terrorism Council; (2) the maximum period during which a person detained by law enforcement agents is three days. The three-day period is reckoned from the moment the person is arrested, detained or taken into custody by the apprehending law enforcement agents; and (3) the arrest and detention of the person concerned must be preceded by a surveillance or examination of bank deposits done by the law enforcement agents. Again, the role of the Anti-Terrorism Council in extending the period of detention is questionable.

Further, Section 19 states that in the event of an actual or imminent terrorist attack, suspects may not be detained for more than three days without the written approval of a municipal, city, provincial or regional official of a Human Rights Commission or judge of the municipal, regional trial court, the Sandiganbayan or a justice of the Court of Appeals nearest the place of the arrest.<sup>77</sup>

That Section 19 opens the possibility of detention for more than three days as long as there is written approval of the human rights commission or judge, shows how draconian the law is. A deeper analysis of the law reveals that

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confer at any time with his attorney or counsel. (*As amended by E.O. No. 59 and No. 272*).

<sup>77</sup> R.A. 9372, § 19. *Period of Detention in the Event of an Actual or Imminent Terrorist Attack.* –

In the event of an actual or imminent terrorist attack, suspects may not be detained for more than three (3) days without the written approval of a municipal, city, provincial or regional official of a Human Rights Commission or judge of the municipal, regional trial court, the Sandiganbayan or a justice of the Court of Appeals nearest the place of the arrest. If the arrest is made during Saturdays, Sundays, holidays or after office hours, the arresting police or law enforcement personnel shall bring the person thus arrested to the residence of any of the officials mentioned above that is nearest the place where the accused was arrested. The approval in writing of any of the said officials shall be secured by the police or law enforcement personnel concerned within five (5) days after the date of the detention of the persons concerned: Provided, however, that within three (3) days after the detention the suspects, whose connection with the terror attack or threat is not established, shall be released immediately.

it permits **indefinite detention beyond three days**. How long? As long as the government believes that, there is an actual or imminent terrorist attack.

A further reading of Section 19 unfortunately reveals how misleading the law is. Inasmuch as the provision is worded purporting to safeguard the endangered civil liberties of the 'suspects' by saying, "in the event of an actual or imminent terrorist attack, suspects may *not* be detained for more than three days *without* the written approval of the Human Rights Commission or judge..." the blatant legal shortcut unfolds in the next phrase which says, "The approval in writing of any of the said officials shall be secured by the police or law enforcement personnel concerned within five days after the date of the detention of the persons concerned." The two phrases are so irreconcilable. The provision ought to proscribe detention beyond three days without approval of the mentioned authorities and yet such approval may be secured after the lapse of three days as long as it is within the five day period, making the proscription an empty rhetoric. The safeguard prohibiting detention beyond three days without approval is thrown to the wolves, hostageing with impunity the liberty of a suspect. Worse, such is sanctioned by law, and again in the fight against terrorism. More insulting is the last phrase, "provided, however, that within three (3) days after the detention the suspects, whose connection with the terror attack or threat is not established, shall be released immediately." The intent seems to be laudable, at least, as it appears. But the arrest is supposedly already a product of the surveillance (§ 7) and examination of bank deposits (§27) as provided for in Section 18, in order to prevent arbitrary detention and arrest and yet, Section 19 allows still three days of detention and only after the failure to establish a case against the suspect shall he/she be released.<sup>78</sup>

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<sup>78</sup> Another possible construction is to interpret the arrest in § 19, i.e., in case of actual and imminent attack, as independent by its own, separate from the arrest in § 18 which is based on surveillance and examination of bank deposits as in the latter there is no actual nor imminent terrorist attack yet, and therefore, there is time to fulfill the requirement. But such interpretation would even be more dangerous, as it would allow detention for three days without charge and based solely on the ground that one is 'suspected' in connection with an actual or imminent terror attack.

Senator Pimentel is of the opinion that "there is a need to be flexible on the requirement of judicial approval of detention but only in case of an actual or imminent terror attack. Under those circumstances, it is obvious that the ordinary process of the law may not be complied with seasonably." A. PIMENTEL, *THE MAKING OF THE HUMAN SECURITY ACT*, *supra* note 1, at 141.

