

Conflict of Jurisdiction Between Civil and Military Courts

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IN a republic, it is axiomatic that the civil authority must always be superior to the military (See Willoughby, p. 669). With the enactment of the Code of War (Commonwealth Act No. 408) creating a set of courts martial, apparent conflicts of jurisdiction may arise between the civil and the military courts. It is the purpose of this paper to present in brief a proper solution to such apparent conflicts.

Commonwealth Act No. 408 in brief.—The Military Code is an adoption of the Articles of War of the United States (Explanatory Note, Bill No. 3771) created to make effective the powers of the President as Commander in Chief of the Armed Forces (Speech of Assemblyman Sandoval, August 12, 1938, in the discussion of said bill). In synthesis it determines (a) the persons subject to military law (Art. 2); (b) the offenses and penalties punishable under the Articles of War (Arts. 54-97); and (c) the courts that will recognize those military offenses (Arts. 3-11), their jurisdiction (Arts. 12-16) and procedure they will have to adopt (Arts. 17-53).

Persons subject to military law.—Only the following persons are subject to military law and therefore triable by the military courts:

“Art. 2. Persons subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term ‘any per-

son subject to military law’ or ‘persons subject to military law,’ whenever used in these articles:

(a) All officers, members of the Nurse Corps and soldiers belonging to the Regular Force of the Philippine Army; all reservists, from the dates of their call to active duty and while on such active duty; all trainees undergoing military instructions; and all other persons lawfully called, drafted, or ordered into or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same:

(b) Cadets, flying cadets, and probationary third lieutenants;

(c) All retainers to the camp and all persons accompanying or serving with the Army of the Philippines in the field in time of war or when martial law is declared though not otherwise subject to these articles;

(d) All persons under sentence adjudged by courts-martial.

The reason why only the military are triable by the court-martial is because historically the court-martial was the court of chivalry (In *Re Reed*, 100 U. S. 13). In two cases, the military courts may try a civilian, for a military offense and these two cases are:

“Art. 82. Relieving corresponding with, or aiding the enemy.—Whoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other things, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or

such other punishment as a court-martial or military commission may direct."

"Art. 83. Spies.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of the Army of the Philippines or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

But in both cases, the offenses are committed in time of war (See the caption "war offenses"), when military law becomes indistinguishable from martial law.

Offenses cognizable by the court-martial.—Only military offenses specified in the Articles of War are cognizable by the court-martial (Art. 54-97). The court-martial has no jurisdiction over crimes punishable by the penal law. However, the court-martial may try a person subject to military law for a common crime, i.e., a crime under the penal law of the Philippines, if such crime is committed within the military reservation.

"Art. 94. Various crimes.—Any person subject to military law who commits any crime, breach of law or violation of municipal ordinance, which is recognized as an offense of a penal nature and is punishable under the penal laws of the Philippines or under municipal ordinances, on a Philippine Army reservation, shall be punished as a court-martial may direct: Provided, That officers and enlisted men of the Philippine Constabulary shall not be triable by courts-martial for any crime, breach of law or violation of municipal ordinance committed under this article. In imposing the penalties for offenses falling within this article, the penalties for such offenses provided in the penal laws of the Philippines or in such municipal ordinances shall be taken into consideration."

In no other case may a court-martial recognize a crime under the penal law.

The military courts that may be created under the Articles of War are:

(1) The Court of Inquiry whose authority is purely one of investigation (Art. 98).

(2) The Summary Court-Martial whose jurisdiction cannot exceed the imposition of confinement for one month, restrictions for 3 months, or forfeiture of more than two-thirds of one month's pay (Art. 14).

(3) The Special Court-Martial whose jurisdiction cannot exceed the imposition of confinement of more than six months and forfeiture of more than two-thirds of six month's pay (Art. 13).

(4) And the General Court-Martial whose jurisdiction covers the military offenses committed by all persons subject to military law and all persons who under the laws of war are subject to trial by court-martial; as well as the imposition of all the penalties therein prescribed (Art. 12). But a sentence of death needs the confirmation of the President (Art. 47).

With these premises developed, we now come to the questions that may arise where the jurisdiction of the Civil Code clashes with the jurisdiction of the court-martial, and submit the answers to those questions one by one:

(1) A civilian commits a crime punishable under the Articles of War, outside a military reservation. Is he triable by a military court or by a civil court?

