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ENFORCED DISAPPEARANCE

When the President of the Republic signed Presidential Proclamation No 216 declaring a state of Martial Law in the whole island of Mindanao, many people expressed trepidation anticipating the proliferation of abuses by people in uniform. Such anxiety harks back to the old days of martial rule under a former regime in the not so distant past.

Those opposed to the declaration say that the proclamation opens again the floodgates for violations of human rights such as enforced disappearances and use of secret detention cells. Are these anxieties valid? Let us look at the rule of law.

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What is the legal basis for the declaration of martial law in Mindanao and how does it differ from the martial law under the Marcos regime?

Basically, Proclamation No 216 is anchored in Section 18, Article VII of the 1987 Philippine Constitution. As such, the provision enshrined therein embodies the limitations of the presidential proclamation, to wit:

“A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of habeas corpus.

The suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion.”

On the other hand, the martial law declared by former President Marcos was based on the 1935 Constitution. By declaring martial law, Marcos suspended the writ of habeas corpus and also the [1935 Constitution](#), dissolved [Congress](#) and padlocked the doors to the *Batasang Pambansa*, thereby assuming both legislative and executive powers.

What are the safeguards against recurrence of incidents/cases of enforced disappearances or use of secret detention facilities?

The laws prohibiting the said acts are still in full effect. **RA No 10353**, otherwise known as Anti-Enforced or Involuntary Disappearance Act of 2012 declares as a matter of state policy that *“The State values the dignity of every human person and guarantees full respect for human rights for which highest priority shall be given to the enactment of measures for the enhancement of the right of all people to human dignity, the **prohibition against secret detention places, solitary confinement, incommunicado, or other similar forms of detention, the provision for penal and civil sanctions for such violations, and compensation and rehabilitation for the victims and their families, particularly with respect to the use of torture, force, violence, threat, intimidation or any other means which vitiate the free will of persons abducted, arrested, detained, disappeared or otherwise removed from the effective protection of the law.**”* (Sec 2, RA No 10353)



Moreover, RA No 9745, or the Anti-torture Law likewise provides that it is the declared aim of the State *“to ensure that secret detention places, solitary, incommunicado or other similar forms of detention, where torture may be carried out with impunity, are prohibited”* (Sec 2, RA No 9745)

Is the right against enforced or involuntary disappearance non-derogable?

Yes, the right against enforced or involuntary disappearance and the fundamental safeguards for its prevention shall not be suspended under any circumstance including political instability, threat of war, state of war or other public emergencies. (Sec 4, RA No. 10353)



What is considered as enforced or involuntary disappearance?

This refers to the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law. (Sec 3, RA No. 10353)

Who are considered as agents of the State?

Any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the government,

or shall perform in the government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class. (Sec 3, RA No. 10353)



May State agents effect warrantless arrest in view of the suspension of the privilege of the writ of habeas corpus?

Yes. However, "the suspension of the writ does not give imprimatur to warrantless arrest in violation of the Constitution." (**Aberca v Ver, 243 Phil 755, 1988**)

In so doing, State agents must strictly observe the provisions under Section 5, Rule 113 of the Rules of Court and other settled jurisprudence regarding the matter.

Who may be liable under the law?

Sec 14 of RA No. 10353 clearly states "**The immediate commanding officer of the unit concerned of the AFP or the immediate senior official of the PNP and other law enforcement agencies shall be held liable as a principal to the crime of enforced or involuntary disappearance for acts committed by him or her that shall have led, assisted, abetted or allowed, whether directly or indirectly, the commission thereof by his or her subordinates. If such commanding officer has knowledge**

of or, owing to the circumstances at the time, should have known that an enforced or involuntary disappearance is being committed, or has been committed by subordinates or by others within the officer's area of responsibility and, despite such knowledge, did not take preventive or coercive action either before, during or immediately after its commission, when he or she has the authority to prevent or investigate allegations of enforced or involuntary disappearance but failed to prevent or investigate such allegations, whether deliberately or due to negligence, shall also be held liable as principal."

Will this be the only liability of PNP personnel or other law enforcement agencies?

No. This shall be considered as an independent liability which means that the criminal liability of the offender under this Act shall be independent of or without prejudice to the prosecution and conviction of the said offender for any violation of Republic Act No. 7438, otherwise known as "An Act Defining Certain Rights of Person Arrested, Detained or Under Custodial Investigation as well as the Duties of the Arresting, Detaining, and Investigating Officers, and Providing Penalties for Violations Thereof"; Republic Act No. 9745, otherwise known as "An Act Penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and Prescribing Penalties Therefor"; and applicable provisions of the Revised Penal Code.

What are the State responsibilities insofar as enforced disappearances are concerned?

To the extent that the practice of 'disappearances' may amount to torture or arbitrary deprivation of life, the consequence of establishing state responsibility for such acts would be the same as if the government has committed acts of torture or has inflicted extra-legal executions.

The **UN Declaration on Disappearances** establishes a whole number of duties for the purpose of preventing and taking action in response to disappearances:

1. The prompt, thorough and impartial investigation by a competent and independent State authority
2. The prosecution of alleged perpetrators
3. Compensation for the family
4. Non-expulsion to a country where there are substantial grounds to believe that a person would be in danger of enforced disappearance.

Those obligations are also contained in the **Protocol Additional to the Geneva Conventions of 12 August 1949**, and relating to **the Protection of Victims of International Armed Conflicts (Protocol I)**, 8 June 1977.

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