DUNGO V. PEOPLE AND THE CLASSIFICATION OF CRIMES *MALA PROHIBITA*[*]

NOTE

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INTRODUCTION

On July 2, 2015, the Supreme Court ("Court") convicted two members of the Alpha Phi Omega ("APO") Fraternity for violating Republic Act No. 8049 or The Anti-Hazing Law of 1995.[1] The controversy arose after one of the fraternity's neophytes, Marlon Villanueva ("Villanueva"), died while undergoing initiation rites in Laguna. According to the Court in *Dungo v. People*,[2] "the amended information sufficiently informed the petitioners that they were being criminally charged for their roles in the planned initiation rite,"[3] "there was *prima facie* evidence of [their] participation in the hazing because of their presence in the venue,"[4] and "the circumstantial evidence presented by the prosecution was overwhelming enough to establish [their guilt] beyond a reasonable doubt."[5] As a result, Dandy Dungo ("Dungo") and Gregorio Sibal ("Sibal") were imposed with the penalty of *reclusion perpetua* as well as the obligation to pay actual, moral, and exemplary damages amounting to nearly 500,000 pesos. The media promptly reported the Court's decision which seemed to validate the effectiveness of Rep. Act No. 8049, that is to say, the law might not have been as full of "loopholes" or as "toothless" as one Congressman last year

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[1] Rep. Act. No. 8049 (2012). An Act Regulating Hazing and Other Forms of Initiation Rites in Fraternities, Sororities, and Other Organizations, and Providing Penalties Therefor [hereinafter "The Anti-Hazing Law"].

[2] Dungo v. People [hereinafter "Dungo"], G.R. No. 209464, July 1, 2015, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/july2015/209464.pdf.

[3] *Id.* at 28.

[4] *Id.* at 30.

[5] *Id.* at 37.

made it out to be.[6]

While *Dungo* is praiseworthy in its symbolic and practical value, it is submitted that the classification of hazing as a crime *malum prohibitum* raises more questions than it answers. To begin with, there is no penalty in Rep. Act No. 8049 in case a fraternity, sorority, or organization engages in hazing without prior written notice.[7] Unlike other crimes *mala prohibita* such as infringing a trademark or issuing a bouncing check, therefore, hazing is not punishable once committed, but only when it results in rape, mutilation, etc., which, curiously, are crimes *mala in se*.[8] However, instead of invalidating

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[6] *See* Tetch Torres-Tupas, *For 1st time, frat men convicted of violating Anti-Hazing Law*, INQUIRER.NET, (August 21, 2015), *available at* http://newsinfo.inquirer.net/715122/for-1st-time-frat-men-convicted-of-violating-anti-hazing-law; Anjo Alimario, *Supreme Court records first conviction under Anti-Hazing Law*, CNN PHILIPPINES (August 22, 2015), *available at* http://cnnphilippines.com/news/2015/08/22/Supreme-Court-first-conviction-anti-hazing-law.html; Adrian Stewart Co, *Supreme Court upholds Anti-Hazing Law conviction*, PANAY NEWS (August 22, 2015), *available at* http://panaynewsphilippines.com/2015/08/22/supreme-court-upholds-1st-anti-hazing-law-conviction; John Carlo Cahinhinan, *Lawmaker: Loopholes in Anti-Hazing law tolerates violence*, SUNSTAR MANILA (July 5, 2014), *available at* http://archive.sunstar.com.ph/manila/local-news/2014/07/05/lawmaker-loopholes-anti-hazing-law-tolerates-violence352058; Ben Rosario, *Solon seeks repeal of anti-hazing law; frat member surrenders*, MANILA BULLETIN (July 2, 2014), *available at* http://www.mb.com.ph/replace-anti-hazing-law-solon.

[7] The Anti-Hazing Law, § 2.

> No hazing or initiation rites in any form or manner by a fraternity, sorority or organization shall be allowed without prior written notice to the school authorities or head of organization seven (7) days before the conduct of such initiation. The written notice shall indicate the period of the initiation activities which shall not exceed three (3) days, shall include the names of those to be subjected to such activities, and shall further contain an undertaking that no physical violence be employed by anybody during such initiation rites.

[8] § 4.

> If the person subjected to hazing or other forms of initiation rites suffers any physical injury or dies as a result thereof, the officers and members of the fraternity, sorority or organization who actually participated in the infliction of physical harm shall be liable as principals. The person or persons who participated in the hazing shall suffer:
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> 1. The penalty of *reclusion perpetua* (life imprisonment) if death, rape, sodomy or mutilation results there from.
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> 2. The penalty of *reclusion temporal* in its maximum period (17 years, 4 months and 1 day to 20 years) if in consequence of the hazing the victim shall become insane, imbecile, impotent or blind.
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> 3. The penalty of *reclusion temporal* in its medium period (14 years, 8 months and one day to 17 years and 4 months) if in consequence of the hazing the victim shall have lost the use of speech or the power to hear or to smell, or shall have lost an eye, a hand, a foot, an arm or a leg or

Section 2 of the law on the principle that penal laws are construed in favor of the accused in case of doubt or that penal laws which prohibit an act but lay down no penalty therefor are statutorily infirm, or declaring that hazing is a crime *malum in se* because its predicate crimes are also crimes *mala in se*, *Dungo* did neither. Not only did it refrain from striking down Section 2 or rationalize why hazing is not a crime *malum in se* in spite of its predicate crimes, it even went so far as to propose amendments to the law and repeat the assertion that hazing is a crime *malum prohibitum* not just once or twice, but thrice.[9]

Furthermore, if *dolo* is disregarded when a person is charged with the crime of hazing, why does Rep. Act No. 8049 contain the provision that its violators are not entitled to the mitigating circumstance that there was no intention to commit so grave a wrong,[10] when mitigating circumstances are applicable only to crimes *mala in se*, being defects in freedom, intelligence, or

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shall have lost the use of any such member shall have become incapacitated for the activity or work in which he was habitually engaged.

4. The penalty of *reclusion temporal* in its minimum period (12 years and one day to 14 years and 8 months) if in consequence of the hazing the victim shall become deformed or shall have lost any other part of his body, or shall have lost the use thereof, or shall have been ill or incapacitated for the performance on the activity or work in which he was habitually engaged for a period of more than ninety (90) days.

5. The penalty of *prison mayor* in its maximum period (10 years and one day to 12 years) if in consequence of the hazing the victim shall have been ill or incapacitated for the performance on the activity or work in which he was habitually engaged for a period of more than thirty (30) days.

6. The penalty of *prison mayor* in its medium period (8 years and one day to 10 years) if in consequence of the hazing the victim shall have been ill or incapacitated for the performance on the activity or work in which he was habitually engaged for a period of ten (10) days or more, or that the injury sustained shall require medical assistance for the same period.

7. The penalty of *prison mayor* in its minimum period (6 years and one day to 8 years) if in consequence of the hazing the victim shall have been ill or incapacitated for the performance on the activity or work in which he was habitually engaged from one (1) to nine (9) days, or that the injury sustained shall require medical assistance for the same period.

