COMMENTS

THE HERNANDEZ BAIL RESOLUTION

Perhaps no order of the Supreme Court granting bail to an accused pending determination of his case on appeal has had such far-reaching implications as the resolution granting bail to Amado V. Hernandez.[1] The resolution rather abruptly settled the controversy heretofore unresolved as to whether there could be a complex crime of rebellion with murder. It caused no little amount of consternation to the Executive branch, especially the Department of National Defense and the Solicitor General's Office, culminating in an abortive threat by ranking army officers to resign.[2]

The resolution caught the Solicitor General so unaware that in his motion for reconsideration, he had to remonstrate:

> "Surprisingly, this Honorable Court discussed and decided the 'important and controversial question' of whether rebellion may be complexed with multiple murders, etc. not in a decision on the merits but as a mere *incident* on a petition for bail, without giving the Office of the Solicitor General an opportunity to argue and expound the legal reasons in support of such complex crime."

The resolution also stirred up a controversy between the Solicitor General and some members of Congress on the proposed amendment of the Revised Penal Code provisions on rebellion, and on the propriety of prosecuting the rebels for treason.[3]

I. THE RESOLUTION

The majority resolution penned by Mr. Justice Roberto Concepcion granted bail on two main premises: that under the allegations of the information, Hernandez was guilty of the crime of simple rebellion, a non-capital offense;[4] that in the exercise of its discretion, the Court had laid down the policy of granting bail to persons accused of non-capital offenses while their cases are on appeal.

The majority believed that under the allegations of the amended information, Hernandez was guilty of the crime of simple rebellion

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[1] Resolution in G.R. Nos. L-6025-26, July 18, 1956.

[2] The Philippines Herald, July 27, 1956, p. 1, col. 8; The Manila Chronicle, July 27, 1956, p. 1, col. 8.

[3] The Manila Chronicle, July 30, 1956, p. 1, col. 1; July 31, 1956, p. 1, col. 4-5.

[4] The resolution did not rule out the possibility of rebellion being complexed with some other crime, although the reasoning of the Court seems to lead to no other conclusion. Note the stress laid on the allegations of the information. In the hearing of the petition for bail of Hernandez' co-accused, the *ponente* of the resolution asked the Solicitor-General to point out any express statement in the resolution to the effect that rebellion could not be complexed with some other crime.

and not of the complex crime of rebellion with murder, arsons and robberies because such murders, arsons, etc. were alleged in the information as "necessary means to commit rebellion and in the furtherance thereof," and could therefore be considered as falling under two of the five ways of committing rebellion, namely, "engaging in war against the forces of the government," and "destroying property or committing serious violence." In support of this view, the majority cited precedent in treason cases which could be applied by analogy, and the distinctions in the Spanish Penal Code and the International Law on Extradition between a "political crime" and a "common crime."

Dissenting, Mr. Justice Montemayor believed that the commission of rebellion is complete and consummated if a group of persons for the purpose enumerated in Article 134[5] rise publicly, take up arms and assemble; and following the distinction pointed out by Groizard between an "indispensable" and a "necessary" means, the murders, arsons and robberies are not indispensable means but only necessary means, and could therefore be complexed with rebellion.

It should be noted that the majority opinion laid emphasis on the concept of rebellion rather than on the concept of complex crimes which was fully developed by the dissenting opinion of Mr. Justice Montemayor. The position taken by the majority is understandable for if there were only one crime, Article 48[6] would not apply, since this article requires the commission of at least two crimes.

In establishing their concept of rebellion, the majority leaned heavily on Article 135 which provides:

> "Penalty for rebellion or insurrection.—Any person who promotes, maintains, or heads a rebellion or insurrection, or who, while holding any public office or employment takes part therein, engaging in war against the forces of the Government, destroying property or committing serious violence, exacting contributions or diverting public funds from the lawful purpose for which they have been appropriated, shall suffer the penalty of *prision mayor* and a fine not to exceed 20,000 pesos."
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> "Any person merely participating or executing the commands of others in a rebellion shall suffer the penalty of *prision mayor* in its minimum period."

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[5] Article 134, Rev. Penal Code provides: "The crime of rebellion or insurrection is committed by rising publicly and taking arms against the Government for the purpose of removing from the allegiance to said Government or its laws, the territory of the Philippine Islands or any part thereof, of any body of land, naval or other armed forces, or of depriving the Chief Executive or the Legislature, wholly or partially, of any of their powers or prerogatives."

[6] Art. 48 *id.* provides: "When a single act constitutes two or more grave or less grave felonies, or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period. (As amended by Act No. 4000)."

"When the rebellion or insurrection shall be under the command of unknown leaders, any person who in fact directed the others, spoke for them, signed receipts and other documents issued in their name, or performed similar acts on behalf of the rebels, shall be deemed the leader of such rebellion."

