

PEOPLE OF THE PHILIPPINES, PETITIONER, VS. HON. SIMEON N. FERRER, IN HIS CAPACITY AS JUDGE OF THE COURT OF FIRST INSTANCE OF TARLAC, BRANCH I; FELICIANO CO ALIAS “LEONCIO CO” AL...

G.R. Nos. L-32613-4. April 30, 1974

Ponente: CASTRO, J.

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CASTRO, J.:

The respondents Feliciano Co and Nilo Tayag separately seek a reconsideration of our decision in this case dated December 27, 1972. The motion for reconsideration filed by Co, being a mere reiteration of arguments previously advanced, need not detain us. It is the motion filed by Tayag that requires detailed consideration.

The burden of Tayag's motion is that knowing membership alone in the Communist Party of the Philippines or in any other subversive organization cannot, consistently with the Constitution, be made the basis of criminal prosecution under the Anti-Subversion Act. He argues that such membership must be coupled with direct participation by the defendant in the illegal activities of the organization. Thus, he seeks the inclusion in the guidelines set forth in our decision of a requirement that in prosecutions under the Act the State must prove that the defendant joined or remained a member of the CPP or of the subversive organization knowing its subversive character and with specific intent to further its basic objectives as shown by direct participation in the organization's unlawful activities.

1. The respondent Tayag's submission would nullify the legislative policy embodied in the Anti-Subversion Act and frustrate prosecutions under it. On the basis of Congressional findings that the Communist Party of the Philippines is an "organized conspiracy to overthrow the Government of the Republic of the Philippines for the purpose of establishing in the Philippines a totalitarian regime x x x under the control and domination of an alien power,"[1] the Act provides for the punishment of any person who "knowingly, willfully and by overt acts affiliates himself with, becomes or remains a member of the Communist Party of the Philippines." [2]

The Act is thus a conspiracy statute. The gist is the agreement itself rather than action taken pursuant to it.[3] Obviously, to require proof of direct participation of the defendant in the substantive offenses constituting the object of the conspiracy, in addition to proof of agreement, would render ineffectual the conspiracy device in penal law. The law is primarily concerned with conduct and will not intervene as long as the actor withdraws from what he has planned to do. But where the actor acts in concert with others, the likelihood of a change of heart or of a misreading of his intention is minuscule. He is less likely to desist from the criminal enterprise where others are also involved. On the contrary, the encouragement and moral support of others in conspiracy with him fortifies his perseverance. The resulting collective action toward an antisocial end gives rise to a graver danger to society than individual action toward the same end, and justifies the intervention of the law at an earlier stage.[4]

Indeed, section 4 of the Act distinguishes one who only joins or maintains his membership in the CPP or other subversive organization, for whom the penalty provided is *arresto mayor*, from one who not only does so but as

well takes up arms against the Government, for whom the Act provides as heavier penalty, namely, prison mayor to death. The respondent Tayag's thesis would obliterate this distinction. The Court's traditional avoidance of constructions of doubtful constitutionality cannot be turned into an instrument for the evisceration of a plain legislative policy.

2. Moreover, a requirement that the prosecution must prove direct participation by the defendant in the objectives of the conspiracy would run counter to another established principle in the law - that where conspiracy is proved, the act of one is deemed to be the act of all.[5] That is why we referred to criminal conspiracy as a dragnet device for effectively dealing with the growth of organized crime. A contrary requirement would render society powerless to repress widespread criminality.

3. Indeed, as we noted in our decision, the requirement that membership in the CPP or in any other subversive organization be shown by overt acts was intended no more than to preclude the possibility that conviction may be obtained solely on the basis of incriminating evidence rather than positive acts of the defendant. As Senator Cea explained in the course of the deliberations on the bill: "I have inserted the words 'overt acts' because we are punishing membership in the Communist Party. I would like that membership to be proved by overt acts, by positive acts, because it may happen that one's name may appear in the list of membership." [6]

Thus, where one is shown to have taken an oath of membership or signed affiliation papers in a subversive organization, knowing its illegal purposes, the requirement of the law is satisfied. Of course where, as it often happens, it cannot be shown that the defendant explicitly or expressly entered into the conspiracy, his agreement may be inferred from circumstances demonstrating concert of action. It is then that the defendant's participation in the illegal activities of the organization would constitute proof of his specific intent.

