THE MILITARY AS A PUBLIC OFFICE: THE QUESTION OF PUBLIC ACCOUNTABILITY

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Cedant arma togae (Let the soldier yield to the civilian)
— CICERO: *Orationes Philippicae*

The history of the Philippine military is one of role expansion and intrusion into every sphere of civil government. It is one of changing patterns: from Emory Upton's American model; to the classic formulation of the sovereign's coercive arm; to the rise of a potentially influential and unwieldy political force. The last decade saw military forces directing security missions, exercising judicial functions[1] and administering executive bureaus and agencies.

This article seeks to explore the nature of the military institution and its defined role in society under the republican scheme of government. The framers of the 1935 Constitution, in adopting the doctrine on separation of powers, classified the powers of government according to their nature and entrusted these for exercise to the different departments. This arrangement, it is said, gives each department a certain independence; operates as a restraint against usurpation; and provides the necessary check and balance of government essential to a free institution.[2] Inherent in this system of checks and balance is the mechanism of accountability — that is, accountability to the grantor of such power, the sovereign people. This grant of power is an obligation to perform a duty, the public office, with integrity. It is a receipt of trust with a corresponding responsibility within defined limits.

The military power is merely one of the constituent powers of the sovereign. The armed forces may exercise these powers with some measure of independence but may never do so outside the overall scheme of government. It is necessarily bound by the constitutional limits. Any study on the role and nature of the military institution must then consider the normative framework of public officers and consequent public accountability. Also

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1 Gen. Order No. 8 (1972). Pursuant to the Proclamation of Martial Law, President Marcos ordered that certain criminal cases be tried by special military tribunals which he may thereafter create. The late Senator Aquino was tried for subversion by a military commission. Aquino v. Military Commission No. 2, G.R. No. 37364, May 9, 1975, 63 SCRA 546 (1975).

2 COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 43 (1880).

essential to the discussion is the impact of the balance in the civilian-military relations on republicanism. What then is the proper balance of these powers? How can this be maintained; most of all how can the military institution be made accountable to the public for its conduct?

I. HISTORICAL OVERVIEW

> "A coercion of laws or coercion of arms... the great and essential principles necessary for the support of government."
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> —ALEXANDER HAMILTON[3]

Beginnings of Philippine Military Tradition

Although the 1935 Constitution laid down the basic defense policy,[4] the roots of Philippine military tradition reaches back to 18th century America, from which was borrowed the army model. It is said that the history of the United States Army is a history of two armies: a regular army of professional soldiers and a citizen army known at various times as the Militia, the National Guards, the Organized Reserves or the Selectees.[5] The partisans of the regular army believed that only a military policy entrusting war to professionals would give the United States true military security. As early as the 1770's, George Washington argued for a "respectable army... such as will be competent for every contingency."[6] The adherents of a citizen army argued that "only a military policy built upon a citizen soldiery can assure democracy against the possibility of *subversion by the very military forces that are supposed to protect that democracy.*"[7] (Emphasis supplied) An adequately strong citizen army would ensure a military policy that is compatible with a democratic society and an appropriate subordination of the military to civil policy. The exigencies of war (1775-1776), however, proved that the standing army was more reliable; and the advocates of the regular army prevailed over those of the citizens' militia.[8]

But the fear of a military subversion was never quite excised. It crystallized into the doctrine of civilian supremacy over the military. Not a new concept, this doctrine was a vestige of the arguments of the citizen army advocates. It was a policy assurance against those fears of a tyrannical army. As early as 1775, the United States Congress exerted efforts to subordinate

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[3] Quoted in WEIGLEY, HISTORY OF THE UNITED STATES ARMY 102 (1967).

[4] CONST. (1935), art. II, sec. 2: "The defense of the State is a prime duty of the Government and the people, and in the fulfillment of this duty, all citizens may be required by law to render personal military or civil service."

[5] *Supra* note 3 at xi.

[6] *Id.*, at 29.

[7] *Id.*, at xi-xii.

[8] The extent of this victory is shown by Emory Upton's influence on United States military history. A champion of the regular army, his writing, "Military Policy of the United States" (1904), disparaged the citizen soldiery, and affected almost everything written about American military history and policy. *Ibid.*

the military through *ad hoc* committees and other administrative machineries,[9] such as control over appropriations, and the muster of troops.

The Philippines, in establishing a regular army of professional soldiers as its primary defence force, precluded any debate on the merits of a citizen army as against a regular army. It did however, embrace the concept of civilian supremacy over the military as a given postulate.[10]

Unlike that of the United States, and other western democracies, the Philippines had "no tradition of distinguishing between the functions of an internal police force and those of a military organization."[11] The core of the Philippine Army was recruited from the personnel of the national police force (the Philippine Constabulary). Ironically, the PC would later be integrated into the AFP. The original functions of the Armed Forces of the Philippines (AFP) were a mixture of defence and police work; (1) the protection of the state against external attack; (2) the promotion of internal security; and (3) the maintenance of peace and order.[12]

Changing Roles of the AFP

As envisioned, the military would perform strictly external and internal defense functions. These included recruitment and supervision of reserves training as well as administration of the Philippine Military Academy and related schools.[13] It has continued exercising these basic tasks up to the present. But from 1950 to 1986, it was assigned other functions and it did exercise additional powers.

The Huk insurgency precipitated the role expansion of the AFP beyond its original functions.[14] President Magsaysay countered rural support for the Huks by packaging a combined military and socio-economic program. Incorporated in the AFP chores were the digging of artesian wells; building of roads, bridges, irrigation ditches, school buildings, community centers; supervising food production activities; and providing free dental, medical and legal services to the rural areas.[15] Another program was the Economic Development Corps (EDCOR), a response to the land for the landless slogan of President Magsaysay. This involved resttlement of ex-Huks and other selected landless farmers. The AFP supervised the EDCOR while its men developed the settlements.[16] This socio-economic involvement of the

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[9] *Supra* note 3, at 46.

[10] Com. Act No. 1 (1935) (The National Defense Act), art. 1, sec. 2(d) provides "the civil authority shall always be supreme..." This is reiterated in the CONST. (1973), art. II, sec. 8: "Civilian authority is at all times supreme over the military."

[11] Hernandez, *"The Military: Reform and Conservatism"* 1, paper presented in the XIIth World Congress International Political Science Association, (Brazil, 9-14 August 1982).

[12] *Id.*, at 5.

[13] Com. Act No. 1 (1935), sec. 31; 52 P.A.L. 38.

[14] Hernandez, *supra* note 11, at 7.

[15] *Id.*, at 9.

[16] *Ibid.*

AFP continued during President Garcia's term. He adopted the socio-economic Military Program (SEMP) as a formal and regular military responsibility.[17] Its aim was to utilize military resources for the development plans of the country.

The government also enlisted the military for implementation of criminal laws against gambling, prostitution, smuggling, illegal logging, banditry, and special laws on tenancy, firearms regulations, immigration, fishery, and anti-dummy.[18] These tasks properly belonged to the local police authorities.