Then the majority argued:

"Whether performed singly or collectively, these five (5) classes of acts constitute only *one offense*, and no more, and are altogether, subject to only *one penalty*—prision mayor and a fine not to exceed ₱20,000.00. Thus for instance, a public officer who assists the rebels by turning over to them, for use in financing the uprising, the public funds entrusted to his custody, could neither be prosecuted for malversation of such funds, apart from rebellion, nor accused and convicted of the complex crime of rebellion with malversation of public funds. The reason is that such malversation is inherent in the crime of rebellion committed by him. In fact, he would not be guilty of rebellion had he not so misappropriated said funds. In the imposition, upon said public officer, of the penalty for rebellion *it would even be improper to consider the aggravating circumstance of advantage taken by the offender of his public position*, this being an essential element of the crime he had perpetrated. Now, then, if the office held by said offender and the nature of the funds malversed by him cannot aggravate the *penalty* for his offense, it is clear that neither may it worsen the very *crime* committed by the culprit by giving rise, either to an independent crime, or to a complex crime. Needless to say, a mere participant in the rebellion, who is not a public officer, should not be placed at a more disadvantageous position than the promoters, maintainers or leaders of the movement, or the public officers who join the same insofar as the application of Article 48 is concerned."

From this premise, it concluded:

"One of the means by which rebellion may be committed, in the words of said Article 135, is by 'engaging in war against the forces of the government' and 'committing serious violence' in the prosecution of said 'war'. These expressions imply everything that war connotes, namely: resort to arms, requisition of property and services, collection of taxes and contributions, restraint of liberty, damage to property, physical injuries and loss of life, and the hunger, illness and unhappiness that war carries in its wake—except that, very often, it is worse than war in the international sense, for it involves internal struggle, a fight between brothers, with bitterness and passion or ruthlessness seldom found in a contest between strangers. Being within the purview of 'engaging in war' and 'committing serious violence', said resort to arms, with the resulting impairment or destruction of life and property, constitutes not two or more offenses, but only *one* crime — that of rebellion plain and simple. Thus, for instance it has been held that 'the crime of treason may be committed 'by executing *either a single or similar intentional overt acts*, different or similar but distinct and *for that reason, it may be considered one single continuous offense*. (Guinto vs. Veluz, 44 Off. Gaz., 909)" (People vs. Pacheco, L-4570, July 31, 1953).

The dissenting opinion answered the second premise, but apparently accepted the first. In answer to the second premise, Mr. Justice Montemayor stated:

> "But the majority says that serious violence mentioned in Article 134 may include murder. To me, this view is untenable. From serious violence to the capital offense of murder, certainly, is a far cry. Besides, serious violence can also be on things. In my opinion, the different acts mentioned in Article 135, among them, destroying property, committing serious violence, exacting contributions or diverting public funds, *instead of giving license and unlimited leave to rebels and dissidents to engage in mass murder, looting and wholesale destruction of property, on the contrary, serve to limit and restrict the violations of law that may be included in and absorbed by rebellion.*"

II. CONSTRUCTION AND ARGUMENT

The information against Hernandez charged that he "did then and there willfully, unlawfully and feloniously help, support, promote, maintain, cause, direct and/or command" the Hukbalahaps. It should be noted that he was not charged as a person "who, while holding any public office or employment, takes part therein" by committing the five classes of acts enumerated in par. 1 Article 135.

The majority stated that whether performed singly or collectively, the five classes of acts (enumerated in Article 135) constitute only one offense, and no more, and are altogether, subject to only one penalty — *prision mayor* and a fine not to exceed ₱20,000. This cannot be disputed. From there on, however, the construction and the logic leave something to be desired.

The construction is not accurate when it states that "needless to say, a mere participant in the rebellion who is not a public officer, should not be placed at a more disadvantageous position than the promoters, maintainers, or leaders of the movement, or the public officers who join the same insofar as the application of Article 48 is concerned." The statement implies that the five acts qualify both the public officer who takes part in the rebellion, and the person who promotes, maintains, or heads the movement. A mere reading of Article 135 would show that the five classes of acts enumerated therein qualify only the immediate antecedent, namely, the public officer or employee.

The illustration of a public officer who becomes a rebel tries to prove an undisputable statement by argument which aside from being of doubtful validity, does not prove the main proposition of single offense for any or all of the five acts.

Granted that a public officer who turns over public funds to the rebels is guilty of rebellion only, not a complex crime of rebellion with malversation; that public office would not even be an aggravating circumstance; that if public office could not be considered to affect the penalty it would not affect the crime; and that a mere par-

ticipant in rebellion should not be placed at a more disadvantageous position than the public officer, still it is hard to see how all these would prove that any or all of the five acts enumerated in par. 1 of Article 135 constitute only one offense. All the illustration proves is perhaps that from the premises, a private citizen who malverses public funds (by acting as co-principal of the public officer[7] and who like the public officer has committed no other act so that he "would not be guilty of rebellion had he not misappropriated said funds") would be guilty of the simple crime of rebellion.[8] That is not disputed either.

If by stating that a mere participant should not be placed at a more disadvantageous position than a public officer the majority meant that "a mere participant" who commits any or all of the classes of acts enumerated in par. 1, Article 135 as interpreted by the majority should also be found guilty of only one crime, just like the public officer, then the logic grows worse. The implied argument of the majority is that a different construction would be unfair to the mere participant and hence absurd, and if possible, to be avoided.