Answer.—He is triable by neither and neither court has jurisdiction over him; the court-martial because he is not a person subject to military law; and the civil court because he has not committed a penal offense. If of course the act

committed is also punishable under the penal law he may be then tried by the civil court.

(2) A civilian commits a crime punishable under the Articles of War within a military reservation. By what court is he triable?

Answer.—Assemblyman Sandoval, the sponsor of Bill No. 3771 gave the following answer to an interpellation of this tenor:

"Sr. Rafols.—Voy a citarle el caso del Campamento Murphy. Todo el mundo puede entrar allí, no hay cercos, y no se prohíbe a un particular entrar allí. En el caso de que un particular entra al Campamento Murphy y llega a pelearse ó tener una reyerta con un soldado, este particular va a ser juzgado por un tribunal militar, no es verdad?

"Sr. Sandoval.—Sí, señor. (Minutes of Session of August 12, 1938.)

We beg to differ with this opinion; our answer is that the civilian can not be subject to the jurisdiction of the court-martial even if the offense be committed within the military reservation, because the civilian is not a person subject to military law (Art. 2). In the case cited the civilian, if ever will be triable by the civil court, and this only if the act committed is also punishable by the penal law.

In fact the next day of session, Assemblyman Sandoval changed his answer to the same question as may be seen in the following interpellation:

"Sr. Rafols.—Voy a citarle otro caso. Un particular va al Camp Murphy y llega a tener un rival que es un militar, en una cuestion amorosa, porque hay que suponer que tanto el militar como el civil tienen corazones y sienten los mismos impulsos de la pasion, como cualquier otro hombre. El particular mata al militar. En este caso, ante que tribunal se va a someter el asunto?

Sr. Sandoval.—Ante el tribunal civil.

Sr. Rafols.—Aunque se ha cometido el delito dentro de un campamento?

Sr. Sandoval.—Este bill crea solamente estos juzgados militares para conocer de los asuntos en que son partes los miembros del ejercito.

Sr. Rafols.—Yo voy a pedir la posicion de la discusion de este asunto.

Sr. Sandoval.—Porque?

Sr. Rafols.—Porque cuando ayer pedi informes sobre este mismo punto, S.S. me contestó que cuando se comete un delito, por ejemplo, una pelea entre un particular y un militar dentro de una reserva militar, el que ha de conocer del asunto es el tribunal militar.

Sr. Sandoval.—Si el que comete el delito es miembro del ejercito, pero en el caso de S.S., el que comete el delito es un civilian y en este caso el asunto no cae bajo la jurisdiccion de un tribunal militar.

Sr. Rafols.—Pero la informacion que S.S. me dió ayer es distinta.

Sr. Sandoval.—No recuerdo haber dicho eso.

3. Question.—A civilian commits a crime punishable by the Penal Code within a military reservation. By what court is he punishable?

Answer.—He is punishable by the civil court. The military court has no jurisdiction over him; again for the simple reason that he is not a person subject to military law; and the mere fact that the act was committed within a military reservation does not matter because military reservations are not excluded from the jurisdiction of the civil courts.

4. Question.—A soldier commits an offense punishable by the penal law outside a military reservation. By what court is he punishable?

Answer.—The soldier will be tried by the civil court because his status as a person subject to the

military law does not affect his amenability to the penal law. This not being a military offense, the court-martial has no jurisdiction at all in this case. But suppose that the act committed is also a military offense, and the soldier is immediately seized by the military authorities before the civil authorities were able to apprehend him; and the soldier is tried by the court-martial; does the sentence of the court-martial constitute jeopardy or former conviction or acquittal so as to constitute a bar to an ulterior criminal proceeding in the civil court? Apparently the answer is yes, the proceeding in the court-martial is already jeopardy (*Grafton v. U. S.* 206 U. S. 333).

5. Question.—A soldier commits an offense punishable by the penal law within a military reservation, by what court is he punishable?

Answer.—The court-martial in the military reservation has jurisdiction concurrent with the civil court to try the soldier for the act committed even if the act may not constitute a military offense in its strict sense, but only an offense under the penal law (art. 94 as above-quoted).

6. Question.—A soldier and a civilian cooperate to perform an offense punishable by the military law outside a military reservation. How is the offense triable?