During President Marcos' pre-martial law incumbency, he further institutionalized the development (that is, socio-economic involvement) and security roles of the military.[19] For his key socio-economic projects, the AFP manpower and engineering capabilities were harnessed. To enhance security, Marcos created the PC Metropolitan Command (Metrocom) as a policing unit for the escalating student and urban workers unrest; and expanded the operational jurisdiction of the Presidential Security Command originally formed as a security force for the first family. Despite a presidential pledge not to use the military in 1968, the military continued to be used during elections as in prior years.[20] At about this time, there began massive deployment of army troops in Mindanao to counter Communist insurgency as well as the Muslim secessionists movement. As a consequence, the military forces became very visible and entrenched in the community affairs. These counter-insurgency missions lead to widespread displacement of villages (commonly referred to as "hamletting").

A Military Leviathan

> "I repeat, this is not a military takeover of civil government functions..."[21]

Thus was the public assured of a continued civilian regime, despite the proclamation of martial law in the entire Philippines. As it was, public experience in the latter years however, belied such repeated statements by President Marcos. Instead, there was widespread intervention of otherwise civilian affairs, making one doubt whether there was indeed a military takeover. How did this happen?

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[17] *Id.*, at 11.

[18] *Ibid.*

[19] *Id.*, at 12. In his first State of the Nation Address, he announced: "The Armed Forces of the Philippines with its manpower, material, and equipment resources plus its organizational cohesiveness and discipline possess a tremendous potential to participate in economic development which should be exploited to the maximum. Such participation becomes inoperative considering that the problem besetting the country is *socio-economic* rather than military and the resources available to solve this problem are scarce and limited."

[20] *Id.*, at 13-14.

[21] FM's Statement to the Nation (Re: Proclamation of Martial Law) 1 Vital Docs. 1.

As a first step, Marcos in his dual capacity as President and Commander-in-Chief of the AFP,[22] commanded the armed forces of the country to *prevent* or suppress all forms of lawless violence, acts of insurrection and rebellion and to *enforce obedience* to all decrees, orders and regulations promulgated by him personally or under his direction.[23] This move was justified on the premise that martial law could not be equated with a military regime for two basic reasons: first, the President acted in his capacity as the chief civil magistrate, through the aid of the armed forces as specified in the Constitution; second, the civil authorities continued to exercise their functions.[24] Yet the bastion of a civilian authority was undermined: Congress was abolished giving Marcos sole executive and legislative prerogatives.

At this point, two corollary questions may be raised. Was it the President that governed; or was it the Commander-in-Chief of the armed forces? Was there military control over the civilian; or civilian control over the military, that is, the civil power in command of the army? Arguably, the phraseology of General Order No. 1 would imply the former.

> . . . . . I, Ferdinand E. Marcos, [President of the Philippines], BY VIRTUE OF THE POWERS vested in me by the Constitution as COMMANDER-IN-CHIEF OF THE ARMED FORCES, do hereby proclaim that I SHALL GOVERN THE NATION AND DIRECT THE OPERATION of THE ENTIRE GOVERNMENT, including all its agencies and instrumentalities, IN MY CAPACITY and shall exercise all the powers

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[22] In the constitutional convention, there was unanimous support for making the President, the Commander-in-Chief of the Armed Forces of the Philippines. Art. VII, sec. 10(2), 1935 CONST. and Art. VII, sec. 11, 1973 CONST. provides: "The President shall be commander-in-chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law.

Years, ago, the question of whether this provision appointing the President as Commander-in-Chief of all AFP satisfies the principle of civilian supremacy over the military was answered in the affirmative. Two views however were presented based on American jurisprudence. In *Re Moyer,* 85 Pac. 193 (1904), the affirmative view upheld by the majority, is as follows:

> Such a provision does not conflict with Article 2, sec. 22, of the Bill of Rights which provides that the military shall always be in strict subordination to the civil power. "The governor in employing the military to suppress insurrection, is merely acting in his capacity as Chief Civil Magistrate of the state." Although exercising the authority conferred upon him by law through the aid of the military under his command, he did so merely in his civil capacity. That is to say, the state executive merely exercised the civil power vested in him by law through a given means which the law has provided for the protection of the citizens.
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> The dissenting opinion, providing a negative view, questioned the logic of such construction. Would such provision "have no meaning except that the military shall always be under the command of the governor? If it were so, it would simply be annulling the provision in the Bill of Rights. "Military authorities" must be construed as the *governor* and *his military representatives* while "civil authorities" include the sheriff, ordinary peace officers and also the courts of law to which they are subordinate. Benitez, *"An Analytical Study of the Military Powers of the President Under the Constitution of the Philippines."* 18 Phil. Law J. 1, 4 (1938).

[23] Proc. No. 1081 (1972) 1 Vital Docs. 7, 23,

> and prerogatives appurtenent and incident to my position AS SUCH COMMANDER-IN-CHIEF of all the Armed Forces of the Philippines."[25] (Emphasis supplied)

Under this construction, the affirmative view upheld in the *Re Moyer*[26] case would be a fallacy. If leadership were to be based on the powers of the army commander, then the doctrine of civilian supremacy would be for naught.

In mobilizing the armed forces during martial law, President Marcos, as commander-in-chief, disenfranchised the local police authorities and emasculated the judiciary. Through the Defense Secretary, the armed forces were ordered to arrest and take into custody[27] all individuals who may have committed the following crimes: crimes of insurrection or rebellion;[28] other crimes against public order;[29] crimes against national security and the law of nations;[30] crimes of usurpation of authority and allied crimes;[31] crimes of kidnapping;[32] robbery[33] carnapping,[34] smuggling,[35] gun-running,[36] trafficking in prohibited drugs[37] and hijacking,[38] price manipulation, tax evasion; crime of bribery[39] and corrupt practices[40] other crimes committed by public officers,[41] crimes against public morals;[41] crimes of forgeries,[42] frauds and illegal exaction;[43] crimes of malversations;[44] crimes against liberty;[45] crimes of infidelity;[46] and any other violations of any decree or order promulgated by the President.[47]

The criminal jurisdiction of the courts on the other hand, was curtailed to exclude cases:[48] involving the "validity, legality, or constitutionality of Proclamation No. 1081", or of any decree, order or acts issued, promulgated

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[24] Gen. Order No. 3 (1972). This directed all executive departments and offices of the national government, as well as the judiciary, to continue to function despite the proclamation of Martial Law.

[25] Gen. Order No. 1 (1972).

[26] 85 Pac. 193 (1904), *supra* note 22.

[27] Gen. Order No. 2-A (1972).

[28] REV. PENAL CODE, arts. 134-138.

[29] *Id.*, arts. 146-149, arts. 151, 153, 154, 155, 156.

[30] *Id.*, arts. 114-123.

[31] *Id.*, arts. 177-179.

[32] *Id.*, arts. 270-271.

[33] *Id.*, arts. 293-305.

[34] Rep. Act No. 6539 (1972) known as the Anti-Carnapping Act.

[35] There are various laws in smuggling of timber and sugar as well as the Tariff and Customs Law.

[36] REV. ADM. CODE, sec. 2692, as amended.

[37] Rep. Act No. 6425 (1972), The Dangerous Drugs Act of 1972.

[38] Rep. Act No. 6235 (1971).