Par. 1 of Article 135 is a special provision applicable to those who play a leading part in the rebellion (head, promoter, maintainer) and those who though not playing such a leading part, are public officers or employees. The absurdity and unfairness contemplated by the majority is brought about by its own construction of the article in question. If it is assumed that "engaging in war against the forces of the government" and "committing serious violence" includes all crimes committed in the course of and in the furtherance of the rebellion (so that a public officer who commits acts which but for the rebellion are to be considered as murder, homicide, arson or kidnapping, would be guilty of the crime of simple rebellion), then it would certainly be absurd to convict a mere participant of a complex crime of rebellion with murder or arson simply because he is not a public officer. But in this illustration, the majority already assumed that murder and other acts committed "as a necessary means and in the furtherance of the rebellion" would fall under "engaging in war," "committing serious violence" or any of the five classes of acts enumerated in par. 1, Article 135.

If, on the other hand, it is assumed that rebellion includes only those acts which are "indispensable" as contrasted with "necessary" and "separate" acts, then the supposed absurdity does not come

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[7] United States v. Ponte, et al., 20 Phil. 379 (1911).

[8] In which event the absurdity contemplated by the majority would not arise. The absurdity comes about only when there is a change of premise so that the "mere participant" is understood to have committed acts other than the malversation.

about. Under this assumption, a test must be laid down for determining whether an act, which ordinarily is an offense, is absorbed in, complexed with, or independent of, rebellion. This assumption does not in any way nullify the enumeration in par. 1, Article 135. On the contrary, aside from being reasonable and not shocking to the conscience of both the learned and the unlearned in the law, it is in keeping with the evident purpose of Article 135. For it should be noted that par. 1 of Article 135 makes the enumeration only in relation to a public officer or employee. The provision was evidently made to impose upon him a stiffer penalty by reason of his position, because even though he may be a "mere participant" in the rebellion, and not a leader, promoter or maintainer, he is given the same penalty as that given to the leader, promoter or maintainer. Under the construction of the majority, Article 135 would favor him when the law actually was intended to be strict on him.

III. COMPLEX CRIMES

Article 48 establishes two classes of complex offenses: (1) when a single act constitutes two or more grave or less grave felonies,[9] (2) when an offense is a necessary means for committing another.

The first class is illustrated by the case where defendant who killed a policeman on duty was found guilty of the complex crime of homicide with assault upon an agent of authority;[10] or a case where defendant who threw a hand grenade and thereby killed a person and wounded others was found guilty or the crime of murder with multiple attempted murder;[11] or a case where a person who treacherously inflicted one stab which killed two persons standing together was found guilty of the complex crime of double murder.[12]

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[9] "Grave felonies are those to which the law attaches the capital punishment or penalties which in any of their periods are afflictive, in accordance with article 25 of this code.

"Less grave felonies are those which the law punishes with penalties which in their maximum period are correctional, in accordance with the above mentioned article.

"Light felonies are those infractions of law for the commission of which the penalty of *arresto menor* or a fiine not exceeding 200 pesos or both, is provided." (Art. 9, Rev. Penal Code).

The following are the afflictive penalties: *Reclusion perpetua, reclusion temporal*, perpetual or temporary absolute disqualification, perpetual or temporary special disqualification, *prision mayor*.

The following are the correctional penalties: *prision correccional, arresto mayor, suspensión, destierro*.

The following are the light penalties: *arresto menor*, public censure.

Fine and bond to keep the peace are penalties common to the three preceding classes. (Art. 25, Rev. Penal Code).

[10] People v. Lojo, 52 Phil. 390 (1928).

[11] People v. Guillen, 47 O.G. No. 7, 3433 (1950).

[12] People v. Balatol, G.R. No. L-1935, Aug. 11, 1949; *accord*, People v. Pama, (C.A.) 4 O.G. No. 9, 3339 (1947).

The second class is illustrated by the case where a person abducted a woman for the purpose of raping her,[13] or falsified a public document for the purpose of malversing funds.[14]

To be distinguished from these two classes are offenses for which the Revised Penal Code specifically provides only one penalty. These offenses are robbery with homicide (Article 194, par. 1), and robbery with rape (Article 194, par. 2). These offenses are special crimes for which the Code specifically applies a distinct penalty as an indivisible crime, instead of two separate crimes.[15]

In the first class, two requisites must be present: (1) a single act, and (2) two or more grave or less grave felonies resulting from such act. Hence if there is more than one act, it would fall under the second class of complex offenses, or be separate, or indispensable. Also, if one of the offenses is light, there would be no complex offense since the light offense would be either absorbed[16] or separate[17] depending on the nature of the crime and the circumstances.

To be distinguished from this class are offenses produced by one single act but which could not properly be considered complex, not because one is indispensable to the other, but because one is incompatible with the other. Thus homicide and less serious physical injuries could not be considered a complex crime under this first class, even if the offender committed only one act, because the two offenses are incompatible by their very nature and statutory definition. If the victim dies, it is homicide or murder. If the victim lives but the accused intended to kill, it would be frustrated or attempted murder or homicide.[18] If the victim lives and there was no intent to kill, it would be physical injuries.[19]

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[13] People v. Amante, 49 Phil. 679 (1926); People v. Pineda, 56 Phil. 688 (1932).

[14] People v. Barbas, 60 Phil. 241 (1934); People v. Silvallana, 61 Phil. 636 (1935).

[15] 1 PADILLA, CRIMINAL LAW 389 (1955).

[16] People v. Apiado, 53 Phil. 325 (1929).

