SHOULD IMPOSSIBLE CRIMES BE PUNISHED?

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I. INTRODUCTION

Law is primarily custom and morality codified. It is also public policy expressed. But custom, morality and public policy change with the change of the times, and so does law. As new ideas evolve and new thoughts arise which to the lawmaker reflect the best and the ideal, and as these ideas and thoughts gain ascendancy in the life of a people, new laws are enacted to suit the resulting change. This is but inevitable, for such is the law of progress; and law is at all times progressive. Sometimes the lawmaker may be far advance of the times, and at occasions behind it; but in the main, it can well be said, that the laws of the land reflect the customs and morality of its people and reveal the public policy of its government.

The criminal law, more than any branch of the law, bears this truism. And if there is any branch of the law which must faithfully represent the actual feelings and demands of the community, it is the criminal law. This is but natural, since the very foundation and existence of government depend on the respect and obedience of the people to its laws and laws that are not backed by the will of the people or supported by their customs and their code of morals will seldom evoke that respect and obedience.

Criminal law, furthermore, may embody in its provisions the spirit of reform; it may contain the elements of progress; it may follow the trend of the times; but if its provisions or some of them do not correspond with the sentiments and necessities of the people whose conduct it seeks to regulate, the law will certainly be defied and law enforcement will be a sorry spectacle. Take that colossal American failure known as the Eighteenth Amendment to the United States Constitution, as an example. It is an experiment, noble in purpose and reformative in aim, but it is a law forced upon a people whose sentiments are against it and as a consequence it is treated with contempt and its very existence is a serious menace to law enforcement. Furthermore, a law may be capable of effective enforcement and yet if it is not desired by the community, the enforced obedience and exacted

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respect rendered to it is no less a tyranny—an obnoxious imposition which every man resents and which the community is well without.

Two years ago the Philippine Legislature enacted the Revised Penal Code. Like any work of man, the code has its excellent as well as its weak features. And here and there are serious imperfections. Are its provisions defining and penalizing what are termed impossible crimes one of these imperfections? Are those provisions an imposition upon an unwilling community whose ideas are against them? Or do they represent a new-born sentiment, and an actual need? In plain language, should impossible crimes be punished? These are the questions, inter alia, I propose to answer in this short dissertation.

II. NATURE AND SCOPE OF IMPOSSIBLE CRIMES

The law defines an impossible crime as "an act which would be an offense against persons or property were it not for the inherent impossibility of its accomplishment or on account of the employment of inadequate or ineffectual means." Article 4, par. 2, Revised Penal Code. The impossibility may be of the means or of the ends. There is impossibility of the means when such means are ineffectual to execute the act desired to be realized, as when a person attempts to poison another with common salt believing it to be arsenic; or, when one, unconscious of the fact that his firearm is unloaded, fires with intent to kill upon another. There is impossibility of the ends when the result desired by the actor cannot be secured by reason of the lack of a fit object, as when a person tries to murder a corpse believing it to be another person alive; or when one performs acts upon a woman to cause abortion believing that the woman is pregnant when in fact she is not. *Cuello Calon,* Derecho Penal, p. 375.

An impossible crime, according to the law, can only have as an object persons or property, and by the application of the rule of statutory construction *"inclusio unius est exclusio alterius,"* there is therefore no act which can constitute an impossible crime against any entity or thing which is not included in any of the above categories. I may also add that this crime must be an act, since the law so declares it to be. This is but logical for most, if not all, crimes against person or property are acts of commission and therefore impossible crimes must of necessity be acts of commission and not of omission.

The penalty imposed by the law for the commission of impossible crimes is, according to Article 59 of the Revised Penal Code, *arresto mayor* (from 1 month and 1 day to 6 months imprisonment) or a fine ranging from 200 to 500 pesos, the court, imposing the penalty, to bear in mind the social danger and the degree of criminality shown by the offender.

III. LEGISLATION ON IMPOSSIBLE CRIMES

Philippine criminal law before the enactment of the present revised Penal Code does not contain any provision defining and penalizing crimes and its silence can only mean that impossible crimes were then non-existent. By the incorporation of Article 4, par. 2 of the Code above quoted, such acts are now made punishable.

The Philippine Penal Code seems to be the only legislation which defines and penalizes impossible crimes as such. No Penal Code in Continental Europe or South America seems to contain a provision similar to Article 4, par. 2 of our Revised Penal Code. The proposed Italian Penal Code of 1921, however, in Article 16 recognized the necessity of punishing impossible crimes. Jimenez Asua, *Estudio Critico del Proyecto de Codigo Penal Italiano de 1921*, p. 59. The Penal Code of Brazil, on the other hand, in its Article 14, positively prohibits its punishment. It must be stated, however, that here has been a tendency to punish impossible crimes as attempted felonies, under the common and usual code provisions on the matter. Impossible crimes are characterized as intended crimes by the Penal Code of Mexico. Its Article 25 on this matter, in its original language reads:

> "Art. 25. Delito intentado es: el que llega hasta el ultimo acto en que debia realizarse la consumación, si esta no se verifica por tratarse de un delito irrealizable porque es imposible o porque son evidentemente inadequados los medios que se emplean."

