Authentic Superior Accountability in the Civil Service: "Command Responsibility" as a Key to Economic Development

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I. INTRODUCTION

It is not unusual for an Essay like this to begin with an almost ceremonial recollection of the constitutional precept that "[p]ublic office is a public trust."[1] And yet, even before one can finish quoting the said precept's subsequent amplification that "[p]ublic officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency,"[2] it will also not be unusual for anyone to experience a certain discomfort while the mantra of government accountability is chanted. This uneasiness is not altogether surprising given the Filipino people's long and arduous fight against graft and corruption — a struggle, quite sadly, known more for its perceived failures than the individual successes that crop up from time to time.

II. CORRUPTION: AN OBSTACLE TO COMPETITIVENESS

In a society hit in fairly recent times by low governance indicators (on a scale of negative 2.50 to positive 2.50) — 0.49 for control of corruption, 0.53 for voice and accountability, 0.03 for government effectiveness, and negative 0.49 for rule of law[3] — the slide towards pessimism is indeed quite tempting. One need only consider the finding of the civil society group Procurement Watch, Inc. that potential leaks in procurement due to corruption reached an estimated Php95 billion in 2001 alone, an amount equivalent to 68% of the deficit of that year.[4] More shocking is the World Bank's discovery that the Philippine government lost around US$48 billion in the last 20 years, reckoned as of the year just mentioned — an amount greater than the country's foreign debt of US$40.6 billion during the same period — owing to "[l]ack of transparency and competition, collusion, political interference, and delays, as well as the excessive use of discretionary criteria."[5]

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1. PHIL. CONST. art. XI, § 1.
2. Not to mention "act with patriotism and justice, and lead modest lives." PHIL. CONST. art XI, § 1.
3. Asian Development Bank, Country Governance Assessment for the Philippines 12-13 (2005), *available at* http://www.adb.org/Documents/Reports/CGA/pga-feb-2005.pdf (last accessed Oct. 16, 2008) (citing Governance Matters II: Updated Indicators for 2000-2001, a study of the World Bank (2002)).
4. *Id.* at 68.
5. *Id.*

As if these were not enough, the World Economic Forum's (WEF) Global Competitiveness Report (GCR) for 2007-2008 ranked the Philippines a relatively low number (no.) 61 (out of 131 countries or economies), with a score of 3.99 (out of a perfect score of 7) in terms of competitiveness[6] — way behind Association of Southeast Asian Nations (ASEAN) neighbors Malaysia (no. 21, with 5.10), Thailand (no. 28, with 4.70), and even relative upstart Vietnam (no. 68, with 4.04). According to the report, the Philippines is still a *factor-driven* economy, with its development primarily based on factor endowments, primarily unskilled workers and natural resources.[7] The country is rated poor in the area of institutions, meaning that there is "low public trust of politicians, excessive red tape, and concerns related to the diversion of public funds and wastefulness of government spending."[8] Significantly, the GCR identifies corruption as the top problematic factor for doing business in the Philippines, with an inefficient government bureaucracy coming in fourth.[9]

III. THE INDIVIDUAL PUBLIC SERVANT: THE MOST BASIC UNIT OF ACCOUNTABILITY

Even as citizens and foreigners alike monitor with fingers crossed anti-corruption measures, such as the Government Procurement Reform Act[10] and the amended Anti-Money Laundering Act,[11] the previously mentioned discomfort persists. A solution more drastic — yet more fundamental and universal, such that its power of compulsion cannot be questioned — must be taken. Resort must therefore be had to the norm of public trust. In this

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6. *Competitiveness* is defined in the report as the set of institutions, policies, and factors that determine productivity. *See* Michael E. Porter & Xavier Sala-i-Martin, Global Competitiveness Report (GCR) for 2007-2008, at 5, *available at* http://www.gcr.weforum.org (last accessed May 24, 2008) [hereinafter Porter].

7. Co-editor Michael E. Porter, Director of the Institute for Strategy and Competitiveness of the Harvard Business School, identifies three stages of development for economies: first, when an economy is *factor-driven*; second, when it is *efficiency-driven*; and third, when it is *innovation-driven*. *Cf.* Porter, *supra* note 6, ch. 1.1, at 5.

8. Porter, *supra* note 6, ch. 1.1, at 28-29.

9. *Id.* It presents the table showing the Most Problematic Factors for Doing Business in the Philippines, Section on Problematic Factors Analysis.

10. An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes [Government Procurement Reform Act], Republic Act No. 9184 (2003).