[17] People v. Vidal (C.A.) 47 O.G. No. 6, 3002 (1949). This case is to be distinguished from the *Apiado* case, *ibid.*, where slight physical injuries were inflicted on the genital organ of the victim. Here, the slight physical injuries were inflicted on the victim's breast, abdomen and wrist. *See* 1 AQUINO AND GRIÑO, NOTES ON THE PHILIPPINE REVISED PENAL CODE 274-275 (1953).

[18] People v. Pacubas, et al., 64 Phil. 614 (1937).

[19] People v. Penesa, 46 O.G. Supp. to 1, 180 (1948); 2 PADILLA, *op. cit. supra* note 15, at 379, 398.

Mr. Justice Montemayor, dissenting in *People v. Hernandez*, et al., gave physical injuries inflicted on one person who dies as a result thereof as an example of an offense being indispensable to the commission of another. He thereby applied the test he had laid down for the second class of complex offenses. This remark enabled Mr. Justice Concepcion to destroy the validity of the test for the second class of complex offenses with this observation: "A person may kill another without inflicting physical injuries upon the latter, such, for instance, as by poisoning, drowning, suffocation or shock. Yet it is admitted that he who fatally stabs another cannot be convicted of homicide with physical injuries."

The second class of complex crimes requires that there be two offenses and that one offense be committed as a necessary means to commit another. The distinction between the first and this class of complex crimes is that here, there must be two or more acts.

In the second class, a distinction must be made between offenses which are "necessary" to commit another, and offenses which are "indispensable" to commit another, or offenses which are separate (not necessary) to commit another offense. Mr. Justice Montemayor laid down the distinction between a necessary means and an indispensable means as follows:

> " 'Necessary means' as interpreted by criminologists, jurists and legal commentators, does not mean indispensable means, because if it did, then the offense as a 'necessary' means to commit another would be an indispensable element of the latter and would be an ingredient thereof. That would be true in the offense of trespass to dwelling to commit robbery in an inhabited house, or the infliction of physical injuries to commit homicide or murder. The phrase 'necessary means' used in Art. 48, merely signifies that for instance, a crime such as simple estafa can be and ordinarily is committed in the manner defined and described in the Penal Code; but if the 'estafador' resorts to or employs falsification, merely to facilitate and insure his committing the estafa, then he is guilty of the complex crime of estafa thru falsification. So, if one desiring to rape a certain woman, instead of waiting for an opportunity where she could be alone or helpless, in the fields or some isolated place, abducts her by force and takes her to a forest to ravish her; or he enters her home through a window at night and rapes her in her room, then he is guilty of the complex crime of abduction with rape or rape with trespass to dwelling. The reason is that the commission of abduction or trespass to dwelling are not indispensable means or ingredients of the crime of rape. They are but means selected by the culprit to facilitate and carry out perhaps more quickly his evil designs on his victim."[20]

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[20] Mr. Justice Montemayor cited Groizard in support of this distinction. It should be noted, however, that Groizard uses the term "medio necesario" to mean "indispensable means" and "puramente medio" for "necessary means." Groizard explains the distinction and the reason for it as follows:

"Una cosa análoga acontece respecto de los delitos conexionados con una relación de medio a fin. También en ellos la unidad de acto moral, que da vida al delito, hace lógica la imposición de una sola pena. Preciso es, sin embargo, distinguir el caso en que el delito medio sea medio necesario de realizar el delito fin, del caso en que sea puramente medio, pero no medio indispensable. En aquél, el delito medio no es, en realidad, sino una condición precisa, una circunstancia sine qua non, un elemento integral de la acción punible concebida como fin. Sin pasar por uno, sería imposible llegar al otro. La voluntad, libre e inteligente, tiene entonces por único objeto llegar al delito fin. Si al recorrer su camino ha de pasar, indispensablemente, por la comisión de otro hecho punible, no dos, sino un delito habrá que castigar, toda vez que uno fué el mal libremente querido, no siendolo el otro por si, sino tanto que era necesario para obtener la realización del mal propósito concebido.

"Así, hay que reconocer que es plausible que cuando un delito es medio de realizar otro, se imponga al culpable la pena correspondiente al mayor en su grado máximo; pero que no lo es si resulta que ha sido medio necesario. Por lo contrario, para que sea justo el aumento de pena, con arreglo a la doctrina general acerca del delito y las circunstancias agravantes, es preciso que existan y no se aprovechen otros procedimientos, otros recursos, más o menos fáciles para

It is indeed fortunate that Mr. Justice Montemayor took pains to define the term, for its loose usage has led to no little amount of confusion. Mr. Chief Justice Moran, apparently used the term quite loosely when he wrote:

> "Also, abduction is, in general, not an *essential* element of rape, because rape may be committed anywhere *without necessity* of forcibly abducting or taking the victim to another place for that purpose, but if the offense charged is that the defendant abducted or carried by force the victim from one place to another wherein the latter was raped by the former, the offense charged would be a complex crime of rape through abduction, the latter offense being in such a case, a *necessary means* to commit rape."[21]

It is indeed hard to grasp how one can state that rape may be committed "without necessity" of abducting the victim, and in the same breath say that abduction is a "necessary means" to commit rape. What the distinguished jurist evidently meant to say was that abduction is not indispensable to commit rape, and not that abduction was not necessary to commit rape, otherwise abduction could not be complexed with rape.

