THE ASSO: AN ABNORMALITY IN A PERIOD OF NORMALCY

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As early as 1900, during the early years of the American occupation, the American colonials, whose constitution largely influenced the principles and framework upon which our own fundamental law is founded, had this to say about our history in their Schurman Report:

> The more one studies the recent history of the Philippines and the more one strives by conversation and intercourse with the Filipinos to understand and appreciate their political aims and ideals, the more profound becomes one's conviction that what the people want, above every thing, is a guaranty of those fundamental human rights which Americans hold to be the natural and inalienable birthright of the individual but which under Spanish domination in the Philippines were schamefully invaded and ruthlessly trampled upon. Every scheme of government devised by the Filipinos is, in its primary intent, a means to secure that end . . .[1]

Commenting on this short excerpt, Fr. Joaquin Bernas, S.J. concludes that ". . . we as a people have a deep consciousness of civil and political rights, and that ours is a consciousness which dates back to our earliest history and which grew and took deep root because of wrongs and cruelties to which our people have been exposed."[2]

Today, we are supposed to have a constitution which protects those rights that the Filipino, throughout history, have held to be important. These rights are what we call "civil rights," which refers to the rights secured by the constitution of any given state or country to all its citizens or to all its inhabitants, and not connected with the organization or administration of government.[3] While political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government, civil rights are those which to relation to the establishment, management or support of the government.[4] Among the civil rights

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[1]U.S. Philippine Commission, *Report of the Philippine Commission to the President*, 4 volumes (Washington: Government Printing Office, 1900), 1:84-85.

[2]Joaquin G. Bernas, S.J., "Filipino Consciousness of Civil and Political Rights," Philippine Studies (1977): 163-185, 163.

[3]Black, *Handbook of American Constitutional Law*, 524 (4th edition, 1927).

[4]Anthony vs. Burrow, 129 F. 783, 789 (1904).

are the guarantee against involuntary servitude, religious freedom, prohibition against unreasonable searches and seizures, liberty of abode and the prohibition against imprisonment for debt.[5] One of the essential civil rights embodied in our constitution's Bill of Rights is Section 3 of Article 4, which reads:

> Sec. 3. 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 not be violated, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, or such other responsible officer as may be authorized by law, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.

The inviolability of the home is one of the most fundamental of all the individual rights declared and recognized in the political codes of civilized nations.[6] Landynski in his authorative work believes that "to value the privacy of home and person and to afford its constitutional protection against the long reach of government is no less than to value human dignity, and that his privacy must not be disturbed except in case of overriding social need, and then only under stringent procedural safeguards."[7] What is protected is a person's "personal privacy and dignity against unwarranted intrusion by the State."[8]

It is not our purpose here to eleborate on the meaning of this constitutional right. However, its significance is underlined by the fact that for the requirement of reasonableness of a search and seizure to be satisfied, there must be a warrant from a judge "or such other responsible officer as may be authorized by law."[9] The immunity from unreasonable search of a man's papers and effects is made more specific by this constitutional provision: "The privacy of communication and correspondence shall be inviolable except upon lawful order of the court or when public safety and order require otherwise."[10]

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[5]Malcolm, *The Constitutional Law of the Philippine Islands*, 431-457 (2nd edition 1926).

[6]U.S. vs. Arceo 3 Phil. 381, 384 (1904).

[7]Landynski, *Search and Seizure in the Supreme Court* (1966) which referred to the following decisions of the US Supreme Court: Schmerber vs. California 384 US 757 (1966) and Hoffa vs. U.S. 385 U.S. 293 (1966).

[8]Schmerber vs. California 384 U.S. 757, 765 (1966).

[9]Article IV, Section 3, 1973 Constitution.

[10]Article IV, Section 4, 1973 Constitution.

In the 1935 constitution, only a judge may issue a warrant, only a judge may authorize a search or an arrest. This is significant because it is a departure from American constitutional law. In other words, in 1935, while we were at the threshold of our independence, our representatives were willing to entrust the sanctity of our homes and the sacredness of our persons only to a judge and to no one else. The reason for this was that in the minds of our representatives only a judge would have the requisite neutrality and detachment needed in the often competitive enterprise of ferreting out crime.[11] After independence, the trend was toward liberalization of the rule, i.e. against the state and in favor of the accused.[12] The Court was unswerving in its insistence that only a judge could issue a search warrant or warrant of arrest. Even warrants issued by authority of the President in deportation cases were invalidated.[13]

In the 1973 constitution, we have a return to the American rule, where a "responsible officer as may be authorized by law," may issue a search warrant or a warrant of arrest. A responsible officer is one who is competent and neutral, that is one whose role is not prosecutorial. Fair play demands that the arbiter of human rights be impartial and neutral.[14] The question is, since the 1973 constitution went into effect, has any such responsible officer, other than judges, been authorized by law to issue warrants?