Answer.—The soldier is triable by court-martial. The civilian will not be liable not being a person subject to military law. The best illustration is the military offense of desertion (Art. 59); it is submitted that a civilian who aids a deserter cannot be tried by a court-martial although the deserter can be; and as apparently there is no penal law punishing the act

committed by the civilian, neither will he be triable by the civil court. If of course the act committed is also a penal offense, for example that of engaging in a duel which is punished both under the Articles of War and under the Revised Penal Code, the civilian surely is triable by the civil court and the soldier by both the court-martial or by the civil court.

7. Question.—A soldier and a civilian cooperate to commit an offense punishable by the military law inside the military reservation. How is this triable?

Answer.—The answer is the same. The place of commission is immaterial. The soldier is triable by the court-martial; the civilian will not be liable. If the act was also a penal offense the court-martial has jurisdiction over the soldier under Art. 94; but the civilian in any case is not within the jurisdiction of the court-martial and must be tried by the civil court (Art. 94).

8. Question.—A soldier fights a civilian outside a military reservation. How is this offense punishable?

Answer.—This is a case which falls under Question 4 and is subject to the same solution.

9. Question.—A soldier fights a civilian within a military reservation. How is this offense punishable?

Answer.—This is a case which falls under Question 5 and is subject to the same solution.

10. Question.—A soldier commits a common crime punishable by death; he is tried by court-martial, condemned to death and the sentence of execution is confirmed by the President of the Philippines; can he appeal to the Supreme Court?

Answer.—Judging from the authorities it seems that he has

no right to appeal. His only recourse is Habeas Corpus and this, only when the court-martial had exceeded jurisdiction or had no jurisdiction:

"Civil courts are not courts of error to review the proceedings and sentences of courts-martial, where they are legally organized and have jurisdiction of the offenses and of the person of the accused, and have complied with the statutory requirements governing their proceedings. *Mullan v. U. S.* 212 U. S. 516. 53: 632.

"The sentences of court-martial, when affirmed by the military tribunal of last resort cannot be revised by the civil court, save only when void because of an absolute want of power and not merely voidable because of the defective exercise of the power possessed. *Carter v. McDonough.* 183 U. S. 365. 46:236.

"Neither the Supreme Court of the District of Columbia nor the United States Supreme Court has any appellate jurisdiction over a naval court-martial, over offenses which such a court has power to try. *Wales v. Whitney.* 114 U. S. 564. 29:277."

But the question does not end here, because the Constitution of the Philippines expressly provides that:

"Art. VIII, Sec. 2. The National Assembly shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, nor of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in—

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(4) All criminal cases in which the penalty imposed is death or life imprisonment. (Art. VIII, Sec. 2, Par. 4).

The Constitution of the United States does not contain this provision of our Constitution; a sentence of death by a court-martial in the United States is therefore not subject to appeal to a higher court; and the only remedy as above stated is Habeas Corpus where lack of jurisdiction is shown to exist. Having in view the mandatory requirement of our Constitution that any sentence of death will be appealed to the Supreme Court of the Philippines the conflict between that provision of our Constitution and the Articles of War which provide that the sentence of death may be executed upon confirmation by the President, becomes apparent. Honorable Eusebio Orense, conceded to be the most independent member of the National Assembly centered his attack upon this point in the following language:

"Orense.—Yo no trato de obstaculizar la política de la administración. Se ha anunciado aquí por el floor leader y he oído de varios labios que esta es una medida de la administración No. 1, según dice al caballero por Zamboanga. Sin embargo, atento a los dictados de mi conciencia y a mis deberes como entiendo debo cumplirlos en mi capacidad de diputado, esta vez voy a disentir de este proyecto de ley y no propulsar su pronta aprobación, como ocurre con respecto a los otros bills que vienen de Malacañan.

"Razones: Voy a exponerlas y procurar hacerlo a la mayor brevedad. Estoy de acuerdo con la opinión del departamento legal que este cuerpo legislativo tiene poderes para crear tribunales inferiores al Tribunal Supremo, porque así clara, categórica y expresamente y sin necesidad de esa opinión, que ha sido siempre para mí responsable, dispone el artículo 8. sección primera de nuestra constitución, al proveer que el poder judicial queda investido en el Tribunal Supremo, y en los tribunales inferiores que crea la Asamblea, mediante ley, pero no es esta la cuestión