Under this test for the second class of complex crimes, offenses which are not necessary to commit another may be either indispensable or separate. Trespass to dwelling is one act, and robbery in an inhabited house is another, but one cannot possibly rob an inhabited house without committing trespass; hence trespass would be indispensable and absorbed in the robbery.[22] Again, the offender may commit two acts on the same occasion, but when one is not indispensable for the commission of the other, the crimes are separate not complex. Examples of these would be rape and homicide,[23] and sedition and murder.[24]

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consumar el delito. Entonces la responsabilidad se hace mayor eligiendo un medio que sea un delito en sí. El que puede, haciendo uso de su libertad y de su inteligencia, escoger entre varios procedimientos para llegar a un fin, y se decide por uno que por sí solo constituye delito, de este delito no necesario para la realización del proyectado como fin, debe responder tambien."

2 GROIZARD, EL CODIGO PENAL DE 1870 495-496 (1924).

21 2 MORAN, COMMENTS ON THE RULES OF COURT 631 (1952).

22 GROIZARD, *op cit., supra* note 20, at 496. *But cf. People v. Abedosa*, 53 Phil. 788 (1928) where trespass to dwelling was considered an aggravating circumstance in homicide; and *People v. Medina*, 59 Phil. 134 (1933) where trespass and frustrated homicide committed on the same occasion were considered separate offenses. The distinction seems to be that in the latter case, the accused entered the dwelling without intent to kill, but stabbed the occupant who tried to arrest and prevent him from escaping.

23 People v. Matela, 58 Phil. 718 (1933). This case is to be distinguished from *People v. Acosta*, 60 Phil. 158 (1934). In the *Matela* case, the accused raped and then strangled the victim. In the *Acosta* case, the accused who was suffering from gonorrhea raped the child who contracted his disease and thereby died of peritonitis. In the *Matela* case, there were two acts, while in the *Acosta* case there was only one act.

24 People v. Cabrera, et al., 43 Phil. 82 (1922).

IV. CONTINUING CRIMES

While a combination of most of the offenses in the Penal Code could properly be examined in the light of the two classes of complex crimes, there are some combinations which cannot be easily placed under either class. The difficulty is brought about by the fact that one of the offenses is a continuing crime which involves the commission of other offenses.[25] Illustrative of continuing crimes are brigandage,[26] treason,[27] rebellion[28] and sedition.[29]

The problem however does not arise in brigandage because the law expressly provides that the penalty for the offense will be imposed only "if the act or acts committed by them (the members of the band) are not punishable by higher penalties, in which case, they shall suffer such high penalties."[30]

The crimes of treason and rebellion and sedition, however, pose a difficult problem of classification. Evidently, they cannot be placed under the first class for they involve the commission of more than a single act. They could perhaps be properly placed under the second class[31] but the decisions of the Supreme Court on the point are not by any means unanimous. In sedition, the Court applied the test for the second class and after finding that murder was not necessary for the commission of sedition, it sentenced the accused for murder[32] after it had convicted them of sedition.[33]

Treason cases are confusing. In some cases, the Supreme Court convicted traitors for the complex crime of treason with murder.[34] But in the majority of cases, the Court categorically announced that murders committed as overt acts of treason would be absorbed in the latter offense.[35] It is unfortunate that the Court shifted from one

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[25] A continuous crime is "one consisting of a continuous series of acts, which endures after the period of consummation, as, the offense of carrying concealed weapons. In the case of instantaneous crimes, the statute of limitations begins to run with the consummation, while in the case of continuous crimes it only begins with the cessation of the criminal conduct or act. U.S. v. Owen, D.C. Or., 32 F. 537."
BLACK'S LAW DICTIONARY 445 (4th ed.).

[26] Art. 306, Rev. Penal Code.

[27] Art. 114, *id.*

[28] Art. 134, *id.*

[29] Art. 139, *id.*

[30] Par. 2, Art. 306, *id.*

[31] In which case, the other offenses cited in the information would be included only by way of particulars since under § 12, Rule 106, an information should charge only one offense.

[32] People v. Cabrera, et al., 43 Phil. 82 (1922).

[33] People v. Cabrera, et al., 43 Phil. 65 (1922).

[34] People v. Alejo, 45 O.G. No. 7, 2871 (1948); People v. Labra, G.R. No. L-1240, May 12, 1949.

[35] People v. Prieto, 45 O.G. No. 8, 3329 (1948); People v. Labra, 46 O.G. Supp. to 1, 159 (1948); People v. Vilo, 46 O.G. No. 6, 2517 (1949); People v. Delgado, 46 O.G. No. 9, 4213 (1949); People v. Adlawan, 46 O.G. No. 9, 4299 (1949); People v. Ingalla, 46 O.G. No. 10, 4831 (1949); People v. Butawan, 46 O.G. No. 11, 5452 (1949).

ruling to the other, without even explaining why it was making the shift. The question probably did not attract the attention of the Court to a great degree considering that the penalty for treason was almost the same as the penalty for the most serious offenses under the Code. In the words of Professor Navarro, the Supreme Court for a time followed a policy of "enlightened vacillation."[36]

The Supreme Court has never convicted a person for the complex crime of rebellion with murder or with some other crime. Various tests and explanations have been advanced to determine whether one offense could be complexed with rebellion instead of being absorbed in or separate from rebellion.