11. An Act Defining the Crime of Money Laundering, Providing Penalties Therefore and for Other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160 (2001).

connection, Justice George Malcolm's basic idea of government in the Philippines comes to mind: it is a representative form of government, where

> the officers [are] mere agents and not rulers of the people, one where no man or set of men has a proprietary or contractual right to an office, but where every officer accepts office pursuant to the provisions of law and holds the office as a trust for the people whom he represents.[12]

Be that as it may, the efficaciousness of that trust will ultimately depend on the *individual* public servant, particularly on how responsible the public servant will be in living out the sacred trust reposed upon him or her. Indeed, "[g]overnment [rests] on the very ethic that people in positions of power take responsibility for their actions."[13] This is plain and simple accountability, which political and governance scholar Matthew Flinders, as quoted by Professor Thomas S. Axworthy, described as follows:

> Accountability is a process where a person or group of people are required to present an account of their activities and the way in which they have or have not discharged their duties … the difference between accountability and responsibility is culpability.[14]

It is not that processes of check and balances as well as other institutional measures are unimportant. They are. The situation here, however, could very well be likened to the scenario of one being so close to the trees that one cannot see the forest. Peering into that structure called government from without, it is clear that the main player here is the government official or employee who engages in corruption, or who is willing to be "corrupted," so to speak. In terms of the small fry, however, Philippine legal history is already replete with instances of officers being held liable. With the current furor over scandals like the ZTE-NBN deal, not to mention the above-discussed debilitating effect of corruption on Philippine competitiveness, an inescapable question is: what must be done to those *to whom much has been given and much has been entrusted*,[15] such as the heads of agencies and offices

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12. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1108 (2003 ed.) (citing Cornejo v. Gabriel, 41 Phil. 188 (1920)).

13. Thomas S. Axworthy, The Accountability Ladder: Five Steps Toward Democracy, at 15-17, *available at* http://www.wfda.net/UserFiles/File/speeches/Axworthy.pdf (last accessed Oct. 16, 2008) (a paper presented at the First Biennial Conference, World Forum for Democratization in Asia in Sep. 2005).

14. *Id.* (citing MATTHEW FLINDERS, THE POLITICS OF ACCOUNTABILITY IN THE MODERN STATE (2001)).

15. *Cf. Luke* 12:48 (The New Testament: Translated from The Latin Vulgate, The Episcopal Committee of the Confraternity of Christian Doctrine (1997)).

where corruption is unabashedly committed. To this end, the author is impelled to revisit the long-suggested application of the norm of *command or superior responsibility* — traditionally or regularly associated with military or police commanders — to erring government officers.

IV. COMMAND RESPONSIBILITY AS A BASIS FOR CULPABILITY

The concept of command responsibility is traditionally associated with international humanitarian law, the law of *armed conflict* or the laws and customs of war.[16] Command responsibility is a responsibility held by military commanders, as well as civilian superiors, for crimes committed by subordinate members of the armed forces or other persons subject to their control in international as well as domestic armed conflicts.[17]

Based on Article 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Trial Chamber outlined the following elements which constitute command responsibility:

- the existence of a superior-subordinate relationship;
- the superior knew or had reason to know that the criminal act as about to be or had been committed; and

16. *Cf.* INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS (2d ed. 2004). This branch of public international law covers both international armed conflicts, including wars of national liberation, and non-international armed conflicts, including so-called "new" conflicts, such as the so-called "anarchic" and "identity-related" conflicts. "Anarchic" conflicts are those marked by either the partial or total breakdown of State structures such that armed groups take advantage of the political vacuum to grab power. The same is also marked by a weakening of, or breakdown in, the chain of command in the same armed groups. On the other hand, "identity-related" conflicts seek the exclusion of an adversary by "ethnic cleansing," which means displacing or even exterminating populations. *Id.* at 18. Not being an essay on international humanitarian law, this Essay refrains from going into an extended discussion on the evolution of command responsibility within the community of nations. It merely extracts a general understanding of the concept, en route to its later application to incidents of corruption in the civil service.

17. *Cf.* Joaquin G. Bernas, S.J., *Command Responsibility*, *available at* http://www.supremecourt.gov.ph/publications/summit/Summit%20Papers/Bernas%20-%20Command%20Responsibility.pdf (last accessed Oct. 16, 2008) [hereinafter, Bernas, *Command Responsibility*] (delivered at the National Summit on Extrajudicial Killings in Feb. 2007); Eugenia Levine, Command Responsibility: The Mens Rea Requirement, Feb. 2005, *available at* http://www.globalpolicy.org/intljustice/general/2005/command.htm (last accessed Oct. 16, 2008).

- the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.[18]

Because it actually contains two alternative norms of knowledge — namely, *knew* and *had reason to know* — the second requisite, naturally, calls for a brief explanation. *Knew* refers to actual knowledge, which can be established either directly or through circumstantial evidence.[19] On the other hand, the definition of *had reason to know*, which was expectedly contentious, after some time, developed into "that the commander must have some information available to him, which puts him on notice of the commission of unlawful acts by his subordinates."[20] With no such information, there was no liability. This was regardless of the fact that the commander's ignorance was wrought by negligence in the discharge of the former's duties.[21]

Significantly, the legal brusqueness of command responsibility did not go unnoticed in the Philippine civilian government setting. Command responsibility became a convenient basis for *administrative* liability. On 17 February 1995, former President Fidel V. Ramos promulgated Executive Order (E.O.) No. 226,[22] institutionalizing "command responsibility in all

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18. Bernas, *Command Responsibility*, *supra* note 17. In this connection, Bernas comments that the requisites under Section 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) were actually based on Articles 86 (2) and 87 of the Additional Protocol I of 1977 to the Geneva Convention of 1949. *See* Levine, *supra* note 17; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), § 7 (3), May 25, 1993, 32 I.L.M. 1159; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 86 (2) & 87, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

19. Levine, *supra* note 17 (citing The Prosecutor v. Zejnil Delalic, et al., Case No. IT-96-21-A, ¶ 241 (Appeals Chamber 2001) (particularly referring to *Celebici* Appeals Chamber Judgment, etc.)).