In the petition of *Bayan et al v. Macapagal-Arroyo et al.*, at 46: "The lame assurance that within three (3) days after detention, the suspects will be released 'immediately' if the connection with the terror attack or threat is not established is ridiculous. But more than a

Significantly, even during the time that writ of *habeas corpus* is suspended, the Constitution provides that any person arrested or detained shall be judicially charged within three days, otherwise he shall be released.<sup>79</sup> The Constitution further provides that the privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion or rebellion when the public safety requires it.<sup>80</sup> The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion.<sup>81</sup>

Even in extreme case when there is a suspension of the writ of *habeas corpus*, the Constitution mandates that any person arrested or detained shall be judicially charged within three days, otherwise, he shall be released. It is safe to infer therefore, that the seemingly indefinite detention under the Human Security Act, cannot find any legal basis for its justification, in the light of the above-mentioned constitutional provision.

If even in the case of rebellion, warrantless arrest is permitted only within the ambit of Rule 113, Section 5 of the Rules of Court, for mere declaration of state of rebellion cannot diminish or violate constitutionally protected rights,<sup>82</sup> then so too in the case of the fight against terrorism.

Recently, the Philippine government has been plagued by condemnation here and abroad, for unresolved extrajudicial killings and disappearances. Alarmed, the Supreme Court promulgated the Writ of *Amparo*<sup>83</sup> as part of the Rules Court, to protect the rights of those *desaparecidos*, illegally arrested and unlawfully detained, hoping that they would still be found – breathing and living. The warrantless arrest and the indefinite detention sanctioned by the Human Security Act, cloth these otherwise illegal acts with colorable legality.

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source of levity, why wait for three (3) days to establish the connection with the terror attack or threat, when the same is ‘actual and imminent’ before he/she is released immediately? Is it for a fishing expedition in the hope that something might come up? That is not only insulting but is stifling with an individual’s liberty.”

<sup>79</sup> CONST. Art. VII § 18 ¶ 6.

<sup>80</sup> CONST. Art. III § 15.

<sup>81</sup> CONST. Art. VII § 18 ¶ 5.

<sup>82</sup> *Sanlakas v. Executive Secretary* 421 SCRA 656 (2004).

<sup>83</sup> A.M. No. 07-9-12-SC, The Rule on the Writ of Amparo. The Rule on the Writ of Amparo took effect on October 24, 2007.

*Unreasonable Searches and Seizures: Moments of Disgrace*

Section 27 of the law makes the examination of bank deposits another exemption to R.A. 1405, the law on Secrecy of Bank Deposits. It provides that the Justices of the Court of Appeals after satisfying themselves of the existence of probable cause may authorize in writing any police or law enforcement officer to: (a) examine, or cause the examination of the deposits etc., and records in a bank or financial institution; and (b) gather or cause the gathering of *any relevant information* about such deposits, etc., and records from a bank or financial institution, of the (1) a person charged with or *suspected* of the crime of terrorism or conspiracy to commit terrorism; (2) of a judicially declared and outlawed terrorist organization; and (3) of a member of such judicially declared and outlawed organization.<sup>84</sup> On the other hand, R.A. 1405 considers all deposit of whatever nature with banks or banking institutions in the Philippines absolutely confidential and may not be examined. The exceptions are: when there is written permission of the depositor; or in cases of impeachment; or upon order of a competent court in cases of bribery or dereliction of duty of public officials; or in cases where the money deposited or invested is the subject matter of litigation. The exceptions provided in the Law on Secrecy of Bank Deposits are further stretched by R.A. 9194, amending certain provisions of the Anti-Money Laundering Act of 2001, which permits Anti-Money Laundering Council to inquire into or examine any particular deposit with any banking institution or non-banking financial institution upon order of any competent court when it

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<sup>84</sup> § 27 *Judicial Authorization Required to Examine Bank Deposits, Accounts, and Records.* –