Summarizing the decisions of the Supreme Court of Spain, Cuello Calon lays down the test of *gravity*. He states:

> *"La jurisprudencia que éstos han sentado considera como accidentes de la rebelión o sedición — cuya criminalidad queda embebida en la de estos delitos, y, por tanto, no son punibles especialmente—los hechos de escasa gravedad (v.g., atendados, desacatos, lesiones menos graves); por el contrario, las infracciones graves, como el asesinato o las lesiones graves, se consideran como delitos independientes de la rebelión o de la sedición."*[37]

Under this test, if a Huk kills a member of the Armed Forces of the Philippines in an encounter, the killing, being a grave offense, would not be absorbed in rebellion, and under the Spanish Penal Code,[38] would be prosecuted separately. Aside from the fact that the specific provision to that effect is no longer contained in our Revised Penal Code, thereby probably indicating an intent to adopt a different rule,[39] the test of gravity ignores the serious character of a rebellion. Such a test would perhaps find proper application in some South American republics where rebellion is a common sport or pastime.

Another test is the determination of whether the offense is a "political" offense or a "common crime". A necessary corollary to this test is the determination of whether an offense which would ordinarily be a common crime is also a political offense. Mr. Justice Concepcion laid down the test in the following terms:

> "In short, political crimes are those directly aimed against the political order, as well as such common crimes as may be committed to achieve

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[36] See *The Law of Treason in the Philippines*, 30 PHIL. L.J. 739-741 (1955).

[37] 2 DERECHO PENAL 110 (1947).

[38] Art. 259 of the Penal Code of Spain provides:
"Los delitos particulares cometidos en una rebelión o sedición, o con motivo de éllas, serán castigados respectivamente, segun las disposiciones de este Codigo.
"Cuando no puedan descubrirse sus autores, seran penados como tales los jefes principales de la rebelion o sedicion."

[39] Groizard believes that even if Art. 259 were not found in the Penal Code, the Courts would still follow the same rule. See 3 GROIZARD, *op. cit. supra* note 20 at 650.

> a *political purpose. The decisive factor is the intent or motive.* If a crime usually regarded as common, like homicide, is perpetrated for the purpose of removing from the allegiance 'to the Government the territory of the Philippine Islands or any part thereof,' then said offense becomes stripped of its 'common' complexion, inasmuch as, being part and parcel of the crime of rebellion, the former acquires the political character of the latter."

This test however does seem to be very satisfactory for it is shocking that all crimes committed with the intent or motive to further the rebellion should be absorbed in the political offense of rebellion. Such a ruling may very well give the go-signal for the rebellious Huks to commit all sorts of serious crimes knowing that whether they commit them or not, they would still get the same penalty of *prision mayor.*

Furthermore, even in the law of extradition, where the majority claims such a test is employed, decisions are by no means unanimous. As Oppenheim states:

> "To the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will probably, forever exclude the possibility of finding a satisfactory conception and definition. The difficulty is caused through the so-called 'relative political crimes' or *delits complexes*—namely those complex cases in which the political offense comprises at the same time an ordinary crime such as murder, arson, theft, and the like. Some writers deny categorically that such complex crimes are political; but this opinion is wrong and dangerous, since indeed many honourable political criminals would have to be extradited in consequence thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political. Such cases have aroused the indignation of the whole civilized world, and have indeed endangered the very value of the principle of non-extradition of political criminals."[40]

V. REMEDIES

The resolution in question has forced the officials of the Executive branch to devise ways and means of avoiding its consequences. The first attempt, the success of which is still in serious doubt, was a motion for reconsideration.

But even before the motion for reconsideration was filed, the Executive department had prepared an amendment to the Revised Penal Code provisions on rebellion in order to impose a higher penalty for that crime. Rightly or wrongly, Congress failed to pass the bill even after the President had certified to its urgency. But even if it had been passed, it is doubtful whether it could have had any valid retroactive effect.

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[40] 1 INTERNATIONAL LAW 647-8 (7th ed., Lauterpacht, 1948).

Two other alternatives have been advanced to soften the impact of the ruling and the failure of Congress to amend the law on rebellion. One alternative would have the rebels prosecuted separately for serious crimes they should commit in the course of the rebellion; the other would have them prosecuted for treason.

A. SEPARATE PROSECUTION

The view that rebels guilty of killings should be prosecuted separately for those offenses instead of the complex crime of rebellion with murder seems to have been provoked by the strong emphasis in the *Hernandez* resolution on the "allegations of the amended information." If the murders were alleged as "necessary means to commit rebellion and in the furtherance thereof" the killings would be absorbed. Such a ruling has clearly, if not expressly, ruled out the possibility of a complex crime of rebellion and some other crime. The only other possibility would be the prosecution of the rebels separately for murder and other more serious offenses.

The proposal for separate prosecution is not entirely new. In treason cases, the Supreme Court has similarly ruled that when murder and killings are alleged in the information as overt acts of treason, they would be absorbed in the latter offense, and at most, would be considered as aggravating circumstances. However, in the case of *People vs. Prieto*,[41] the Court speaking through the then Mr. Justice Tuason made this significant suggestion:

> "Just as one cannot be punished for possesion of opium in a prosecution for smoking the identical drug, and a robber cannot be held guilty of coercion or trespass to a dwelling in a prosecution for robbery, because possession of opium and force and trespass are inherent in smoking and robbery respectively, so may not a defendant be made liable for murder as a separate crime or in conjunction with another offense where, as in this case, it is averred as a constitutive ingredient of treason. This rule would not, of course, preclude the punishment of murder or physical injuries as such if the government should elect to prosecute the culprit specifically for those crimes instead of relying on them as an element of treason. It is where murder or physical injuries are charged as overt acts of treason that they cannot be regarded separately under their general denomination."