4. But the overt-act requirement may also be satisfied by proof of non-criminal and relatively minor acts.[7] Such acts may consist in signing membership papers, paying dues, attending meetings, and the like, which, although in themselves may not be illegal, are nevertheless acts in pursuance of the objectives of the conspiracy. As the U.S. Supreme Court explained in *Yates vs. United States*: [8]

"... It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. Nor, indeed, need such an act, taken by itself, even be criminal in character. The function of the overt act in a conspiracy prosecution is simply to manifest "that the conspiracy is at work," and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."

Indeed, the rationale of the Anti-Subversion Act, like that of the Smith Act involved in *Yates*, is that the existence of the conspiracy by itself creates the danger to national security. As held in *Dennis vs. United States*, [9] "the formation x x x of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders ... felt that the time has come for action, x x x disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained because it comprises only the preparation. It is the existence of the conspiracy which creates the danger.... If the ingredients are present, we cannot bind the Government to wait until the catalyst is added." In the case of the CPP and other subversive groups, the danger posed is deemed in the Anti-Subversion Act to be so "clear, present and grave" as to warrant the prosecution of those engaged in the conspiracy.

5. Nor is there a constitutional compulsion that the overt acts of conspiracy be evidenced by direct participation of the defendant in the illegal objectives of the organization. In the first place, there is no reason why one who actively and knowingly works in the ranks of the organization, intending to contribute to the success of its specific illegal activities, should be any more immune from prosecution than one to whom the organization has assigned

or entrusted the task of carrying out the substantive criminal acts. In *United States vs. Vergara*[10] for instance, it was shown that the defendants organized the Katipunan, a society for the purpose of overthrowing the Government by force, and that in pursuance of the conspiracy the defendants solicited public contributions. No overt acts of insurrection were shown, but the defendants were nevertheless held guilty of conspiracy to overthrow the Government.

In the second place, the requirement of proof of specific intent precisely limits the operation of the statute only to illegal conduct. There need be no apprehension that unless direct participation by the defendant in the illegal activities of the association is shown, the statute may sweep unnecessarily broadly into protected activities, as the association may have both legal and illegal aims. In the case of the Communist Party of the Philippines, this apprehension is without basis, for the very nature of that organization as a conspiracy for the violent overthrow of the Government defines the character of its objectives.

Indeed, as was held in *Scales vs. United States*,[11] in answer to a similar contention.

"If it is said that the mere existence of such an enactment tends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability, the answer surely is that the statute provides that a defendant must be proven to have knowledge of the proscribed advocacy before he may be convicted. It is, of course, true that quasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its purpose, so that all knowing association with the conspiracy is a proper subject for criminal proscription as far as the First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be real danger that legitimate political expression or association would be impaired but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent.' *Schenk vs. United States*, 249 U.S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims-of-the-organization]-by resort to violence.' *Noto vs. United States* [367 U.S. at 299]. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute; he lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.' Such a person may be foolish, deluded or perhaps merely optimistic, but he is not by this statute made a criminal."

ACCORDINGLY, the two motions for reconsideration are denied. Our decision of December 27, 1972 is hereby declared final and executory.

Makalintal, C.J., Zaldivar, Barredo, Esguerra, Fernandez, and Aquino, JJ., concur.

Makasias, Antonio, and Muñoz Palma, JJ., took no part.

[1] Republic Act No. 1700, sec. 2 and preamble.

[2] *Id.* sec. 4.

[3] Compare article 8 of the Revised Penal Code which provides in pertinent parts that "Conspiracy and proposal to commit felony are punishable only in the cases in which the law specially provides a penalty therefor. A conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. . . ."

[4] See, generally, *Developments in the Law - Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

[5] E.g., *People vs. Peralta*, G.R. No. L-49069, Oct. 29, 1968, 25 SCRA 759.

[6] Senate Cong. Rec., May 22, 1957, p. 1900.

[7] *Developments in the Law - Criminal Conspiracy*, supra note 4, at 946; Emerson, *The System of Freedom of Expression* 409 (1969).

[8] 354 U.S. 298 (1957).

[9] 341 U.S. 494 (1951).

[10] 3 Phil. 491 (1904).

[11] 367 U.S. 203 (1961).