8. The penalty of *prison correccional* in its maximum period (4 years, 2 months and one day to 6 years) if in consequence of the hazing the victim sustained physical injuries which do not prevent him from engaging in his habitual activity or work nor require medical attendance.

[9] *Dungo*, at 21, 23, 26, 37.

[10] The Anti-Hazing Law, § 4 ¶ 7. ("Any person charged under this provision shall not be entitled to the mitigating circumstance that there was no intention to commit so grave a wrong.")

intent?[11] Since hazing is classified as a crime *malum prohibitum*, it is understood that not only this mitigating circumstance, but in fact all the other mitigating circumstances do not apply. Why, therefore, the need to expressly state its non-application and only *its* non-application? As the matter stands, the possible inference is not just that the Congress emphasized the *malum prohibitum* nature of the crime which is how *Dungo* interpreted it to be.[12] Another reasonable deduction is that all the other mitigating circumstances, not having been expressly withheld by law, *should* apply, again on the principle of *in dubio pro reo*. But if this is a valid conclusion, then should not justifying and exempting circumstances apply as well, given that they also favor the accused?

This Note examines these concerns as well as others and advances the thesis that even if Rep. Act No. 8049 may seem self-contradictory upon initial reading, a unifying principle can be identified to justify the classification of hazing as a crime *malum prohibitum* and demonstrate that the nature of crimes *mala prohibita* in general has undergone a quiet but radical evolution in Philippine criminal law after the promulgation of *Dungo*.

THE RULING

On January 13, 2006, Villanueva arrived at the Villa Novaliches Resort in Calamba City as a neophyte about to undergo the final rites of the APO Fraternity's initiations.[13] In the early morning of the following day, Dungo and Sibal escorted him out of the venue and flagged down a tricycle, the driver of whom noticed that Villanueva looked "as weak as a vegetable."[14] Upon entering the Dr. Jose P. Rizal District Hospital, the security guards detained Dungo and Sibal in accordance with the hospital's protocols while Villanueva was placed under medical examination. Dr. Ramon Masilungan concluded that the "contusion hematoma on the left side" of Villanueva's face and the "several injuries on his arms and legs" resulted from acts of hazing, but he never confirmed the same from his patient, since the latter already died.[15]

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[11] LUIS B. REYES, THE REVISED PENAL CODE BOOK ONE 261 (17th ed., 2008). ("*Mitigating circumstances* are based on the *diminution of* either *freedom of action, intelligence, or intent,* or on the *lesser perversity* of the offender.")

[12] *Dungo*, at 25. ("Recognizing the *malum prohibitum* characteristic of hazing, the law provides any person charged with the said crime shall not be entitled to the mitigating circumstance that there was no intention to commit so grave a wrong.")

[13] *Id.* at 3, 34.

[14] *Id.* at 3, 35.

[15] *Id.* at 3-4, 36.

A criminal case based on Section 4 of Rep. Act No. 8049[16] was filed against Dungo and Sibal. After trial, the Regional Trial Court convicted the accused and sentenced them to the penalty of *reclusion perpetua* and the payment of damages. The Court of Appeals ("CA") affirmed the judgment of the lower court. The Court, in upholding the ruling of the CA, held that the defenses of alibi and denial advanced by the accused were weak and self-serving.[17]

As a preliminary, the Court in *Dungo* stated that:

> Criminal law has long divided crimes into acts wrong in themselves called acts *mala in se*; and acts which would not be wrong but for the fact that positive law forbids them, called acts *mala prohibita*. This distinction is important with reference to the intent with which a wrongful act is done. The rule on the subject is that in acts *mala in se*, the intent governs; but in acts *mala prohibita*, the only inquiry is, has the law been violated? When an act is illegal, the intent of the offender is immaterial. When the doing of an act is prohibited by law, it is considered injurious to public welfare, and the doing of the prohibited act is the crime itself.
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> *A common misconception is that all* mala in se *crimes are found in the Revised Penal Code (RPC), while all* mala prohibita *crimes are provided by special penal laws.* In reality, however, there may be *mala in se* crimes under special laws, such as plunder under Rep. Act No. No. 7080, as amended. Similarly, there may be *mala prohibita* crimes defined in the RPC, such as technical malversation.
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> *The better approach to distinguish between* mala in se *and* mala prohibita *crimes is the determination of the inherent immorality or vileness of the penalized act. If the punishable act or omission is immoral in itself, then it is a crime* mala in se*; on the contrary, if it is not immoral in itself, but there is a statute prohibiting its commission by reasons of public policy, then it is* mala prohibita. In the final analysis, whether or not a crime involves moral turpitude is ultimately a question of fact and frequently depends on all the circumstances surrounding the violation of the statute.[18]

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[16] *See supra* note 8.

[17] *Dungo*, at 36-37.

[18] *Dungo*, at 17, 18, *citing* REYES, *supra* note 11; Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, Nov. 19, 2001; Garcia v. CA, G.R. No. 157171, 484 SCRA 617, Mar. 14, 2006; Ysidoro v. People, G.R. No. 192330, 685 SCRA 637, Nov. 14, 2012; Teves v. COMELEC, G.R. No. 180363, 587 SCRA 1, Apr. 28, 2009; Dela Torre v. COMELEC, G.R.

To which is added three pages later, however, the following comment:

> Having in mind the potential conflict between the proposed law and the core principle of *mala in se* adhered to under the RPC, the Congress did not simply enact an amendment thereto. Instead, it created a special law on hazing, founded upon the principle of *mala prohibita*.[19]

These remarks seem difficult to reconcile. If the determination of whether a crime is a *malum in se* or a *malum prohibitum* is based not on whether if it is penalized by the RPC or by a special law, then why did the Congress have to enact a special law on hazing when an amendment could have served the same purpose? That is to say, will the crime's nature undergo an alteration if the Congress did otherwise? What the "potential conflict between the proposed law and the core principle of *mala in se* adhered under the RPC" is mysterious at first, but its full import can be gleaned from the deliberations of the Senate prior to the enactment of The Anti-Hazing Law:

> SENATOR GUINGONA. Most of these acts, if not all, are already punished under the Revised Penal Code.
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> SENATOR LINA. That is correct, Mr. President.
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> SENATOR GUINGONA. If hazing is done at present and it results in death, the charge would be murder or homicide.
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> SENATOR LINA. That is correct, Mr. President.
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> SENATOR GUINGONA. If it does not result in death, it may be frustrated homicide or serious physical injuries.
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> SENATOR LINA. That is correct, Mr. President.
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> SENATOR GUINGONA. Or, if the person who commits sexual abuse does so it can be penalized under rape or acts of lasciviousness.
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> SENATOR LINA. That is correct, Mr. President.

No. 121592, 258 SCRA 483, July 5, 1996. *See* Stephen Garvey, Authority, Ignorance, and the Guilty Mind, 67 SMU L. REV. 545, 551-60 (2014). *See also* Richard Gray, *Eliminating the (Absurd) Distinction Between* Malum in Se *and* Malum Prohibitum *Crimes*, 73 WASH. U. L. Q. 1369 (1995). (Emphasis supplied.)

