An Analysis of the Double Jeopardy Clause: The Same Offense or Not the Same Offense, That is the Question

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I. INTRODUCTION

In April 2018, the Office of the Ombudsman filed four Informations[1] against Al Caparros Argosino, Michael Bautista Robles, and Wenceslao Azarcon Sombero, Jr. for the following offenses: (1) Violation of Republic Act No. 7080 (Plunder Law or R.A. No. 7080);[2] (2) Violation of Article 210 of the Revised Penal Code (Direct Bribery);[3] (3) Violation of Section 3 (e) of

1. People v. Argosino, et al., SB-18-CRM-0240-43, Aug 28, 2020, *available at* https://sb.judiciary.gov.ph/RESOLUTIONS/2020/H_Crim_SB-18-CRM-0240-0243_People%20vs%20Argosino,%20et%20al_08_28_2020.pdf (last accessed Nov. 30, 2020).
2. An Act Defining and Penalizing the Crime of Plunder, Republic Act No. 7080 (1991) (as amended).
3. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815, art. 210 (1930).

Republic Act. No. 3019 (R.A. No. 3019);[4] and (4) Violation of Presidential Decree No. 46 (P.D. No. 46).[5]

These four charges stem from the same set of facts. On 24 November 2016, the Department of Justice arrested over 1,300 Chinese nationals at the Fontana Leisure Resort in Pampanga for engaging in illegal online gaming.[6] Mr. Argosino and Mr. Robles are alleged to have received the amount of ₱50 million from Mr. Sombero for the release of the Chinese nationals from the custody of the Bureau of Immigration.[7]

The imposable penalty for Plunder is "*reclusion perpetua* to death;"[8] for Direct Bribery, it is "*prision mayor* in its medium and maximum periods and a fine of not less than three times the value of the gift, in addition to the penalty corresponding to the crime agreed upon, if the same shall have been committed[;]"[9] for violation of Section 3 (e), it is "imprisonment for not less than six years and one month nor more than fifteen years, perpetual disqualification from public office, and confiscation or forfeiture in favor of the Government of any prohibited interest and unexplained wealth manifestly out of proportion to his salary and other lawful income[;]"[10] and for P.D. No. 46, it is "imprisonment for not less than one [ ] year not more than five [ ] years and perpetual disqualification from public office."[11]

4. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019, § 3 (e) (1960) (as amended).

5. Office of the President, Making it Punishable for Public Officials and Employees to Receive, and for Private Persons to Give, Gifts on any Occasion, Including Christmas, Presidential Decree No. 46 [P.D. No. 46, s. 1972] (November 10, 1972).

6. *Argosino, et al.*, SB-18-CRM-0240-43, at 7.

7. *Id.* at 27.

8. Republic Act No. 7080, § 2.

9. An Act Amending Articles Two Hundred Ten and Two Hundred Eleven of Act Numbered Thirty-Eight Hundred and Fifteen, Otherwise Known as the Revised Penal Code, as Amended, to Increase the Penalty for the Offense of Bribery, Batas Pambansa Blg. 871, § 2 (1985).

10. An Act Amending Sections Eight, Nine, Ten, Eleven, and Thirteen of Republic Act Numbered Thirty Hundred and Nineteen, Otherwise Known as The Anti-Graft and Corrupt Practices Act, Batas Pambansa Blg. 195, § 2 (1982).

11. P.D. No. 46, s. 1972.

If convicted, the accused will serve these prison sentences successively following the order of severity[12] subject only to the three-fold rule,[13] which provides that "the maximum duration of the convict's sentence shall not be more than threefold the length of time corresponding to the most severe of the penalties imposed upon him"[14] but the "maximum period shall in no case exceed forty years."[15]

Does the Constitution permit the concurrent multiple prosecutions and punishments for a single criminal act? Can these four charges be filed successively instead of concurrently? The filing of four criminal cases, whether simultaneously or concurrently, and the possible imposition of four prison sentences for a single criminal act seem like overkill. Is it?

The answer to these questions hinges on the interpretation of the Double Jeopardy Clause of the Constitution,[16] more particularly, on the interpretation of the words "same offense."

Article III, Section 21 of the 1987 Constitution[17] provides, "[n]o person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."[18]

How should the courts interpret the phrase "same offense?" The task is not as simple as it seems. The Double Jeopardy Clause is not a self-contained constitutional provision whose meaning can be divined through an analysis of the clause alone. A proper interpretation of the Double Jeopardy Clause requires an analysis of substantive criminal law and criminal procedure as well.