DISSENTING OPINION

FERNANDO, J.:

My dissent from the well-written opinion of Justice Castro in the decision promulgated on December 27, 1972 opened with this paragraph: "It is with regret that I find myself unable to join the rest of my brethren in the decision reached upholding the validity of the Anti-Subversion Act. It is to be admitted that the learned and scholarly opinion of Justice Castro has the impress of conscientious and painstaking scrutiny of the Constitutional issues raised. What is more, the stress in the concluding portion thereof on the basic guidelines that will assure in the trial of those prosecuted under such Act respect for their constitutional rights is to be commended. Nonetheless, my own reading of the decisions cited, interpreting the bill of attainder clause coupled with the fears, perhaps induced by a too-latitudinarian construction of the guarantees of freedom of belief and expression as well as freedom of association as to impermissible inroads to which they may be exposed, compels a different conclusion."^[1]

It is beyond cavil that the present resolution bears the imprint of lucidity and comprehensiveness, characteristic of the opinions of Justice Castro. I regret however that the basic premise that precluded me from yielding concurrence to the decision is once again a bar to my conformity. There is no need then to repeat what was said by me before. It only remains to be added that the stress on the conspiracy principle in the resolution, to be sure in conformity with sound and settled concepts, does give rise to misgivings as to its too broad a scope. That is why I would like to express briefly my doubts on the matter.

For the purposes of this dissent, I adopt the characterization of Justice Jackson that conspiracy has in it the elements of the "elastic, sprawling and pervasive" resulting at times in "a serious threat to fairness in our administration of justice."^[2] His concurring opinion in *Krulewitch* continues: "The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent."^[3] Its relationship to political offenses was discussed by him in these terms: "The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the coup d' etat, the putsch, the revolution, and seizures of power in modern

times, as they have in all history." [4]

Along the same line are the comments of Professor Johnson on the dangers of conspiracy to freedom of thought and expression. Thus: "Prosecutions of political dissidents, including labor organizers, Communist Party leaders, and contemporary radicals, typically have been conspiracy prosecutions. The law of conspiracy is intended, after all, to make it easier to impose criminal punishment on members of groups that plot forbidden activity. Insofar as it accomplishes this end, it unavoidably increases the likelihood that persons will be punished for what they say rather than for what they do, or for associating with others who are found culpable. Critics who are alarmed at the resulting threat to freedom of speech and freedom of association typically have proposed new constitutional doctrines derived from the first amendment to curtail the use of conspiracy charges in cases having some 'political' element." [5] For Professor Johnson, it does not suffice "to reform conspiracy legislatively by removing its most widely deplored overextensions, or to reform it judicially by engrafting new doctrines derived from the first amendment [freedom of speech and of the press]." [6] He would expunge it from the corpus of the law. "The law of criminal conspiracy is not basically sound. It should be abolished, not reformed." [7]

Let there be no misunderstanding. I am not prepared to go that far. It does occur to me, though, that with due recognition of the persuasive character of the resolution from the standpoint of defense against the dangers of subversion as well as the desire of my -brethren- to give the utmost protection to constitutional rights, under current conditions with the serious problems posed, still I find it difficult to dispel my grave doubts as to Republic Act No. 1700 suffering from the corrosion of constitutional infirmity, as set forth in some detail in my dissent.

Regretfully, I am compelled to do so again.

[1] Fernando, J., dissenting.

[2] Jackson. con., in *Krulewitch vs. United States*, 336 US 440, 446 (1949).

[3] *Ibid*, 446-447.

[4] *Ibid*, 448.

[5] Johnson, *The Unnecessary Crime of Conspiracy*, 61 *California Law Rev.* 1137, 1139 (1973)

[6] *Ibid*.

[7] *Ibid*.

CONCURRING AND DISSENTING OPINION

TEEHANKEE, J.:

I concur with the resolution penned for the Court by Mr. Justice Castro insofar as it denies the motion for reconsideration filed by respondent Feliciano Co which on the whole merely reiterates the same arguments previously advanced and dealt with in the Court's decision of December 27, 1972 remanding the case to the court below for trial on the merits.