20. *Id.*

21. Levine views this as a lenient formulation of the rule and espouses in her paper the establishment of an affirmative duty on the part of a commander or superior to actively know what is going on — such that liability will accrued not only upon such time that the commander or superior obtains information that will place such officer on guard. *See* Levine, *supra* note 17 (discussing the *Celebici* Appeals Chamber Judgment of Feb. 20, 2001 and the *Blaskic* Appeals Judgment of July 29, 2004).

22. Office of the President, Institutionalizing of the Doctrine of "Command Responsibility" in All Government Offices, Particularly at All Levels of Command in the Philippine National Police and Other Law Enforcement Agencies, Executive Order No. 226, 91 O.G. 2482 (Feb. 17, 1995).

government offices, particularly at all levels of command in the Philippine National Police and other law enforcement agencies."[23] Command responsibility is defined therein as the "accountability of any government official or supervisor, or officer of the Philippine National Police or that of any other law enforcement agency" for *neglect of duty* if

> he [or she] has knowledge that a crime or offense shall be committed, is being committed, or has been committed by his [or her] subordinates, or by others within his [or her] area of responsibility and, despite such knowledge, he [or she] did not take preventive or corrective action either before, during, or immediately after its commission.[24]

E.O. No. 226 complements this definition with a brief enumeration of the instances under which there may be *presumed knowledge* of the commission of irregularities or criminal offenses, to wit, when the irregularities or illegal acts are widespread in the area of jurisdiction of the official, supervisor, or officer —

- when the irregularities or illegal acts have been repeatedly or regularly committed within the area of responsibility of the official, supervisor or officer; or
- when members of his immediate staff or office personnel are involved.[25]

Its clear usage of presumptive knowledge notwithstanding, E.O. No. 226 does not explicitly mention the *had reason to know* standard of knowledge earlier read into the Additional Protocol I of 1977[26] and which legal exegetes also divined from the United States Military Commission's finding that General Tomoyuki Yamashita, former Commanding General of the 14th Army Group of the Japanese Imperial Army in the Philippines during World War II, was responsible for the atrocities committed by the members under his command,[27] due, among others, to his failure to "discover" said

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23. *Id.*

24. *Id.* § 1. This was reiterated in a memorandum issued by then Chief of Staff General Hermogenes C. Esperon, Jr. on Feb. 4, 2007, ordering strict adherence to the doctrine of command responsibility. *Cf.* Pacifico A. Agabin, Accountability of the President under the Command Responsibility Doctrine, *available at* http://www.supremecourt.gov.ph/publications/summit/Summit%20Papers/Agabin%20-%20Accountability%20of%20the%20President.pdf (last accessed Oct. 16, 2008) (delivered at the National Summit on Extrajudicial Killings on Feb. 2007).

25. E.O. No. 266, § 2.

26. Protocol I, *supra* note 18.

27. Bernas, *Command Responsibility*, *supra* note 17. *See In Re* Yamashita, 327 U.S. 1 (1946).

criminal acts.[28] Instead, and apparently as a matter of procedural convenience, E.O. No. 226 makes use of an inference as to the existence of culpable knowledge drawn from the established existence of any of the instances enumerated under Section 2.[29] This presumption is disputable — as it is not yet a rule of substantive law[30] — and hence, may be rebutted by contrary evidence.[31]

Observing perhaps that E.O. No. 226 was in no small terms more specifically addressed to the police and other law enforcement agencies, Ramos' successor, former President Joseph Ejercito Estrada, promulgated his own measure of administrative accountability against graft and corruption based on command responsibility. Couched in more generic language and addressed to "all heads of executive departments, bureaus, instrumentalities, offices and agencies of the government, including government-owned/controlled corporations and state colleges and universities, as well as local government units,"[32] Estrada's Memorandum, dated 19 November 1999, defined command responsibility as "the accountability of all heads of departments and other superior officers to closely supervise, coordinate, control, and monitor the discharge of duties by (their) subordinates."[33] The term also includes "the responsibility to control and monitor the activities of those operating within [the head's or officer's] area of jurisdiction and to take preventive or corrective measures as may be warranted under the premises."[34]

Instead of providing presumptions, the aforementioned presidential memorandum lists down various "circumstances" of administrative liability, described therein as "already specified in the Administrative Code of 1987 and in various Supreme Court decisions,"[35] as follows:

> (1) Where, being charged with the duty of employing or retaining his subordinates, he negligently or willfully employs or retains unfit or improper persons.

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28. Levine, *supra* note 17.

29. *See* 6 OSCAR HERRERA, REMEDIAL LAW 29-30 (1999 ed.) (citing Manning v. John Hancock Mutual Life Ins. Co., 100 U.S. 693 (1880)).