12. *See* REV. PENAL CODE, art. 70.

13. LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW BOOK ONE 750–51 (19th ed. 2017).

14. An Act to Amend Article Sixty-One, Seventy, and Seventy-One of The Revised Penal Code, Commonwealth Act No. 217, § 2 (1936).

15. *Id.*

16. PHIL. CONST. art. III, § 21 (commonly referred to as The Double Jeopardy Clause).

17. PHIL. CONST. art. III, § 21.

18. PHIL. CONST. art. III, § 21.

II. HISTORY OF THE DOUBLE JEOPARDY CLAUSE

The right against double jeopardy is an

> ancient and [well-established] doctrine[. It is] 'a sacred principle of criminal jurisprudence, and is a part of the universal law of reason, justice, and conscience' [and] is founded on the maxim *non bis in idem* (not twice for the same) or *nemo debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the same cause) ... .[19]

The prohibition against double jeopardy is "a revered constitutional safeguard."[20] It is a safeguard to protect an individual against governmental tyranny.[21]

The Double Jeopardy Clause first found its way to the Philippines in the Philippine Organic Act of 1902,[22] four years after Spain ceded the Philippine Islands to the United States (U.S.) under the Treaty of Paris in December 1898.[23] Together with the yoke of colonization came a guarantee of various freedoms. Section 5 of the Philippine Organic Act of 1902 provides "[t]hat no person shall be held to answer for a criminal [offense] without due process of law; and *no person for the same* [*offense*] *shall be twice put in jeopardy of punishment*, nor shall be compelled in any criminal case to be a witness against himself."[24]

The Double Jeopardy Clause was then incorporated in the Jones Law of 1916[25] as one of the fundamental rights guaranteed in the Bill of Rights.[26]

The 1935 Constitution[27] likewise included a Double Jeopardy Clause but this time, it contained the following additional sentence, "[i]f an act is punished by a law and an ordinance, conviction or acquittal under either shall

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19. People v. Pilpa, G.R. No. L-30250, 79 SCRA 81, 85 (1977) (citing 22 C.J.S. 616).

20. People v. Velasco, G.R. No. 127444, 340 SCRA 207, 211 (2000).

21. Kirstin Pace, *Fifth Amendment--The Adoption of the Same Elements Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769, 804 (1994).

22. THE PHILIPPINE ORGANIC ACT OF 1902, § 5 (superseded in 1916).

23. Treaty of Peace Between the United States of America and the Kingdom of Spain (Treaty of Paris), Spain-U.S., Dec. 10, 1898.

24. THE PHILIPPINE ORGANIC ACT OF 1902, § 5, para. 3 (superseded in 1916) (emphasis supplied).

25. THE JONES LAW OF 1916 (superseded in 1935).

26. THE JONES LAW OF 1916, § 3 (b), para. 2 (superseded in 1935).

27. 1935 PHIL. CONST. (superseded in 1973).

constitute a bar to another prosecution for the same act."[28] Article III, Section 1 (20) of the 1935 Constitution reads, "[n]o person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."[29]

The amendment to the Double Jeopardy Clause, which was proposed by Delegate Vicente S. Francisco, was intended to overturn the decision of the Supreme Court in the 1905 case of *U.S. v. Chan-Cun-Chay*.[30]

In that case, Manuel Chan-Cun-Chay was charged with the violation of Ordinance No. 2 of the City of Manila,[31] which provided —

> No person shall set up, keep, or maintain or permit to be set up, kept, or maintained on any premises occupied or controlled by him, any table or other instrument or device for the purpose of gaming or gambling or with which money, liquor, or anything of value shall in any manner be played for.[32]

It was his contention that City Ordinance No. 2 was in conflict with Article 343 of the Penal Code,[33] which provided —

> The bankers and proprietors of houses where games of chance, stakes, or hazard are played shall be punished with the penalty of *arresto mayor* and a fine of from six hundred and twenty-five to six thousand two hundred and fifty pesetas, and, in case of a repetition, with those of *arresto mayor* in its maximum degree to *prisión correccional* in its minimum degree, and a fine double the above mentioned.
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> The players who assemble at the houses referred to shall be punished with those of *arresto mayor* in its minimum degree and a fine of from three hundred and [twenty-five] to three thousand two hundred and fifty pesetas. In case of

28. 1935 PHIL. CONST. art. III, § 1 (20) (superseded in 1973).