In the 1976 case of Collector of Customs vs. Villaluz[15] the Court held that until then, no law or presidential decree had been enacted or promulgated vesting such authority in any particular "responsible officer. In the words of the court decision, penned by Justice Felix Makasiar:

> It is clear from the aforequoted provisions of the 1973 Constitution that until now only the judge can determine the existence of probable cause and can issue the warrant of arrest. No law or presidential decree has been enacted or promulgated vesting the same authority in a particular "responsible officer."[16]

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[11] Bernas, *op. cit.*, p. 176.

[12] Stonehill vs. Diokno L-19550, 19 June 1967.

[13] Qua Chee Gan vs. Deportation Board 9 SCRA 27.

[14] Johnson vs. U.S. 333 U.S. 10, 14 (1948); Coolidge vs. New Hampshire 403 U.S. 443 (1971); Shadwick vs. City of Tampa 40 LW 4758 (1971).

[15] 71 SCRA 357

[16] Ibid, p. 380.

From the points we have discussed, it may be observed that: 1) our history shows a deep awareness and concern for our civil rights 2) trends in our jurisprudence indicate that our high court has tried as much as possible to restrict the power of search warrants and warrants of arrest to the judge 3) until the Villaluz decision, and despite the 1973 constitution's expansion of the power, no law or decree was then promulgated to specify the "responsible officer" authorized by law.

THE ARREST, SEARCH AND SEIZURE ORDER

The 1973 constitution had been created and put into effect during a period of martial law. Essentially therefore, it is a constitution that grew from a period of emergency. The transitory provisions included therein, which considers as law all the proclamations, decrees, instructions and acts promulgated by the President[17] reinforce this view. Thus not only the provisions of the constitution *per se* are to be treated as the law of the land, but comprehends the entire body of decrees by the President, even after the lifting of martial law. It cannot but be then a "rule of law," under martial law, since all the rules promulgated during this period are the law, and consequently, to heed such, would conform to this "rule of law." It is no surprise that then Justice, now Chief Justice Fernando writes of this in the following manner:

> X X XThere is emphasis on the role of authority, but there is no disregard of the limitations of the Constitution as found in both the present and the past Charters. What is more, martial rule itself under the conditions therein set forth was itself recognized as a mode of coping with emergency conditions. X X X It is my submission that a dispassionate appraisal of the Philippine experience yields the conclusion of the observance of the traditional concept of the rule of law. The power the government exercises is traceable to its interpretation of the Constitution and applicable jural norms. There is no obstacle to its acts being challenged in court. It cannot be said, therefore, that under martial rule the Philippines has departed from its longstanding tradition of adherence to the rule of law.[18]

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[17] Article XVII Section 3 (2) of the 1973 Constitution which reads: All proclamations, orders, decrees, instructions and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after the lifting of martial law or the ratification of this Constitution, unless modified, revoked, superseded, by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President, or unless expressly and explicitly modified or repealed by the regular National Assembly.

[18] Enrique M. Fernando, "Rule of Law Under Martial Rule," in *Philconsa Reader on Constitutional and Policy Issues* ed. by Augusto Caesar Espiritu, p. 677 (Quezon City: UP Law Center, 1979).

Upon the proclamation of martial law on September 21, 1972, General Order No. 3, dated September 22, 1972, as amended by General Order No. 3-A, dated September 24, 1972, certain cases were withdrawn from the jurisdiction of the judicial department, including those involving the validity of Proclamation No. 1081, proclaiming martial law, the decrees and rules approved pursuant thereto, crimes against national security, the law of nations, the fundamental laws of the State, public order, usurpation of authority, and those commited by public officers. The President also ordered that certain criminal cases be tried by special military tribunals which might be created by him or upon his orders. Under General Order No. 8, military tribunals created pursuant to this Order exercised exclusive jurisdiction over certain crimes. 19 These offenses may be referred to a military tribunal in the public interest, by the President of the Philippines.

