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MILITARY TRIBUNALS AND TRIAL RIGHTS OF ACCUSED

DANIEL C. GUTIERREZ*

A Question for Years to Come

On January 17, 1981 President Marcos issued Proclamation No. 2045 declaring the termination of the state of martial law throughout the Philippines.

The essence and nature of martial law will occupy political scientists and constitutional lawyers for many years to come. Among the more controversial aspects of the martial law experience in the Philippines is the jurisdiction of military tribunals over civilian offenders at a time when civil courts are functioning normally and freely with no impediments or restraints arising from the factual situation.[1]

The Classic Theories

The trial by military courts of civilian offenders in areas where civil courts are open and functioning conflicts with the classic or traditional theories of martial law. In fact, the classic formulations of martial law require that the emergence must be such that there has to be a supersession of civil courts by military tribunals. Only then may martial law be validly proclaimed.[2]

The Open Court Theory

The United States Supreme Court stated in *Ex-parte Milligan*[3] that "martial law can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction." Under the "open courts" theory, military tribunals may try civilians for common offenses only during foreign invasion or civil war when the courts are actually closed and there is necessity to furnish a substitute for the civil authority thus overthrown,

* Vice-Chairman, Editorial Board, Philippine Law Journal

[1] A full discussion on the consequences of the lifting of martial law is found in Tan, *The Philippines After the Lifting of Martial Law: A Lingering Authoritarianism*, 55 PHIL. L.J. 418 (1980); Carag, *The Legal Implications of the Lifting of Martial Law*, 55 PHIL. L.J. 449 (1980); and Pangalangan, *The 1981 Amendments: The Presidency in the Wake of A Constitutional Mutation*, 56 PHIL. L.J. 225 (1981).

[2] Consult FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 295-317 (1977), and FERNANDEZ, PHILIPPINE CONSTITUTIONAL LAW VOL. I 33-156 (1977). See also Sanidad, *Facade Democracy: Martial Law and the Myth of Democracy* 54 PHIL. L.J. 313 (1979).

[3] 18 L. Ed. 281 (1866).

to preserve the safety of the army and society.[4] Similar rulings were made in *Sterling v. Constantin*[5] and *Bean v. Beckwith*.[6]

In *Duncan v. Kahanomoku*[7] the phrase "martial law" as found in the Organic Act of Hawaii was interpreted to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Hawaiian Islands against actual or threatened rebellion or invasion but not the supplanting of courts by military tribunals.

Consistently Strict Interpretation

The precedents found in American law from which our martial law provision was lifted are consistent.

Military trial of civilians is an extraordinary jurisdiction which should not be expanded at the expense of the Bill of Rights.[8]

Where martial law is necessary, the jurisdiction of military commissions is grudgingly tolerated but always restricted. It is never encouraged.[9]

The power of the military under martial law over persons not in the military service is limited by the reasonable necessities of the occasion and this is true even where the term "martial law" is used in its strict sense.[10] The same rule applies where a modified form of martial law is declared in cases of internal insurrection or disorder which is beyond the power of the civil authorities to quell.[11]

No Open Courts Theory in the Philippines

We do not follow the "open courts" theory of martial law. Nor its consequences.[12]

On September 27, 1972, shortly after proclaiming martial law in the entire country, President Marcos directed the creation of military tribunals.[13] Three days later, a long list of offenses triable by military courts to the exclusion of civil courts was ordained into law.[14] General Order No. 12 not only listed offenses which by their nature are usually committed by civilians but it specifically mentioned the jurisdiction of military courts over civilians. In fact, military commissions were created precisely for civilian offenders especially rebels and those charged with crimes that create insta-