I dissent from the resolution insofar as it denies the motion for reconsideration of respondent Nilo Tayag praying in essence not for reconsideration but for a clarification of the guidelines on page 32 of the Court's decision (which really forms an integral part of the judgment) so as to incorporate therein the Court's own rationale expressed on pages 15-16 of its decision that the Anti-Subversion Act is not to be construed "as punishing mere

membership devoid of any specific intent to further the unlawful goals of the [Communist] Party" since section 4 thereof "requires that membership, to be unlawful, must be shown to have been acquired 'knowingly, willfully and by overt acts.' The ingredient of specific intent to pursue the unlawful goals of the Party must be shown by 'overt acts.' This constitutes an element of 'membership' distinct from the ingredient of guilty knowledge. The former requires proof of direct participation in the organization's unlawful activities, while the latter requires proof of mere adherence to the organization's illegal objectives." [1]

1. The writer concurred with the Court's decision of December 27, 1972 on the basis of its ratio decidendi rejecting the principal challenge against the validity of the Anti-Subversion Act on grounds of its amounting to a bill of attainder proscribed by Article III, section 1 (11) of the 1935 Constitution [2]

The decision thus defined and stressed that "a bill of attainder is a legislative act which inflicts punishment without trial. Its essence is the substitution of a legislative for judicial determination of guilt. The constitutional ban against bills of attainder serves to implement the principle of separation of powers by confining legislatures to rule-making and thereby forestalling legislative usurpation of the judicial function. History in perspective, bills of attainder were employed to suppress unpopular causes and political minorities, and it is against this evil that the constitutional prohibition is directed. The singling out of a definite class, the imposition of a burden on it, and a legislative intent, suffice to stigmatize a statute as a bill of attainder." [3]

The decision then summarized the reasons and considerations which impelled respondent court to declare invalid the Anti-Subversion Act as a bill of attainder as follows: "(I)n the case at bar, the Anti-Subversion Act was condemned by the court a quo as a bill of attainder because it 'tars and feathers' the Communist Party of the Philippines as a 'continuing menace to the freedom and security of the country; its existence, a 'clear, present and grave danger to the security of the Philippines.' " By means of the Act, the trial court said, Congress usurped 'the powers of the judge,' and assumed 'judicial magistracy by pronouncing the guilt of the CPP without any of the forms or safeguards of judicial trial.' Finally, according to the trial court, 'if the only issue [to be determined] is whether or not the accused is a knowing and voluntary member, the law is still a bill of attainder because it has expressly created a presumption of organizational guilt which the accused can never hope to overthrow.'" [4]

The decision rejected respondent court's ratiocination on the following principal grounds:

"1. When the Act is viewed in its actual operation, it will be seen that it does not specify the Communist Party of the Philippines or the members thereof for the purpose of punishment. What it does is simply to declare the Party to be an organized conspiracy for the overthrow of the Government for the purposes of the prohibition, stated in section 4, against membership in the outlawed organization. The term 'Communist Party of the Philippines' is used solely for definitional purposes. In fact the Act applies not only to the Communist Party of the Philippines but also to 'any other organization having the same purpose and their successors.' Its focus is not on individuals but on conduct." [5]

xxx xxx xxx

"Indeed, were the Anti-Subversion Act a bill of attainder, it would be totally unnecessary to charge Communists in court, as the law alone, without more, would suffice to secure their punishment. But the undeniable fact is that their guilt still has to be judicially established. The Government has yet to prove at the trial that the accused joined the Party knowingly, willfully and by overt acts, and that they joined the Party, knowing its subversive character and with specific intent to further its basic objective, i. e., to overthrow the existing Government by force, deceit, and other illegal means and place the country under the control and domination of a foreign power.

"As to the claim that under the statute organizational guilt is nonetheless imputed despite the requirement of proof of knowing membership in the Party, suffice it to say that that is precisely the nature of conspiracy,

which has been referred to as a 'dragnet device' whereby all who participate in the criminal covenant are liable. The contention would be correct if the statute were construed as punishing mere membership devoid of any specific intent to further the unlawful goals of the Party. But the statute specifically requires that membership must be knowing^[6] or active, with specific intent to further the illegal objectives of the Party. That is what section 4 means when it requires that membership, to be unlawful, must be shown to have been acquired 'knowingly, willfully and by overt acts.' The ingredient of specific intent to pursue the unlawful goals of the Party must be shown by 'overt acts.' This constitutes an element of 'membership' distinct from the ingredient of guilty knowledge. The former requires proof of direct participation in the organization's unlawful activities, while the latter requires proof of mere adherence to the organization's illegal objectives."^[7]

Respondent Tayag's motion should accordingly be duly granted as a necessary and logical consequence when it prays for the clarification and spelling out of the elements of the crime of joining the Communist Party of the Philippines or any other subversive association (as defined in the Act) "knowingly, willfully and by overt acts" by adding after said phrase the following clarificatory or supplemental phrase:

"that is, knowing its subversive character and with specific intent to further its basic (subversive) objective by proof of direct participation in the organization's unlawful activities."