30. A.R. BAUTISTA, BASIC EVIDENCE 1117 (2004).

31. *Cf.* HERRERA, *supra* note 29, at 41.

32. *Cf. War Against Graft: Pres. Joseph Estrada institutionalizes command responsibility doctrine*, COA NEWS, Jan.-Feb. 2000, vol. 2, no. 1, *available at* http://www.coa.gov.ph/COA_News/2000/vol2n1/graft.asp (last accessed Oct. 16, 2008) [hereinafter *War Against Graft*].

33. *War Against Graft, supra* note 32.

34. *Id.*

35. *Id.*

(2) Where he so carelessly or negligently oversees, conducts or carries on the business of his office as to furnish the opportunity for default.
(3) Where he has actually authorized by written order the specific act or omission complained of.
(4) A fortiori, where he has directed, authorized or cooperated in the wrong.
(5) Where a superior officers' liability is expressly provided in existing laws.
(6) When the irregularity is illegal acts are widespread within his area of jurisdiction or have been regularly committed within his area of responsibility.
(7) When members of his immediate staff or office personnel are involved.[36]

It appears then that the intent of the former President was to constitute each of the above instances as independent grounds for administrative liability. Those instances which clearly spell out overt acts or omissions — such as the negligent or willful retention of unfit employees[37] or when the head or officer has directed, authorized, or cooperated in the wrong — pose no problem as these may easily be proved or disproved by evidence. The palpable conundrum, however, lies in phrases like "as to furnish opportunity for default," "widespread within [one's] area of jurisdiction," and "regularly committed within [one's] area of responsibility." These phrases easily echo, as in the case of E.O. No. 226, the *had reason to know* standard discussed above. But what is more telling here is that the memorandum provides that appropriate civil and criminal actions shall likewise be taken against public officers found guilty of the foregoing circumstances.[38] Even if there should be some dovetailing with existing criminal and other statutes, the memorandum itself is packed with an administrative whip that can make prosecution in court easier for the State. Such being the case, is the defense therefore doomed in the case of a well-meaning head of agency who will find himself trapped after some time in a government office where corruption and fraud are deeply entrenched and institutionalized, notwithstanding efforts at reform on his part? And is there any sense in serving in government when the above "circumstances" are utilized as evidentiary badges for, say, a violation of Section 3 (e) of Republic Act (R.A.) No. 3019,[39] otherwise known as the Anti-Graft and Corrupt

36. *Id.*

37. The author must admit that "improper" to describe undesirable employees is rather an unwieldy adjective, given the Memorandum's failure to specify a more or less clear standard of propriety.

38. *Cf. War Against Graft, supra* note 32.

39. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).

Practices Act?[40] The situation in such cases is not exactly encouraging, especially for one who is well aware of the institutional inadequacies in Philippine government service. Be that as it may, it appears that the memorandum fell short of expressly stating its adherence to the abovementioned standard of knowledge. Then again, is it possible that, by making a few legal refinements, there will be room for criminally actionable presumptive knowledge (which shall logically cover the civil aspect consistent with the norm under criminal law that every person criminally liable is also civilly liable) in civilian government? The author believes so. Nevertheless, there are still some matters to address in the meantime.

V. *BONA FIDE* RELIANCE ON REGULARITY: IS IT REALLY JUST "TOMATO PASTE?"

The gravity of the country's problem of corruption, manifestly identified by socio-political and economic indicators as an obstacle to authentic development, naturally pleads for the application of the more stringent *had reason to know* standard. This is for purposes of not only administrative, but also criminal, and, consequently, civil liability. Arguably radical in character, the standard may be questioned in terms of fairness and reasonability. In simple terms, going beyond the administrative realm may be against due process.[41] Worth recalling is the time-honored principle for the legitimate exercise of police power in *United States v. Toribio*,[42] that for any law to pass the test of substantive due process, first, it must appear that the interest of the

40. Considered as a corrupt practice and hence, unlawful under this provision is "[c]ausing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of [one's] official *administrative* … functions through manifest partiality, evident bad faith or gross inexcusable negligence." (emphasis supplied). *Id.* § 3 (e).

41. PHIL. CONST. art. III, § 1. Interesting in this regard is the recollection of Bernas that there was a proposal during the deliberations of the 1986 Constitutional Commission to make command responsibility a constitutional principle — such that "[i]n cases of grave abuses against the right to life by … the military or the police forces or their adversary, the state must compensate the victims of government forces." This was vigorously objected to, notes Bernas, on grounds of violation of due process and of the principle *nullum crimen sine lege*. *See* Bernas, *Command Responsibility*, *supra* note 17. The argument that there can be no crime if there is no law punishing the act or omission complained of can easily be hurdled by the passage of law. It is the test of reasonableness that is more crucial — whether the persons involved are the armed functionaries of government or, as in this Essay, heads of agencies or other officers in the regular government bureaucracy, various agencies or offices, as well as government-owned or controlled corporations.