It is submitted, however, that this suggestion leaves much to be desired by way of logic and consistency. It gives too much importance to the allegations of the information, to form rather than to substance. It unduly binds the court and renders it powerless in the face of the whims of the prosecuting officer who may choose to prosecute the accused for treason or for murder. Aside from the pos-

[41] 45 O.G. No. 8, 3329 (1948).

sibility of abuse on the part of prosecuting officers, there is the strong possibility that persons equally guilty of killings as overt acts of treason would receive different penalties depending on the manner the fiscal decides to prosecute them.

The anomaly of having two persons equally guilty being sentenced to radically different penalties becomes more patent when the suggestion is applied to rebellion cases where the maximum penalty is *prision mayor* instead of death in treason cases. A person who is charged with rebellion for killing certain persons in the course of such rebellion would get a penalty of *prision mayor*. His companions whom the fiscal decides to prosecute for murder or homicide would at the very least be sentenced to *reclusion temporal* and even run the risk of being sentenced to death.

Furthermore, it is hard to see how the particular information charging murder could prevent the rebel who realizes after the presentation of the evidence for the prosecution that he would be found guilty, from presenting evidence that the murder was committed as a "necessary means to commit rebellion and in the furtherance thereof." If the accused's claim should be proved, the Court would have no alternative in the light of the resolution in the *Hernandez* case but to dismiss the case or convict the accused for rebellion. The information then would not really cast away the consequences of the *Hernandez* resolution which will continue to follow all prosecutions like a shadow.[42]

B. PROSECUTION FOR TREASON

The second alternative would have rebels prosecuted for treason. In *United States v. Lagnason*,[43] the majority of the justices believed that treason could be committed both in war and in peace. In peace, treason could be committed by "levying war." In that case, all the justices except Mr. Chief Justice Arellano and Mr. Justice Mapa who were satisfied with finding the defendant guilty of rebellion, agreed that treason could be committed in times of peace.

As against this opinion, we have the concurring opinion of Mr. Justice Perfecto in *Laurel v. Misa*[44]:

> "Treason is a war crime. It is not an all time offense. It can not be committed in peace time. While there is peace there are no traitors.

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[42] The approach of the Court in *People v. Umali*, G.R. No. L-5803, Nov. 29, 1954, is more direct and reasonable. Under an information very similar to that filed against Amado Hernandez, the Supreme Court avoided a ruling on whether there could be a complex crime of rebellion with murder. The Court instead sentenced the defendant for each and every offense proved, as separate offenses, pursuant to § 3, Rule 116.

[43] 3 Phil. 472 (1904).

[44] 77 Phil. 856 (1947).

> **Treason may be incubated when peace reigns. Treasonable acts may actually be perpetuated during peace, but there are no traitors until war has started."**

It should be noted however that in the *Lagnason* case, all the justices, except Mr. Justice Torres and Mr. Justice Johnson, agreed to impose on the defendant the penalty for rebellion and not for treason. Most of the justices considered the defendant guilty of treason in name but of rebellion in effect.

As far as results are concerned, the proposal to prosecute the rebels for treason in order to impose on them a higher penalty is untenable. On the contrary, by prosecuting them for treason, the prosecution would have to undergo the difficulties entailed by the two-witness rule in treason, without securing any stiffer penalty for the rebels. Such a move therefore would be nothing more than a mere waste of time and effort.

Furthermore, it is a serious question whether the views of Mr. Justice Willard and the American justices in the *Lagnason* case would still so hold after the enactment of our Revised Penal Code. How far could the Anglo-American origin of our law on treason be taken as a sufficient reason for bringing into this jurisdiction the principles on treason enunciated in those countries? The Revised Penal Code which is predominantly of Spanish origin has inserted the Anglo-American definition of treason. But at the same time, it has introduced in the very chapter on treason provisions which, under Anglo-American law, could not exist. Thus we find in our Penal Code provisions on conspiracy and proposal to commit treason[45] when under Anglo-American law, conspiracy and proposal to commit treason alone do not amount to treason and hence would not be punishable at all.[46] We have also in our Penal Code a provision on misprision of treason under which a person could be found guilty as an accessory to the crime of treason.[47] And yet under Anglo-American law, there are no accessories in treason; all are principals or not guilty at all.[48]

Thus, even our law on treason represents a curious blend of the Spanish and the Anglo-American. By the adoption of certain principles on treason found in England and America we have found ourselves confronted with the task of reconciling them with the predominantly Spanish origin and character of our Penal Code. Mr. Justice Albert sought to reconcile these views when he discussed the *Lagnason* case. He observed:

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[45] Art. 115, Rev. Penal Code.
[46] Ex Parte Bollman and Ex Parte Swartwout, 4 Cranch 75, 2 L. ed. 554 (1807); Burr's Trial, 2 L. ed. 684, 687 (1807).
[47] Art. 116, Rev. Penal Code.
[48] Burr's Trial, 2 L. ed. 684, 694 (1807).