[39] REV. PENAL CODE, art. 210.

[40] Rep. Act 3019, as amended (1960).

[41] *Id.*, arts. 203-245.

[42] *Id.*, arts. 161-171.

[43] *Id.*, arts. 213-216.

[44] *Id.*, arts. 217-222.

[45] *Id.*, arts. 267-269.

[46] *Id.*, arts. 223-229.

[47] *Supra* note 27.

[48] Gen. Order No. 3 (1972); Gen. Order No. 3-A (1972).

or performed by President Marcos; involving crimes against national security and the law of nations; involving crimes against fundamental laws of the state;[49] involving crimes of usurpation of authority, rank or title; involving crimes committed by public officers. In addition, the Chief of Staff was empowered to create military tribunals to try cases involving military personnel *and* such other cases as may be referred to them.[50] These military tribunals were authorized to try the following case *exclusive* of the civilian courts: those involving crimes against national security and the law of nations; those constituting violations of the anti-subversion laws and hijacking laws; those involving crimes against the fundamental laws of the state, if committed by members of the AFP; those involving all crimes against public order; those constituting violations of the law on firearms and explosives; those violations committed by public officers; those constituting violations of the Anti-Graft and Corrupt Practices law, if the accused were a military personnel (if the accused were a civilian personnel, the civil courts shall exercise *concurrent* jurisdiction); and violations of the Dangerour Drugs Act (if the accused were a military personnel).

As has been shown, the security, law enforcement and quasi-judicial functions of the military became quite extensive. Parallel to this development was the expansion of the military functions into the sphere of administration, management and policy-making. In 1974, President Marcos revealed that from the start, the military was involved in the decision to put the country under martial law. Although an executive prerogative, Congress' policy making authority would be impaired by such involvement of the military in major policy decisions.

Public utilities and communications media were confiscated and placed under the control and administration of the military.[51] An illustration is the takeover of the Rajah Broadcasting Network, In., and the National Steel Company, both owned by the Jacinto Group of Companies. This move lead to numerous army officers managing private business enterprises and providing them with greater chances for amassing wealth. In addition, active duty officers were recruited as directors or supervisors of civilian bureaus and agencies: the National Housing Authority, the Philippine Coconut Authority and Metro Manila Transit Corporation are only some examples. These moves were ostensibly for the promotion of efficiency and integrity of government agencies. This may be regarded as a "military colonization of the bureaucracy."[52]

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[49] REV. PENAL CODE, arts. 124-133.

[50] Gen. Order No. 8 (1972).

[51] FM's Statement to the Nation. *Supra* note 21, at 2.

[52] Finer, *Morphology of Military Regimes*, SOLDIERS, PEASANTS, AND BUREAUCRATS, 297 (1982). The role of the military expanded to one of being a reservoir of personnel for key institutions in the State. Colonization signifies that the military have spilled over from the strictly armed service hierarchy into the political parties, government corporations or the civil bureaucracy with a grip on local as well as central authority.

An alarming consequence was the emergence of a military political patron. Since various army officers were either highly placed in government or were seemingly at the core of political power, they were able to solicit and dispense favors to the public. Either way, these military personnel had become local or national political "godfathers," replacing former senators and congressmen.

As military functions expanded, control over the military institution dwindled. Where before, there existed ample control mechanisms, the period during and after martial law was characterized by very limited control mechanisms. Then, an active Congress fully exercised its legislative control over the military through budget appropriations, and the myriad senate and house committees for military anomalies and other military-related matters. Despite the President's sole administrative control and supervision over the AFP, the interplay of the three branches of government ensured a sufficient level of check and balance. Most importantly, a zealous media with its public information system worked as an antidote to government secrecy. The subsequent curtailment of press freedom precisely provided opportunities for all sorts of abuses by government officials.

During martial law, the controls provided by Congress, the judiciary and the media were obliterated. All administrative, legislative and judicial control over the military was vested in one person, the commander-in-chief, without any balancing mechanism to check the latter. The communications media were placed under the control of the military allegedly to suppress an existing conspiracy against the government. Even after the lifting of martial law, when Parliament was convened, the control theoretically exercised by the legislature never quite materialized. The Batasan, being dominated by President Marcos' political party, was infamously called a "rubber stamp" of the President. It merely provided formalities to the President's decisions.

This distintegration of the control mechanisms naturally lead to non-accountability and a propensity for abuses of power. The army most often conducted itself without regard for public concerns. Its system of command responsibility contributed to the inscrutability of the military by the public. Under the chain of command, a soldier would be accountable for his acts only to his immediate commanding officer (CO), who in turn would be accountable personally to his own CO, and so on up the line. There was a sharp increase of abuses committed by soldiers and army officers, some documented and substantiated, others uninvestigated. Most of these violations were for torture, illegal detention, denial of due process, corrup-

tion and simply, lack of discipline.[53] It is in the sphere of human rights abuses where public accountability has been nil.[54]

All the foregoing factors combined to create an awesome if not gruesome institution ironically established to defend the democratic system chosen by the people. It was a specie of a tyrannical army showing marked loyalty only to the President or its Commander-in-Chief. The institution was so rife with abnormalities that the public viewed it with much derision.

Marcos' 20-year regime was indeed a "military-supported civilian regime."[55] Its government dependent solely on the armed forces to uphold its dictatorial policies. It was a government without misgivings of unleashing military might.

Ironically, the very same forces that thrived under the situation, and which supported the Marcos' regime realigned itself and overthrew him. The 1986 "February revolution" or "EDSA revoluiton" was regaled by the people as a victory for freedom; the military reformists, heroes. It was, however, possible because of the *coup d'état* staged by the Minister of Defense and a faction of the armed forces.[56] Although laudable, there are startling consequences that should not be overlooked. The military intervention in the electoral process sets a dangerous precedent.

It was the military's coming of age as a decisive political force with a greater awareness of its capacity to overturn a civilian authority. This was later confirmed by an attempted *coup dêtat* staged soon after by Tolentino and some "loyalist forces" at the Manila Hotel. It is to be hoped that these events are not repeated, or that lessons regarding the Roman praetorian army be recalled. And that in the future, the military shall operate within the sphere *of purely defense matters;* following the policies laid down by the executive *instead of leading* the executive.

The Philippine military experience only goes to show how important is the need for civilian control over the military; or the necessity for its public accountability. It puts into issue the propriety of nurturing a poli-

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53 Amnesty International reported in 1981, abuses by the military, such as detention without trial, torture and unexplained killing, convening of military tribunals with procedures which do not conform to international standards. It was estimated that about 70,000 people were detained during martial law. Amnesty International Report 250-257 (1981).

54 It is precisely the military abuses which is the focus of the Human Rights Commission organized by President Corazon Aquino.