42. United States v. Toribio, 15 Phil. 85 (1910).

public in general, as distinguished from a particular class, requires such a measure; and second, the means that make the measure are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[43]

The concern over reasonableness can be best underscored by the Supreme Court's decision in *Sistoza v. Desierto*.[44] In this case, then Bureau of Corrections Director Pedro Sistoza was accused, with several of his subordinates, of conspiring in bad faith and with manifest partiality, while in the performance of their official duties of awarding the bid to supply tomato paste for the inmates of the New Bilibid Prisons to the second lowest bidder, resulting allegedly in an unwarranted benefit, advantage, and preference granted by the government to said bidder and the release of undue payment in the sum of Php240,800.00. In ruling that Director Sistoza could not have been guilty of violating Section 3 (e) of R.A. No. 3019, the Supreme Court began by affirming, nonetheless, that there was no question with regard to the need to "ferret out and expel public officers whose acts make bureaucracy synonymous with graft in the public eye, and to eliminate systems of government acquisition procedures which covertly ease corrupt practices."[45] The Court, however, quickly qualifies its position by stating that "[t]he remedy is not to indict and jail every person who happens to have signed a piece of document or had a hand in implementing a routine government procurement."[46]

Finding no fault in the said prison director for endorsing to the Department of Justice the bid of the second highest bidder[47] after a regular review of the supporting documentation submitted by his subordinates, the Supreme Court went on to ratiocinate, among other grounds, to wit:

> [Indicting all those in the paper trail, so to speak] is excessive and would simply engender catastrophic consequences since prosecution will not likely end with just one civil servant, but must logically, include like an

43. *Cf.* Lawton v. Steel, 152 U.S. 133 (1894).

44. Sistoza v. Desierto, 388 SCRA 307 (2002). If afforded some latitude, the author would have sub-titled this controversy something like "much ado about spent tomato paste." Indeed, by the time the controversy was being investigated by the Ombudsman, the month-long supply of tomato paste would have long been spent.

45. *Id.* at 315.

46. *Id.*

47. Note that the first highest bidder was eventually found unqualified by the Bureau of Correction's Pre-Qualification, Bid and Awards Committee (PBAC) since it offered a non-registered brand of tomato paste and that it failed to specify in the bid tender form the country of origin of the tomato paste it would supply. *Cf. Sistoza*, 388 SCRA at 317-18.

> unsteady streak of dominoes the department secretary, bureau chief, commission chairman, agency head, and all chief auditors who, if the flawed reasoning were followed, are equally culpable for every crime arising from disbursements they sanction.
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> . . . [I]f a public officer were to personally examine every single detail, painstakingly trace every step from inception, and investigate the motives of every person involved in a transaction before affixing his signature as the final approving authority, if only to avoid prosecution, our bureaucracy would end up with public managers doing nothing else but superintending minute details in the acts of their subordinates.
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> . . .
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> . . . Considering that his duties as Director . . . entailed a lot of responsibility not only on the management side but also in the rehabilitation and execution of convicted prisoners, public relations and other court-imposed duties, it is unreasonable to require [accused Sistoza] to accomplish direct and personal examination of every single detail in the purchase of a month-long supply of tomato paste and to carry out an in-depth investigation of the motives of every public officer involved in the transaction before affixing his signature on the *pro-forma* documents as endorsing authority.[48]

Undeniably, *Sistoza*'s appeal to logic makes a strong case for reasonableness and, thus operates as an intellectual deterrent to the legal paradigm latent in a prosecution for conspiracy in violating a graft statute such as Section 3 (e) of R.A. No. 3019. After all, it must be established that there was a real unity of purpose among all the accused to give any unwarranted benefit, advantage, or preference to any entity to the prejudice of Government. Hence, where there was no positive evidence presented to prove the bureau head's active involvement with others in a scheme to unduly favor a particular bidder, the Supreme Court cannot be faulted for deciding the way it did. The law simply does not allow for considering the nature of one's position — even if it be intrinsically laden with demands of greater responsibility — as an efficacious starting point, or even basis, for prosecution under our anti-graft laws. The question to ask now is whether or not the Philippines should stick to this legal paradigm, given the failure of our government institutions to become leaven for global competitiveness.

VI. DEMAND FOR A PARADIGM SHIFT

In corporate governance, being disconcerted about public servants falling down like dominoes or them superintending minute details would easily warrant a resounding rebuff. Heads of offices or agencies, by the nature of the positions they hold, are expected to know and oversee what is happening below and around them. It is not that they have to be 100% psychic. Rather,

48. *Sistoza*, 388 SCRA at 315-16 & 330-31.

such heads should install and maintain systems that *would enable them* to have the required reliable information for the asking. A paradigm shift in the legal appreciation of a government head's function is thus imperative: *from mere bureaucrat to visionary manager or executive* to being *authentic leaders* — endowed with responsibility, not to mention service value orientation, and integrity of character.[49] Relevantly, this paradigm shift is reflected in the Philippine Civil Service Commission's (CSC) Strategic Plan 2002-2004, which seeks a radical change in orientation among civil servants, especially those holding functions of authority.