[19] *Id.* at 21, *citing* Villareal v. People, G.R. No. 151258, 664 SCRA 519, 580, Feb. 1, 2012.

SENATOR GUINGONA. So, what is the rationale for making a new offense under this definition of the crime of hazing?

SENATOR LINA. To discourage persons or group of persons either composing sorority, fraternity or any association from making this requirement of initiation that has already resulted in these specific acts or results, Mr. President.

That is the main rationale. *We want to send a strong signal across the land that no group or association can require the act of physical initiation before a person can become a member without being held criminally liable.*

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SENATOR GUINGONA. Yes, but what would be the rationale for that imposition? Because the distinguished Sponsor has said that he is not punishing a mere organization, he is not seeking the punishment of an initiation into a club or organization, he is seeking the punishment of certain acts that resulted in death, etcetera as a result of hazing which are already covered crimes. *The penalty is increased in one, because we would like to discourage hazing, abusive hazing, but it may be a legitimate defense for invoking two or more charges or offenses, because these very same acts are already punishable under the Revised Penal Code.* That is my difficulty, Mr. President.

SENATOR LINA. x x x

Another point, Mr. President, is this, and this is a very telling difference: *When a person or group of persons resort to hazing as a requirement for gaining entry into an organization, the intent to commit a wrong is not visible or is not present, Mr. President. Whereas, in these specific crimes, Mr. President, let us say there is death or there is homicide, mutilation, if one files a case, then the intention to commit a wrong has to be proven. But if the crime of hazing is the basis, what is important is the result from the act of hazing.*

To me, that is the basic difference and that is what will prevent or deter the sororities or fraternities; that they should really shun this activity called "hazing." *Because, initially, these fraternities or sororities do not even consider having a neophyte killed or maimed or that acts of lasciviousness are even committed initially, Mr. President.*

So, what we want to discourage is the so-called initial innocent act. That is why there is need to institute this kind of hazing. Ganiyan po ang nangyari. Ang fraternity o ang sorority ay magre-recruit. Wala talaga silang intensiyong makamatay. Hindi ko na babanggitin at buhay pa iyong kaso. Pero dito sa anim o pito na

namatay nitong nakaraang taon, walang intensiyong patayin talaga iyong neophyte. So, kung maghihintay pa tayo, na saka lamang natin isasakdal ng murder kung namatay na, ay after the fact ho iyon. *Pero, kung sasabihin natin sa mga kabataan na: "Huwag ninyong gagawin iyong hazing. Iyan ay kasalanan at kung mamatay diyan, mataas ang penalty sa inyo."*

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SENATOR GUINGONA. I join the lofty motives, Mr. President, of the distinguished Sponsor. But I am again disturbed by his statement that the prosecution does not have to prove the intent that resulted in the death, that resulted in the serious physical injuries, that resulted in the acts of lasciviousness or deranged mind. *We do not have to prove the willful intent of the accused in proving or establishing the crime of hazing.*

This seems, to me, a novel situation where we create the special crime without having to go into the intent, which is one of the basic elements of any crime.

If there is no intent, there is no crime. If the intent were merely to initiate, then there is no offense. And even the distinguished Sponsor admits that the organization, the intent to initiate, the intent to have a new society or a new club is, per se, not punishable at all. *What are punishable are the acts that lead to the result. But if these results are not going to be proven by intent, but just because there was hazing, I am afraid that it will disturb the basic concepts of the Revised Penal Code, Mr. President.*

SENATOR LINA. Mr. President, the act of hazing, precisely, is being criminalized because in the context of what is happening in the sororities and fraternities, when they conduct hazing, no one will admit that their intention is to maim or to kill. *So, we are already criminalizing the fact of inflicting physical pain.* Mr. President, it is a criminal act and we want it stopped, deterred, discouraged.

If that occurs, under this law, there is no necessity to prove that the masters intended to kill or the masters intended to maim. What is important is the result of the act of hazing. Otherwise, the masters or those who inflict the physical pain can easily escape responsibility and say, "We did not have the intention to kill. This is part of our initiation rites. This is normal. We do not have any intention to kill or maim."

This is the lusot, Mr. President. *They might as well have been charged therefore with the ordinary crime of homicide, mutilation, etcetera,*

> *where the prosecution will have a difficulty proving the elements if they are separate offenses.*
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> SENATOR LINA. x x x
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> I am very happy that the distinguished Minority Leader brought out the idea of intent or whether it is *mala in se* or *mala prohibita*. There can be a radical amendment if that is the point that he wants to go to. If we agree on the concept, then, maybe, we can just make this a special law on hazing. We will not include this anymore under the Revised Penal Code. That is a possibility. I will not foreclose that suggestion, Mr. President.[20]

What appears to be Senator Lina's contention is that a crime *malum in se*, such as homicide or serious physical injuries, should be considered a crime *malum prohibitum* if committed during an initiation rite or in any activity covered in Section 1 of Rep. Act No. 8049.[21] As a result, the need to prove evil intent is dispensed with in securing a conviction. If, while being hazed, a neophyte suffers death; rape; sodomy; mutilation; or slight, less serious, or serious physical injuries, the principals are liable regardless of whether or not they had the intent to kill, abuse, or injure.[22]

DOLO

Dolo is the element disregarded when a crime *malum in se* is penalized as a crime *malum prohibitum* or, to speak more accurately, when the act constitutive of a crime *malum in se* is penalized by the mere fact that it was committed. This concept was discussed by the Court in *Villareal v. Court of Appeals* in the following manner:

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[20] *Id.* at 21, *citing* the Sponsorship Speech of former Senator Joey Lina, Senate Transcript of Session Proceedings No. 34 & 47 of the 9th Congress, 1st Regular Sess. [SENATE TSP], at 21-22; *See* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 106-08 (2013).

[21] The Anti-Hazing Law, § 1.

> Hazing, as used in this Act, is an initiation rite or practice as a prerequisite for admission into membership in a fraternity, sorority or organization by placing the recruit, neophyte or applicant in some embarrassing or humiliating situations such as forcing him to do menial, silly, foolish and other similar tasks or activities or otherwise subjecting him to physical or psychological suffering or injury.

[22] § 4 (1).

Our Revised Penal Code belongs to the classical school of thought. The Classical theory posits that a human person is essentially a moral creature with an absolute free will to choose between good and evil. It asserts that one should only be adjudged or held accountable for wrongful acts so long as free will appears unimpaired. The basic postulate of the classical penal system is that humans are rational and calculating beings who guide their actions with reference to the principles of pleasure and pain. They refrain from criminal acts if threatened with punishment sufficient to cancel the hope of possible gain or advantage in committing the crime. Here, criminal liability is thus based on the free will and moral blame of the actor. The identity of *mens rea* defined as a guilty mind, a guilty or wrongful purpose or criminal intent is the predominant consideration. *Thus, it is not enough to do what the law prohibits. In order for an intentional felony to exist, it is necessary that the act be committed by means of dolo or malice.*

The term *dolo* or malice is a complex idea involving the elements of *freedom*, *intelligence*, and *intent*. The first element, *freedom*, refers to an act done with deliberation and with power to choose between two things. The second element, *intelligence*, concerns the ability to determine the morality of human acts, as well as the capacity to distinguish between a licit and an illicit act. The last element, *intent*, involves an aim or a determination to do a certain act.