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4 *Ibid.*
5 287 U.S. 378 (1932).
6 21 L. Ed. 849 (1874).
7 327 U.S. 304 (1946).
8 Reid v. Covert, 354 U.S. 1 (1957).
9 It is perhaps to the credit of government lawyers that they, in the long years of martial law litigation, never resorted to the use of Sec. 3 of the Transitory Provisions in order to justify governmental action during the emergency.
10 Mitchell v. Harmony, 14 L. Ed. 75 (1851).
11 Luther v. Borden, 12 L. Ed. 581 (1849).
12 *Supra*, notes 1 and 2. This doctrine is also extensively discussed in the martial law cases, *infra*.
13 Gen. Order No. 8 (1972).
14 Gen. Order No. 12 (1972).

bility in society. Court martials have always been available for military personnel and there is absolutely no showing that the usual procedures under military law would have proven inadequate for military offenders.[15]

The leading case of *Aquino v. Military Commission No. 2*[16] departed from the *Milligan* and *Kahanomoku* precedents. The Supreme Court, at a time when the operation of civil courts had not been interrupted nor remotely threatened, categorically ruled that a military commission has jurisdiction to hear cases filed against civilians during a period of martial law.

Reasons for the Departure

Solicitor-General Estelito P. Mendoza. in his introduction to a Supreme Court publication[17] gave some reasons for the use of military courts rather than regular courts in martial law situations. It may happen that the judges are in active sympathy with the rebels.[18] Judges may be unwilling to try the rebels out of fear.[19] Neither reason appeared applicable to the Philippine situation. A likelier explanation is the third one given by Mr. Mendoza—the possibility that the accused might exploit procedural advantages available in the civil courts and render military operations against the rebellion difficult.[20]

The Aquino Rule

At any rate, *Aquino v. Military Commission* legitimated military trials for civilians under martial law. Among the findings and conclusions are:

> 1. *Aquino v. Ponce Enrile*[21] declared the proclamation of martial law valid and constitutional—and that its continuance is justified by the danger posed to the public safety.
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> 2. To preserve the safety of the nation in times of national peril, the President necessarily possesses broad authority compatible with the imperative requirements of the emergency. On this basis, he has authorized the creation of military tribunals, vested them with jurisdiction over various crimes, transferred cases from civil courts to military tribunals, and prescribed rules of procedure for military courts.
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> 3. Civilians are not deprived of due process. A mere power of detention may be inadequate. Prompt and effective trial and punishment of offenders may be necessary.

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15 See *Administration of Justice by the Military* (1974), which contains an article by the late Chief Justice Fred Ruiz Castro on military tribunals during martial law, and an article by now Sandiganbayan Presiding Justice Manuel Pamaran on the rights of the accused. Refer also to GLORIA, PHILIPPINE MILITARY LAW (1973).

16 G.R. No. 37364, My 9, 1975 63 SCRA 546 (1975).

17 MARTIAL LAW AND THE NEW SOCIETY (1977).

18 Concurring opinion of Chief Justice Chase in *Ex parte* Milligan, *supra.*

19 U.S. *ex rel.* Mc Masters v. Wolters, 26 F. 69 (1920).

20 The Solicitor-General was citing State ex rel. Mays Brown, 77 S.E. 243 (1912).

21 G.R. No. 35546, September 17, 1974, 59 SCRA 183 (1974).

4. In time of overpowering necessity, public danger warrants the substitution of executive process for judicial process.

5. The guarantee of due process is not a guarantee of any particular form of tribunal in criminal cases.

6. The existence of military tribunals and their jurisdiction over civilians during a period of martial law fall under Section 3, paragraph 2 of Article XVII of the Constitution.

Military Trials in Normal Times

The implications of the *Aquino v. Military Commission* rulings taken with the decision in *Aquino v. Ponce Enrile* are, understandably, debatable. But even more perplexing is the continued existence of military tribunals after martial law has been lifted and the country has returned to normal and complete civilian rule. Indeed if the lifting of martial law signifies that the emergency situation is over or has ebbed and subsided, else why lift martial law? What would justify the continued jurisdiction of military courts over civilian accused?