Some of the relevant shifts desired by the CSC are shown in the following table.[50]

AREAS OF CONCERN	FROM	TO
Role of Civil Servants	Followers/Implementers	Source of Expertise and Institutional Memory
Recruitment of Civil Servants	Aptitudes and Skills	Service Value Orientation & Integrity of Character
Role of Third-Level Officials	Administrators and Managers	Visionaries, Technocrats and Experts
Appointment and Promotions to Third Level	Bias toward managerial skills (only)	Competitive process Insulated from politics; with major considerations being character, competence (covering both managerial and technical skills) and potential.

Significantly, the above-described imperative to be *more* is already expressed in statute. The Code of Conduct and Ethical Standards for Public Officials and Employees, or R.A. No. 6713,[51] provides categorical norms of

49. *Cf.* Table of Required Shifts in Paradigm, CSC Strategic Plan 2002-2004, ADB Country Governance Assessment, at 25 (2005).

50. *Id.*

51. An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, to Uphold the Time-Honored Principle of Public Office Being a Public Trust, Granting Incentives and Rewards for Exemplary Service, Enumerating Prohibited Acts and Transactions and Providing Penalties for Violations Thereof and for Other Purposes [Code of Conduct and Ethical Standards for Public Officials and Employees], Republic Act No. 6713 (1989).

personal conduct for public servants, the more relevant of which are the following:

> *Commitment to public interest*. — Public officials and employees shall always uphold the public interest over and above personal interest. All government resources and powers of their respective offices must be employed and used efficiently, effectively, honestly and economically, particularly to avoid wastage in public funds and revenues.
>
> *Professionalism*. — Public officials and employees shall perform and discharge their duties with the *highest degree of excellence, professionalism, intelligence and skill*. They shall enter public service with utmost devotion and dedication to duty. They shall endeavor to discourage wrong perceptions of their roles as dispensers or peddlers of undue patronage.
>
> *Justness and sincerity*. — Public officials and employees shall remain true to the people at all times. They must act with justness and sincerity and shall not discriminate against anyone, especially the poor and the underprivileged. They shall at all times respect the rights of others, and shall refrain from doing acts contrary to law, good morals, good customs, public policy, public order, public safety and public interest. They shall not dispense or extend undue favors on account of their office to their relatives whether by consanguinity or affinity except with respect to appointments of such relatives to positions considered strictly confidential or as members of their personal staff whose terms are coterminous with theirs.[52]

Admittedly, the tendency to give the above-quoted provisions sentimental "healthy babies and apple pie" treatment is high. The natural reaction is such that while the abovementioned norms are desirable, their fulfillment belongs to a heavenly abode far above the Philippine civil service. Nevertheless, can it be said that Philippine law has honestly exhausted all possible means to attain at an optimum level the "highest degree of excellence" and "professionalism" desired by R.A. No. 6713, especially with respect to heads of departments, offices, and agencies? The author believes it has not.

VII. COMMAND RESPONSIBILITY IN GOVERNMENT AFFAIRS: TAKEN TO A NEW LEVEL

Precisely, it is because they are the leaders of their departments, bureaus, offices, and agencies that superiors in government must know what is going

52. *Id.* § 4 (a), (b) & (c) (emphasis supplied).

on in their respective turfs. Hence, the need for the radical application of the principle of command responsibility, even within the sphere of criminal law — but with the *mens rea* thereof not being merely confined to actual knowledge that a corrupt practice is being or about to be committed, such as when a department undersecretary has received a written report from a government clerk that the latter's bureau chief will be meeting with a license applicant at a given time to take a bribe.[53] It will have to include as well the relatively stricter *had reason to know* — or stated otherwise, *should have known* — standard. Relevantly, this norm appears in Article 28 (a) of the so-called Rome Statute of the International Criminal Court.[54]

Under Article 28 (a) of the Rome Statute,

> [a] military commander or person effectively acting as a military commander [is] responsible for crimes … committed by forces under his or her effective control and command, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where
> (i) that military commander or person either knew, or owing to the circumstances at that time, should have known that the forces were committing or about to commit such crimes; and
> (ii) that military commander or person failed to take all necessary or reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.55

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53. At this juncture, the author hastens to qualify that the nature of the superior's position renders inapplicable a strict observance of the normal rule on direct personal knowledge expected of witnesses in court. It suffices that the superior possesses reliable evidence that can stand the test of judicial scrutiny, even if this may originate from another source, e.g. the affidavit of that person having direct personal knowledge of the anomalous transaction.

54. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. It must be clarified though that this international statute, which was first opened for signature by all states in Rome at the headquarters of the Food & Agriculture Organization (FAO) of the United Nations on even date, has not yet been ratified by the Philippines. The presentation therefore of the Rome Statute, particularly its provision on command responsibility, in this Essay is for the purpose of proposing an *alternative legal backbone* for superior responsibility in cases of corruption in government.

55. Rome Statute, art. 28 (a) (emphasis supplied). By way of information, the crimes falling under the jurisdiction of the proposed International Criminal Court are genocide, crimes against humanity, war crimes, and the crime of aggression. *See* Rome Statute, art. 5.