55 Finer, *Morphology of Military Regimes,* SOLDIERS, PEASANTS, AND BUREAUCRATS 283 (1982).

55 Finer, *Supra;* note 52 at 283.

56 Huntington, *The New Military Politics,* CHANGING PATTERNS OF MILITARY POLITICS 32-33 (1962). At least three types of coups can be distinguished — the government coup, or "palace revolution", the "revolutionary coup", and the "reform coup". The February coup may be considered as a reform coup where a "combination of military and civilian groups seizes power intending to make reforms in the political, economic or social structure." They usually make reforms, though they do not instigate a convulsive revolutionary process. Instead, the coalition responsible for the coup usually begins to disintegrate after a few years."

ticized entity highly trained to mobilize itself even to the ends of subverting the very system it is engaged to defend. Should the military as the state repository of arms, be given full discretion as to the use of such arms? How much control must the public have? How can public accountability be maintained? A first step in the resolution of these issues is the recognition that a military post is a commitment in the government service. From such premise flows other legal consequences. The government service being a public office, the pertinent norms must be strictly applied. A Public Office is a public trust; a breach of that trust subjects the malfeasor to well defined sanctions.

II. PUBLIC OFFICERS AND THE MILITARY SERVICE

The question of public accountability may be best broached by redefining the public officer, his rights and duties. As a major premise, a public office is the right, authority and duty, created by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.[57] It is a special trust[58] created by the competent authority and the person so invested becomes a public officer. Unless merely honorary, certain duties attach to it, the performance of which constitutes the *causa* for its conferment.[59] In its broad sense, the public office refers to any public charge, or even a particular employment affecting public interests. Yet not every employment qualifies as a public office. Special elements distinguish an office from a mere employment or contract. These are: (1) the creation and conferment by law; (2) the delegation to the individual of some of the sovereign functions of the government to be exercised for the public weal; (3) the taking of an oath; (4) the continuance of the office or function as prescribed by the government, unaffected by changes of persons appointed; and (5) the nature of the duty.[60] The decisive criterion is the *delegation of sovereign functions* which may either be legislative, executive or judicial. This trichotomy logically lends itself to a classification scheme of judicial, legislative, and executive officers. Judicial officers are those whose duties are to decide controversies. Legislative officers are those whose duties relate mainly to the enactment of laws while executive officers are those whose duties are mainly to cause laws to be executed.[61]

Of more significance to the present inquiry is Mechem's added types of public officers. These are the ministerial officers whose duty is to execute the mandates lawfully issued by their superiors; the military and naval officers who have command of the army and navy; and civil officers, a loose

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[57] MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 1 (1890).
[58] "Public Office is a Public Trust." CONST. (1973), art. XIII, sec. 1.
[59] MECHEM, *supra*, note 57.
[60] *Id.*, at § 4-8.
[61] *Id.*, at 21-24.

term for any officer holding an appointment under the government, whether executive or judicial, in the highest or the lowest departments of the government.[62]

At this point, it must be asserted that a military post comprises both military as well as ministerial duties. Further, there is not much legal difference between the military officer and the civil officer especially with respect to public responsibility. The implication being that despite the defense nature of the military office, the same government service laws must be applied. The Constitution in laying down the government service standard does not make any distinctions. "Public officers and employees shall serve with the highest degree of responsibility, integrity, loyalty, and efficiency, and shall remain accountable to the people."[63] The public officer should always remember that the only justification for his continuance in such service is his ability to contribute to the public welfare.[64]

The concept of accountability has reference to an existing duty which corresponds to a fiduciary relation. Military accountability usually means the liability for the proper discharge of the responsibilities of his position that the holder has to higher authority.[65] This mainly alludes to the chain of command. For the purposes of this paper, accountability is construed in its liberal meaning. That is, the state of being responsible or answerable for official and personal actuations to the public at large. Public officers owe numerous duties to the individual citizen as well as to the body politic. Public accountability corresponds to this duty owing to the general public. To illustrate, the executive (President, governor or mayor) owes the duty to the public to see that laws are properly implemented; that fit and competent officials are appointed by him; and that rational policies are made. Legislative officials have the duty of passing only wise and proper laws.[66] Upon the other hand, military officials who are entrusted with the defense and security tasks of the state, must ensure to the citizens a degree of security of their lives.

Embraced in the concept of accountability are the rights and remedies of the public against the public officer. These rights are numerous: the public, viewed collectively has a right to insist that the officer "shall do his duty, that he will be faithful and honest, that he will protect and preserve the rights and interests entrusted to his care, that he will exercise due diligence and wisdom in the exercise of his functions, that he will enforce the prerogatives and observe the limitations which the law attaches to his office, and that, upon the expiration of his term, he will surrender his trust with all of its rights and incidents to him who has been lawfully chosen to

62 *Ibid.*
63 CONST. (1973), art. XIII, sec. 1.
64 Pineda v. Claudio, G.R. No. 29661, May 13, 1969, 28 SCRA 34, 54 (1969).
65 BEISHLINE, MILITARY MANAGEMENT FOR NATIONAL DEFENSE 135 (1950).
66 Mechem, *supra* note 57 at 590-591.

succeed him."[67] Negligence, culpable conduct, misfeasance and nonfeasance give rise to a consequent liability, either civil, administrative or criminal.

The available mechanism for public officer's accountability is founded upon the basic principle of separation of powers. Each branch of government is apportioned specific powers with the executive having administrative control over the governmental machinery. Control and supervision is established by settled norms of administrative law. The sources of the President's controlling power over administrative agencies are based on his constitutional appointment as chief executive,[68] with control over the ministries;[69] his power to formulate the guidelines of national policy and to approve the program of government; his power of appointment;[70] and the sworn duty to preserve and defend the Constitution and execute the laws.[71]

Legislative control lies in its inherent prerogatives to create or abolish agencies, its power over budget appropriations and legislative inquiries.[72] The legislature controls the size and strength of the military, the economic machinery given the President for defense purposes, as well as the delegation of emergency powers through various statutes.[73] It may also enact the laws which limit or define the sphere of operations of the military institution.

The Constitution also provides for a grievance mechanism through the *Tanodbayan* and the *Sandiganbayan*. The Sandiganbayan is a special court with jurisdiction over criminal and civil cases involving graft and corrupt practices, and other offenses committed by public officers and employees in relation to their office.[74] The Ombudsman receives and investigates complaints relative to public office, makes appropriate recommendations and when necessary, files and prosecutes the corresponding criminal, civil or administrative case before the proper court or body.[75] The ultimate adjudicator, of course, is the Supreme Court. Its power of judicial review allows the public the special remedies of certiorari, mandamus, quo warranto, prohibition and other rights of action for the alleged misfeasance, nonfeasance, criminal or tortious acts of public officials.

Public officials, even more than other persons are required to obey the laws. An officer can never justify an offense against the state (crime) by his position as officer of the state.[76] To summarize, the liabilities of a public officer are: criminal liability or impeachment for misdemeanor,

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[67] *Id.*, at 908.
[68] CONST. (1973), art. VII, sec. 1.
[69] *Id.*, art. VII, sec. 10.
[70] *Id.*, art. VII, sec. 12.
[71] *Id.*, art. VII, sec. 7.
[72] CORTES, PHILIPPINE ADMINISTRATIVE LAW CASES AND MATERIALS 58-61 (1984).
[73] Goldwater, *The President's Ability to Protect America's Freedoms—The War Making Power*, WAR POWERS, Subcom. on National Security Policy and Scientific Developments of the Comm. on Foreign Affairs, H. Rpt. 9th Cong., 1st Sess. (19733.
[74] CONST. (1973), art. XIII, sec. 5.
[75] *Id.*, art. XIII, sec. 6.

treason, bribery, high crimes; liability for *ultra vires* acts; liability for acts under an unconstitutional statute. Officers are personally liable when they enforce an unconstitutional statute because they are presumed to know the law. Public officers may also be liable for the acts of subordinates. Generally, an officer is not responsible for the misfeasance or negligent conduct of persons employed by him in the discharge of official duties. But if he directs, encourages or personally cooperates in the negligent act of the latter, then he must answer for the subordinates' wrong.