It will be readily noted that the proposed additional phrase simply projects the very thrust of the Court's decision that "(T)he ingredient of specific intent to pursue the unlawful goals of the Party must be shown by 'overt acts' which is "an element of 'membership' distinct from the ingredient of guilty knowledge" and "requires proof of direct participation in the organization's unlawful activities."^[8]

The Court's conclusion and guidelines on page 32 of the decision as thus amended and supplemented, would read as follows:

"In conclusion, even as we uphold the validity of the Anti-Subversion Act, we cannot overemphasize the need for prudence and circumspection in its enforcement, operating as it does in the sensitive area of freedom of expression and belief. Accordingly, we set the following basic guidelines to be observed in any prosecution under the Act. The Government, in addition to proving such circumstances as may affect liability, must establish the following elements of the crime of joining the Communist Party of the Philippines or any other subversive association:

"(1) In the case of subversive organizations other than the Communist Party of the Philippines, (a) that the purpose of the organization is to overthrow the present Government of the Philippines and to establish in this country a totalitarian regime under the domination of a foreign power; (b) that the accused joined such organization; and (c) that he did so knowingly, willfully and by overt acts, that is, knowing its subversive character and with specific intent to further its basic (subversive) objective by proof of direct participation in the organization's unlawful activities; and

"(2) In the case of the Communist Party of the Philippines, (a) that the CPP continues to pursue the objectives which led Congress in 1957 to declare it to be an organized conspiracy for the overthrow of the Government by illegal means for the purpose of placing the country under the control of a foreign power; (b) that the accused joined the CPP; and (c) that he did so willfully, knowingly and by overt acts, that is, knowing its subversive character and with specific intent to further its basic (subversive) objective by proof of direct participation in the organization's unlawful activities."

(added phrase underscored)

I am constrained, therefore, to dissent from the resolution when it declines to incorporate into its guidelines, as above proposed to be amended, the very rationale of the decision in saving the Act from the fatal stigma of a bill of attainder that it is not to be construed "as punishing mere membership devoid of any specific intent to further

the unlawful goals of the Party" but that "the statute specifically requires that membership, to be unlawful, must be shown to have been acquired 'knowingly, willfully and by overt acts' " - which distinctive element "requires proof of direct participation in the organization's unlawful activities."

2. Stated in another way, Section 4 of the Anti-Subversion Act is the key section of the Act which together with section 2 defines the elements of the offense made a crime thereunder, as follows:

"SEC. 2. The Congress hereby declares the Communist Party of the Philippines to be an organized conspiracy to overthrow the Government of the Republic of the Philippines for the purpose of establishing in the Philippines a totalitarian regime and place the Government under the control and domination of an alien power. The said party and any other organization having the same purpose and their successors are hereby declared illegal and outlawed."

xxx xxx xxx

"SEC. 4. After the approval of this Act, whoever knowingly, willfully and by overt acts affiliates himself with, becomes or remains a member of the Communist Party of the Philippines and/or; its successor or of any subversive association as defined in Section 2 hereof shall be punished by the penalty of arresto mayor and shall be disqualified permanently from holding any public office, appointive and elective, and from exercising the right to vote; in case of a second conviction, the principal penalty shall be prision correccional, and in all subsequent convictions the penalty of prision mayor shall be imposed; and any alien convicted under this Act shall be deported immediately after he shall have served the sentence imposed upon him:

Provided, That if such member is an officer or a ranking leader of the Communist Party of the Philippines or of any subversive association as defined in Section 2 hereof, or if such member takes up arms against the Government, he shall be punished by prision mayor to death with all the accessory penalties provided therefor in the Revised Penal Code:

And provided, finally, That one who conspires with any other person to overthrow the Government of the Republic of the Philippines or the government of any of its political subdivisions by force, violence, deceit, subversion or other illegal means, for the purpose of placing such Government or political subdivision under the control and domination of any alien power, shall be punished by prision correccional to prision mayor with all the accessory penalties provided therefor in the same Code."[9]

Thus, whereas apparently section 4 of the Act would make criminal mere membership in the Communist Party of the Philippines regardless of the lack of criminal intent and activity on the part of an accused member, the Court in its decision rejected such a concept of guilt by association and quite emphatically stressed that

"Their [accused members'] guilt still has to be judicially established.