The wisdom behind this palpably "harsh" standard is best explained by Eugenia Levine when she observed that the same "objectively evaluates the commander's particular position and attributes to him the knowledge that would have been reasonable for him to possess."[56] For Levine, this norm of constructive knowledge effectively serves as a deterrent, "giving incentive to a commander to be aware of what his subordinates are doing."[57] A more lenient approach, as when

> [the] duty to investigate [arises only when] the commander has been put on notice by [his receipt of] some general information, would allow superiors to argue that they are not criminally responsible for their subordinates' crimes because, having negligently failed to carry out their duty to institute a proper reporting system, they never received reports of these subordinates' actions.[58]

In this regard, the author agrees with Levine that the non-observance of the *should have known* standard can even prevent commanders from "instituting appropriate monitoring and communication systems in order to avoid receiving information which would put them on notice."[59] In other words, the *should have known* standard essentially encourages a pro-active and authentically responsible superior, the very type sought by the canons of excellence and professionalism in government service desired under R.A. No. 6713; and, one may add, it is unquestionably in furtherance of the principle of public trust under the Constitution.

It may be argued then that the "appeal for understanding" in *Sistoza*, with all due respect, is necessarily a thing of the past. This is not to fault the Court for deciding the way it did for, admittedly, the said decision's notion of conduct expected of a superior in government essentially agrees with the conventional expectations of the time. Nevertheless, there was no alarming GCR then. The norm of conduct for government leadership must now be raised to a new level. There must be a *continuing* and *dynamic* type of responsibility, one that arises from day one and which does not wait for anything unusual to happen. It must be value-centered and virtue-oriented. The superior in government must be like that traditional figure of virtue: the sentry of a watchtower, with his or her heart ever pounding with the words

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56. Levine, *supra* note 17 (citing Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 U.S. AIR FORCE ACAD. J. OF LEGAL STUD. 27 (2001)).

57. *Id.*

58. *Id.*

59. *Cf.* Levine, *supra* note 17.

cor meum vigilat.[60] He or she must have systems in place such that, among others,

- definitive timelines are set for the processing of applications (ideally, shorter than the period required by law, lest one falls into negative minimalism, the sort of sentiment that generates a "for compliance only" attitude);
- periodic individual dialogues are made with personnel[61] (indeed the leader must *really know* the follower, lest the latter slips like fish into corruption, for example, a government warehouseman will be a likely candidate for pilferage if he shuttles between two "wives" and suffers the resultant moral and financial burden);
- concise forms, electronic or otherwise, and pointing to accountability for the correctness of pre-requisite information, are required at certain points of each governmental process; and
- reliable monitoring and review mechanisms in terms of goal accomplishment, quality of performance, work ethic, and service value orientation[62] are present and are continually enhanced.

In sum therefore, a superior in government is responsible for violations of anti-graft laws committed by any personnel under his or her effective

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60. *Cf. Cant.* 5:2 (translated as "My heart is awake.").

61. The sheer size of a bureaucracy, such as an Executive Department, arguably militates against individual dialogues between the over-all head (in this example, the cabinet secretary) and each and every functionary under his or her stead. Nonetheless, a system of delegated dialogue as well as feedback can be established with each sub-head assigned to a group of employees. The sub-head will likewise have his own dialogue with an officer of superior rank.

62. Again, considering the law's emphasis on excellence and professionalism, any review of work ethic and service value orientation will have to look into a civil servant's observance of : (a) *justice*, such as giving what is due to others — e.g. devoting the same attention to a lowly license applicant as one would an affluent or influential person (this can be considered the fulcrum of any one's *spirit of service*); (b) *perseverance and patience* — e.g. not giving into short cuts even if the work is arduous, as when an investigating prosecutor issues a poorly researched resolution for the filing of a criminal information, clearly shifting the burden to trial court to determine whether or not the case warrants a place in the government dockets; (c) *moderateness* — e.g. a simple lifestyle as well as a constant effort to avoid wastage in government resources; (d) *sound judgment* — which includes an intense habit of study, making one's self well-informed of the technical and other nuances of a particular issue, as well as a constant resort to seek the advice of officers more superior in rank; and (e) *daring* — i.e. the audacity to be "more" and to see the greatness and nobility in government service which cannot be bought by money or material goods.

authority and control, as a result of the said superior's *failure* to exercise proper control over any such personnel, in such cases where he or she either knew or, owing to the circumstances at the time, should have known, that the personnel concerned were committing or about to commit such violations. Borrowing the spirit that animates Article 28 (b) of the Rome Statute, the knowledge element, in the alternative, can be that the superior either knew of, or consciously disregarded information which clearly indicated that the subordinates concerned were committing or about to commit such violations.[63]

In addition, it must be established that the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the violations, or to submit the matter to the competent authorities for investigation and prosecution. It is proposed, in this connection, that any such culpable omission be considered as a separate and distinct offense by way of special law. Of course, if the superior was a more active participant or cooperator in the perpetration of a corrupt practice or crime committed by a public officer or employee, then the former will have to be indicted for such specific offense or felony as a co-conspirator. This, parenthetically, brings to the fore the legal incongruence wrought by the inclusion in the 1999 Estrada Memorandum of instances when the superior charged the specific act or omission complained of which was actually authorized by written order or when he or she directed, authorized, or cooperated in the wrong as circumstances of liability. These, strictly speaking, are not failures or omissions, which are the very essence of command responsibility, but rather overt acts which are aggravated by the fact that they are done by superiors.[64]