The element of *intent* on which this Court shall focus is described as the state of mind accompanying an act, especially a forbidden act. It refers to the purpose of the mind and the resolve with which a person proceeds. It does not refer to mere *will*, for the latter pertains to the act, while intent concerns the result of the act. While motive is the moving power that impels one to action for a definite result, intent is the purpose of using a particular means to produce the result. *On the other hand, the term felonious means, inter alia, malicious, villainous, and/or proceeding from an evil heart or purpose. With these elements taken together, the requirement of intent in intentional felony must refer to malicious intent, which is a vicious and malevolent state of mind accompanying a forbidden act.* Stated otherwise, intentional felony requires the existence of *dolus malus* that the act or omission be done willfully, maliciously, with deliberate evil intent, and with malice aforethought. The maxim is *actus non facit reum, nisi mens sit rea* a crime is not committed if the mind of the person performing the act complained of is innocent. As is required of the other elements of a felony, the existence of malicious intent must be proven beyond reasonable doubt.

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> In culpable felonies or criminal negligence, the injury inflicted on another is unintentional, the wrong done being simply the result of an act performed without malice or criminal design. *Here, a person performs an initial lawful deed; however, due to negligence, imprudence, lack of foresight, or lack of skill, the deed results in a wrongful act.* Verily, a deliberate intent to do an unlawful act, which is a requisite in conspiracy, is inconsistent with the idea of a felony committed by means of *culpa.*
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> The presence of an *initial* malicious intent to commit a felony is thus a vital ingredient in establishing the commission of the intentional felony of homicide. Being *mala in se*, the felony of homicide requires the existence of malice or *dolo* immediately before or simultaneously with the infliction of injuries. Intent to kill or *animus interficendi* cannot and should not be inferred, unless there is proof beyond reasonable doubt of such intent. Furthermore, the victims death must not have been the product of accident, natural cause, or suicide. If death resulted from an act executed without malice or criminal intent but with lack of foresight, carelessness, or negligence the act must be qualified as reckless or simple negligence or imprudence resulting in homicide.[23]

To emphasize, doing the prohibited act, by itself, is not enough to produce a crime *malum in se*. In addition, the act must have also been motivated by *dolo*. Aware of this qualification, the Congress in enacting Rep. Act No. 8049 criminalized the doing of the prohibited act itself, a maneuver which the Court bestowed with its approval or *imprimatur*.[24] In other words,

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[23] *Villareal*, 664 SCRA at 556-58, *citing* I RAMON C. AQUINO, THE REVISED PENAL CODE 3 (1961); People v. Estrada, G.R. No. 130487, 333 SCRA 699, June 19, 2000; People v. Sandiganbayan, G.R. No. 115439, 275 SCRA 505, July 16, 1997; GUILLERMO B. GUEVARRA, PENAL SCIENCES AND PHILIPPINE CRIMINAL LAW 6 (1974); MARIANO A. ALBERT, THE REVISED PENAL CODE (Act No. 3185) 21-24 (1946); Guevarra v. Almodovar, G.R. No. 75256, 169 SCRA 476, Jan. 26, 1989; 46 CJS Intent 1103; BLACK'S LAW DICTIONARY 670 (8th abr. ed. 2005); People v. Regato, G.R. L-36750, 127 SCRA 287, Jan. 31, 1984. *See* Re'em Segev, *Moral Rightness and the Significance of the Law: Why, How, and When Mistake of Law Matters*, 64 U. TORONTO L.J. 36, 36-49 (2014).

[24] *Dungo*, at 26.

> The study of the provisions of Rep. Act No. No. 8049 shows that on paper, it is complete and robust in penalizing the crime of hazing. It was made *malum prohibitum* to discount criminal intent and disallow the defense of good faith. It took into consideration the different participants and contributors in the hazing activities. While not all acts cited in the law are penalized, the penalties imposed therein involve various and serious terms of imprisonment to discourage would-be offenders. Indeed, the law against hazing is ideal and profound.

to avoid the necessity of proving *dolo* when prosecuting a crime *malum in se*, a special law is enacted for the purpose of penalizing the constitutive act of such a crime. For instance, instead of penalizing "serious physical injuries," what is instead penalized is any act which once inflicted leads to the injured person's becoming insane, imbecile, impotent, or blind[25] even in the absence of the intent to harm, or instead of "homicide" any act which once committed results in the death of another[26] even in the absence of the intent to kill. Since the act itself is penalized and not the crime *malum in se* to which it is constitutive of, the need to prove *dolo* is no longer material. Once the act is committed, the offender is immediately deemed liable.

In supporting this logic of the Congress, it is submitted that *Dungo* has expanded the traditional scope of crimes *mala prohibita.*

NOTES ON A NEW CLASSIFICATION OF CRIMES *MALA PROHIBITA*

1. Class-A Crimes *Mala Prohibita*

In the original definition of crimes *mala prohibita*, the state in the exercise of its police power prohibits an act that is neither immoral nor illegal.[27] As a result, the act is now illegal but only because there exists such a prohibition.[28]

For instance, the act of walking on a certain portion of the road or engaging in recruitment and placement are acts which are neither immoral nor illegal. However, if because a specific portion of the road becomes unsafe to walk through or recruitment and placement *sans* regulation has led to abuse or fraud, the state can criminalize the act of walking on that portion of the road or engaging in recruitment and placement without a license. Such acts are in fact penalized as crimes *mala prohibita* today, namely jaywalking[29] and illegal recruitment.[30]

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[25] The Anti-Hazing Law, § 4 (2). *See supra* note 8.

[26] *Id.* § 4 (1). *See supra* note 8.

[27] REYES *supra* note 11, at 58.

[28] *Id.* at 58-60.

[29] Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, Nov. 19, 2001.

[30] LAB. CODE, § 13 (b), 38. *See* People v. Panis, G.R. No. 58674, 142 SCRA 664, July 11, 1986; People v. Dela Piedra, G.R. No. 121777, 350 SCRA 163, Jan. 24, 2001; People v. Goce, G.R. No. 113161, 247 SCRA 780, Aug. 29, 1995; People v. Ortiz-Miyake, G.R. No. 115338, 279 SCRA 180, Sept. 16, 1997; People v. Ocden, G.R. No. 173198, 650 SCRA 124, June 1, 2011.

In symbolic terms, let x stand for an act which is neither immoral nor illegal and the bracket sign ("[]") that an act is criminalized. In Class-A crimes *mala prohibita*, the state turns x into the illegal act [x] out of public policy, although it may return x to its original status as x when public policy likewise demands a reversal. Note that the fact of criminalization does not turn x into an immoral act, i.e., [x] may have become illegal, but it is still not immoral.