"The Government has yet to prove at the trial that the accused joined the Party knowingly, willfully and by overt acts,

"and that they joined the Party knowing its subversive character and with specific intent to further its basic [subversive] objective, i.e. to overthrow the existing Government by force, deceit and other illegal means and place the country under the control and domination of a foreign power.

"The statute is [not to be] construed as punishing mere membership devoid of any specific intent to further the unlawful goals of the Party.

"But the statute specifically requires that membership must be knowing or active, with specific intent to further the illegal objectives of the Party.

"That is what section 4 means when it requires that membership to be unlawful, must be shown to have been acquired 'knowingly, willfully and by overt acts.

"The ingredient of specific intent to pursue the unlawful goals of the Party must be shown by overt acts - [which] requires proof of direct participation in the organization's unlawful activities." [10]

In addition, the Court's decision specified in its guideline [11] that notwithstanding the outlawing of the Communist Party of the Philippines in section 2 of the Act, the prosecution must establish "that the CPP continues to pursue the objectives which led Congress in 1957 to declare it to be an organized conspiracy for the overthrow of the Government by illegal means for the purpose of placing the country under the control of a foreign power" and required that the same illegal objectives be established in the case of subversive organizations other than the Communist Party of the Philippines.

The Court's decision thus hewed in effect to the narrow path of bare majority decision of the U.S. Supreme Court in *Communist Party vs. Subversive Activities Control Board* [12], of not outlawing or inflicting legislative punishment on membership in the Communist Party as such but requiring registration for certain prescribed activities subject to judicial review wherein "present activity constitutes an operative element to which the statute attaches legal consequences", as follows:

"The Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. x x x The Subversive Activities Control Act is not of that kind. It requires the registration only of organizations which, after the date of the Act, are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence. Present activity constitutes an operative element to which the statute attaches legal consequences, not merely a point of reference for the ascertainment of particular persons ineluctably designated by the legislature." [13]

The Court's decision thus adopted the prevailing view of the U.S. Supreme Court that to escape the fatal stigma of a bill of attainder and vagueness amounting to denial of due process of law, membership in the Communist Party or other subversive organization (the unlawfulness of whose objectives must be judicially established by the prosecution at the trial) must be "active" and not merely a nominal, passive, inactive or purely technical [membership]. [14]

The Court thus rejected in the writer's view after emphasizing "the need for prudence and circumspection in [the Act's] enforcement, operating as it does in the sensitive area of freedom of expression and belief" the oppressive concept of a blanket pronouncement of guilt by mere association or membership, having in mind what was aptly said in one case that "(T)hose who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization ... It rests on the doctrine of 'guilt by association which has no place here . . . Such a law cannot stand." [15]

By granting respondent Tayag's motion for clarification and spelling out in the guidelines on page 32 of the decision the Court's rationale as discussed hereinabove that the prosecution bears the burden of establishing the "elements of the crime of joining the Communist Party of the Philippines or any other subversive association" by proving that:

a) their purpose is or continues to be the overthrow of the Government by illegal means for the purpose of placing the country under the control of a foreign power;

b) the accused joined the Party or subversive association; and

c) he so joined the Party or subversive association "knowingly, willfully and by overt acts," as required by section 4 of the Act, i. e. knowing its subversive character, willfully with specific intent to further its subversive objectives and by overt acts as an active member by direct participation in the organization's unlawful activities, the Court would be but reiterating and clarifying its guidelines geared against the Act being stigmatized as a bill of attainder that suffers besides from the fatal defects of vagueness. [16]

3. I dissent further from the majority resolution's pronouncement that the Anti Subversive Act is a "conspiracy statute. The gist is the agreement itself rather than action taken pursuant to it "[17] which leads it to the conclusion that "non-criminal acts" such as "signing membership papers, paying dues, attending meetings and the like, which although in themselves may not be illegal, are nevertheless acts in pursuance of the objectives- in the conspiracy" - and that proof of such non-criminal acts may be given to satisfy the overt act requirement of the Act.[18]

This would constrict now the text and significance of the guidelines given on page 32 of the decision. Furthermore, it reads the "conspiracy statute" into the membership provision of section 4 of the Act when the two are completely separate and distinct.