So far as can be gathered, impossible crimes seem to be unknown as such in jurisdictions under the Common Law. The Philippines are, therefore, a pioneer in this field of legislation.

IV. AN IMPOSSIBLE CRIME NOT AN ATTEMPT TO COMMIT A FELONY

The question may perhaps be asked: May not an impossible crime constitute an attempt to commit a felony? Under our Code, there is an attempt "when the offender commences

the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistence." The classical as well as the objective schools of penal philosophy do not consider that an impossible attempt constitutes a real attempt because there could be no commencement in the execution of that which is not possible of being executed. Realized acts, they aver, are purely the manifestation of a criminal will, but that in itself, is not sufficient for the imposition of a penalty. *Cuello Calon, supra*, p. 375. In the opinion of Pessina, the act does not constitute an attempt and is not punishable because there is no violation of the juridical mandate; that the law forbids no more than that which is possible of human accomplishment and not that which is not. Derecho Penal, sec. 105. From the use of ineffectual means, Groizard believes, it can never be inferred directly that an intent to commit a crime exists. It is not enough to wish the death of a person in order to be responsible for an attempted homicide; it is necessary that the execution of the act, capable of producing death, commences; that the use of adequate means is put forth so that the aim may be converted into reality, and that there is a material possibility of producing the result desired or the end at which the act is aimed. While these facts do not exist, law and principle will view in one who so acts a person mildly dangerous, at times demented, but never a criminal. Crimes which are frustrated by the use of ineffectual means do not alarm society and do not come to the attention of any one but him against whom the acts are directed; nor do they offer reliable data from which to determine, with the certainty that is required in the imposition of a penalty, the real and dangerous will of the actor. Much less can the desire revealed by exterior acts of realizing crimes physically impossible be the basis of an attempted or frustrated crime. Acts that with this motive are executed either recognize as a cause an error of fact or are properly acts of real sensibility. 1 *Groizard,* Codigo, Penal, pp. 105-106.

Relapsing into jurisprudence, in a case where a wife prepared and served a drink for her husband in which she put a certain drug with the intention of killing him, but which drug only produced a slight indisposition lasting a few hours on his part, even though the accused believed that the drug was fatal when in fact it was not, the Supreme Court of Spain acquitted

the defendant of attempted parricide for the reason that the means adopted were inadequate or ineffectual to produce death. It could not be an attempt because there can be no commencement in the execution of that which is impossible to be executed. Dec. Sup. Ct. of Spain, Nov. 26, 1879. In still another case where less than 12 grams of a certain poison were mixed with a bottle of wine intended to be drunk by three victims, although the intent to commit murder was clearly established, the same Supreme Court acquitted the accused for the reason that the poison was not fatal unless given in a dose of 15 grams for each person, but since the 12 grams of the drug was yet divided among the three victims, its inefficacy to kill was therefore apparent, and there could be no attempt. Dec. Sup. Ct. of Spain, March 26, 1888.

The highest Court of Germany, in recent celebrated decisions, has held the existence of an attempted infanticide in a child born dead, and of an attempted abortion in case where the accused performed acts calculated to produce abortion, upon a woman who was not actually pregnant. These decisions, however, were combated by the majority of German commentators. French jurisprudence has declared in certain cases that an impossible attempt constituted a punishable offense, as in a case of a person who attempted to steal from an empty alms-box in a church, while in others, it has denied the existence of a punishable offense. *Cuello Calon, supra*, p. 376, Note: 15.

In common law jurisdictions, the word "attempt" is defined as an attempt to do a thing, coupled with an overt act which falls short of the accomplishment of the thing intended. Burton v. State, 62 So. 394, 395. In the Common Law, if the means are apparently and absolutely unfit, there is no attempted crime, but capability of success is not essential to an attempt. To sustain the indictment, there must be a probable object within reach, as in the case of a thief attempting to steal from an empty pocket. In this case there is an indictable offense because it is "public, indictable as a scandal and breach of public peace," irrespective of the question of personal loss. Where the object is absolutely non-existent as where a person takes aim at a shadow or a tree, imagining it to be his enemy, there is no indictable offense unless under circumstances disturbing public peace. And where the object of the crime is absolutely unfit as where a person intending to murder his enemy, runs his sword thru a holster, dressed in the intended victim's clothes, and placed in the latter's bed, the act is not