The provisions of Republic Act No. 1405 as amended, to the contrary notwithstanding, the justices of the Court of Appeals designated as a special court to handle anti-terrorism cases after satisfying themselves of the existence of probable cause in a hearing called for that purpose that (1) a person charged with or suspected of the crime of terrorism or conspiracy to commit terrorism, (2) of a judicially declared and outlawed terrorist organization, association, or group of persons, and (3) of a member of such judicially declared and outlawed organization, association, or group of persons, may authorize in writing any police or law enforcement officer and the members of his/her team duly authorized in writing by the anti-terrorism council to: (a) examine, or cause the examination of, the deposits, placements, trust accounts, assets and records in a bank or financial institution; and (b) gather or cause the gathering of any relevant information about such deposits, placements, trust accounts, assets, and records from a bank or financial institution. The bank or financial institution concerned shall not refuse to allow such examination or to provide the desired information, when so ordered by and served with the written order of the Court of Appeals.

has been established that there is probable cause that the deposits or investments are related to any unlawful activity.<sup>85</sup>

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<sup>85</sup> An Act amending R.A. 9160, otherwise known as the “*Anti Money Laundering Act of 2001*,” R.A. No. 9194, § 8. *Section 11 of the same Act is hereby amended to read as follows:*

Notwithstanding the provisions of the Republic Act No. 1405, as amended, Republic Act No. 6426, as amended, Republic Act No. 8791, and other laws, the AMLC may inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activity as defined in Section 3(i) hereof or a money laundering offense under Section 4 hereof, except that no court order shall be required in cases involving unlawful activities defined in Sections 3(i) (1), (2) and (12).

To ensure compliance with this Act, the Bangko Sentral ng Pilipinas (BSP) may inquire into or examine any deposit or investment with any banking institution or non-bank financial institution when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP.

R.A. No. 9194, Amending R.A. No. 9160 § 3. *Section 3 (i) of the same Act is further amended to read as follows –*

- (i) ‘Unlawful activity’ refers to any act or omission or series or combination thereof involving or having direct relation to the following:
  - “(1) Kidnapping for ransom under Article 267 of Act No. 3815, otherwise known as the Revised Penal Code, as amended;
  - “(2) Sections 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, and 16 of Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002;
  - “(3) Section 3 paragraphs B, C, E, G, H and I or Republic Act No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act;
  - “(4) Plunder under Republic Act No. 7080, as amended;
  - “(5) Robbery and extortion under Articles 294, 295, 296, 299, 300, 301 and 302 of the Revised Penal Code, as amended;
  - “(6) Jueteng and Masiao punished as illegal gambling under Presidential Decree No. 1602;
  - “(7) Piracy on the high seas under the Revised Penal Code, as amended and Presidential Decree No. 532;
  - “(8) Qualified theft under Article 310 of the Revised Penal Code, as amended;
  - “(9) Swindling under Article 315 of the Revised Penal Code, as amended;
  - “(10) Smuggling under Republic Act Nos. 455 and 1937;
  - “(11) Violations under Republic Act No. 8792, otherwise known

It must be noted that what is covered by Section 27 of the Human Security Act is R.A. 1405- the rule applicable being *expressio unius, exclusio alterius est*.<sup>86</sup> It does not cover therefore, R.A. 6426 as amended – the Foreign Currency Deposit act<sup>87</sup> or any other related laws. Simply put, Section 27 can examine, or cause the examination; and gather or cause the gathering of *any relevant information* about deposits, when the account involved is in the Philippine currency because HSA made mention only of R.A. 1405 and nothing else. It cannot examine nor gather any relevant information of a dollar, euro, or any other foreign account as they are covered by the Foreign Currency Deposit Act, an entirely different law. Unfortunately, Section 27 of the HSA, while all encompassing to the point of endangering fundamental rights against unreasonable searches and seizures, made a great loophole in not incorporating R.A. 6426 probably due to oversight or inadvertance. One cannot lose sight of the fact that international terrorists maintain foreign accounts. Their funds to finance their activities usually come from foreign sources. Ironically, these accounts are beyond the clutches of the HSA. The average Filipino, suspected for being a terrorist is deprived of his right to privacy respecting his accounts, deposits, and transactions with banks and financial institutions in the guise of national security. Those who could afford foreign accounts could just sit, look, and listen, to the agony and wailing of the average Filipinos- the lowly, weak and destitute, who could not afford to defend themselves while the abusive police and other law enforcement agencies are violating their privacy. With this provision under the HSA, terrorists would be prompted or alerted to convert their account in the Philippine currency to foreign currency to evade the examination of their bank accounts. Instead of apprehending terroristic activities, the law has made a convenient escape and thus, facilitating even further the commission of acts of terrorism.