If the necessities of the Philippine situation warranted a departure from the classic or traditional theories of martial law, may the departure extend beyond the period of martial law? Can it become a regular fixture of peacetime and normal constitutional government? The above questions remain as intriguing constitutional law problems.

Abolition of Courts and Reorganization

One of the closing paragraphs of Proclamation No. 2045 while intended to reassure raises corollary questions. It states:

> General Order No. 8 is also hereby revoked and the military tribunals created pursuant thereto are hereby dissolved upon final determination of cases pending therein which may not be transferred to the civil courts without irreparable prejudice to the state in view of the rules of double jeopardy or other circumstances which render further prosecution of the cases difficult if not impossible.

The abolition and reorganization of civil courts is not part of this paper but one cannot help noticing the clear implication in the decrees and orders relative to martial law that civil courts cannot adequately cope with the present and immediately past situation and that military courts are more efficient and their decisions more in keeping with survival, development, and other national goals.[22]

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22 For an extensive discussion of Batas Pambansa 129, refer to Gutierrez, *The Judiciary Reorganization Act: A Question of Necessity* 56 PHIL. L.J. 327 (1981); *and* Arcinas, *et al., Batas Pambansa Blg. 129 and Judicial Innovation: A Closer Look* 57 PHIL. L.J. 238 (1982).

Rights of the Accused

Apart from the basic issues inherent in military courts trying civilians during non-emergency and normal times, there are questions raised about the rights of accused before these tribunals.

The Supreme Court has heard these questions in petitions before it. And in a fashion answered them.

Go v. Olivas[23] reiterated the *Aquino v. Military Commission* dictum that an accused before a military tribunal enjoys the specific constitutional guaranties pertaining to criminal trials, that these tribunals are bound to observe the fundamental rules of law and principles of justice observed and expounded by the civil judicature. The Court itemized some of the constitutional safeguards to which an accused is entitled and declared that a denial of a right may oust the tribunal of jurisdiction. The same principle and assurance was given in *Romero v. Ponce Enrile.*[24]

General Challenges

The challenges to military tribunals have been general in nature—directed at their jurisdiction over civilians. The questions as to rights of accused before these military courts have been of the same category. Instead of pinpointing exactly what constitutional right has been violated in each case, there have been blanket charges that military tribunals are concerned primarily with the conviction of an accused and that proceedings therein involve the complete destruction and abolition of constitutional rights.[25]

Fairness Rule in American Tribunals

In the United States, the court martial system which does not try civilians has received intensive and objective study. In 1946, a War Department Advisory Committee conducted an extensive study of the U.S. court martial system. The committee rendered a report which stated with confidence that "the innocent are almost never convicted and the guilty seldom acquitted."[26]

National Security Code

Can we say the same of Philippine military tribunals which try civilian offenders? No study of cases even that based on random sampling has been conducted. The petitioners who have gone to the Supreme Court are

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[23] G.R. No. 44989, November 29, 1976 74 SCRA 230 (1976).

[24] G.R. No. 44613, February 28, 1977 75 SCRA 429 (1977).

[25] In recent years, there has been a spate of charges that specifically dealt with violations of the physical rights of detainees, the most recent being the alleged torture of former Development Academy of the Philippines Vice-President Horacio Morales, Jr. Aside from this however, the challenges remain essentially general.

[26] *Feld, The Court Martial Sentence, Fair or Foul,* 39 VIRGINIA L. REV. 319 (1953).

few. Represented as they were by capable counsel, the observance of basic rights by the military commissions was more or less assured.

The National Security Code[27] governs trials before military tribunals. An entire chapter is dedicated to tribunals and Section 76(e) gives an impressive listing of the rights of an accused.

We may examine some of these listed rights.

Right to Be Presented and to Confront Witnesses

An accused is entitled to be present at two stages of a trial arraignment, when he pleads guilty, and pronouncement of judgment of conviction.[28] But where the accused is in custody or charged with a capital offense, he shall be entitled to be present at all stages of the trial. The right to be present and to confront witnesses is fundamental in court procedure. Failure to accord this right not only violates Section 19 of the Bill of Rights but amounts to a denial of due process in general.