Specifically, the penal laws define special crimes committed only by public officers. These encompass malfeasance, misfeasance, frauds and illegal exactions, malversation of public funds and property, infidelity and other irregularities.[77] The civil laws expressly grants to an individual a right of action for damages in case a public officer or employee obstructs, defeats, violates or in any manner impedes or impairs civil rights and liberties.[78]

Yet another cornestone of public accountability is the Civil Service Commission and civil service laws.[79] It ensures integrity of government service through its control over the recruitment and appointment of government personnel, the basis of which must be fitness and merit. Excluded from its jurisdiction however, is the power to screen and appoint the members of the AFP. Although the military officers belong to the executive branch, control over appointment is with the President exercised through the Ministry of National Defense. The President as the Commander-in-Chief, formulates the rules governing the recruitment of AFP members. For reasons that will be discussed presently, it is asserted that the inclusion of the military under an expanded commission on government service best assures effiiciency in control and accountability of the military officers. The Civil Service Commission is the agency that enforces the constitutional prescription or standards for government service.

There is also the not so evident element of the mechanism for public accountability — public opinion. The underlying postulate of democracy is a free and participatory government; a government arrived at by consensus, a government by public opinion.[80] Public accountability is strengthened by a dynamic public information system. This is defined as consisting of all those elements and channels of communication through which a citizen learns of the activities of his government and conveys to government his views and needs.[81] It is integral to the democratic process because it works as an antidote to state secrecy which itself breeds abuse and evil in government. It is vital to the accountability process because it is the only way in

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[76] SWENSON, FEDERAL ADMINISTRATIVE LAW 183 (1952).
[77] REV. PENAL CODE, arts. 203-245.
[78] CIVIL CODE, art. 32.
[79] Pres. Decree No. 907 (1975), hereafter referred to as the Civil Service.
[80] Key, *An Introduction to Public Opinion and American Democracy,* PUBLIC OPINION ITS FORMATION AND IMPACT 13-14 (1975).
[81] Cutlip, *Government and the Public Information System,* A PUBLIC AFFAIRS HANDBOOK INFORMING THE PEOPLE 22 (1981).

which the citizen becomes conscious of the performance of a public officer. At the same time, it gives the public an opportunity for confrontation with officialdom. A public officer will not be as foolhardy as to commit offenses knowing that his conduct is keenly monitored. It works as a potent check upon public officers.

There are however two doctrinal limitations to the mechanism of accountability. One is the executive privilege and political question doctrine. This principle limits the jurisdictional ambit of courts for reviewability of executive conduct. It precludes judicial intervention over certain discretionary acts of the executive branch. The other, is the doctrine of sovereign immunity from suits. This rule may not be circumvented by directing the action against the officers of the state instead of against the state itself. This immunity from suit by private parties obtains not only in actions based on contracts but also those arising from tortious acts of its officers.[82] These two principles are frequently and conveniently invoked in controversies involving the military.

Because nothing could be more dangerous to public peace and safety than a licentious and undisciplined military,[83] discipline of the strictest kind must be maintained. To this end, superior officers are vested with authority to enforce obedience to commands and to discipline the soldiers. And if there be any transgressions, the public must have a right of action or remedy.

Before one can apply the general principles of public officers' accountability to the military, the distinct nature of the same must first be appreciated. Military service is unique in the sense that it is governed primarily by a law forged through time and wars, by generals and not political thinkers. Military law emphasizes swiftness of actions and absolute trust in the commander's leadership. It must be so because within the sphere of actual warfare and hostilities, the military commander's authority is extensive. Medieval military law, in fact, operated under the axiom that the king or the war commander could exercise unlimited powers of discipline over his troops.[84] General Douglas MacArthur defines war and aptly relates this to the commander's powers when he states:

> ". . . that war was the ultimate process of politics, that when all other political means failed, you then go to force; and that when you do that, the balance of control... is in the control of the military. A theater commander... is not merely limited to a handling of his troops; he commands that whole area politically, economically, and militarily.

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82 SINCO, PHILIPPINE POLITICAL LAW 38-39 (1962). This statement must be modified in view of Art. 32 of the Civil Code granting a right of action for damages against public officers for tortious acts.

83 GLORIA, THE ARMED FORCES OF THE PHILIPPINES AND THE LAW 293 (1956) quoting O'BRIEN, A TREATISE ON AMERICAN MILITARY LAW (1846).

84 BISHOP, JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 3 (1974).

85 McArthur, *Hearings Before the Comm. on Armed Services and Comm. on Foreign Relations, 82nd Cong.*, quoted in Weigley, *supra* note 3 at xii.

> You have got to trust at the stage of the game when politics fail and the military take over you must trust the military."[85]

Following this reasoning, military law would indeed be martial rule; in its essence a law of arms.[86] It is no wonder that courts traditionally recognized the military as specialized and separate from civilian society; the difference of the military and civilian communities being the primary pursuit of armies to fight or be ready on fight should the need arise. The military is not regarded as a deliberative body but an executive or ministerial arm. Its law is strict obedience governed by a separate form of discipline.[87]

Since work is primarily defense, secrecy and risk are mere incidents of the job, as are the basic skills of fighting and weaponry (as distinguished from ordinary civil service job descriptions). Tenure is not quite unlike "non-career service"[88] in the civilian service. Tenure or the "tour of duty" is specified by a period of years and is almost "contractual" in nature. This is based on the commission granted by the commander-in-chief. Further, the age-old control of troops by the commander still forms an integral part of the organizational structure.

Military law in general, refers to the system of regulations for the government of the armed forces with focus on military administration and discipline. Its form of discipline is one of its distinctive features.[89] Its built-in system of accountability may be broken down into the following elements: Firstly, the nature of administrative control and supervision by the commander-in-chief as exemplified by command responsibility and the chain of command; Secondly, the institution of the military courts-martial; and Thirdly, summary discipline in accordance with the articles of war. Summary discipline is similar in objective to the summary proceedings[90] prescribed by the civil service law. The powers of the commanding officer are more extensive than as provided by the civil service. This is actually an administrative proceeding.

Since military accountability usually refers to the liability of the discharge of a duty according to the position of the holder in relation to a higher authority, its operative incidents are command responsibility and the chain of command. *Command Responsibility* means "that the commander alone is responsible for all that his unit does or fails to do."[91] He may not shift this responsibility to any other individual. It is the responsibility of a commanding officer to account for any failure of mission, negligence or misconduct of the company, garrison or unit. Command is the authority

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86 BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 32 (1914).