indictable unless it was preceded by steps to commit murder. Also in a case where an English lady in crossing the British Channel carried with her what she supposed to be Brussels lace, which she intended to smuggle into England, but which lace turned out to be of English manufacture and therefore was not susceptible of being smuggled into England, it was held that the act was not indictable. Yet, where there is actual injury to the person or property of another, though from circumstances exterior to the actors will, this injury does not produce its immediate contemplated result, there is an offense. Thus, an attempt at miscarriage may be proved, though it turns out that the woman is not actually pregnant; and an attempt at forgery could be sustained, although the forged paper attempted to be made could not by any possibility defraud. 1 *Wharton,* Criminal Law, secs. 175, 222-225.

V. NECESSITY AND ADVANTAGES OF PENALIZING IMPOSSIBLE CRIMES

A. The new provisions of the Revised Penal Code which are the subject of this commentary represent a new trend in modern penal philosophy. Whereas formerly the whole theory of criminal law revolved around that fact that crime is a disturbance of the juridical order by a will thereto opposed, the new theory is that it is a natural phenomenon which exists whether or not there is a law defining and penalizing it. The old theory is to adapt the nature and extent of punishment to the nature and extent of the juridical mandate violated; the new theory is to adapt the punishment to the degree of perversion of the offender and to the extent of the danger which may proceed from him to society. Under the old school of thought, impossible crimes are not properly punishable because they injure nobody and the juridical order is not disturbed. Offenses were gauged by the extent of the injury caused and since impossible crimes by their very nature are not injurious, there could be no basis upon which the determination of the punishment might rest. On the other hand, although the new school admits that there may be no injurious consequences proceeding from the commission of impossible crimes, it is nevertheless certain that the actor has exhibited himself as a criminal personality from whom the community might reasonably expect a future manifestation of moral turpitude. In the opinion of the new school, the old method of graduating the penalty in

accordance with the nature and consequences of the act done is unreasonable; the more scientific method is to individualize punishment, so that the more criminally minded an individual is, the greater should be his punishment. And if, by the commission of an impossible crime, an individual has shown himself to be inadaptable to social life, there is therefore a reason for his elimination in the interest of social defense.

B. Furthermore, there is a time-worn adage that an ounce of prevention is worth a pound of cure, which still holds true to the end of time. If a person has revealed himself as a dangerous and criminal personality, must society wait for him to strike again before he is eliminated from its midst? Must the community lie supinely on its back and wait complacently for a more dangerous and injurious exhibition of his moral turpitude before it takes steps to penalize the wrong doer? Or must proceed at once to the elimination of the criminally minded individual so that it may dwell secure in the conviction that no sword of Damocles hangs eternally over its head? Society possesses both the means and ability in its power to prevent and minimize crime and its consequences, and this power should be used in no other way than that which is most effective and beneficial to mankind.

VI. NON-NECESSITY AND DISADVANTAGES OF PENALIZING IMPOSSIBLE CRIMES

A. "The first requirement of a sound body of law," wrote former Associate Justice Holmes of the United States Supreme Court, "is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion for revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. * * *" The Common Law, p. 41. Law should therefore correspond with actual needs and desires if it is to fulfill its mission; otherwise, it can have no reason for existence. At the same time, it should avoid regulating the conduct of the community in the way society does not actually desire, however advantageous may be that mode. Impossible crimes are offenses formerly unknown in this jurisdiction; they are offenses the punishment of which few have advocated

and the bulk of the community does not realize. The zeal for reform must not overstep the bounds of propriety, it must not override established customs; it must not set up new ideas that only a few could comprehend and most could not realize. "Crime," wrote a distinguished writer on the philosophy of law, "like law, cannot be made, but must be found. Society is not an institution created by voluntary action or mutual improvement and discipline, but is a great fact springing from the nature of man as a social animal. It existed for countless ages before it acquired a conscious organism, and passed through many successive stages of progress in accordance with natural laws. Its nature was in no respect changed when man came to assume a conscious, but limited control over it, and the success of man's administration of that control lies in his correct perception of those fundamental laws which it must necessarily follow, and shaping the exercise of his limited power to aid and not to supersede those laws." *Carter*, Laws, Its Origin, Growth and Function, pp. 252-253.