As may be seen from the text of section 4 of the Act, supra, as construed in the Court's decision (at page 15-16) the first part thereof penalizes "knowing or active membership with specific intent to further the illegal objectives of the Party [or other subversive organization]" after the approval of the Act on June 20, 1957,[19] "knowingly, willfully and by overt acts." The decision specifically noted that "(T)he ingredient of the specific intent to pursue the unlawful goals of the Party x x x requires proof of direct participation in the organization's unlawful activities." The Act punishes a first conviction with arresto mayor and permanent disqualification from public office and suffrage, a second conviction with prision correccional and all subsequent convictions with prision mayor (which is the same penalty imposed for rebellion (under Article 135 of the Revised Penal Code).

Such construction of the proscribed membership is but consistent with the pronouncement in the Court's resolution (at page 5) that "the requirement of proof of specific intent precisely limits the operation of the statute only to illegal conduct" and to "direct participation by the defendant in the illegal activities of the [subversive] association" and the holding in *Scales vs. United States*[20] approvingly quoted therein that "the clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend(s) to accomplish [the aims of the organization] by resort to violence.' *Noto vs. United States* [367 U.S. at 299]. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute; he lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.' Such a person may be foolish, deluded or perhaps merely optimistic, but he is not by this statute made a criminal."

The first proviso of the Act however imposes the principal penalty of prision mayor to death upon "member [who is an officer or ranking leader of the Communist Party of the Philippines or of any subversive association or if such member takes up arms against the Government." This clearly draws the line that the unlawful activities which an ordinary member must be shown to have participated in to evidence specific intent to further the unlawful goals of the subversive organization in proof of his active (as against mere nominal, inactive or passive) membership, would be those which fall short of taking up arms against the Government.

The second proviso of the Act constitutes the 'conspiracy statute' and furnishes the "dragnet device." But it will be noted from the very text that the proscribed criminal conspiracy does not refer to membership. Rather it provides that one (be he a member or not of the Party or of any other subversive organization) who conspires with any other person to overthrow the Government or any of its political subdivisions by force, violence, deceit,

subversion or other illegal means for the purpose of placing such Government or political subdivision under the control and domination of any alien power shall be meted the penalty of prison correccional to prison mayor.

4. The distinction is best illustrated by the case of *Carino vs. People*[21] where this Court set aside the petitioner-accused's conviction by the Court of Appeals and by the Court of first instance as an accomplice in the crime of rebellion with murders, arsons, robberies and kidnappings simply because he furnished cigarettes and food supplies to a famous Huk and performed certain other acts, when it was not shown that he was a member of the Hukbalahap organization nor could the acts be deemed per se to carry or prove any criminal intent of helping the Huks in committing the crime of insurrection or rebellion nor was he shown to have been engaged in any conspiracy or proposal to commit rebellion. In acquitting the accused, the late Justice Alejo Labrador speaking for a unanimous Court held that:

"In the case at bar the appellant did not take up arms against the Government. Neither was he a member of the Hukbalahap organization. The Court of Appeals also found that he did not openly take part in the commission of the crime above defined by any other act without which said crime would not have been committed.

xxx xxx xxx

We cannot agree to the above conclusion of the Court of Appeals that the above-mentioned acts of appellant constitute acts of cooperation in the execution of the act of overthrowing the government. If appellant's acts may be considered an indirect help or aid in the rebellion, which we positively doubt, the same cannot constitute previous or simultaneous acts of uprising or rebellion. In the crime of treason any act of giving comfort or moral aid may be criminal, but such is not the case with rebellion or insurrection where the Code expressly declares that there must be a public uprising and the taking up of arms in rebellion or insurrection. The act of sending or furnishing cigarettes and food supplies to a famous Huk does not prove intention to help him in committing rebellion or insurrection. Neither is the act of having \$6,000 changed to Philippine money or in helping Huks to open accounts, by themselves show an intent or desire to participate or help in an uprising or rebellion. Appellant's work was as a public relations officer of the bank of which he was an employee, and the work above indicated performed by him was a part of his functions as an employee of the bank. These acts by themselves do not and cannot carry or prove any criminal intent of helping the Huks in committing the crime of insurrection or rebellion. The law is to the effect that good faith is to be presumed. No presumption of the existence of a criminal intent can arise from the above acts which are in themselves legitimate and legal. Said acts are by law presumed to be innocent acts while the opposite has not been proved.