In Class-A crimes *mala prohibita*, the operative question to ask is the following: "Has the act been committed?"[31] If the answer is no, then the offender is not liable; if the answer is yes, then the offender is liable.

2. Class-B Crimes *Mala Prohibita*

Going beyond the original definition of crimes *mala prohibita*, it can be inferred from *Dungo* that the state may, to use an inaccurate phrase, also penalize a crime *malum in se* as a crime *malum prohibitum* if public policy so requires.[32] The goal of such legislation is to expedite the conviction of persons who committed acts constitutive of crimes *mala in se* by dispensing with the requirement of proving *dolo* either because the unique nature of a given situation makes it difficult, if not impossible, to prove *dolo*, or because acts which are in themselves neither immoral nor illegal facilitate the commission of such constitutive acts.[33]

In hazing, for instance, where the participants or the members of a fraternity, sorority, or organization are engaged in the act of testing the physical, emotional, and mental fitness of an applicant, the likelihood that acts constitutive of crimes *mala in se* such as homicide or physical injuries are committed is increased because the unique nature of this proceeding (e.g., its secrecy, the neophyte's fear of his or her "masters," etc.) facilitate the employment of abuse and violence even in the absence of *dolo*.[34]

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[31] REYES, *supra* note 11, at 58, citing *People v. Kibler*, 106 N.Y. 321 (1887).

[32] *Dungo*, at 18-21. I refer here not to the act of hazing *per se* as defined in § 1 of THE ANTI-HAZING LAW, but to § 4 or when hazing results in acts constitutive of crimes *mala in se* such as homicide, rape, mutilation, etc. As such, the comment of the Court on the criminalization of hazing does not affect the thesis I advance.

> [T]he Court noted that in our nation's very recent history, the people had spoken through the Congress, to deem conduct constitutive of hazing, an act previously considered harmless by custom, as criminal. The act of hazing itself is not inherently immoral, but the law deems the same to be against public policy and must be prohibited. (Citations omitted.)

[33] *Id.*

[34] *Id.*

As such, the state can decree that the mere commission of an act constitutive of a crime *malum in se* (e.g., killing or maiming a person) makes the participants liable even if they had neither the intent to kill nor to maim.[35]

In short, the purpose of Class-B crimes *mala prohibita* is to prevent crime and deter criminals not only by imposing a heavier penalty on the commission of an immoral and illegal act but also by making such commission punishable whether caused by *dolo* or by *culpa*.[36] As *Dungo* emphasized, the offenders are liable even if they acted without evil intent, that is, the defense of good faith is not applicable.[37]

But it is submitted that the terms "without evil intent" and "good faith" must be qualified. Since the acts penalized in Class-B crimes *mala prohibita*, unlike those in Class-A, are immoral and illegal, then justifying, exempting, and mitigating circumstances should apply, since they can also be the reason behind the commission of immoral and illegal acts.[38] Moreover, since these circumstances emanate from human nature itself, not only is it unjust, but it is also useless to criminalize them, because they are forms of conduct that the state can never prevent people from observing.[39] To repeat an invocation in *Dungo*, the law does not require the impossible. *Lex non cognit ad impossibilia*.[40]

For instance, if "a person subjected to hazing or other forms of initiation rites suffers any physical injury or dies as a result thereof,"[41] and the reason for such physical injury or death is an act of self-defense on the part of the "officers and members of the fraternity, sorority or organization,"[42] then they should not be held liable not just as principals, but at all,[43] since self-defense is an act no law can prohibit people from doing.[44]

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[35] *Id.*

[36] Prior to the enactment of The Anti-Hazing Law, those who committed the act of hazing which led to the death of the neophyte were convicted of reckless imprudence resulting to homicide. *See Villareal*, 664 SCRA at 591-97.

[37] *Id.* at 21, *citing* People v. Beriarmente, G.R. No. 137612, 365 SCRA 747, Sept. 25, 2001. ("Accordingly, the existence of criminal intent is immaterial in the crime of hazing. Also, the defense of good faith cannot be raised in its prosecution.")

[38] REYES, *supra* note 11, at 155, 157, 225, 261.

[39] *Id.*

[40] *Dungo*, at 27.

[41] The Anti-Hazing Law, § 4. *See supra* note 8.

[42] *Id.*

[43] REYES, *supra* note 11, at 155, 157, 225, 261.

The same logic applies to the exempting and mitigating circumstances as well, since they also force people to do an act which they cannot have otherwise desisted from.[45]

This explanation clarifies the ruling in *Dungo* and the provisions of Rep. Act No. 8049. First, the inclusion of the non-application of the mitigating circumstance that there was no intention to commit so grave a wrong in The Anti-Hazing Law is not illogical, because in Class-B crimes *mala prohibita*, justifying, exempting, and mitigating circumstances as a general rule apply. Second, it validates the phrase "turning a crime *malum in se* into a crime *malum prohibitum*" without falling into a self-contradiction because as shown in the analysis above, it is the act itself (e.g., causing

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[44] *Id.* at 157.

> Because it would be quite impossible for the State in all cases to prevent aggression upon its citizens (and even foreigners, of course) and offer protection to the person unjustly attacked. On the other hand, it cannot be conceived that a person should succumb to an unlawful aggression without offering any resistance.

[45] I refer only to (1) those who acted in defense of their persons or rights; their spouses, ascendants, or descendants; and a stranger in the face of unlawful aggression; (2) those who acted to avoid an evil or injury; (3) those who acted in the fulfillment of a duty or in the lawful exercise of a right or office; (4) those who acted in obedience to an order issued by a superior for some lawful purpose; (5) any person who, while performing a lawful act with due care, causes an injury by mere accident without the fault or intention of causing it; (6) any person who fails to perform an act required by law, when prevented by some lawful or insuperable cause; (7) any person who had no intention to commit so grave a wrong as that committed; (8) any person who acted upon an impulse so powerful as naturally to have produced passion or obfuscation; and even (9) any person who caused death under exceptional circumstances.