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as the Electronic Commerce Act of 2000;

“(12) Hijacking and other violations under Republic Act No. 6235; destructive arson and murder, as defined under the Revised Penal Code, as amended, including those perpetrated by terrorists against non-combatant persons and similar targets;

“(13) Fraudulent practices and other violations under Republic Act No. 8799, otherwise known as the Securities Regulation Code of 2000;

“(14) Felonies or offenses of a similar nature that are punishable under the penal laws of the countries.”

<sup>86</sup> R. AGPALO, STATUTORY CONSTRUCTION, at 224 (2003).

<sup>87</sup> An Act Instituting a Foreign Currency Deposit System in the Philippines and for other Purposes.

The Constitutional right against unreasonable searches and seizures is a guarantee that protects a citizen against wanton and unreasonable invasion of his privacy and liberty as to his person, paper, and effects.<sup>88</sup> To this end, it is required that a search in order to be valid: (a) should have a search warrant; (b) that probable cause supported the issuance of such warrant; (c) the probable cause had been determined personally by the judge; (d) the judge personally examined the complainant and his witnesses; and (e) the place to be searched and the persons or things to be seized have been *particularly described*.<sup>89</sup> In *Stonehill v. Diokno*, the Court outlawed 'general warrants,'<sup>90</sup> for it would place the sanctity of the domicile and privacy of communication and correspondence at the mercy of the whims, caprice, or passion of peace officers. As the Court added, "it is not difficult to imagine what would happen, in times of keen political strife, when the party in power feels that the minority is likely to wrest it, even though by legal means."<sup>91</sup> And in no way, shall the search warrant be used for fishing evidence of the commission of the crime, because such fishing expedition is indicative of the absence of evidence to establish a probable cause.<sup>92</sup> The Act however, permits to *gather or cause the gathering of any relevant information* about such deposits, etc., and records from a bank or financial institution. There is no more clearer word to describe that such is for fishing evidence. The phrasing of the law does not hesitate even to hide the intent in a more subtle form and wrapping. It is blatant and rascal "Such ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which liberties of the people rest."<sup>93</sup>

The Constitutional guarantee against unreasonable searches and seizures is a never-ending quest to strike the balance between the demands of the law and the claims to freedom, liberty, and privacy. But such right cannot remain an empty promise.

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<sup>88</sup> *20<sup>th</sup> Century Fox Film Corp. v. Court of Appeals*, 164 SCRA 655 (1988), AT 660.

<sup>89</sup> R. GOROSPE, CONSTITUTIONAL LAW: NOTES AND READINGS ON BILL OF RIGHTS, CITIZENSHIP AND SUFFRAGE, at 425.

<sup>90</sup> *Stonehill v. Diokno*, 20 SCRA 383, at 391 (1967).

<sup>91</sup> *Id.* at 392.

<sup>92</sup> *Id.* at 396.