"But granting, for the sake of argument, that appellant had the criminal intent of aiding the communists in their unlawful designs to overthrow the Government, the assistance thus extended by him may not be considered efficacious enough to help in the successful prosecution of the crime of insurrection or rebellion so as to make him an accomplice therein. (*People vs. Tamayo*, supra.) We, therefore, find that the supposed acts found by the Court of Appeals to have been committed by the appellant do not necessarily and legitimately lead to the conclusion that he performed said acts precisely with the criminal intent of helping in the execution or the carrying out of the rebellion or insurrection.

"For the foregoing considerations, we declare that the guilt of appellant as an accomplice in the crime of rebellion or insurrection as charged in the information has not been proved beyond reasonable doubt, his supposed acts not having been shown to be acts of direct cooperation in the execution of the crime nor have they been induced by a criminal intent nor were they shown to be sufficiently efficacious to make appellant guilty as accomplice in the crime charged."

5. Finally, it is submitted that the original guidelines of the decision (at page 32) if clarified as prayed for by respondent Tayag rather than constricted by the present resolution would serve but to reiterate the rationale of the decision of December 27, 1972 and would be in consonance with the underlying doctrine of *Carino vs People*,

supra, against presumption of the existence of criminal intent. It would furthermore give substance and meaning to the safeguards carefully provided against unjust accusation and harassment in the Act, viz, no prosecution under the Act unless there has first been a proper preliminary investigation with notice whenever it is possible to give the same to the party concerned, who shall have the right to be represented by counsel, to testify to have compulsory process for obtaining witnesses in his favor, and to cross-examine witnesses against him." with such investigation to be conducted by the proper court of first instance where the offense is defined and penalized by prison mayor to death;[22] the imposition of prison correccional against any person who knowingly furnishes false evidence in any prosecution under the Act[23] the prohibition of any conviction for an offense penalized with prison mayor to death under the Act except "on the testimony of at least two witnesses to the same overt act or on confession of the accused in open court;"[24] and the injunction that "Nothing in this Act shall be interpreted as a restriction to freedom of thought, of assembly and of association for purposes not contrary to law as guaranteed by the Constitution." [25]

[1] Pages 15-16, decision; emphasis supplied.

[2] At pages 9-23, decision. The rest of the decision dealt with what in 11w writer's view were obiter dicta and lesser challenges against the Act on grounds of denial of due process (pp. 23-28) denial of freedom of expression (pp. 29-30) and its embracing more than one subject not expressed in the title of the bill (pp. 30-32).

[3] At pages 111-11, decision; emphasis supplied.

[4] At pages 11-12, decision; Idem.

[5] At page 12, decision; idem.

[6] Emphasis copied.

[7] At pages 15-16, decision; emphasis supplied.

[8] At page 16, decision.

[9] Paragraphing and emphasis supplied

[10] Pages 15-16, decision; paragraphing and emphasis supplied: supra.

[11] Supra, pp. 4-5.

[12] 367 U.S. 1 (1961)

[13] Emphasis supplied.

[14] See *Yates vs. U.S.*, 354 U.S. 298 (1957); *Scales vs U.S.* 367 U.S. 203 (1061); *Elfbrandt vs. Russel*, 384 U.S. 11 (1966); *Keyishian vs Bd. of Regenis*, 3115 U.S. 589 (1967).

[15] *Elfbrandt vs Russel* 384 U.S. 11 16- 17 emphasis supplied

[16] "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 of law." *U.S. vs. National Dairy Products* 372 U.S. 29 (1963).

[17] At page 2.

[18] At page 3.

[19] It should be noted that the decision (at page 33) expressly "refrain(ed) from making any pronouncement as to the crime of remaining a member of the Communist Party of the Philippines or of any other subversive association" and the challenge against the *ex post facto* nature of the statutory provision, leaving the matter to future determination.

[20] 367 U.S. 203 (1961) at pages 5-6, *resolution*: emphasis supplied

[21] 7 SCRA 900; 905-906 (1963); *emphasis supplied*.

[22] Section 5, Anti-Subversion Act. Rep. Act 1700.

[23] Section 6, *idem*.

[24] Section 7, *idem*

[25] Section 9, *Idem*.

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