See REV. PEN. CODE, arts. 11; 12 (4), (7); 13 (3), (6); 247. *See also* People v. Boholst-Caballero, G.R. No. 23249, 61 SCRA 180, Nov. 25, 1974; People v. Alconga, G.R. No. 162, 78 Phil. 366, Apr. 30, 1947; US v. Mack, G.R. No. 3515, 8 Phil. 701, Oct. 3, 1907; People v. Sumicad, G.R. No. 35524, 56 Phil. 643, Mar. 18, 1932; People v. Genosa, G.R. No. 13598, 419 SCRA 537, Jan. 15, 2004; Rep. Act No. 9262, §§ 3, 26; People v. Luague, G.R. No. 43588, 62 Phil. 504, Nov. 7, 1935; People v. De la Cruz, G.R. No. 41674, 61 Phil. 344, Mar. 30, 1935; People v. Jaurigue, C.A. No. 384, 76 Phil. 174, Feb. 21, 1946; People v. Apolinar, 38 OG 2870; United States v. Bumanglag, G.R. No. 5318, 14 Phil. 644, Dec. 23, 1909; People v. Narvaez, G.R. No. 33466, 121 SCRA 389, Apr. 20, 1983; US v. Esmedia, G.R. No. 5749, 17 Phil. 260, Oct. 21, 1910; People v. Hernandez, 55 OG 8465; Ty v. People, G.R. No. 149275, 439 SCRA 220, Sept. 27, 2004; People v. Delima, G.R. No. 18660, 46 Phil. 738 (1922); People v. Belbes, G.R. No. 124670, 334 SCRA 161, June 21, 2000; People v. Beronilla, G.R. No. L-4445, 96 Phil. 566, Feb. 28, 1955; People v. Bindoy, G.R. No. L-34665, 56 Phil. 15, Aug. 28, 1931; U.S. v. Tanedo, G.R. No. L-5418, 15 Phil. 196, Feb. 12, 1910; Pomoy v. People, G.R. No. 150647, 439 SCRA 439, Sept. 29, 2004; People v. Puedon, 388 SCRA 266; People v. Abarca, G.R. No. L-74433, 153 SCRA 735, Sept. 14, 1987; People v. Ural, G.R. No. L-30801, 56 SCRA 138, Mar. 27, 1974; United States v. Hicks, G.R. No. 4971, 14 Phil. 217, Sept. 23, 1909; United States v. De la Cruz, G.R. No. 7094, 22 Phil. 429, Mar. 29, 1912.

another person's death) which is penalized and not the crime *malum in se* to which it is constitutive of (e.g., homicide). The difference is that in the latter, as with all the other intentional felonies, *dolo* is an essential element, whereas in the former, the offender may have acted in "good faith" or "without evil intent" (i.e., through *culpa* or a justifying, exempting, or mitigating circumstance).

In symbolic terms, let x stand for an act which is neither immoral nor illegal; y for an act which is immoral but not illegal; *J.E.M.* for a justifying, exempting, or mitigating circumstance;[46] and the bracket sign ("[]") that an act is criminalized.

The act of y, by itself, is not a crime.[47] When the state, however, exercises its police power and criminalizes y, the result is a crime *malum in se* if y is motivated by *dolo*, i.e., [*dolo* + y], although the state may also decree that y be punishable even if caused unintentionally or by *culpa*, i.e., [*culpa* + y].[48] Note, in addition, that the fact of criminalization is not the reason why y is immoral.[49]

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[46] I refer only to the justifying, exempting, and mitigating circumstances enumerated in note 46.

[47] REYES, *supra* note 11, at 36. ("This is based upon the maxim, "*nullum crimen, nulla poena sine lege*," that is, there is no crime where there is no law punishing it."). *See* H.L.A. HART, THE CONCEPT OF LAW, 167-84 (Penelope Bulloch & Joseph Raz, eds., 2nd ed., 1994).

[48] REV. PEN. CODE, art. 365 ¶¶ 1-4.

> Any person who, by reckless imprudence, shall commit any act which, had it been intentional, would constitute a grave felony, shall suffer the penalty of *arresto mayor* in its maximum period to *prision correccional* in its medium period; if it would have constituted a less grave felony, the penalty of *arresto mayor* in its minimum and medium periods shall be imposed; if it would have constituted a light felony, the penalty of *arresto menor* in its maximum period shall be imposed.
>
> Any person who, by simple imprudence or negligence, shall commit an act which would otherwise constitute a grave felony, shall suffer the penalty of *arresto mayor* in its medium and maximum periods; if it would have constituted a less serious felony, the penalty of *arresto mayor* in its minimum period shall be imposed.
>
> When the execution of the act covered by this article shall have only resulted in damage to the property of another, the offender shall be punished by a fine ranging from an amount equal to the value of said damages to three times such value, but which shall in no case be less than twenty-five pesos.
>
> A fine not exceeding two hundred pesos and censure shall be imposed upon any person who, by simple imprudence or negligence, shall cause some wrong which, if done maliciously, would have constituted a light felony.

[49] Art. 365 ¶¶ 1-4.

The act of *y* cannot be criminalized by itself, i.e., [*y*], since it is an immoral act, and unlike *x*, an immoral act cannot be committed without the presence of, at least, either a perverse will, imprudence, or negligence.[50]

Furthermore, when the state, again, out of public policy, "turns a crime *malum in se* into a crime *malum prohibitum*," it may have intended that the *y* in an intentional felony [*dolo* + *y*] be now punishable by itself, i.e., whether if committed with evil intent [*dolo* + *y*] or not [*culpa* + *y*], in only one penal law, i.e., [*dolo* / *culpa* + *y*], and usually with a heavier penalty.[51]

But this logic is susceptible to a fallacy. The gap in this reasoning forms when the phrases "with or without evil intent" or "good faith" are construed as [*dolo* / *culpa* + *y*] when the correct formulation is [*dolo* / ~ *dolo* + *y*], which reveals an ambiguity, since ~ *dolo* may refer either to *culpa*, which still makes *y* punishable, or to a *J. E. M.*, which, while capable of causing *y*, does not, however, make it punishable.[52]

A serious danger lies in a potential misreading of *Dungo* to the effect that Class-B crimes *mala prohibita* can be equated with those of Class A, i.e., [*dolo* / *culpa* + *y*] = [*x*],[53] since, firstly, such equation surpasses the police power of the state, being an imposition on the metaphysical quality of an act, whereby merely because of the fact of criminalization, the distinction between acts which are not immoral and acts which are immoral is obliterated; and, secondly, because such equation conceals the ambiguity earlier identified, i.e., it is unclear to which of the two possible antecedents the term ~ *dolo* may be referring to, and this uncertainty raises a problem, since only one of the antecedents makes *y* punishable, i.e., *culpa*.

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[50] REYES, *supra* note 11, at 58.

[51] *Villareal*, 664 SCRA at 591. *Dungo*, at 21.

[52] The more accurate term is "no longer making *y* punishable." *Dolo* is presumed from the immoral and illegal act, and the justifying, exempting, and mitigating circumstance merely rebuts this presumption, i.e., from the commission of *y*, the law presumes that [*dolo* + *y*], to which the accused can prove that the act is [~ *dolo* + *y*] because it is in fact [*J.E.M.* + *y*], the result of which, if the accused is successful, is *J.E.M.* + *y*, where although *y* has been committed, there is no crime and no or limited criminal liability. *See* REYES, *supra* note 11, at 41, 155, 157, 225, 261.

[53] *Dungo*, at 21.

> The act of hazing itself is not inherently immoral, but the law deems the same to be against public policy and must be prohibited. Accordingly, the existence of criminal intent is immaterial in the crime of hazing.

Again, this statement is not entirely accurate because hazing as a crime *per se* should be differentiated when it results in crimes *mala in se*. *See supra* note 33.