<sup>93</sup> *Id.*

### *Dominion of the Big Brother*

*“The most comprehensive of rights and the right most valued by men is the right to privacy.”<sup>94</sup>*

The right to be let alone emanates from the concept of *individualism*, so that a person can do his purely private affairs without the unreasonable intrusion by the government. It is a highly treasured right in a democratic society, a distinguishing factor from a totalitarian one. A democratic society honors the limit that in a certain point governmental powers should stop short of certain intrusions into the personal life of the citizen.<sup>95</sup> Thus, the Constitution states that, “the privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.”<sup>96</sup> This provision is unique for the Philippines. It does not have any American counterpart, such provision having been taken from the Malolos Constitution. Unquestionably, it rules out eavesdropping on private communications.<sup>97</sup>

Privacy is not an absolute right. The constitutional provision limits it as long as there is an enacting law, though the law is subject to strict scrutiny. Human Security is one of the laws which delimit this ever narrowing right to privacy. The Act makes surveillance as provided in Section 7 exemption to Anti-wiretapping law. It authorizes a “police or law enforcement official and the members of his team upon a written order of the Court of Appeals to, listen to, intercept and record, with the use of *any mode*, form, kind or type of electronic or other surveillance equipment or intercepting and tracking devices, or with the use of any other suitable ways and means for that purpose, *any communication*, message, conversation, discussion, or spoken or written words between: (a) members of a *judicially declared* and outlawed terrorist organization, association, or group of persons; or (b) of any person charged with or *suspected of the crime of terrorism* or conspiracy to commit terrorism. Provided, that surveillance, interception and recording of communications between lawyers and clients, doctors and patients, journalists and their sources and confidential business correspondence shall not be authorized.” It should be noted that the terrorist organization whose communications are subjected to interception

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<sup>94</sup> Mr. Justice Brandeis, quoted by M. C. R. Padiernos, *The Right to be Let Alone: A Re-Evaluation*, U.S.T. Law Rev. Vol. XLVIII, at 72 (2004).

<sup>95</sup> *Ople v. Torres*, 293 SCRA 141 (1998).

<sup>96</sup> CONST. Art. III § 3 ¶ 1,2.

<sup>97</sup> I. CRUZ, J., CONSTITUTIONAL LAW 165 (2003).

and recording must be judicially declared as outlawed by the Court of Appeals, else any interception is deemed unlawful. Further, Section 8 provides that, the application with the Court of Appeals shall be done *ex parte*,<sup>98</sup> when the subject is a person who is a suspect, and as provided in Section 9, would have the right to be informed and to challenge the legality of the interference, notwithstanding that the order of the Court of Appeals and the written authorization of ATC is deemed a classified information.<sup>99</sup> Again, it is an utter contradiction of terms,

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<sup>98</sup> R.A. 9372, §8. *Formal Application for Judicial Authorization.* –

The written order of the authorizing division of the Court of Appeals to track down, tap, listen to, intercept, and record communications, messages, conversations, discussions, or spoken or written words of any person suspected of the crime of terrorism or the crime of conspiracy to commit terrorism shall only be granted by the authorizing division of the Court of Appeals upon an *ex parte* written application of a police or of a law enforcement official who has been duly authorized in writing by the Anti-Terrorism Council created in Section 53 of this Act to file such *ex parte* application, and upon examination under oath or affirmation of the applicant and the witnesses he may produce to establish: (a) that there is probable cause to believe based on personal knowledge of facts or circumstances that the said crime of terrorism or conspiracy to commit terrorism has been committed, or is being committed, or is about to be committed; (b) that there is probable cause to believe based on personal knowledge of facts or circumstances that evidence, which is essential to the conviction of any charged or suspected person for, or to the solution or prevention of, any such crimes, will be obtained; and, (c) that there is no other effective means readily available for acquiring such evidence.

<sup>99</sup> §9. *Classification and Contents of the Order of the Court.* –

The written order granted by the authorizing division of the Court of Appeals as well as its order, if any, to extend or renew the same, the original application of the applicant, including his application to extend or renew, if any, and the written authorizations of the Anti-Terrorism Council shall be deemed and are hereby declared as classified information: Provided, That the person being surveilled or whose communications, letters, papers, messages, conversations, discussions, spoken or written words and effects have been monitored, listened to, bugged or recorded by law enforcement authorities has the right to be informed of the acts done by the law enforcement authorities in the premises or to challenge, if he or she intends to do so, the legality of the interference before the Court of Appeals which issued the written order. The written order of the authorizing division of the Court of Appeals shall specify the following: (a) the identity, such as name and address, if known, of the charged or suspected person whose communications, messages, conversations, discussions, or spoken or written words are to be tracked down, tapped, listened to, intercepted, and recorded and, in

for how can a person challenge the legality of an order which is considered a classified information?

