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Gerald W. Healy

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The Question of Jurisdiction: American Military Personnel in the Philippines

GERALD W. HEALY

I

IN July of this year the Supreme Court of the United States, reaching back to a decision of John Marshall, third Chief Justice, upheld the right of the Japanese Government to try U.S. Army soldier William Girard for the killing of a Japanese woman. Marshall had laid down as a legal absolute that a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders unless it expressly or impliedly consents to surrender its jurisdiction.

This decision of the Supreme Court in the Girard case caused a wave of good will and pro-American sympathy to sweep through Asia. Editorials in free Asia lauded the American sense of fair play and the American concept of justice. That America could make such a decision in dealing with a nation that was a bitter and crushed enemy twelve short years ago augurs well for the international relations that we might expect in the future. The decision did more than a thousand seminars on international law.

Unfortunately, there were sour grapes. Instead of the usual communistic anti-American barrage that we have come to expect after every major American move in Asia, some lead-

ing American government officials and newspapers attacked the decision as a "blunder of expediency at the price of justice," "a clear danger to the discipline and morale of our troops abroad." The Hearst New York *Journal American* bewailed the fact that "the basic rights of this soldier have been violated." The New York *Daily News* likened the Supreme Court to Pontius Pilate washing his hands. Some senators rushed to prepare legislation to empower them to reexamine all U.S. treaties with foreign nations regarding jurisdiction over our troops abroad. President Eisenhower was forced to issue a special warning against such a move because of the danger to the whole American overseas program. No one questioned the basic legal principle on which the Supreme Court based its decision. Isolationism and a befuddled nationalism seemed to be the motivating forces behind the dissension.

II

In addition to the *cause celebre* of Girard (who incidentally did not seem at all disturbed by the Supreme Court decision) the past six months have seen many cases involving jurisdiction cropping up all over Asia. The Taipei riots over the acquittal of Sgt. Robert Reynolds, USA, shocked the free world and made many wonder if America was losing out in the "cold war."

Here in Manila the American Embassy was picketed in July for the first time since the grant of independence to the Philippines in protest against the return of an American sailor, George E. Roe, to the United States while a case was pending against him in the local courts. A few days later a rally was held wherein the Mayor of Manila demanded the return of the sailor for trial. At the same time the Philippine Foreign Office reminded the American Embassy of a previous case involving another American sailor, Roy Cook, who was likewise transferred to another post abroad while a case was pending against him in the local courts.¹ These cases take on special

¹ These two cases will continue to occupy public attention in view of the refusal of the United States to bring back for trial the two defendants involved.

significance in the Philippines since the U.S.-P.I. bases discussions broke down after six months of heated and fruitless discussion on the very point of jurisdiction.

In the same six-month period two other incidents, both involving the killing of Filipinos by Americans, occurred here. One of the Americans was a sergeant in the Air Force who allegedly killed a Filipino priest in a rather brutal hit-and-run accident. He was soon apprehended when he smashed his car into a telegraph pole. All the evidence seems to point to the fact that he had been drinking. Since he was off duty and off the military base when the accident occurred there was no doubt about jurisdiction and he was turned over to the Filipino authorities. The excitement about the case died down as soon as the jurisdiction of the Philippine courts was clear.

The other incident involved an American businessman who sideswiped the car of a prominent Manila doctor and killed the doctor and his wife. The police who took charge of the case turned the American businessman over to the U.S. Naval authorities. This caused a storm of protest. But the whole story died down when the U.S. authorities spoke out clearly and said that there was no doubt that the Philippines had jurisdiction in the case since it involved an American civilian.

These incidents both involved the accidental killing of Filipinos by Americans, one a soldier. But there were no international repercussions since it was admitted that the local courts had jurisdiction. There has been no emotional outburst in America, no move on the part of the state department to intervene. In the Philippines there has been no rioting, no anti-American demonstrations or flaming editorials. When jurisdiction is clear there is no room for friction. This is true even when the case involves the killing of an innocent national. But when jurisdiction is not clear a great furor can result from even the most insignificant case involving slight property damage. It is not indignation at the crime committed that arouses such passion; it is the violation of the sovereignty of

a free nation that is resented when its jurisdiction is not respected.

Like good walls and clear property titles, clear jurisdiction and clear agreements based on respect for sovereignty make good neighbors. The solution can not be founded on unilateral decisions or concessions forced from a reluctant nation. In the light of the hard realities of the "Cold War" international agreements have to be simon-pure or else they will be turned into grist for the communists' propaganda mill that is ever alert to spot the slightest defect in the American political or diplomatic strategy.