> "...treason is levying war against the United States or the Government of the Philippine Islands by any person owing allegiance to it. On the other hand, it has been held that the act of engaging in a rebellion is levying war, and, therefore, treason. Apparently, the same act is punished in different ways. But the inconsistency disappears by holding that where the acts are such as would, if done with regard to a public enemy, constitute an adherence to him, giving him aid or comfort, or where the purpose of the offenders in levying war against the constituted authorities is the delivery, in whole or in part, of the country to the foreigner, then it should be punished as treason under Article 114; otherwise, the mere act of levying war against the Government would constitute rebellion."[49]

Professor Navarro believes that "it would, therefore, seem far more reasonable to return to the clear-cut distinction established by the Spanish Penal Code and, thus, obliterate all confusion."[50]

It is submitted that such a return to the clear-cut distinction established in the Spanish Penal Code could be made by our Courts by substituting blind adherence to Anglo-American precedents with a judicious reconciliation of those doctrines with the general scheme of our Penal Code. For it must be remembered that unlike in the United States where a definition of treason in the Federal Constitution[51] prevented any alteration of its accepted signification, the definition of treason in our Penal Code leaves sufficient room for judicial interpretation. In this respect, the classification of treason under "Crimes against National Security and the Law of Nations,"[52] and of rebellion under "Crimes against Public Order"[53] is not entirely meaningless and could perhaps furnish a sound guide to judicial construction. If the return to the distinction under the Spanish Penal Code should materialize, then perhaps the opinion of Mr. Justice Perfecto that treason is exclusively a war crime might not have been too sweeping after all. Perhaps it was a step in the right direction.

But even if the return should not materialize, it is quite evident that the kindest view we can take of the proposal to prosecute the rebels for treason in order to impose a higher penalty on them is that it has not been seriously made.

VI. CONCLUSION

The gravity test and the political intent or motive test do not produce satisfactory results. The prosecution of rebels for crimes like murder, as separate crimes or their prosecution for treason will not yield results any more satisfactory. It is submitted, however,

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[49] ALBERT, REVISED PENAL CODE ANNOTATED 325 (1932).
[50] Navarro, *op. cit. supra*, note 36, at 731.
[51] U.S. CONST. Art. III, § 3 par. 1.
[52] Bk II, Tit. 1, Ch. 1, Rev. Penal Code.
[53] Bk. II, Tit. 3, Ch. 1, *id.*

that the test embodied in Article 48 coupled with a reasonable construction of the provisions on rebellion could perhaps produce satisfactory results.

Rebellion, though admittedly a continuing offense may be viewed under the second class of complex crimes. If the information and the evidence to prove such rebellion were examined in the light of the test laid down for the second class of complex crimes, the murders, arsons and robberies could be considered either as absorbed in, complexed with, or separate from rebellion, depending upon the circumstances under which they were committed.

If in a clash of arms or skirmish between government forces and the rebels, one of the rebels should kill an enlisted man or officer, such killing could perhaps be considered as absorbed. Viewing the offense as a whole, the Court would perhaps find that the rebels had no other alternative in the light of the circumstances.

If on the other hand, a rebel should kill another because of a personal quarrel, not connected in any manner with the furtherance of the rebellion, except perhaps for the wanton spirit of the rebellious forces, such killing should not be considered as absorbed in nor complexed with rebellion. It would be separate.

But in between these two poles lies a third class or possibility that an offense may be committed which is not indispensable to the commission of rebellion but nevertheless reasonably and sufficiently connected with it. These offenses could properly be complexed with rebellion.

Mr. Justice Montemayor started in this direction when he distinguished between the "indispensable" and the "necessary." What is not clear however is whether other crimes not indispensable would have to be prosecuted separately or complexed with rebellion and the reasons for doing so.

In some respects the dissenting opinion is quite vague. There is the observation that after gathering and rising publicly, rebellion has been consummated. This observation as it stands cannot be disputed. The difficulty would arise when one starts to imply that all acts *subsequent* to such gathering and uprising are not indispensable, and hence, separate or necessary. But Mr. Justice Montemayor would not agree to an implication so restrictive of the concept of rebellion. In fact he admitted that certain offenses *during* and *after* the initial uprising could be considered absorbed. And when forced to draw a dividing line between acts absorbed and acts not absorbed, he resorted to the test of gravity. But as previously pointed out, the test of gravity is not entirely satisfactory.

The ambush of Mrs. Quezon and her party could properly be considered under this class. The killing, as far as facts can be gathered, was certainly not indispensable. But neither could we say that such killing was not necessarily connected with the rebellion. Perhaps were it not for their purpose of terrorizing the countryside the Huks would not have killed her. At any rate, whether the Huks had no other alternative in the light of the circumstances but to commit the murder, would depend upon the evidence to be submitted to the Court.

These three classes or possibilities, to be sure, are subjective and leave much to the courts by way of evaluation of evidence and exercise of discretion. These propositions do not establish a hard and fast rule under which, to paraphrase Mr. Justice Bengzon and Mr. Justice Frankfurter, the choice is "between Scylla and Charybdis." But perhaps, under the present state of the law, only by such propositions may we prevent the law from being absurd.

SABINO PADILLA, JR.