The right to privacy was not engraved in the Constitution for flattery.<sup>100</sup> It is not a lifeless dried ink on a piece of paper. Out of those letters springs a source of joy for simple men in a democratic society, without which democracy stops having meaning at all.

The authority to intercept by *any* mode... and *any* surveillance available, *any* communication... of ... *any suspect*, endangers the privacy enshrined in the Constitution. Such acts threaten the very abuses that the Bill of Rights seeks to prevent. The intrusive eyes and ears of the authoritarian state to snoop and spy on individuals including those who are merely under suspicion trample even personal dignity. Living life is turned into a mere existence. The all-encompassing provision does not hesitate to leave even just a little privacy to a person. It leaves nothing private. It takes away everything private. It makes right to privacy, a thing of the past, a dream for the present generation, a *Shangri-la* for our children's children. From the foregoing, clear is that Section 7, the surveillance of suspects and interception and recording of Communications, is just so encompassing and endangers the fundamental rights. Parallel to *Ople v. Torres*, "the lack of proper safeguards may interfere with the individual's liberty of abode and travel by enabling authorities to track down his movement; it may also enable unscrupulous persons to access confidential information and circumvent

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the case of radio, electronic, or telephonic (whether wireless or otherwise) communications, messages, conversations, discussions, or spoken or written words, the electronic transmission systems or the telephone numbers to be tracked down, tapped, listened to, intercepted, and recorded and their locations ***or if the person suspected of the crime of terrorism or conspiracy to commit terrorism is not fully known, such person shall be subject to continuous surveillance provided there is a reasonable ground to do so;*** (b) the identity (name, address, and the police or law enforcement organization) of the police or of the law enforcement official, including the individual identity (names, addresses, and the police or law enforcement organization) of the members of his team, judicially authorized to track down, tap, listen to, intercept, and record the communications, messages, conversations, discussions, or spoken or written words; (c) the offense or offenses committed, or being committed, or sought to be prevented; and, (d) the length of time within which the authorization shall be used or carried out.

<sup>100</sup> *Id.* at 162.

the right against self-incrimination.”<sup>101</sup> To quote Senator Tanada:

“It has been said that innocent people have nothing to fear from their conversations being overheard. But this statement ignores the usual nature of conversations as well as the undeniable fact that most, if not all, civilized people have some aspects in their lives they do not wish to expose. Free conversations are often characterized by exaggerations, obscenity, agreeable falsehoods, and the expression of anti-social desires of views not intended to be taken seriously. The right to the privacy of communication, among others, has expressly been granted by our Constitution. Needless to state here, the framers of our Constitution must have recognized the nature of conversations between individuals and the significance of man’s spiritual nature, of his feelings and of his intellect. They must have known that part of the pleasures and satisfactions of life are found to be unaudited and free exchange of communication between individuals – free from every unjustifiable intrusion by whatever means.”<sup>102</sup>

***The Death of the Bright Consummate Flower of All Liberty***<sup>103</sup>

The law does not stop in surveillance and interception of private communications. Not yet contented, the prohibition goes further, where a person is not just stripped of his privacy, he is denied to even express and exercise that right.

*Section 26. Restriction on Travel. - In cases where evidence of guilt is not strong, and the person charged with the crime of terrorism or conspiracy to commit terrorism is entitled to bail and is granted the same, the court, upon application by the prosecutor, shall limit the right of travel of the accused to within the municipality or city where he resides or where the case is pending, in the interest of national security and*

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<sup>101</sup> *Id.* at 162.

<sup>102</sup> Explanatory note of Senator Tanada to the Bill which would later be R.A. 4200, “*An Act to Prohibit and Penalize Wiretapping and Other Related Violations of Private Communication and Other Purposes,*” cited in *Ramirez v. Court of Appeals*, 248 SCRA 590 (1995).