III

In all this talk about jurisdiction it is interesting to note that American businessmen, the ever-growing "army" of American tourists,² the American exchange students studying abroad in ever-increasing numbers, enjoy no special immunity from the local courts of the country where they happen to be. They have no special international agreements "to guarantee them their Constitutional rights." Similarly American civilians here have no immunity from the local courts. They are on their own and they know it. That very knowledge must act as a powerful deterrent from "cutting capers" overseas since we hear of very few incidents involving these American citizens. Incidentally we should note that even in the status-of-forces agreements the soldier who violates a law off the base and off duty is under the jurisdiction of the local court. This period of off-base and off-duty is, for the ordinary soldier, the most dangerous time of all, when he is most likely to get in trouble. In the dangerous periods of his stay overseas he has no immunity yet no one complains about this.

The problem of jurisdiction is a thorny one as we can readily conclude from the fact that the Philippines and the United States could not come to an agreement on this point after six months of heated discussion last year. The discus-

² *U. S. News and World Report* (24 May 1957) p. 43 predicts that 1,500,000 Americans will travel overseas in 1957.

sions broke down and have not yet been resumed. Meantime the question of jurisdiction is unresolved and hardly a day goes by without the local papers playing up some case involving disputed jurisdiction over American military personnel. As long as the problem remains unsettled incidents will continue to arise that keep the relations of the two countries strained and provide the extreme nationalists with excellent material for their relentless attacks on the United States and embarrass the pro-American members of the community. No matter how thorny the problem, it seems the height of folly to play the ostrich at such a period in history. One high ranking U.S. Army man said that the problem is only as thorny as you want to make it. Perhaps the very type of American who is now attacking the Supreme Court decision was also responsible for the alleged intransigent attitude of the American panel in its discussion last year. Perhaps it was the same isolationist mentality that prevailed.

IV

Two high-ranking U.S. officers recently stationed in the Philippines expressed themselves as favoring the proposition that all jurisdiction in cases involving violation of local laws should be given to the local courts. One argued from his experience in a country where there was no special agreement regarding military personnel of the U.S. He said that it was his job to indoctrinate the newly arrived American soldiers and explain to them that if they got in trouble they had no special understanding with that government; the men would be treated exactly as local criminals were treated. This simple explanation was followed by a conducted tour to the local jails where the men could see for themselves what life would be like if they fell afoul of the law. After that tour there were no incidents; the men kept on the straight and narrow path.

The other officer argued from the fact that American businessmen and tourists and exchange students had to live according to the local law and did not receive any of the indoctrination and constant warnings that the military personnel received. He could see no special reason for causing such

hard feelings among foreign nations by fighting them on the question of jurisdiction over military personnel.

On another occasion another officer, this time of the U. S. Navy, said that what really worries the men is the fact that their wives and children might easily get into an accident and be arrested and tried in the local courts. This is a real problem but a recent U. S. Supreme Court decision did not help things very much when it denied that a U.S. military court has jurisdiction over the wives of military men in case of crimes committed overseas. Two Justices, Clark and Burton, in their dissenting opinions wrote: "All that remains is for dependents of our soldiers to be prosecuted in foreign courts, an unhappy prospect not only for them but for all of us." This of course is not a clear corollary of the Supreme Court decision, but it does show how confused the picture is at the moment in a very important point of law.

This alleged worry of the military personnel about the legal status of their wives and dependents overseas is one that is not exclusively theirs. All American businessmen who take up residence in foreign lands have the same worry; it is one of their calculated risks.

V

But to get back to the problem of jurisdiction over military personnel. The reaction of some of the American people in the Girard case shows the emotional factors that must be considered on the American side of the picture. But the implied and sometimes expressed fear that an American soldier will not get justice except in an American Military Court is not worthy of serious consideration. The famous court-martial of Billy Mitchell comes to mind, not to mention some infamous court decisions in Negro cases in southern states! In fact an impartial observer might conclude that American Negro troops would often fare better in some foreign courts than in some American states.