General Order No. 62, promulgated in 1977 authorized the Secretary of National Defense to effect upon probable cause the arrest, detention, search and seizure of persons and/or things through an arrest, search and seizure order for offenses within the exclusive jurisdiction of military tribunals. In addition, it authorized the issuance of arrest, search and seizure orders for certain common crimes like murder, kidnaping, arson and robbery.[20] In the case of Danganan v. Enrile[21], the Court held that a person who is detained by virtue of an Arrest, Search and Seizure Order (ASSO), may be kept in detention until released by the President or by the Secretary of Defense. Detention therefore under the ASSO, is legal. Danganan could not be released by means of the writ of *habeas corpus.*

The Danganan case, penned by Justice Ramon Aquino merely stated that the ASSO was legal, and argued that the accused may be detained since the crime he was charged of, illegal possession of firearms, kidnapping and murder, were among the grounds stated in General Order No. 60 as amended by General Order No. 62. This decision of the Court, crucial as it is, is peculiar because it does not explain *why* the ASSO is legal, or from what principle of law does it derive its authority.

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[19]For a complete listing of the cases withdrawn from the jurisdiction of the judicial department under General Order Nos. 3 and 3-A, and those cases under the military tribunals created under General Order No. 8, see Aruego, Political Law Reviewer, 1979 edition, pp. 131-133.

[20]Jacinto D. Jimenez, "Civil Rights Under the New Constitution," in *The New Constitution and Human Rights,* ed. by Purificacion V. Quisumbing, p. 59, (Quezon City: UP Law Center, 1979).

[21]82 SCRA 185. The offenses included under General Order No. 60, dated June 24, 1977 as amended by General Order No. 62, dated October 22, 1977 are the following:

cont'd.....

The decision essentially *presumed* the ASSO as legal, and henceforth disposed of the case accordingly.

This Danganan case, which was subsequently used as the basis for decisions involving the ASSO order is dangerous as a precedent because it does not specify the reasons and rationale of the ASSO. Is the ASSO legal by virtue of the emergency situation existing during a time of martial rule? If such is the case, then the lifting of martial law necessitates the discarding of such order, since it negates the rationale for which it was created. On the other hand, is it the "responsible officer," that Article 4, Section 3 refers to as qualified to issue search and arrest warrants. Is the Secretary (now Minister) of National Defense blessed with the same traits found in an impartial judge?

With Proclamation No. 2045, martial law was terminated on January 17, 1981. To date, the General Orders authorizing the ASSO have not been repealed, whether expressly or impliedly. On the contrary, with the promulgation of the National Security Code, Presidential Decree No. 1498, promulgated before the lifting of martial law, the power of the Secretary of National Defense has been expressly continued regardless of the lifting of martial rule. The Code in fact expands the power of the Secretary in the use of the ASSO order. Section 54 of the Code is instructive:

> **Section 54. Limiting Arrest Powers of the Secretary of National Defense.** – a) the authority of the Secretary of National Defense to effect, upon probable cause, the arrest, detention, search and seizure of persons and/or things through an arrest, search and seizure order, commonly known as ASSO, shall henceforth be limited, generally, to offenses over which the military tribunals have exclusive jurisdiction as limited in Chapter VII of this Code.
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> c) Notwithstanding the provisions of subparagraph (a) hereof, the Department of National Defense may cause the arrest and detention of persons or the

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a. Violations of R.A. No. 6235 (Anti-Hijacking Law)
b. Violations of R.A. No. 6539, otherwise known as the Anti-Carnapping Act.
c. Murder as defined under Art. 248 of the Revised Penal Code, as amended
d. Kidnaping and serious illegal detention as defined under Art. 267 of the RPC, as amended
e. Arson as defined and penalized under Arts. 32 and 322 of the RPC, as amended, including any offense committed as a result thereof
f. Robbery as defined and penalized under Arts. 294, 295, 297, 299, 300 and 302, of the RPC
g. Violations of Presidential Decree No. 532, dated August 8, 1974, otherwise known as the Anti-Piracy and Anti-Highway Robbery Law of 1974
h. Other acts or offenses, involving the theft, robbery or destruction of military or police arms, ammunition, supplies and equipment.

search of places, persons, peapers or effects, or the seizure of things, *for crimes which although not cognizable by the military tribunals likewise have the effect of undermining national security or public order as determined by him* (Italics supplied) [22]

The section cited above, as we have mentioned, enlarges the power of the ASSO because these provisions, especially subparagraph (c) were not included in the original General Orders. The original Orders are practically reproduced in Section 55 of the same Code.[23] Clearly, the National Security Code authorizes the Secretary to issue the ASSO for almost all the felonies and offenses punishable by the Revised Penal Code and the related special laws[24] - but also crimes which although not cognizable by military tribunals likewise have the effect of undermining national security or public order *as determined by him.* And national security, as construed by the Code as stated in its declaration of policy, "shall be broadened to encompass national strength *not only in the politico-military but also in the socio-economic sense."*[25] National security therefore is not to be understood in its ordinary meaning, but in its broadest sense, and may comprehend all forms of economic dislocation caused by both internal and external events.