<sup>103</sup> 1 R. GOROSPE, CONSTITUTIONAL LAW: NOTES AND READINGS ON BILL OF RIGHTS, CITIZENSHIP AND SUFFRAGE, at 666. Also cited by Justice Romero in her dissent in *Osmena v. Comelec*, 288 SCRA at 507 (1998), who further quoted Wendell Phillips. The phrase among others also appeared at U.S.T. LAW REVIEW, vol L., when James Benedict F. Panopio used it as his title in: *Free Speech: the Bright Consummate Flower of All Liberty* at 85 (2005).

public safety, consistent with Article III, Section 6 of the Constitution. Travel outside of said municipality or city, without the authorization of the court, shall be deemed a violation of the terms and conditions of his bail, which shall then be forfeited as provided under the Rules of Court.

He or she may also be placed under house arrest by order of the court at his or her usual place of residence.

*While under house arrest, he or she may not use telephones, cell phones, e-mails, computers, the internet, or other means of communications with people outside the residence until otherwise ordered by the court (Italics supplied).*

Simply put, once a person is granted bail, he shall be restricted to travel and may be put under house arrest. While under house arrest, he or she may not use telephones, cell phones, e-mails, computers, the internet, or other means of communications with people outside the residence until otherwise ordered by the court. In other words, he is prohibited to communicate, plain and simple. He is denied of his basic right to express the ideas that reside deep within his being—the expressions of his inner soul.

It is an utter absurdity. A suspect can be subject to surveillance and interception. Then when charged, he continues being subject to it and when granted bail, still while being subject to surveillance, he cannot even make outside communication. This is truly an overkill, something tantamount to solitary or incommunicado confinement. It vitiates the free will and it is a psychological torture, proscribed by the Constitution.<sup>104</sup>

It is patently anathematic to a democratic framework where free, alert, and even militant press is essential for the political enlightenment and growth of the citizenry.<sup>105</sup> Even convicted prisoners can make calls, write and receive letters, talk to his visitors. But not so when a person has been charged with terrorism. And notwithstanding the fact that a person has been granted bail because the evidence against him is weak, he is still put under house arrest upon court's order. It is as if, he is being punished for the weak case against him. Under the HSA, a person cannot even shout 'fire, fire, in a crowded theater nor in an open field.' A person is from the very outset, prohibited to shout. This is how laconic the law is. This is how oppressive the law is. In the name of national

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<sup>104</sup> CONST. Art. III §12 ¶2. No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary *incommunicado*, or other similar forms of detention are prohibited.

<sup>105</sup> *Burgos* 26 SCRA 288, cited by I. CRUZ, J., *supra* note 91, at 209 (2003).

security, people cannot even communicate, because it believes when people stop communicating, terrorism will vanish and fade away into the oblivion. In a free society, the individual is not supposed to speak in timorous whispers or with bated breath but with the clear voice of the unafraid.<sup>106</sup>

The Constitution mandates, “that no law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.”<sup>107</sup> That law has come.

Inasmuch as the privacy of communication may be limited upon lawful order of the court or when public safety or order requires otherwise as provided by law; the exception does not apply when the law is a *prior restraint* or a *censorship* or a *subsequent punishment*. Inasmuch as it is well-settled that there are areas of speech that are clearly beyond the constitutional protection, such as “those which by very utterance, inflict injury or tend to incite an immediate breach of the peace,”<sup>108</sup> a provision of HSA which, unqualifiedly prohibits the any form of communication when the accused is out on bail, cannot find any justification as long as the bright consummate flower of all liberty lives in this pluralistic society. Section 26 is susceptible to be facially challenged. “The overbreadth doctrine permits a party to challenge the validity of a statute even though as applied to him it is not unconstitutional but it might be if applied to others not before the Court whose activities are constitutionally protected. Invalidation of the statute ‘on its face’ rather than ‘as applied’ is permitted in the interest of preventing a “chilling” effect on the freedom of expression.<sup>109</sup>

## V. FINAL WORDS

### LOOKING AT THE HUMAN SECURITY ACT THROUGH ITS SHADOWS IN HISTORY

After reaching the climax of every story, dénouement follows. After emotions reached their peak and after the height of conflicts, they gradually

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<sup>106</sup> I. CRUZ, J., *supra* note 97, at 212.