If in cases where the local courts clearly have jurisdiction, Americans trust that there will be justice for the men,

why can they not carry this conviction over into all cases? It is a fundamental point in American jurisprudence that a man is innocent until proved guilty. It would seem that they should likewise hold that a court of a foreign nation should be considered just until the opposite is proven. The facts support this conclusion. An article in *Time* magazine (17 June 1957) shows that in a one-year period only 108 Americans of the 4,437 servicemen, dependents and civilian auxiliaries brought to trial in foreign courts were imprisoned. Since it applied to 700,000 men, it amounts to "a remarkably low crime rate and one of the highest leniency rates in the world." American military courts would be much more severe in dealing with the same cases as a comparison of their penalties with the sentences of foreign courts clearly show. Thus, often the American soldier might prefer to be tried by a foreign court.

In the Bill of Rights in the Philippine Constitution we read:

No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the law.³

This Constitutional guaranty which is a cardinal principle in American constitutional law was introduced in the Philippines by the United States at the inception of American rule. It was retained by the framers of the Constitution of the Philippines as a restraint on governmental action whether national or local. The word "person" includes aliens.⁴

In the same Section is guaranteed to every person, regardless of nationality, freedom from unreasonable search and seizure. This right is an aspect of personal security which involves the exemption of one's private affairs, books and papers from the inspection and scrutiny of others unless, as a general rule, a duly authorized search warrant has been issued. This Article also prohibits the passage of any *ex post facto* law. The privilege of the writ of habeas corpus is

³ Article 3, Section I, Clause I.

⁴ *Smith Bell & Co. vs. Natividad*, 40 Phil. 136.

guaranteed. There is a guarantee that no person shall be held to answer for a criminal offense without due process of law. This due process includes the right of preliminary investigation and the right to counsel. It bans the use of involuntary confessions. The same Article guarantees the right to bail except when a person is charged with a capital offense when evidence of guilt is strong.

In all criminal prosecutions the accused is presumed to be innocent until the contrary is proved. This Article places the burden of the proof upon the prosecution. In case there is a reasonable doubt about his guilt the defendant shall be acquitted. This has been a part of the laws of the Philippines for centuries.⁵ The Constitution likewise guarantees the right to the accused to be heard by himself and counsel, to be informed of the nature and cause of the prosecution against him, to have a speedy and public trial, to meet the witnesses face to face and to cross-examine them, to have compulsory process to secure the attendance of witnesses in his behalf. No person shall be compelled to be a witness against himself. The Constitution likewise guarantees that no excessive fines shall be imposed, nor cruel and unusual punishment inflicted. Another important provision of the Bill of Rights is that no person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.

In the Philippine Rules of Court we find substantial agreement with their American counterpart since they but implement the Constitutional Rights. They are so close to the American laws that no one would find an argument against Philippine jurisdiction on that score. For the protection of the accused there is a further stipulation of Philippine law that all cases involving the death penalty must be automatically elevated to the Supreme Court for review and the death penalty will not be executed unless at least eight Justices of that Court give their approval.

⁵ United States vs. Navarro, 3 Phil. 143; United States vs. Luzon, 4 Phil. 343.

VI

There but remains the fear that the courts will be prejudiced or that a foreigner will be judged guilty out of hand. This is a gratuitous assertion which, as we have seen, has not entered into the discussion in the numerous cases where American military personnel or civilians are clearly under the jurisdiction of the courts of the host nation. If this suspicion were based on fact then there should, by now, be at least one case that could be cited to prove the assertion. Remembering also the publicity given to such cases involving foreigners and taking into account the freedom of the press in the Philippines, it would seem that the glaring flood-light of publicity would be a very effective added assurance of a fair trial, if such added assurance were needed.

There is no trial by jury in the Philippines. There is none in Japan either but this has the oft forgotten advantage of making facts much more important to the prosecutor than the ability to sway emotions which could be easily aroused by a cheap demagogue in a case involving a foreigner. This lack of trial by jury was not considered an issue in the decision to allow the Japanese courts to try Girard. It should not be considered an issue in the Philippine question of jurisdiction.

VII

According to the provisions of the agreement between the Republic of the Philippines and the United States of America concerning military bases, dated 14 March 1947, the civil courts of the Philippines have jurisdiction over all felonies committed within the Philippines except when the (1) offense is committed within a military base, unless both the offender and the offended are Filipino civilians or the offense is against the security of the Philippines; (2) or when the offense is outside the bases, but both the offender and offended are U.S. military personnel; and (3) when the offense by a member of the U.S. armed forces is against the security of the United States.