87 Parker v. Levy, 417 U.S. 733 (1974) quoted in Owen, *A Hard Look at the Military Magistrate Pretrial Confinement Hearings: Gerstein and Courtney Revisited*, 88 Mil. Law Rev. 3, 48-49 (1980).

88 Civil Service, *supra* note 79, secs. 4-6.

89 BEISHLINE, MILITARY MANAGEMENT FOR NATIONAL DEFENSE 135 (1950).

90 Civil Service, *supra*, note 79 sec. 40.

91 TALLOW, COMMAND RESPONSIBILITY: ITS LEGAL ASPECT 17 (1965).

of an individual over his subordinates by virtue of his rank and assignment. Its elements are: precedence over the personnel within the organization; responsibility for planning and coordination of the efforts of the constituents; responsibility for the actions of units or individuals; the power to enforce official will by issuing orders in conformity with the laws and directives established by the higher authority; the authority to make inspections; and the authority to initiate corrective or disciplinary measures.[92] The succession of commanding officers through which command is exercised from the superior (the President, Commander-in-Chief through the Minister of Defense) to subordinates (the enlisted men) is referred to as the chain of command or command channel.[93] This promotes efficiency of command but impedes public opportunity for confrontation in the middle of the command line. The linear and vertical[94] structure best characterizes the administrative control of the military.

The Articles of War[95] provides for a regular judicial process to ascertain guilt and assess punishment through the courts-martial proceedings. The court-martial is a court convened by the military authorities, to try persons for violations of military criminal law.[96] Suffice it to say that there are three types depending on the degree of violations and jurisdiction of the constituent body. There is General Courts-Martial, Special Courts-Martial and Summary Courts-Martial.[97] Jurisdictional requirements must be satisfied before a person may be tried by court-martial. The court must be convened by an officer empowered to do so; membership must be correct with regard to members and competency; the court must acquire jurisdiction over the person and the offense charged. That is, it must be for a violation of the Articles of War and must be "service connected."[98]

Court-martial has not been expressly provided for in the Constitution. But its constitutionality has been defended on the basis of the United States jurisprudence, from which the Philippine military and constitutional law is derived. It has been accepted as a lawful tribunal with competent authority to finally determine any case over which it has jurisdiction. Applying early (and obsolete) United States decisions, it has been asserted that courts-martial "proceedings when confirmed as provided, are *not open to review* by the civil-tribunals, except for the purpose of ascertaining whether the military court had jurisditcion over the person and subject matter, and whether having such jurisdiction, it had exceeded its powers in the sentence pro-

92 *Id.*, 19.
93 *Ibid.*
94 Beishline, *supra* note 65 at 144.
95 Com. Act No. 408 (1938) hereinafter referred to as the Articles of War.
96 FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL 17 (1957).
97 Articles of War, art. 3.
98 Salisbury, *Non-Judicial Punishment Under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice*, 19 SAN DIEGO L. REV. 839-875 (1982).

nounced."[99] A direct consequence of this reasoning would be a wider latitude for immunity of military officials and minimal judicial intervention or review. It is unfortunate that for all the increased militarization of the Philippines in recent years, there exists a dearth if not an absence of jurisprudence contesting the jurisdiction of courts-martial. The case of *Aquino v. Military Commission No. 2*[100] is not really in point because this was convened under the regime of martial law. This will be discussed later. The trend of United States jurisprudence is towards narrower and defined limits of official immunity and wider court jurisdiction or reviewability by the court of military tribunals and courts-martial. The Warrent Court in *O'Callahan v. Parker*[101] rejected the longstanding doctrine of minimal interference with military courts. Although modified by the case of *Parker v. Levy*,[102] the jurisprudence laid down would still allow a balancing of military necessity as against constitutional necessity for judicial review. Present American law, in comparison to Philippine jurisprudence, is more liberal where the military is involved.

Courts-martial decisions are appealable to the AFP Board of Review[103] and to the Court of Military Appeals. Although the decree expressly grants review by the Supreme Court, there is as yet no case brought to the Supreme Court pursuant to this law. Only recently, the military review board was abolished.

The issue of judicial review over military trials is relevant because judicial review contributes to the overall framework of public accountability of officialdom. Resort to the courts by anyone aggrieved, minimizes the dangers of closed military trials not unlike the star chambers. It further assures civilian supremacy over the military. This is quite an important concern, in light of contemporary experience of the public as regards the military.

As was noted earlier, the doctrine of sovereign immunity from suit operates as a limit to the military public accountability. The doctrine provides officials with absolute immunity from personal liability for actions taken within the scope of their discretion, even if they acted out of malice or bad faith.[104] There has been an erosion of the absolute immunity doctrine in the cases of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[105] and *Scheur v. Rhodes*.[106] The United States Supreme Court recognized a right of action against federal officials accused of common law

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[99] Exec. Order No. 178 (1938), Armed Forces of the Philippines, Handbook for Courts-Martial 7 (1969), citing *Grafton v. U.S.*, 206 US 333 (1907).

[100] G.R. No. 37364, May 9, 1975, 63 SCRA 546 (1975).

[101] 395 U.S. 258 (1969) cited in Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. LAW REV. 4-5 (1980).

[102] *Ibid*, see also *supra* note 87.

[103] Pres. Decree No. 1199, 3 O.G. 1197-11203 (Sept., 1977).

[104] Burgess, *Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After Butz v. Economou*, 89 MIL. LAW REV., 25, 30 (1980).

[105] 403 U.S. 388 (1971), *Id.*, 35.

[106] 94 S. Ct. 1683 (1974).

or constitutional torts despite the absence of any express legislative consent. The court noted that the conduct of the National Guards in the *Scheur* case is not beyond judicial review. Further, it may not be gleaned from earlier cases that there *may not* be "accountability in a judicial proceeding for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief."[107] In *Butz v. Economou*[108] the court held that federal executive officials are entitled only to qualified immunity in suit for damages arising from an unconstitutional act. If an officer is acting unconstitutionally, he is not acting within his authority and therefore loses any shred of his sovereign-employer's immunity from suit.

Military as well as other public officials enjoy only qualified immunity. In the United States, federal laws granting rights to sue state officials are fairly recent enactments. In the Philippines, legislative consent to sue officials has been granted in the civil code.[109] And yet, with respect to the military officials, there has been a clear hesitancy on the part of courts to address the issues. In the case of *Babst v. National Intelligence Board*,[110] the court avoided a definite ruling on the action for prohibition against the intelligence officials for alleged harassment of journalists.

By way of comparison, a short discussion of two parallel cases in the United States and the Philippines as regards judicial interference of military conduct is in order. The constitutions of the Philippines and the then territory of Hawaii had the same provisions relevant to the declaration of martial law.[111] In the case of *Duncan v. Kahanamoku*[112] the Court assailed the sentencing of civilians by military tribunals during martial law. The Court perceived the conduct of the military as a move to assert its power over civilian authority. The court further emphasized that there was no military necessity for the trial of the petitioners by military tribunals rather than by regular courts, especially where the regular courts continued to function. To affirm the convictions would give way to a subordination of executive, legislative or judicial authorities to complete military rule. It was held to be anathema to well entrenched and indispensable procedural safeguards. Upon the other hand, in *Aquino v. Enrile*[113] and *Aquino v. Military Commission No. 2*[114] the Philippine Supreme Court accorded respect for the jurisdiction of the military tribunals convened during martial law. It also affirmed the validity of the proceedings in the latter case, implicitly recognizing the existence of a military government despite assertions of continued

[107] *Id.*, 1693.