In Class-B crimes *mala prohibita*, the operative questions to ask are the following: "Has the act been committed?" If the answer is no, then the offender is not liable. If the answer is yes, then the judge must ask a follow-up question: "Is the act qualified by a justifying, exempting, or mitigating circumstance?" If the answer is no, then the offender is liable. If the answer is yes, then the offender is not liable or his or her liability should be diminished, unless the statute expressly states that such shall not be the case.[54]

3. Class-C Crimes *Mala Prohibita*

Dungo is also noteworthy for avoiding the error in earlier though less successful attempts to "penalize crimes *mala in se* as crimes *mala prohibita*" where the conjunction "or" is inadvertently left out. The result of the error is that, instead of the act constitutive of a crime *malum in se* (e.g., inflicting injury on another which caused him or her to become insane) being penalized whether committed by *dolo* or by *culpa*, what is instead penalized as a crime *malum prohibitum* is the crime *malum in se* itself (e.g., serious physical injuries) whether committed by *dolo* or by *culpa*. As to be expected, the resultant statute is absurd because although an act constitutive of a crime *malum in se* may be committed either by *dolo* or by *culpa*, it does not follow that it may be committed by both at the same time, for the two are antithetical. *Dolo*, which is a required element in all crimes *mala in se*, means an intent to do a wrong, while *culpa*, the opposite.[55]

Two examples of Class-C crimes *mala prohibita* are acts of lasciviousness as penalized by Republic Act No. 7610[56] and fencing as penalized by Presidential Decree No. 1612.[57]

A.

In *Malto v. People*, [58] the Court convicted the petitioner for committing sexual intercourse with one of his students.

According to the Court, "unlike rape...consent is immaterial in cases involving violations of Section 5, Article III of RA 7610," since the

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[54] The Anti-Hazing Law, § 4 ¶ 7.

[55] REYES, *supra* note 11, at 40-52.

[56] Rep. Act. No. 7610. An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation, and Discrimination, and for Other Purposes.

[57] Pres. Dec. No. 1612 (1979). The Anti-Fencing Law. (Emphasis supplied.)

[58] G.R. No. 164733, 533 SCRA 643, 646, Sept. 21, 2007.

"mere act of having sexual intercourse or committing lascivious conduct with a child who is exploited in prostitution or subjected to sexual abuse constitutes the offense. It is a *malum prohibitum*[.]"[59] The reason is that:

> [A] child cannot give consent to a contract under our civil laws. This is on the rationale that she can easily be the victim of fraud as she is not capable of fully understanding or knowing the nature or import of her actions. The State, as *parens patriae*, is under the obligation to minimize the risk of harm to those who, because of their minority, are as yet unable to take care of themselves fully. Those of tender years deserve its protection.[60]

In the recent case of *Imbo v. People*,[61] the accused was convicted by the Court for acts of lasciviousness punishable under Rep. Act No. 7610 for kissing his daughter's private parts and mashing her breasts.

What is problematic in this case as well as in *Malto*, however, is that the Court used the definition of lascivious conduct in Section 32 of Article XIII of the Implementing Rules and Regulations of Rep. Act No. 7610 which states that lascivious conduct is:

> the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth of any person, whether of the same or opposite sex, with *an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person.*[62]

Rep. Act No. 7610, in short, penalizes not only the acts constitutive of acts of lasciviousness but also the crime *malum in se* acts of lasciviousness itself, i.e., it *both* requires and does not require *dolo* at the same time.

B.

P.D. 1612 defined fencing to be:

> the act of any person who, with *intent to gain* for himself or for another, shall buy, receive, possess, keep, acquire, conceal, sell or dispose of, or shall buy and sell, or in any other manner deal in

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[59] *Id.*
[60] *Id.*
[61] G.R. No. 197712, Apr. 20, 2015.
[62] *Id.* at 2. (Emphasis supplied.)

> any article, item, object or anything of value which *he knows, or should be known to him,* to have been derived from the proceeds of the crime of robbery or theft.[63]

Fencing is not only similar to the crime of being an accessory for theft or robbery, but is exactly the same. In fact, according to the Preamble, a rationale behind the enactment of the statute is that, "under existing law, a fence can be prosecuted only as an accessory after the fact and punished lightly."[64]

As the crime of being a fence, however, is a *malum in se*, the effect of its being penalized as a *malum prohibitum*[65] without removing the evil intent requirement manifested in the phrase "intent to gain" and "knowledge which he knows, or should be known to him" is to punish the act of

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[63] The Anti-Fencing Law, § 2 (a). (Emphasis supplied.)

[64] § 2 (a).

[65] Dela Torre v. COMELEC, G.R. No. 121592, 258 SCRA 483, 489-90, July 5, 1996.

> Moral turpitude is deducible from the third element. Actual knowledge by the fence of the fact that property received is stolen displays *the same degree of malicious deprivation* of ones rightful property as that which animated the robbery or theft which, by their very nature, are crimes of moral turpitude. x x x [A]lthough the participation of each felon in the unlawful taking differs in point in time and in degree, both the fence and the actual perpetrator/s of the robbery or theft invaded ones peaceful dominion for gain - thus deliberately reneging in the process private duties they owe their fellowmen or society in a manner contrary to x x x accepted and customary rule of right and duty x x x, justice, honesty x x x or good morals. The duty not to appropriate, or to return, anything acquired either by mistake or with malice is so basic it finds expression in some key provisions of the Civil Code on Human Relations and Solutio Indebiti, to wit:
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> "Article 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.
>
> "Article 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.
>
> "Article 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.
>
> "Article 22. Every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him.
>
> "Article 2154. If something is received when there is no right to demand it, and it was unduly delivered through mistake, the obligation to return it arises." (Emphasis supplied. Emphasis in the original omitted.)

fencing, again, by *both* requiring and not requiring *dolo* at the same time.

A discussion of *Dela Torre v. Commission on Elections*[66] is appropriate. In this case, the Court held that the elements of fencing are the following:

> 1. A crime of robbery or theft has been committed;
>
> 2. The accused who is not a principal or accomplice in the crime of robbery or theft, buys, receives, possesses, keeps, acquires, conceals, sells or disposes, or buys and sells, or in any manner deals in any article, item, object or anything of value, which have been derived from the proceeds of the said crime;
>
> 3. The accused knows or should have known that the said article, item, object or anything of value has been derived from the proceeds of the crime of robbery or theft; and
>
> *4. There is, on the part of the accused, intent to gain for himself or for another.*[67]

However, one month after *Dela Torre* was decided, the Court in convicting the petitioner in *Dunlao, Sr. v. CA*[68] stated that "contrary to [the petitioner's] contention, *intent to gain need not be proved in crimes punishable by a special law such as P.D. 1612.*"[69] This is because:

> [T]he law has long divided crimes into acts wrong in themselves called acts *mala in se*, and acts which would not be wrong but for the fact that positive law forbids them, called acts *mala prohibita.*
>
> This distinction is important with reference to the intent with which a wrongful act is done. The rule on the subject is that in acts *mala in se*, the intent governs, but in acts *mala prohibita*, the only inquiry is, has the law been violated? *When an act is illegal, the intent of the offender is immaterial.*
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> * * *

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[66] *Id.* at 489.