By this agreement the Philippines waived or restricted the right which it possessed as a sovereign nation to try all persons who commit a felony within Philippine territory regardless of nationality, sex, age and other personal circumstances. A growing awareness of national sovereignty and a growing sense of nationalism led to a desire for a revision of this agreement. In the light of other status-of-forces agreements it was felt that the Philippines had surrendered too much in signing this agreement with America in 1947. Even when off-duty, for example, American military personnel guilty of a felony are not under the jurisdiction of the local courts if the felony is committed against another American member of the armed forces.

A comparison with subsequent grants to other nations and jurisdiction acknowledged by America in other countries (even those that were former enemies or were neutral during the second World War) has awakened a desire for comparable grants to the Philippines in a revised agreement. Discussions were initiated, panels were appointed and meetings held for six months. Although held during the presidency of Ramon Magsaysay, the outstanding friend of America in Asia at the time, the discussions were broken off.

The breaking off of the discussions on revision of the Military Bases Agreement has left the Philippines bound by an agreement it no longer likes. This can be turned into anti-American propaganda at the slightest provocation. A demagogue can use it to harangue the multitudes. A sincere patriot using it will necessarily generate anti-American feelings. The communists can exploit it on any and all occasions. It is a powder-keg that could explode any day with great embarrassment to the United States and, strange to say, many people in responsible positions would have to admit that they saw the danger and did nothing about it. This is a foolhardy way of proceeding in dealing with the most pro-American nation in the Orient at a most critical stage in history and in defense of a position that appears more and more untenable in the light of the Supreme Court decision in the Girard case. Treaties

must be honored but when they become offensive to even one of the sovereign nations involved they should be revised.

VIII

While an American news magazine⁶ stated on 7 June of this year that in general friction is easing between civilians and American military personnel stationed overseas, it would seem that the recent rash of incidents in the Philippines and the editorials they provoked would prove the contrary here. The Undersecretary of Justice Jesus Barrera, a member of the Philippine panel in last year's discussions, on July 22nd took steps to prevent the repeated alleged "circumvention" by erring American servicemen of local criminal laws. He ordered the local fiscals (prosecuting attorneys) to adopt a new policy of firmness and strict interpretation of law. Surely this is not a proof that tension is easing in the Philippines.

Certain elements of the local press delight in harping on any infringement, real or imaginary, intentional or accidental of Philippine sovereignty by Americans. They can be very virulent and inflammatory. This has actually become so bad that it led Cardinal Spellman to remark in public when he was here last December, that in his many trips abroad he had never seen such attacks on America as those in the local press. This is more than a straw in the wind and is certainly a paradox in a nation where there is so much pro-American sympathy.

It would seem that such attacks will continue and perhaps even increase until a realistic approach is made to the primary source of friction: the request of a sovereign nation for a revision of a treaty which is no longer acceptable. Jurisdiction was surrendered, but now it is desired that the local courts be granted almost full jurisdiction in accordance with the Philippine Constitution. Unless there is some insuperable obstacle that has not been revealed or even hinted at by the American authorities, it would seem a most reasonable and democratic thing to accede to the request of the Philip-

⁶ *U. S. News and World Report.*

pine Government and put an end to a situation that embarrasses both sides, gives comfort to mutual enemies, threatens at any moment to get out of hand altogether, and hurts American prestige in Asia no little at a time when friends must be counted carefully.

The setting up of an Asian regional nuclear center near Manila as part of the multi-million dollar atoms-for-peace program of President Eisenhower will be a fine gesture of good will and a realistic approach to the economic problems of the nation. It should be interpreted as one of America's finest gestures in Asia. But the good will generated might be smothered in a newspaper barrage of anti-American propaganda due to some untoward incident occurring at the same time involving American military personnel.

It is a risk America is running every day due to the lack of an acceptable agreement on jurisdiction. It seems to be a foolish risk unworthy of a nation that history has put in a position of world leadership. It seems to be especially foolish when we all believe with United States Ambassador Charles E. Bohlen that there should be no great difficulty in settling the inevitable differences that arise since there is no conflict of interests between the two countries and they have the same objectives.⁷ Differences arise as the Ambassador pointed out, between even the best of friends but these differences can be ironed out with the least strain because of the special ties binding together the two nations, ties that have their roots deep in history. These differences must be settled on the basis of mutual respect, equality and furtherance of our common purposes.

⁷ From a speech by the American Ambassador before the Manila Rotary on 18 July 1957 (*Manila Daily Bulletin* 19 July 1957).