29. 1935 PHIL. CONST. art. III, § 1 (superseded in 1973).

30. United States v. Chan-cun-chay, 5 Phil. 385 (1905). *See also* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 590 (2009).

31. *Chan-cun-chay*, 5 Phil. at 386.

32. Municipal Board of the City of Manila, An ordinance relating to gambling, Ordinance No. 2, § 1 (1901).

33. *Chan-cun-chay*, 5 Phil. at 386.

> repetition, with that of *arresto mayor* in its medium degree and double the fine.[34]

He further argued that there was a danger of his right against double jeopardy being violated because two laws punished the same act and that there was a possibility that he could be prosecuted anew for violation of the Penal Code.[35]

The Supreme Court disagreed.[36] It held that the Ordinance and the Penal Code punished different offenses since "[t]he ordinance punishes the maintenance of a house in which are kept gambling paraphernalia, while the Penal Code punishes the maintenance of a house where games of chance are actually played. Therefore[,] the ordinance punishes a different offense from that provided for by the Penal Code in said article."[37]

It further held that, on the assumption that the offenses punished under the Ordinance and the Penal Code are the same, the offense is against two political entities and, hence, permissible on the theory that the City of Manila (the municipality) and the national government (the State) are separate political entities or sovereignties.[38]

There were pros and cons to the amendment overruling *Chan-Cun-Chay*. On the one hand, the amendment was introduced to protect an accused against a "vindictive fiscal" who could "harass an enemy by double prosecution."[39] On the other hand, the system could be manipulated to shield an accused from prosecution under the law with the higher penalty by prosecuting him under the law with the lower penalty.[40]

Fr. Joaquin G. Bernas, S.J. notes that the amendment, referring to "an act" (as opposed to an "offense"), was "carefully worded."[41]

Since the Francisco amendment won the day, an accused, with respect to the commission of an "act," can escape criminal liability under the law with the higher penalty upon conviction or acquittal under the law (ordinance)

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34. The Penal Code, Title VI, art. 343.

35. *See Chan-cun-chay*, 5 Phil. at 387-88.

36. *Id.* at 388.

37. *Id.*

38. *Id.* at 388-89.

39. BERNAS, *supra* note 30, at 590.

40. *Id.*

41. *Id.*

with the lighter penalty. Thus, someone like accused Chan-Cun-Chay, who had been convicted under the ordinance, cannot, under the 1935 Constitution, be prosecuted a second time for the same act.

Under the Local Government Code,[42] the maximum penalty for violation of an ordinance in the Philippines is "a fine not exceeding Five Thousand Pesos (₱5,000) [and] imprisonment not exceeding one (1) year, or both ... ."[43]

The Double Jeopardy Clause of the 1935 Constitution was retained verbatim in the 1973[44] and 1987 Constitutions.[45]

Article III, Section 21 of the 1987 Constitution provides that "[n]o person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."[46]

The double jeopardy clause was taken from the Fifth Amendment of the U.S. Constitution.[47] The Fifth Amendment reads —

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same* [*offense*] *to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[48]

The Fifth Amendment does not contain the following additional sentence — "If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."[49] The U.S. federal courts, in fact, recognize the doctrine of dual sovereignty[50]

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42. An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160 (1991).

43. *Id.* §§ 458 (a) (1) (iii) & 468 (a) (1) (iii).

44. 1973 PHIL. CONST. art. IV, § 22 (superseded in 1987).

45. PHIL. CONST. art. III, § 21.

46. PHIL. CONST. art. III, § 21.

47. U.S. CONST. amend. V.

48. U.S. CONST. amend. V (emphasis supplied).

49. PHIL. CONST. art. III, § 21.

50. *See Fifth Amendment--Double Jeopardy and the Doctrine of Dual Sovereignty*, 69 J. CRIM. L. & CRIMINOLOGY 597, 597 (1978).

that was cited in *Chan-Cun-Chay* but rejected by the framers of the 1935 Constitution.[51]

The principal issue in double jeopardy cases is the issue of the meaning of the words "same offense." How should the courts construe the term "same offense?"