<sup>107</sup> CONST. art. III § 4.

<sup>108</sup> *Chaplinsky v. Hamsphire*, 315 U.S. 568, at 571-572 (1942).

<sup>109</sup> Justice Mendoza’s separate opinion in *Cruz v. Secretary of Environment and Natural Resources*, 347 SCRA at 315 (2000).

subside. The Human Security Act is born out of the unfolding of a grand story- the story of humanity. The Human Security Act is supposed to be the dénouement of the story of the saga of humanity, crowning itself the glory of the lessons learned when emotions and conflicts were at their highest, preparing for an end where rule of law will triumph and human rights vindicated. After all, the law has a special place in history. It was crafted when human rights throughout the world were being trampled in exchange for collective security. It was debated in the halls of Congress after emotions of pain and hatred brought by the different bombings in the United States, Spain, United Kingdom, and in the Philippines subsided, and when men became more logical in facing terrorism. Dénouement is not supposedly a boring part; it is rather that part where great lessons are learned and where the characters of the story emerge stronger and more rational.

The State itself cannot trample human rights to deal with terrorists. The United States – the supposedly greatest defender of liberty and the pillar of democracy did so, and the Philippines should have learned the lesson. But not so, ever the loyal follower, it wants to be its disciple even to self-destruction. When the State disregards human rights to bring the terrorists to ‘justice,’ it loses the moral ascendancy and falls down undignifiedly becoming just one of them. The defeat of the terrorists and terrorism would be meaningless, if it would also mean the collapse of the rule of law. Human rights are the rights of and for everyone. When the State compromises civil liberties in exchange for collective security, it transforms itself into another terrorist. As aptly put by Justice Isagani Cruz in his dissent in *Guanzon*:<sup>110</sup>

“The danger to our free institutions lies not only in those who openly defy the authority of the government and defy its laws. The greater menace is in those who, in the name of democracy destroy the very things it stands for and so undermines democracy itself.”

Any derogation of human rights is a defeat of the rule of law and a victory for the terrorists. It does not mean, however, that no anti-terrorism law would and should ever be passed by Congress, only that the law itself should be crafted not at the expense of the inherent and fundamental rights. It is neither among the duties of the State nor among its powers to throw these rights into oblivion.

The 1987 Constitution is called the “human rights constitution,” primarily because it is the result of a post-Marcos era, when human rights were

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<sup>110</sup> *Guanzon*, *supra* note 16 at 643.

blatantly violated.<sup>111</sup> It is a charter of liberty. It is a reaction to the trauma of the oppressive regime under martial law in the guise of protecting the Filipino nation from terrorism and subversion. It is the testimony of lessons learned from the inhumane and utter disregard of human rights during those martial law years, which infuriated the conscience of the Filipino people. The Human Security Act, as it stands today is reminiscent of that forsaken fold of Philippine history. It seeks to destroy what the Filipino people have vowed that never shall the nation suffer the same fate, ever again.

Human Rights in the Philippines metaphorically are like buds to bloom still to the fullest. They are flowers zealously guarded and nurtured in the midst of adversity, beautiful and rare. They are blessings of independence and democracy. They should be guarded because, vulnerable as they are, they are the only armor too in the fight against terrorism. Their preservation is victory of democracy and the eventual defeat of terrorists and terrorism. Take away human rights and human existence and dignity are turned to nothing but illusions. The Human Security Act, as it stands today, presents itself as a potent instrument in the blatant disregard of human rights, the very rights, the present constitution zealously guards. Human rights are the very essence of human existence.

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<sup>111</sup> J. Co, *When Something Right Becomes Wrong Human Rights in the Philippines: A Reality or a Rhetorical Guarantee?* Vol. 1, U.S.T. LAW REV, at 2 (2005-2006).