It may be asked, however, if any of the instances of presumed, although disputable, knowledge under E.O. No. 226 can be placed in not only adjective law — as proposed by Dean Pacifico Agabin — but also in

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63. This latter element of knowledge actually pertains, under the said Article 28 (b), to superior and subordinate relationships which do not involve "a military commander or person effectively acting as a military commander." Significantly, in his paper, Dean Pacifico Agabin proposed that this element be recognized as the basis for the inclusion of the above-discussed instances of presumed knowledge under E.O. No. 226 as disputable presumptions under Rule 131, Section 3, Revised Rules on Evidence. The said proposal though was admittedly made in the context of the concern over abusive military or police operations, for which the President, as suggested then, should be responsible. *See* Agabin, *supra* note 24.

64. In this connection, one easily recalls the aggravating circumstance of the offender "taking advantage … of his public position." An Act Revising the Penal Code and Other Laws [REVISED PENAL CODE], Act No. 3815, art. 14 (1932).

indication of legal highhandedness, recourse can be made to the limitations identified by Levine to the adoption of the strict *should have known*, or *had reason to know*, standard under Article 28 (a) of the Rome Statute. Referring to them as "realistic limitations," Levine underscored as possible sources of exception: "the commander's position in the chain of command, [the commander's] proximity to the situation, the reasonable possibility of making inquiries, and the reliability of information reaching the commander."[69] Applied to government service, the possible sources of exception (which can similarly be engrafted into statute) can then be: (a) how high the indicted superior is in the bureaucracy; (b) the capability to make inquiries; and (c) the quality and reliability of the information — both general, as part of the superintending process, and specific, as regards particular anomalies or badges thereof. Parenthetically, the elements needed to effect the paradigm shifts outlined in the CSC strategic plan above should be *substantially in place* — more specifically, that morally and technically qualified and competent people (whether wrought by training or directly hired with such attributes) are made as leaders in civil government, and that they vigilantly preside over value-based systems of accountability.

IX. "IT IS NOT JUST TOMATO PASTE" — ACCOUNTABILITY SPELLS DEVELOPMENT

It cannot be denied that the kind of problem in *Sistoza* inevitably prompts a cynical view toward what appears to be a draconian proposal. And yet, serving in government is so great a responsibility and privilege — when at each and every moment, the civil servant is acting on behalf of and for the people — that it must necessarily be complemented by a measure of responsibility of equivalent weight and impact. Anything less will be sheer mediocrity, that very mediocrity that eats away, even at this writing, at our bureaucracy. For our country to develop, the law must do its own share by providing an authentic and efficacious system of accountability, most especially with respect to those who hold great responsibility. If a public servant in this regard cannot stand the heat, then he or she must flee: *for government is only for those who can really govern*.

69. *See* Levine, *supra* note 17.

substantive law (and in the latter case, beyond administrative responsibility). This is meant to make the law more efficacious in both its deterrent effect as well as its need for prosecutorial ease wrought by a grave public interest. Candidly though, that irregularities or illegal acts are widespread within the superior's area of jurisdiction is too unwieldy to establish, given the nebulousness inherent in coming up with a definitive and controlling notion of what is factually "widespread." The same will not necessarily hold true for the other given instances, which may therefore be adopted for the purpose such as when the irregularities or illegal acts have been repeatedly or regularly committed within the superior's area of responsibility and when members of the superior's immediate staff or office personnel are involved. Indeed, repetition or the achievement of some regularity, and with greater reason, the identification of erring immediate personnel are easier to verify, quantify, and prove. Undoubtedly, thus, the entry of these indications into the sphere of criminal law will be easily justified.

VIII. CONFRONTING DUE PROCESS

At this point, it becomes necessary to address the possible challenge of due process should command responsibility, understood along the same lines as Article 28 (a) of the Rome Statute, break into the realm of Philippine criminal law. Going back to the constitutional punch list in *Toribio*, the requirement of public interest is easily met by a simple appeal to the constitutional principle that public office is a public trust.[65] Giving this flesh and blood, so to speak, is the alarm long sounded off as regards the Philippines' failure to even go beyond being a *factor-driven* economy[66] due to a failure of, and resultant lack of trust in, its government institutions. Corollary thereto, it is also easy to see that, given the grave economic pit that the country is in — with ASEAN co-member Vietnam, despite having been ravaged by wide-scale civil strife in the recent past, spurting ahead of the Philippines in global competitiveness[67] — the introduction of command responsibility as "bitter and painful medicine" is a means *reasonably necessary*, *as well as urgent*. If such be the case, Philippine law will actually be an efficacious instrument for securing a far better — if not optimum — level of "life, liberty, and property" for all.[68] Be that as it may, there is still the matter of oppressiveness to hurdle.

Granting the reality of human frailty, the above-discussed application of command responsibility must be subject to certain exceptions. To negate any

65. PHIL. CONST. art. XI, § 1.

66. *See* Porter, *supra* note 6.

67. *Cf.* Porter, *supra* note 6.

68 . PHIL. CONST. art. III, § 1.