As one author notes —

> Although all courts agree that the guarantee against double jeopardy is an absolute necessity in criminal law, there is considerable confusion in attempting to define the term 'same offense' as used in the double jeopardy clause of the fifth amendment to the [U.S.] Constitution. The three devices which the courts have developed for this purpose [—] the same evidence test, the same transaction test, and the collateral estoppel theory [—] have been relatively ineffective in preventing harassment of the defendant or in eliminating the confusion; for example, at least one court has even tried to apply all three tests in one case[.][52]

Another author writes that "[t]he Supreme Court has failed to achieve a stable interpretation of the Double Jeopardy Clause."[53] He explains —

> The doctrinal instability exists largely because the Court has never had a satisfactory account of when two offenses constitute the 'same offense' for double jeopardy purposes. The Court's basic approach is misguided, in my view, because it substitutes formalism for substance, a mechanical test for a test that asks whether the offenses are substantively the same.[54]

Yet another author observes that "[t]he [c]ourt's double jeopardy jurisprudence 'can hardly be characterized as a model of consistency and clarity.'"[55]

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51. *See Chan-cun-chay*, 5 Phil. at 390 (citing United States v. Barnhart, 22 F. 285, 290 (Ct. Ct. D. Or. 1884) (U.S.)) & People v. Quijada, G.R. Nos. 115008-09, 259 SCRA 191, 238 (1996).

52. W. John English, Jr., *Double Jeopardy – Defining the Same Offense*, 32 LA. L. REV. 87, 100 (1971) (citing Estep v. State, 11 Okla. Crim. 103 (1914) (U.S.)).

53. George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1027 (1995).

54. *Id.* at 1028.

55. Pace, *supra* note 21, at 795 (citing Burkes v. United States, 437 U.S. 1, 9 (1978) (U.S); In re Nielsen, 131 U.S. 176 (1889) (U.S.) (holding that the Double Jeopardy Clause is violated when a defendant is tried twice for the same conduct); Gavieres v. United States, 220 U.S. 338 (1911) (U.S.) (holding that the Double

So what meaning should be given to the words "same offense?" Here lies the legal rub.

III. RULES OF COURT

The Rules of Procedure[56] play an important role in understanding the meaning of the Double Jeopardy Clause. The Supreme Court has variously described the Rules as "complementing" the Double Jeopardy Clause;[57] or "implementing" it;[58] or as being in consonance to it;[59] or as "embod[ying]" it;[60] or as "procedurally buttress[ing]" it;[61] or as "echo[ing]" it;[62] or as "strictly adher[ing]" to it;[63] or as being a "restate[ment]" of it;[64] or as "lay[ing] down [its] requisites in order that the defense of double jeopardy may prosper."[65]

However the relation of the Rules of Court to the Double Jeopardy Clause is described, the bottom line is that the Rules are an interpretation of the Double Jeopardy Clause. Notably, the Rules (and jurisprudence) have not

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Jeopardy Clause is not violated even if the two charges are based on the same conduct if the two offenses charged have different statutory elements); & Grady v. Corbin, 495 U.S. 508 (1990) (U.S.) (holding that courts must look to both the elements of the offenses and the defendant's conduct to determine whether the Double Jeopardy Clause is violated by a subsequent prosecution)).

56. 2000 REVISED RULES OF CRIMINAL PROCEDURE.

57. Spouses Que v. Cosico, G.R. No. 81861, 177 SCRA 410, 415 (1989) & People v. Pimentel, G.R. No. 100210, 288 SCRA 542, 553 (1998).

58. People v. Nazareno, G.R. No. 168982, 595 SCRA 438, 448 (2009); Villareal v. People, G.R. No. 151258, 664 SCRA 519, 549 (2012); & *Pilpa*, 79 SCRA at 85.

59. People v. Sandiganbayan (Fourth Division), G.R. No. 232197, 861 SCRA 285, 301 (2018).

60. People v. Sandiganbayan (Fourth Division), G.R. No. 228494, 860 SCRA 101, 113 (2018).

61. People v. Espinosa, G.R. No. 153714, 409 SCRA 256, 265 (2003) & Corpus, Jr. v. Pamular, G.R. No. 186403, Sept. 5, 2018, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64644 (last accessed Nov. 30, 2020).

62. Castro v. People, G.R. No. 180832, 559 SCRA 676, 683 (2008).

63. Yuchengco v. Court of Appeals, G.R. No. 139768, 376 SCRA 531, 540 (2002); Rural Bank of Mabitac, Laguna, Inc. v. Canicon, G.R. No. 196015, 868 SCRA 391 (2018); & *Velasco*, 340 SCRA at 237.