It would seem then that the ASSO after martial law has more "bite" than the one before it. In addition to those powers granted under the old General Orders which are limited to those cases tried by military tribunals, the new ASSO provisions in the Security Code *include everything elese* because they may refer to crimes "not cognizable by the military tribunals," as long as they undermine national security, a situation to be "determined by him" (Secretary of National Defense). The only limitation to this rule is that the ASSO shall not be issued without prior clearance from the President/Prime Minister.[26] Thus, the scope of the ASSO, in the ultimate analysis is not dependent on law, but is actually founded

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[22]General Order No. 60, June 24, 1977.

[23]For a fuller discussion of the National Security Code, see Santiago T. Gabionza, Jr., "Highlights of the National Security Code," Ateneo Law Journal, Vol. 25 No. 3, 25 (March 1981).

[24]Section 17, Supplement, National Security Code.

[25]National Security Code, Chapter II, Declaration of Policy.

[26]Section 13, Supplement. With the 1981 amendments to the Constitution, it is only the President who can give prior clearance to the Minister of National Defense to issue the ASSO since it is the President who "shall be the head of state and chief executive of the Republic of the Philippines" (Article VII, The President Section 1) and it is he who has "control of the ministries." (Article VII, Section 8).

on the discretion of the Secretary. If a certain crime was committed, that does fall within the enumerated grounds in the law, as long as it undermines "national security" in its most comprehensive connotation, then it may be acted upon by an ASSO order.

THE ASSO IN PERSPECTIVE

If we relate the ASSO today to jurisprudence, it can hardly be said that we can find its legal basis in the Danganan case. It does find its "legal" foundation in the sense that the Danganan decision ruled the ASSO as legal. It would be more exact to say that the High Court declared it legal. The decision was definitive without being definite. On the other hand, it cannot be posited that an ASSO order is necessary by virtue of an emergency situation, or martial rule, since the ASSO continues after the lifting of martial law. Logically, an ASSO finds use during martial rule. But to base its existence on the presence of special circumstances is rendered moot by virtue of its perpetuation during normal times. The only possible rationale or explanation then for the ASSO is that the Secretary of National Defense is the "responsible officer" authorized by our constitution to issue the warrants of search and seizure, and arrest. But this is a mere conclusion of law gathered in an attempt to harmonize existing decrees and rules; there is no Court decision that lays the issue squarely. At the same time, a Secretary of National Defense is hardly the "responsible officer" contemplated by the provision which intends to protect constitutional rights. A secretary of defense is certainly in no position to be "responsible" in the same sense, as a judge, whether or not to issue the warrants in question. The secretary, being an executive officer, and more significantly in the defense department or ministry, cannot be entrusted with this sacred right, in normal times.

The reality is that the ASSO's existence during a period of normalization runs counter to the scope of our constitutional right against unreasonable search, seizure and arrest. As we have stated earlier, it goes against our history as a people, which places emphasis on the protection of our individual rights and freedoms. It contradicts the trends in our jurispurdence, for in the 1935 constitution, the right to issue the warrants was granted only to the judge, in any case. In the light of the 1973 constitution, it can be observed that no High Court decision has satisfactorily laid the basis for the ASSO, whether in times of crisis or in normalcy. At worse, the expanded power of the ASSO provides the Secretary a "latitudinarian" scope of power whereby he may utilize the immense forces of the ASSO order. The ASSO in its present form in effect carries a "responsibility" that cannot be assumed by an executive officer of government, much less a defense minister, who cannot be expected to be as impartial as a judge in court.

In the ultimate analysis, the effect of any law, and in this case, the sections on the ASSO in the National Security Code, depends on its implementation. The broad powers outlined remain theory unless the full weight of authority is brought into the picture. The maximum effect of the law may be the worst scenario conceivable. Other measures or amendments may be introduced in the future to soften or cushion the latitude of these powers. Until then, however, it is wise to be apprised of the possible intrusions into our basic constitutional rights, which may be endangered by our unquestioning acceptance of these laws.