[67] *Id., citing* Dizon-Pamintuan v. People, G.R. No. 111426, 234 SCRA 63, July 11, 1994. (Emphasis supplied.)

[68] G.R. No. 111343, 260 SCRA 788, 792, Aug. 22, 1996.

[69] *Id.* (Emphasis supplied.)

> At any rate, *dolo* is not required in crimes punished by a special statute like the Anti-Fencing Law of 1979 because it is the *act alone*, irrespective of the motives, which constitutes the offense.[70]

Nevertheless, it is submitted that such reasoning, where *dolo* is presumed from the commission of the act but the accused is prohibited from rebutting the same, is unfair, if not oppressive.

In the same symbolic terms used in the discussion of Class-B crimes *mala prohibita*, the state, instead of converting the crime *malum in se* or the intentional felony [*dolo* + *y*] into Class-B crimes *mala prohibita*, i.e., [*dolo* / *culpa* + *y*], inadvertently turned it into the aberration [*dolo* + *culpa* + *y*], resulting in a self-contradictory statute where the accused is charged and convicted both for having and lacking evil intent. To aggravate the problem, the issue of ambiguity earlier adverted to also affects this formulation, i.e., the state does not decree the criminalization of just [*dolo* + *culpa* + *y*], since the phrases "with or without evil intent" and "good faith" may also mean an act qualified by a *J.E.M.* What the state is in fact punishing is [*dolo* + ~ *dolo* + *y*] which can either be [*dolo* + *culpa* + *y*] or [*dolo* + *J.E.M.* + *y*], both of which are unjust because inconsistent, but the latter even more so, because a *J.E.M* negates or diminishes criminal liability. But the worst injustice lies in equating Class-C crimes *mala prohibita* with those of Class-A, i.e., [*dolo* + ~ *dolo* + *y*] = [*x*], for the same reasons mentioned concerning Class-B crimes *mala prohibita*, i.e., aside from broaching the field of metaphysics where the state has no right to impose its sovereignty, such equation conceals the ambiguity of the term ~ *dolo*.

In practice, Class-C crimes *mala prohibita* may still be implemented without doing the accused an injustice if the operative questions to be asked by the judge are the same as those in Class-B.

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[70] *Id.* (Emphasis supplied.)

CONCLUDING REMARKS

Philippine criminal law adopted the distinction between crimes *mala in se* and crimes *mala prohibita* in the landmark case of *U.S. v. Go Chico*,[71] where the Court held that:

> The display [of medallions containing Emilio Aguinaldo's image and the flags used in the Philippine-American War] itself, without the intervention of any other factor, is the evil. *It is quite different from that large class of crimes, made such by the common law or by statute, in which the injurious effect upon the public depends upon the corrupt intention of the person perpetrating the act.* If A discharges a loaded gun and kills B, the interest which society has in the act depends, not upon B's death, upon the intention with which A consummated the act. If the gun were discharged intentionally, with the purpose of accomplishing the death of B, then society has been injured and its security violated; but if the gun was discharged accidentally on the part of A, then society, strictly speaking, has no concern in the matter, even though the death of B results. The reason for this is that A does not become a danger to society and institutions until he becomes a person with a corrupt mind. The mere discharge of the gun and the death of B do not of themselves make him so. With those two facts must go the corrupt intent to kill. In the case at bar, however, the evil to society and the Government does not depend upon the state of mind of the one who displays the banner, but upon the effect which that display has upon the public mind. *In the one case the public is affected by the intention of the actor; in the other by the act itself.*[72]

In the penal laws featured in this Note, the problem does not lie when acts constitutive of crimes *mala in se* are turned into crimes *mala prohibita* to prevent crime and deter criminals, but when key phrases such as "without evil intent" or "good faith" are misused, resulting in the non-

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[71] G.R. No. 4963, 14 Phil. 128, Sept. 15, 1909. *See also Kibler*, *supra* note 32; Gardner v. The People, 62 N. Y., 299; Fiedler v. Darrin, 50 N.Y., 437; The Commonwealth v. Murphy, 165 Mass., 66; Halsted v. The State, 41 N. J. L., 552; 32 Am. Rep., 247; Rex v. Ogden, 6 C. & P., 631, 25 E. C. L., 611; The State v. McBrayer, 98 N. C., 623; Commonwealth v. Weiss, 139 Pa. St., 247; State v. Gould, 40 Ia., 374; Commonwealth v. Farren, 9 Allen, 489; Commonwealth v. Nichols, 10 Allen, 199; Commonwealth v. Boyton, 2 Allen, 160; Commonwealth v. Sellers, 130 Pa., 32; Farrell v. The State, 32 Ohio State, 456; Beekman v. Anthony, 56 Miss., 446; The People v. Roby, 52 Mich., 577. *See* Albert Lévitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. R. 578 (1922-1923).

[72] *US v. Go Chico*, 14 Phil. at 131-32. (Emphasis supplied.)

application of justifying, exempting, and mitigating circumstances even when they are applicable; and when *dolo* is retained as a necessary element of the resultant penal law, thereby producing absurd statutes that both require and do not require evil intent at the same time.

The second aforementioned problem is also present in Rep. Act No. 8049. Instead of criminalizing as a crime *malum prohibitum* the act constitutive of rape or mutilation (e.g., sexually abusing another or lopping off from his or her body an organ essential in reproduction), the statute criminalizes the crimes *mala in se* rape and mutilation.[73]

It may be argued that the acts constitutive of crimes *mala in se* should never be turned into crimes *mala prohibita* because the practice "disturbs" the basic concepts of the Revised Penal Code.[74] The correct response to this objection is that no limitation by any statute should hamper the state in the exercise of its police power when addressing issues that may not have arisen in the past, but trouble us today. As the Court ruled in the case of *Lozano v. Martinez*:[75]

> The police power of the state has been described as the most essential, insistent and illimitable of powers which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. It is a power not emanating from or conferred by the constitution, but inherent in the state, plenary, suitably vague and far from precisely defined, rooted in the conception that man in organizing the state and imposing upon the government limitations to safeguard constitutional rights did not intend thereby to enable individual citizens or group of citizens to obstruct unreasonably the enactment of such salutary measures to ensure communal peace, safety, good order and welfare.[76]

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[73] The Anti-Hazing Law, § 4 (1). *See supra* note 8.

[74] *Dungo*, at 20.

[75] G.R. No. 63419, 146 SCRA 323, 338-39, Dec. 18, 1986.

[76] *Id. See* Kwongsing v. City of Manila, G.R. No. L-15972, 41 Phil 103, Oct. 11, 1920; Yu Eng Cong v. Trinidad, G.R. No. L-20479, 271 US 500, Feb. 6, 1925; Layno v. Sandiganbayan, G.R. No. L-65848, 136 SCRA 536, May 24, 1985; Deloso v. Sandiganbayan, G.R. No. 86899, 173 SCRA 409, May 15, 1989.

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