64. People v. Mogol, G.R. No. L-37837, 131 SCRA 296, 303 (1984).

65. Asistio y Consino v. People, 758 Phil. 485 (2015).

limited the interpretation of "same offense" to identical offenses. The Rules have expanded the meaning of "same offense."

A. General Order No. 58

As early as 1900, even before the enactment of the Philippine Bill of 1902, General Order No. 58 (Criminal Procedure of 1900),[66] issued by the U.S. Military Governor of the Philippine Islands, already contained provisions on double jeopardy. Sections 26, 27, and 28 of this criminal procedure read —

> SEC. 26. When a defendant shall have been convicted or acquitted or once placed in jeopardy upon an Information or complaint, the conviction, acquittal shall be a bar to another Information or indictment for the [offense] charged, or for an attempt to commit the same, or for a frustration thereof, or *for any* [*offense*] *necessarily therein included* of which he might have been convicted under such complaint or Information.[67]
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> SEC. 27. If the defendant shall have been formerly acquitted on the ground of variance between the complaint or Information and the proof, or if the complaint or Information shall have been dismissed upon objection to its form or substance or in order to hold the defendant for a higher [offense] without a judgment of acquittal, it shall not be considered an acquittal of the same [offense].[68]
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> SEC. 28. A person cannot be tried for an [offense], nor for any attempt to commit the same of frustration thereof, for which he has been previously brought to trial in a court of competent jurisdiction upon a valid complaint or Information or other formal charge sufficient in form and substance to sustain a conviction, after issue properly joined, when the case is dismissed or otherwise terminated before judgment without the consent of the accused.[69]

General Order No. 58 was issued to carry out "the 7 April 1900 Instructions of President [William] McKinley [ ] to the Philippine Commission headed by William Howard Taft."[70] The Instructions read in part —

> [T]he Commission should bear in mind, and the people of the Islands should be made to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we

66. 1900 CRIMINAL PROCEDURE (superseded in 1985).

67. *Id.* § 26 (emphasis supplied).

68. *Id.* § 27.

69. *Id.* § 28.

70. *Velasco*, 340 SCRA at 222.

> deem essential to the rule of law and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. Upon every division and branch of the Government of the Philippines[,] therefore[,] must be imposed these inviolable rules: that no person shall be put twice in jeopardy for the same offense[.][71]

"Same offense" under Section 26 includes "an attempt to commit"[72] the same offense that was previously charged (and for which the accused has been acquitted or convicted), or a "frustration thereof,"[73] or "any [offense] necessarily therein included ... ."[74] Thus, if one were charged with and acquitted or convicted of Murder, one can no longer be charged with Homicide because Homicide is necessarily included in Murder. This has been the rule since Blackstone — "that a greater offense is the same as all necessarily included offenses."[75]

However, if one were initially charged with and acquitted or convicted of Homicide, one may later on still be charged with Murder since Murder is not necessarily included in Homicide (but necessarily includes Homicide). This makes sense since, if one is charged with Murder, one is in jeopardy of being punished for Homicide. The converse, however, is not true. If one is charged with Homicide, there is no danger (or jeopardy) of being found guilty of Murder.[76]

B. 1940 *Rules of Court*

The 1940 Rules of Court[77] amended Sections 26, 27, and 28 of General Order No. 58. Rule 113, Section 9 of the 1940 Rules provides —

> *Former Conviction or Acquittal or Former Jeopardy*. — When a defendant shall have been convicted or acquitted, or the case against him dismissed or otherwise terminated without the express consent of the defendant, by a court of competent jurisdiction, upon a valid complaint or Information or other formal charge sufficient in form and substance to sustain a conviction, and after the defendant had pleaded to the charge, the conviction or acquittal

71. *Id.*

72. 1900 CRIMINAL PROCEDURE, § 26.

73. *Id.*

74. *Id.*

75. Thomas III, *supra* note 53, at 1034.

76. BERNAS, *supra* note 30, at 608.

77. 1940 RULES OF CRIMINAL PROCEDURE (superseded in 1964).

> of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which *necessarily includes or is necessarily included in* the offense charged in the former complaint or Information.[78]

Under the 1940 Rules, the meaning of "same offense" was further expanded to bar the prosecution of a second offense that "necessarily includes" the offense previously charged.[79] Thus, a previous acquittal or conviction of Homicide would, under the 1940 Rules, bar a subsequent prosecution for Murder because Murder necessarily includes Homicide.