[108] 438 U.S. 478 (1978) cited in Philip, *Executive Immunity for Constitutional Torts After Butz v. Economou*, 20 SANTA CLARA L. REV. 453, 454 (1980).

[109] CIVIL CODE, arts. 27, 32, 34.

[110] G.R. No. 62992, September 28, 1984, 132 SCRA 316 (1984), MENDOZA, SUPPLEMENT TO CONSTITUTIONAL LAW CASES AND MATERIALS 11-19 (1984).

[111] The state executive of Hawaii was empowered to declare martial law "in case of rebellion or invasion, or imminent danger thereof when the public safety requires it."

[112] 66 S. Ct. 606, 631 (1945).

[113] G.R. No. 35546, September 17, 1974, 59 SCRA 183 (1974).

[114] G.R. No. 37364, May 9, 1975, 63 SCRA 546 (1975).

civilian regime and despite the continued exercise by civil courts of their functions. In so doing, the Supreme Court acquiesced to the disenfranchisement of its jurisdiction over offenses enumerated in the general orders. Chief Justice Fred Ruiz Castro in fact defends the validity of military tribunals as allowable emergency situation tribunals under a regime of martial law.[115] He assumes that a military government did exist. The manifest legal consequences of the court's reasoning in the *Aquino* case was a distintegration of judicial control over the military contributing to a breakdown of public accountability.

The rules of official responsibility, asserts Birkhimer, are equally applicable under martial law as elsewhere.[116] The safeguard against abuse of power is not found in denying that officers may act thus depriving the public the benefit of that power. It lies in holding officials to a strict accountability. How else may accountability be enforced if chances of judicial intervention are foreclosed?

The last constituent element is summary discipline under Article 105[117] of the Articles of War. As amended, it provides more extensive powers to commanding officers, stiffer disciplinary punishments and swifter procedure for the imposition of sanctions. Among others, it provides withholding of privileges for thirty days, restriction or suspension of duties, arrest or detention in quarters, withholding of wages, deprivation of liberty, correctional custody, confinement, hard labor, demotion, admonition and reprimand. Summary discipline under the Articles of War appears quite stringent. But the track record of the military in disciplining its ranks never matched these standards. Discipline has not been well maintained; without its enforcement the forces would be nothing but a "mob."[118]

Except for the special distinctions pointed out as regards the tradition of military justice and administration, substantially the same principles apply to all kinds of public officers. The Constitutional provisions, the penal and civil codes and administrative law apply equally to civil officers and military officers. To recapitulate, the doctrine of qualified immunity from suit does not depend for its operative effect upon any distinctions. It attaches to all public offices. Civil and military officers belong to the class of executive officers entrusted with the implementation of laws laid down by superior authority. Administrative supervision differs merely in form but is based on the same principles of control and supervision. The manner of appointment is effected through different agencies but is ultimately controlled by the chief executive. Mass media scrutiny it seems, is more facile in the civilian structure than

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[115] Castro, *The Legal Basis of Military Tribunals in a Martial Law Situation*, 2 J. INTEG. BAR PHIL. 128, 134 (1974).

[116] Birkhimer, *supra* note 86 at 546.

[117] Pres. Decree No. 1968, further amending Article 105 of the Commonwealth Act No. 408 (1985).

[118] Rowe, *Military Justice Within the British Army*, 94 MIL. L. REV. 99, 100 (1981).

in the military set-up. This is due in part to the military's proclivity for keeping state secrets and classified documents.[119] Herein lies the threat to the mechanism of public accountability. This is the sphere where reasonable yet full disclosures by media are essential. This is not to say however that all military secrets must be blurted out. A delicate balance of public disclosure and access to information as against vital security interests must be attempted. The dangers of state secrecy must be constantly weighed against a viable defense strategy. The only few exceptions to free-wheeling disclosures would be concerning matters of national interests, advice privilege, foreign relations[120] and international negotiations.

The preceding survey on the law of public officers was sought for the purposes of clarifying the peculiarities of the military institution as a public office, with special focus on public responsibility. There is a need to address the issue of public accountability in the light of increased military abuses, wanton behavior and culpable violations in the last decade. That the military post is a mere variation of the ordinary public office cannot be denied. The past discussion clearly shows that differences lie only in the traditional modes of military justice and administration but not in the overall requisites for the conferment of the public office as well as consequent duties. From the discussion may be gleaned four important lessons. Firstly, public accountability is a direct result of continued civilian control of the military. Secondly, there has been minimal judicial intervention in military affairs compared to inquiries of the actuations of civil officers. There should be no reason why this record is skewed because judicial review is equally available in both areas. Thirdly, the mechanism for discipline of the military affords substantial control. The problem lies in the enforcement of the military law as well as the liberal application of other general principles on public officers. Fourthly, the public information system provides for a potent check on official action. Yet public scrutiny through the mass media over military affairs has never been that thorough compared to the scrutiny applied in civilan affairs. This should not be ignored. Nurturing a critical public opinion contributes to the reduction of licentious conduct by public officials.

III. Reflections

Alexander Hamilton in 18th century America could not envision a military revolution springing from, and overthrowing the very system of government he and his fellow federalists sought to create. He wrote:

> "Schemes to subvert the liberties of a great community require time to mature them for execution. An army so large as seriously to menace

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[119] Up to the present, the military has kept under classified status the entire national security code disregarding the general principle of publication of laws as a pre-condition for its effectivity, or before anyone can be charged under the statute, notwithstanding the *Tañada v. Tuvera* doctrine, G.R. No. 63915, April 24, 1985, 136 SCRA 27 (1985).

[120] Emerson, *The Dangers of State Secrecy*, The First Freedom Today, 257, 262 (1984).

> those liberties could only be formed by a progressive augmentation; which would suppose, not merely a temporary combination between the legislative and executive, but a continued conspiracy for a series of time. IS IT POSSIBLE THAT SUCH A COMBINATION WOULD EXIST AT ALL? IS IT PROBABLE THAT IT WOULD BE PRESERVED IN... IS IT PRESUMABLE, THAT EVERY MAN, THE INSTANT HE TOOK HIS SEAT IN THE NATIONAL SENATE, OR HOUSE OF REPRESENTATIVES, WOULD COMMENCE A TRAITOR TO HIS CONSTITUENTS AND TO HIS COUNTRY? CAN IT BE SUPPOSED THAT THERE WOULD NOT BE FOUND ONE MAN, DISCERNING ENOUGH TO DETECT SO ATROCIOUS A CONSPIRACY, OR BOLD OR HONEST ENOUGH TO APPRAISE HIS CONSTITUENT OF THEIR DANGER? x x x[121] (emphasis supplied)

The above rhetoric seems quaint when viewed in the light of Philippine political and military experience. Yes..., individuals with dictatorial designs exist and yes, such a conspiracy can easily be hatched. A decade of Marcos' "constitutional authoritarianism" supported by the military gives ample evidence of such conspiracy to control government and subvert its cherished traditions and principles. Civilian supremacy over the military is one such cherished principle. It is up to the present generation of Filipinos to analyze fully the past military campaign against civilian authority; to reassert civilian authority and draft effective measures to maintain the delicate balance of power.

