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THE PDA: WAS THE PCO EVER ABOLISHED?

After the promulgation of the Padilla v. Enrile and Morales v. Enrile decisions last April in which the validity of the Presidential Commitment Order was upheld, public furor was immediate and overwhelming.

Basically, LOI 1211 and its companion Letters of Instruction concerning the PCO were denounced as patently unconstitutional on two grounds: the first was that they violated the constitutional right of the accused to bail and second, that they contravened the constitutional safeguard against arrests made without determination of probable cause made by a judge or other responsible officer.

Thus, the President issued PD 1877, repealing LOI 1211 and replacing the PCO with Preventive Detention Action (PDA). This time, the PDA had a limited duration of one year and a committee for review of detention prisoners under the PDA was authorized. Almost immediately, the protest was silenced, if but for a while. The President's move was hailed by many as a step forward in human rights. Raul S. Roco, President of the Integrated Bar of the Philippines, described it as a " historic and far-sighted endeavor to strike the sensitive balance between individual liberty and the requirements of national security." Information Minister Gregorio Cendaña called it "a milestone in the two-year existence of the New Republic because it portrayed the courage and vision of the leadership in facing the problem of public order and safety."

Basically, however, how different is the PDA from the PCO, if at all; and does it indeed strike a balance between individual liberty and national security?

On the issue of bail, LOI 1211 expressly provided that "when the release on bail of persons already under arrest by virtue of a judicial warrant would endanger public order and safety", the President could issue a PCO for the detention of persons who have committed or are about to commit national security crimes (sec 3(b), LOI 1211). By its very provisions, the law provided for another exception to the Constitutional guarantee that "all persons, except those charged with capital offenses when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties." (sec. 18, Art. 4).

PD 1877 is notably silent on the point of bail. And, unlike detention under the PCO, from which one could be ordered released only by the President (sec. 4, LOI 1211), under the PDA, the detention shall not exceed one year (sec. 3, PD 1877).

The catch, however, seems to be that the PDA is renewable. Sec 4 of the repealing law states that on the basis of the Review Committee's recommendation, the President may either order the release, further detention of the person, or the filing of an information against him. Under the PDA, then detention may be extended by the President. The Review Committee only recommends, the President decides on whether or not there should be release.

Significantly, the law states no period for the duration of the extension.

Under PD 1877, " the President may constitute a Review Committee composed of civilian and /or government lawyers . . . " Thus, the appointment of such persons who are to constitute the committee is within the President's discretion (perhaps in the same manner as the appointment of the Probe Commission for the Aquino assasination). In the long run, this may create little change from LOI 1211 which provided that the PCO shall constitute authority to keep the subject person in detention until ordered released by the President. Not only does the new law furnish a strong temptation for the President to appoint a committee who would find little difference of opinion with his judgement on the matter, it also does nothing to assuage fears and suspicions that absolutely no one may inquire into the arbitrariness of the decision, for if such committee is composed of Presidential appointees, who may be removed by the President at any time no member of the committee may act without such a "sword of Damocles" hanging over their heads.

Section 6 of PD 1877 provides that in case further detention is ordered, a periodic status report on such persons detained shall be submitted to the President with the appropriate recommendation. Apparently, this assures one that the detention shall be constantly under review. But then again, it is solely within the discretion of the President as to whether the detainees should be released. Can the Chief Executive be compelled to act according to the Committee's recommendation should it advise release?

In short, PD 1877 still denies the right to bail and, in effect, authorizes the continued detention of a person for an indefinite period. Even more, if such detainees are acquitted or have served sentence under

conviction, they may still be detained if there is evidence that they are continuing to engage in the acts for which they were detained (sec 7. PD 1877).

With respect to the requisites for a warrant of arrest, the PCO was intended to validate a warrantless arrest and was to be issued " when resort to judicial process is not possible or expedient without endangering public safety" (sec 3 (a) , LOI 1211). Section 3 of the Bill of Rights provides that " 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 the examination under oath or affirmation of the complainant and the witnessess he may produce". The PCO was criticized as ordering arrest without such valid warrant and without any determination of probable cause by a judge or other responsible officer.

PD 1877 remedied this by providing that "the PDA shall constitute authority to arrest the subject person or persons, and to preventively detain him. . . and sequester all arms, equipment or property used or to be used in the commission of the crime or crimes." In effect, the PDA is now both a warrant of arrest and a search warrant. However, it may still be issued when resort to judicial process may endanger public order and safety, and in addition, "when in the judgment of the President of the Philippines to apply for a judicial warrant may prejudice peace and order and the safety of the state like when it may jeopardize the continued covert intelligence/counter insurgency operations of the Government, or endanger the lives of intelligence and undercover agents whose identities would be revealed by the evidence against the person or persons covered by a preventive detention action." (PD 1877, sec 2 (a) & (b).

In other words, probable cause to be determined upon examination of witnesses under oath or affirmation is again not required. The PDA may be availed of in lieu of judicial process when it has been ascertained that the person to be arrested has committed, is actually committing, or is about to commit national-security crimes, or would probably escape or commit further acts which would endanger public order and safety as well as the stability of the state before proper warrant could be obtained (sec. 2, PD 1877). How then, can the PDA operate as both a search warrant and an arrest warrant?

In addition, the probability of the revelation of the identities of undercover agents by the presentation of evidence against the person to be detained may serve as justification for arrest under a PDA without determination of probable cause (sec. 2 (b), PD 1877). Such provision

only exemplified the priorities of the State if such substantive rights can be subordinated to the secrecy of identity of government agents.

PD 1877, being connected with the suspension of the privilege of the writ of habeas corpus, still disregards, as LOI 1211 did, the constitutional provision which states that "The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, rebellion or imminent danger thereof, when the public safety requires it." (sec. 15, Art 4). One of the doctrines laid down in Lansang v Garcia (42 SCRA 448, 1971) was that, as the Constitution had provided standards for the suspension of the privilege, namely (insurrection, invasion, rebellion or imminent danger thereof, when the public safety requires it), the suspension of the privilege was subject to judicial inquiry. However, under the PDA, as with the PCO, the power of the courts to inquire into such has been done away with completely. The arbitrariness of the detention cannot be questioned by the judiciary, such action being within the powers of the President as Commander-in-Chief of the Armed Forces.

In summary, there is little difference between the PDA and the PCO. Such difference merely being on the surface of the matter, intended to appease the general public. The PDA neither restores the detainee's right to bail, nor serves as a valid warrant of arrest. Under the PDA, one may still be detained indefinitely for fear that he may commit national security crimes, and even worse, merely because it is feared that the covert intelligence operations of the government or the lives of undercover agents would be jeopardized by revelation of evidence against such persons.

The issue boils down to whether the State, like any person, may use reasonable means to defend itself. The answer is unquestionably "Yes". But the key word is 'reasonable '. And the PDA, like the PCO, fails to meet the standards of reasonability as dictated by the constitution and by conscience.