This being so, an exception to the right of confrontation found in Section 76(e) of the National Security Code bears examination. It states that in cases where there is an allegation of conspiracy and one or more accused are available for trial and others are not, trial may proceed against all, provided that the indictment shall have been published at least once a week for two consecutive weeks in any paper of general circulation and a copy of notice of trial shall have been served on the accused or on his next of kin or his last known residence or business address with a person of sufficient discretion to receive the same.

Trial in Absentia

The service of summons through publication and trial in absentia are included in the provision on rights of an accused.[29] Perhaps, in the more publicized trials of nationally recognized fugitives such as members of the Communist politburo or the overall commander of the New People's Army, service by publication would suffice to fairly appraise them that they are being tried in absentia. But for the ordinary person, it is quite possible to be tried and convicted without ever hearing of the proceedings before a military tribunal conducted inside Camp Aguinaldo. Identification of the accused by the witnesses who narrate his criminal activities is essential to a fair trial. If an accused is not present at his trial where witnesses testify to his criminal activities. there is always the possibility that the witnesses are talking about somebody else. And this is likely in rebellion where rebels use *nom de guerres* and their movements are covert.

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27 Pres. Decree No. 1498 (1980). See also Avena, *The Public Order Act and the Morning After: Constitutional Issues* 56 PHIL. L.J. 525 (1981).

28 CONST. art IV, sec. 19. See also RULES OF COURT, Rule 115.

29 Compare with RULES OF COURT provisions on service of summons and rights of the accused.

The fact that the rule is applicable only to conspiracy trials helps assure some semblance of due process but the danger of an impairment of a constitutional right is nonetheless present. In the United States, an accused who is given tranquilizers during trial and who suffers narcotic effects from them may be physically present but his conviction may not stand if the medicine deprived him of the ability to comprehend what was going on and to assist in his own defense.[30] If an accused who is physically present but mentally numbed can claim a violation of his right to be present, with more reason may a person who is unaware that he is being tried in absentia.

Preliminary Investigations

The Rules of military trials also provide for summary preliminary investigation. The Code is specific that there is no right to counsel at this stage.

The preliminary investigation is only to determine *prima facie* evidence warranting referral to a military commission for trial. It is to be conducted with dispatch and with the least possible delay. The right is statutory and failure to accord it by law is not violative of due process.

At the same time, it is also settled that where the law grants the right to a preliminary investigation, it becomes a substantial part of due process, and a denial of this statutory right violates due process.[31] This being so and considering that we are discussing civilians being tried before military courts, where the judges may be conscientiously but hardly knowledgeable in Constitutional Law, it is difficult to understand why the law should be so stingy in its description of the right.

The Miranda Doctrine

Furthermore, if the *Miranda*,[32] *Messiah*,[33] and *Escobedo*[34] rulings now incorporated in the Bill of Rights must be observed during custodial interrogation, at a time when the finger of accusation has just been pointed at the accused, why deny these rights of one already under preliminary investigation?

Right to Military Counsel

The right to counsel during trial is protected. But the right appears to be complete only insofar as it assures the accused that a military lawyer

[30] State v. Hancock 426 P. 2d 872 (1967). Refer also to COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 18 (1974); and BISHOP, JUSTICE UNDER FIRE (1974).

[31] U.S. v. Marfori, 35 PHIL. 666 (1916), Conde v. CFI of Tayabas, 45 PHIL. 173 (1923).

[32] Miranda v Arizona, 384 U.S. 436 (1966).

[33] Messiah v. U.S. 377 U.S. 201 (1964).