As elsewhere in the world, defiance and take-over by military forces are endemic occurrences.[122] The supremacy of civilian authority over the military has been repeatedly challenged and will be so. This is due, in part, to the fact that the armed forces enjoy massive political advantages over civilian organizations: marked superiority in organization, a highly emotionalized symbolic status, and a monopoly of arms. They enjoy overwhelming superiority in the means of applying force."[123]

In the Philippines, military assertion of power was basically a two-pronged strategy. The obvious campaign was the exercise by the President of his war powers as a Commander-in-Chief. His control of the civilian helm as well as that of the army assured a dictator's success. The regime was maintained by a blatant show of military might. The other strategy was more subtle. It involved a gradual colonization of the civilian bureaucracy and by the military forces leading to a distintegration of civilian control. By this is meant appointments or designations of active military officers to civilian positions in the government, and assumption by the military of purely civilian functions.

The breakdown of control would have been very difficult to achieve were it not for the obliteration of Congress, because Congress shared with the President ample war making powers in addition to its fiscal powers.

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[121] Hamilton, *Grounds for Limitations or Control Over Armies*, in BEARD, THE ENDURING FEDERALIST, 106 (1948).

[122] FINER, THE MAN ON HORSEBACK, 2 (1962).

[123] *Id.*, 7.

An influential legislature serves as a check on the abuse of executive powers and provides yet another forum for the debate, discussion and investigation of governmental matters. Samuel Finer criticizes the tendency to assume that it is somehow natural for the armed forces to obey the civil power; that where instances show civilian control to have broken down, they are to be viewed as isolated disturbances, after which matters will again return to "normal", no reason being adduced for showing that civilian control of the armed forces is natural. According to him, *instead of asking why the military engages in politics, one must reflect why the military ever does otherwise.*

Even so, the people through the Constitution have adopted the principle of civilian supremacy as one of the underlying bases of government. The perceived distrust and fear of a warrior's republic dates back to early history. The roots of modern democracy were nurtured by the very oppression of king and generals. Kings maintained armies to rule people. But armies also unmade kings. The destabilizing effect of shifting military loyalties as was the experience of Roman emperors, has had its heyday time and again. The axiom of civilian supremacy is merely a corollary to the principles of democracy and assures the integrity of the sovereign people by restraining personal loyalties. The military owes its allegiance to the sovereign people and not to particular leaders or political parties. As a consequence of this allegiance, the military must account to the people for its conduct.

The so-called "EDSA revolution" merely exposed a nascent praetorian army bred during the years of martial law. The concept of praetorianism refers to systems where a "bureaucratically administered professional army paid in coin, intermittently deposes governments by extra-legal acts, the most characteristic being the *coup'état.*"[124] Praetorian armies undermine civilian supremacy, and impair the elemental principles governing a public office.

This paper sought to explore the factors and underlying circumstances which gave rise to an unwieldy military institution; and to assert that, all special elements considered, it is still a public office that demands from its personnel, utmost integrity, loyalty, and competence. The impediments to the upholding of this special public office, has been amply discussed. The present exposition affirms the need for judicial review and a strict enforcement of all the pertinent laws: military law on discipline, penal laws, civil laws and where practicable, civil service laws by analogy.

There is sufficient basis for asserting that the "hands-off" policy of courts as regards the military jurisdiction diminishes public accountability.

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[124] Rapoport, *The Praetorian Army: Insecurity, Venality, and Impotence,* in SOLDIERS, PEASANTS AND BUREAUCRATS 253 (1982).

[125] Proposed Code of Crimes, art. 372 cited in Tallow, *supra* note 91 at 1.

Judicial activism is strongly recommended, especially in view of the substantial intrusion of the military into civilian affairs.

The above survey indicates that there do exists good laws, and mechanisms for public accountability, well established. But their effectiveness has been subverted in the recent past, by the concentration of legislative and executive powers in the President/Commander-in-Chief. The solution lies in revitalizing these laws and mechanisms as well as refining them where needed. One possible refinement may deal with command responsibility. It is not a recognized doctrine under Philippine penal laws. The proposed Code of Crimes which was intended to replace the Revised Penal Code specifically provides for command responsibility under new offenses. One proposed offense provides for criminal liability for any chief or captain of police or a commanding officer who fails to maintain strict discipline among those under his immediate command.[125] The proposals in the Code of Crimes should not be overlooked.

Another area which deserves looking into involves delineation of military and civilian service. Two things may be dealt with by law. One is a possible merging of the civil service and military service under an umbrella agency administering all government service. That is not to say that their functions will also be merged: only administration, viz., the regulation of fitness and merit, control over recruitment and selection, as well as compensation. This would increase civilian control of the military. After all, the business of the military is only to enforce the defense policy laid down by the President and the legislature. The function is purely ministerial in this respect. Again, it must be emphasized that while it is suggested that administration of the two services be merged, it is also suggested that a strict delineation of their functions be maintained. Hence, it is recommended that active military personnel be barred from appointments in the civil service. The recent move in the Constitutional Commission is laudable. Section 6, Article XII of the proposed Constitution would prohibit any member of the armed forces in active service from, at any time, being appointed or designated in any capacity to a civilian position in the government, including government-owned or controlled corporations.[126]

Another area which definitely requires refinement affects the public information system. It was stated earlier that access to information and public disclosures has not been very effective when it involved military matters. A few years ago, there were moves to enact a freedom of information act. Fortunately, it was not enacted; it is fortunate because the bill promoted more censorship rather than free access to information. A statute must be enacted providing for a reasonable and rational access of the public to information especially on matters of public interest. The Ministry of National Defense has been very assiduous in its perceived duty to keep

[126] Resolution No. 468, Constitutional Commission 1986.

classified documents just that. The public has a right to information as long as this does not impair national security. A good illustration is the classified treatment accorded by the Ministry of National Defense (MND) to the National Security Code. Official (or unofficial) opinion is that this compilation of security laws is classified information and therefore cannot be shown to library users in the MND Library. How can citizens be continually charged for security offenses when they are ignorant of the laws? Even more alarming is the ignorance of some officials responsible for classifying documents: President Marcos promulgated Presidential Decree No. 1876, dated July 21, 1983 which repealed the National Security Code. This decree appears in a private publication, *Philippine Presidential Decrees and Other Vital Legal Documents* but does not appear in the Official Gazette. For months, the defense officers have continued to enforce a *repealed law* as well as maintained its classified information status. There is here, misinformation not only by the public, but by officials as well. This distorted information system definitely needs reorganizing. This odious state of affairs require positive action, by way of a statute rationalizing public disclosures of information.

Since state secrecy breeds abuse in government, and full public disclosures its antidote, it is strongly recommended that the mechanisms of judicial review, legislative inquiries and the public information system be strengthened. This is the only way control over the military may be institutionalized. Further, it must be an extensive control.