fundamental, en mi humilde sentir. Si en el ejercicio de esa facultad manifestada en este proyecto de ley tropezamos o no con una disposicion constitucional que es antagonica a los principios sustentados en este proyecto de ley, esto es para mi una de las cuestiones que en la opinion o dictamen del departamento legal no se ha tenido en cuenta, y si no, que lo diga la opinion legal que tengo aqui delante, del departamento de justicia que ha suscrito el subsecretario, que para fines de record y con el fin de que esta Asamblea, por cuyo prestigio debemos todos defender y velar, pedire y pido que forme parte del record de esta Asamblea, con el objeto de que la misma, si ocurre luego un desaguado, no sea como decimos en español, "cabeza de turco," porque eso es lo que está ocurriendo ahora, que en muchos casos, los errores que se cometen, se atribuyen siempre a esta pobre Asamblea. Digo pobre Asamblea si quereis saber, porque todos y cada uno de nosotros no ganamos mas que cinco mil pesos al año, que apenas sirven para empezar una campaña electoral (Risas).

"Es mas, apele o no el acusado, bajo las leyes vigentes antes de la promulgacion de la Constitucion y hasta ahora, es deber del tribunal inferior elevar a la Corte Suprema esas causas para la confirmacion, y para la pena de muerte. Se requiere el voto unanime de los siete Magistrados del Tribunal mas alto de nuestra nacion. Pues bien; bajo este codigo militar el Consejo de Guerra superior, el primero en su categoria, porque hay tres categorias, segun tengo entendido, puede imponer la pena de muerte y esto es de caracter ejecutorio desde el momento en que el Presidente del Commonwealth lo ratifique o lo confirme. Esta no es una innovacion o una modificacion de las leyes vigentes sobre el particular, consagradas e incorporadas en este precepto constitucional?"

The defense made by the sponsor of the measure in order to evade that attack revolved about the theory that the court-martial is not an "inferior court" within

the meaning of that provision of the Constitution:

"Sr. Kapunan.—Me permitiria su S.S. llamar su atencion a una disposicion de nuestra Constitucion? Me parece que no puede interpretarse de otra manera esta disposicion de nuestra constitucion que aparece en el Titulo VIII y que dice lo siguiente. (Leyendo el Art. VIII). Podemos decir ahora que los tribunales militares que se crean en virtud de este proyecto no son tribunales inferiores, para los efectos de esta disposicion constitucional?"

"Sr. Sandoval.—No son tribunales inferiores en cuanto afecta a los militares, porque se crean estos tribunales Señor Presidente, bajo el poder ejecutivo del Presidente de Filipinas como Jefe Comandante de toda la fuerza armada de Filipinas, como Commander in Chief y no esta dentro de la jurisdiccion de los tribunales creados bajo la Constitucion.

"Sr. Kapunan.—Porque?"

"Sr. Sandoval.—Porque se crean estos tribunales mas bien para ser instrumentos del poder Ejecutivo del Presidente de Filipinas, para mantener la disciplina militar en su capacidad de Comandante.

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"Sr. Sandoval.—Mr. Speaker, precisely we claim that a military court is not an inferior court within the purview of the Constitution. It is not a judicial body. It is only an agency of the Executive in carrying out his function as Commander in Chief of the Army. That is why we claim that with the approval of this law, we will not be impairing the original or appellate jurisdiction of the Supreme Court as contained in the Constitution because the court we are now treating are not inferior courts as contemplated in the Constitution." (Minutes, Discussion of Bill No. 3771).

Unfortunately, we have decisions of the Supreme Court of the United States which consider that courts-martial are such inferior courts:

"A court-martial is an inferior court of limited jurisdiction, whose judgments

may be questioned collaterally. In *Re Watkins* 3 Pet 193; 7 U. S.

"Courts-martial are tribunals of special and limited jurisdiction whose judgments so far as questions relating to their jurisdiction is concerned, are always open to collateral attack. *Givins v. Zerbst* 255 U. S. 11."

The last question therefore,

prudence compels us to refrain from answering. Besides, the question of unconstitutionality cannot be decided by a purely academic discussion. We only hope that a proper case may in the future be presented before the Supreme Court, so that the issue may be determined once and for all.

THE INCONSTANCY IN LAW

"**WE** LIVE in a world of change. If a body of law were in existence adequately for the civilization of today, it could not meet the demands of the civilization of tomorrow. Society is inconstant. So long as it is inconstant there can be no constancy in law. Law defines a relation not always between fixed points, but often between points of varying position. There is change whether we will it or not."—ASSOCIATE JUSTICE BENJAMIN NATHAN CARDOZO, a great juridical scholar, philosopher, humanitarian, poet.