[34] Escobedo v. Illinois, 378 U.S. 478 (1964). See also Mapp v. Ohio, 367 U.S. 343 (1961).

will be given to him. The convening authority appoints the defense counsel. Insofar as a private counsel is concerned, the Code states "or counsel of his own choice *if practicable.*" The meaning of "practicable" has a limited scope because the very next sentence reads—"In the event that he is allowed a counsel of his own choice, he may elect to retain or excuse the appointed defense counsel." Thus, the right to counsel is a right to have an army officer-lawyer to represent him. A counsel of choice may be *allowed* but then it may also be denied.[35]

Perpetuation of Evidence

Another provision of the Code warranting study is the rule on perpetuation of evidence.[36] If a witness is too sick or infirm to appear at the trial, or has to leave the country with no definite date of return or where delay in the taking of testimony may result in the failure of justice or adversely affect national security, the evidence may be taken through deposition and perpetuated for future use by any civil or military tribunal in future proceedings or actions.

The law is rather general. If reasonable notice has been given the opposite party, the deposition taking may be conducted in the latter's absence. The perpetuated testimony may be used in *any* proceeding or action before *any* court or tribunal, civil or military, even for or against the person or persons who were not present at the time of perpetuation. The proviso requiring publication once a week for two consecutive weeks in any newspaper of general circulation helps somewhat but does not fully answer various constitutional questions that come to mind. And who reads legal notices in newspapers, anyway?

The Form of Decision

The form of decision is another interesting aspect of procedures before military courts. The military judges vote by secret ballot. There is no required form of a decision. The record consists of a verbatim reproduction of proceedings. The counting of the votes and the rendition of the sentence constitutes the decision.

The Constitution provides in Section 9, Article X, "Every decision of a court of record shall clearly and distinctly state the facts and the law on which it is based. The Rules of Court shall govern the promulgation of minute resolutions."[37] Established procedure of collegiate courts calls for a ponente to write the decision and for any member so inclined to write

[35] Compare with note 28, *supra.*

[36] The practice seemed to have picked up after the assasinations of NPA commanders Melody and Pusa, who were supposed to be state witnesses in the subversion trial of former Senator Benigno S. Aquino, Jr.

[37] CONST. art X, sec. 9.

a concurring or dissenting opinion.[38] This is not followed by military tribunals.

The Buscayno Ruling

The form of decisions rendered by military tribunals was challenged in *Buscayno v. Ponce* Enrile.[39] The Commander-in-chief of the New People's Army, bent on overthrowing the government, is entitled to the constitutional protections guaranteed every Filipino citizen. At the same time, considerations of national security are not only evident but strong. Thus, with such a petitioner a question on form of decisions cannot really be given the full treatment it deserves. The Court ruled:

> It cannot be said of course that a military commission is a court of record within the meaning of this Article on the judiciary. Moreover, the procedure followed, including the form the judgment takes, was given the seal of approval in the above *Aquino* decision citing the applicable section of the Article on Transitory Provisions that would remove any taint of unconstitutionality. It may be stated further that the record of the proceedings are available to the reviewing authorities. Hence any imputation of arbitrariness sought to be avoided by the above provision would not be warranted.[40]

Implications of the Ruling

The *Buscayno* decision does not illuminate constiutional protections with the light they deserve. A military commission may not be a court of record but *Aquino v. Military Commission*[41] is emphatic that an accused tried by military tribunals "enjoys the specific constitutional safeguards pertaining to criminal trials." Military tribunals are "bound to observe the fundamental rules of law and principles of justice observed and expounded by the civil judicature." The fact that the entire records of the proceedings are elevated to reviewing authorities is not significant. The reviewing authorities are generals or other high military officers, not judges or justices. They are not conversant with the impressions of witnesses, demeanors and manner of testifying. And any one who has seen a record of criminal proceedings, one or two feet thick, consisting of thousands of pages and the number of exhibits exhausting all letters of the alphabet two or three times can easily suspect that a busy commanding general will take the easy way out and merely affirm the tribunal's decision.

A Proper Concern

The rights of accused before a military tribunal will be a proper concern of discussions on constitutional law and human rights for as long as these tribunals have jurisdiction over non-military personnel.