B. Acts and omissions constituting crimes are penalized because they are real wrongs which public policy should prohibit and penalize. For a real wrong to exist there must be an actual injury to another, material or moral. There must be a transgression of the moral code of the community—a transgression which society instinctively resents and for which it demands a reprisal upon the wrongdoer. In the commission of acts constituting an impossible crime it would be a fallacy to affirm that the law has been placed in danger, and it would be an hypocrisy to allege that the danger might proceed, when through such acts danger is perpetually impossible. Carrara, Reminisrenzi di Cattedrae fro v, tentativo ron mezzi inidonie, 24 Agosto, 1880. An impossible crime by its very nature is not injurious. It is not one whit more harmful than a malicious intent not carried out. And however much our code of morals may disapprove of any illfeeling between man and man, it has as yet not gone to the extent of condemning uninjurious acts as grave departures that merit stern reprobation and vengeance upon those who so err. Our customs and code of morals have as yet not regarded a harmless act a crime worthy of being penalized; nor an ill-intentioned person a criminal when his offense does not disturb society or produce a danger against it. We

have always regarded as a crime only that which is a harmful act, not that which is not, committed in transgression of customs and morals.

C. Even supposing that an impossible crime constitutes a real wrong, is that fact alone sufficient to make it punishable? Obviously not, because it is clear that there are considerations other than the inherent wrongfulness of an act which public policy consider necessary before an act may be made punishable by human justice. An impossible crime may be inherently wrong; it may also produce a moral injury; but so long as it remains the materially harmless act that it is against persons or property, and so long as the public policy obtaining in the Philippines does not change, there can exist no reason why it should be penalized.

As has been before stated, an impossible crime is a crime against persons or property, and crimes against persons or property are penalized because they cause injury to so much of the moral sense as is represented by one or the other of the altruistic sentiments of pity and probity, in a measure which is indispensable to the adaptation of the individual to society. And the public policy here has been to adapt the penalty in accordance with the degree of injury produced, so that the lesser the injury is, the lighter the penalty. Our public policy with regard to crimes against persons or property also requires that the injury to be properly reparable must be material; otherwise it is beyond the pale of retributive justice. And as the injury caused to another by one who commits an impossible crime is at most moral and never material, it follows as a logical consequence that the particular provision of law penalizing an act against persons or property that does not cause any material harm is misplaced.

D. It is true that one who commits an act constituting an impossible crime exhibits himself as a potentially dangerous individual to the community; but is every exhibition of perniciousness however harmless a sufficient reason for the application of the social sanction known as punishment to the individual? It may also be true that the degree of dangerousness proceeding from a perverted mind is a better criterion than the nature and consequences of the offense in determining the extent of punishment; but if public policy does not so view and

adapt that criterion as the guiding principle in the social legislation known as the criminal law, there is no reason why contrary theories should be placed in the same law. Besides, criminal perversion as revealed solely by intent is an unknown and scarcely determinable quantity that cannot be fully known by any one but him who possesses it. Criminal personality is scarcely revealed by a single act and a criminal intent manifested by an impotent overt act cannot be determined with the exactness that is required is the imposition of a penalty. The most that those administering criminal justice can do in determining the amount of danger which might proceed from a person executing an impossible crime, is to hazard a guess—a process that certainly is not conducive to the proper, faithful and impartial administration of justice.

E. Again, the public policy obtaining here has been directed to the punishment only of wrongful acts or acts though not wrongful inherently, nevertheless needs curtailment, which are possible of human accomplishment and execution. The law could but prohibit only that which is possible of execution and accomplishment; it never is sensible to prohibit that which cannot be accomplished. Social authority has no power to punish but for the defense of law. It cannot, therefore, legitimately exercise this power against mere intention, although such intention are offensive and perverse, because mere intentions of the evil minded are not sufficient to offend the law of the community, if they are not accompanied by an external act which has effectively violated the law (consummated felony) or has produced an imminent danger of violating it (attempted felony). * * * Science has established two (not only one) elements against which works the criminal law—elements (malicious intent and an external, dangerous or injurious act) that are indispensable and without which to punish would be a tyranny. Cararra, *supra*.

VII. CONCLUSION

I shall conclude as I have begun: Law is primarily customs and morality codified. It is also public policy expressed. And while law changes with the changing of the times, it always is fundamentally the expression of the people's desire. A law may be good or it may be bad; it may fall behind progres-

sive modern legislation or it may be far advance of the times—these are considerations minor in importance in the determination of whether or not it should continue to be what it is. So long as a law corresponds with the actual feelings and demands of the community whose conduct it seeks to regulate, however archaic and ancient it may be, however unwise or unliberal its provisions are, it is the rule that should be adopted, the regulations that should exist.

The new legislation defining and penalizing impossible crimes represents a new trend, a new philosophy, a novel idea. Strong reasons exist for its adoption. But representing, as it does, no sentiment and supplying no demand of the community; supporting no custom and reflecting no code of morals, the conclusion is inevitable that, so far as our public policy is concerned, impossible crimes should not be punished.