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[38] See the Internal Operating Procedure of the Court of Appeals. The author is an employee of the Supreme Court.

[39] G.R. No. 47185, January 15, 1981 102 SCRA 7 (1981).

[40] *Ibid.*

[41] *Supra*, note 16.

To follow American precedents on military court martial is not adequate. These rulings refer to discipline of military courts over military personnel or over war ciminals, not civilian citizens.

Certiorari Jurisdiction Only

The rule enunciated in *Burns v. Wilson*[42] that the Supreme Court has only one function "namely to see that the military court has jurisdiction, not whether it has committed error in the exercise of that juristdiction" was evolved in the review of military court's decisions over military personnel. It has been stated that military law is *sui generis* and Congress alone can strike a balance between constitutional requirements and the demands of discipline and duty.[43] Traditionally, there can be no collateral attacks on court martial decisions except for review, usually on the U.S. Supreme Court's habeas corpus jurisdiction. "To those in the military . . . . military law is due process."[44] And *In re Yamashita*[45] where the Japanese general was tried after hostilities had ended, affidavits and depositions were used in a manner invalid even before regular court martials, and the rules of evidence not strictly followed. The U.S. Supreme Court stated, "We consider here only the lawful power of the Commission to try the petitioner for the offense charged." Court review was limited to jurisdiction.

Intended for Uniformed Accused

The precedents may be valid for court martials of men in uniform and of war criminals. But should they apply to civilians tried by military commissions for crimes triable by civil courts and *after martial law has been lifted?*

As stated by Wilson,[46] in an environment where the overriding goal is superior force of arms, military law has sometimes seemed "harsh law which is frequently cast in very sweeping and vague terms (emphasizing) the iron hand of discipline more than it does the even scales of justice."[47] Another author had this to say about the appellate military tribunal in the United States: "It is freer than any in the land, save again the Supreme Court, to find its law where it will, to seek, new fledged and sole, for principle, untampered by the limiting crop of the years. This is not to suggest, of course, that the new tribunal is licensed to act in an unjudicial manner."[48]

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[42] 346 U.S. 147 (1953).

[43] Wilson, *Investigative Procedures in the Military, A Search for Absolutes* 53 CALIF. L. REV. 878 (1965).

[44] US *ex rel.* Creary v. Weeks, 259 V.S. 344 (1922).

[45] 327 U.S. 1 (1946).

[46] *Supra,* note 43.

[47] *Supra,* note 8.

[48] Brosman, *A Symposium on Military Justice* 6 Vand. L. Rev. 167 (1953); Snedeker, *Habeas Corpus and Court Martial Prisoners* 6 Vand. L. Rev. 288 (1953).

The Necessities of the Situation

Due process is a fundamental and useful right but difficult to define. As Justice Holmes stated in *Moyer v. Peabody*,[49] "What is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation."

The period of martial law has spawned many decisions on constitutional rights which are novel and far-reaching. The American civil war took place more than a century ago and yet legal scholars still discuss the trial by military commissions of Mary Surrat, David E. Herold, Lewis Payne, and others for the assassination of conspiracy which killed President Abraham Lincoln. The trial of Vallandigham for public expressions of sympathy with the Confederacy was appealed to the Supreme Court but the appeal was denied.[50] And in 1942, German spies in the United States could be tried by military commissions.[51]

Old Wines in New Bottles

The validity of trials by military commissions after the lifting of martial law where the accused are civilians may be a contemporary legal as well as moral problem but guiding principles are fairly ancient. Principles of liberty implicit in the Bill of Rights continually receive new interpretations in the light of modern and changing conditions.

As old wine is poured into new and Philippine bottles, it is hoped that it will acquire an improved, strengthened, and better flavor. Richer jurisprudence should be the result of present day constitutional law conflicts.

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[49] 212 U.S. 78 (1909).
[50] *In re* Vallandigham, 17 L.Ed. 589 (1864).
[51] U.S. *ex rel.* Burger, 317 U.S. 1 (1942).