Not long after the adoption of the 1940 Rules, the Supreme Court, in *People v. Tarok*,[80] was confronted with an issue that required the application and interpretation of the phrase "necessarily include."[81] In *Tarok*, the accused hacked his wife with a bolo multiple times.[82] He was charged with Serious Physical Injuries, to which he pleaded guilty, and he was thereafter sentenced to imprisonment of seven months and one day.[83] While serving his sentence, his wife died from an infection caused by the wounds inflicted by the accused.[84] A charge of Parricide was subsequently brought against him,[85] an offense which necessarily includes Serious Physical Injuries. The accused invoked his right against double jeopardy.[86] The Supreme Court (a majority) granted the appeal, holding that the crime of Homicide necessarily includes Serious Physical Injuries as provided under the freshly minted Rules and, therefore, the subsequent filing of the Homicide charge is disallowed.[87]

In deciding the case, the Supreme Court declared that it was "not unmindful of the rule laid down in several cases that the protection against a

78. *Id.* rule 113, § 9 (emphases supplied).

79. *Id.*

80. People v. Tarok, 73 Phil. 260 (1941).

81. *Id.* at 265.

82. *Id.* at 261.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Tarok*, 73 Phil. at 261.

87. *Id.* at 265.

second jeopardy is only for the same offense, not for the same act."[88] It then noted that "[t]here is, however, considerable discordance in the cases in determining the test as to when two offenses are substantially the same."[89] The various tests identified by the Supreme Court are —

> One test is to ascertain whether the facts alleged in the second Information would, if given in evidence, have warranted a conviction on the first, and if this is the case, then the offenses are assumed to be identical [...] In other cases, the plea of former conviction or acquittal is sufficient if the proof shows the second case to be the same transaction as the first [...] Another test is to inquire whether the two offenses are in substance precisely the same or of the same nature or of the same species, so that the evidence which proves the one would prove the other; or if this is not the case, then the one crime must be an ingredient of the other [...] Other negative tests have also been laid down; viz.:
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> (1) A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution or conviction under the other.
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> ...
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> (2) If the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in the second, the former conviction or acquittal is not a bar.
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> ...
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> (3) Unless the two offenses charged are the same in law and in fact, they are not the same offense.[90]

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88. *Id*. at 261 (citing People v. Espino, 73 Phil. 260 (1940); People v. Cabrera, 43 Phil. 82 (1922); U.S. v. Vitog, 37 Phil. 42 (1917); *Gavieres*, 220 U.S; Kepner v. U.S., 195 U.S. 100 (1904); U.S. v. Capuro, 7 Phil. 24 (1906); & U.S. v. Ching Po, 23 Phil. 578 (1912)).

89. *Tarok*, 73 Phil. at 262.

90. *Id*. at 262-63 (citing *Ching Po*, 23 Phil.; U.S. v. Lim Tigdien, 30 Phil. 222 (1915); *Gavieres*, 220 U.S.; *Cabrera*, 43 Phil.; People v. Alvarez, 45 Phil. 472, 478 (1923); People v. Martinez, 55 Phil. 6 (1906); People v. Defoor, 100 Cal. 150 (1893) (U.S.); State v. Price, 127 Iowa 301 (1905) (U.S.); Newton v. Commonwealth, 198 Ky. 707 (CA Ky.1923) (U.S.); Moore v. State, 59 Miss. 25 (1881) (U.S.); Nochderffer v. State, 34 Okla. Crim. 215 (1926) (U.S.); Roberts v. State, 14 Ga. 8 (1853) (U.S.); Burnam v. State, 2 Ga. App. 395 (1907) (U.S.); State v. Mowser,

According to the Supreme Court, by approving the adoption of the phrase "necessarily included in," in effect, it had chosen a rule from among the conflicting theories.

Justice Manuel V. Moran dissented from this decision.[91] He was of the opinion that the inclusion of the phrase "necessarily included in" was nothing new and that it was adopted "merely [to] give expression to a principle already known and observed in our jurisdiction, and which [S]ection 26 of General Orders No. 58 failed to embody[,]"[92] and that part of this principle was the recognition that "where the greater offense of which an accused is subsequently charged was not yet existing at the time he was convicted for the lesser offense, double jeopardy cannot be invoked."[93]

The ruling in *Tarok* underscores the importance the Rules play in the interpretation of the Double Jeopardy Clause. Depending on the theory that is adopted, the Rules can expand or contract the meaning of the phrase "same offense."

Incidentally, *Tarok* was abandoned nine years later in 1950 in the case of *Melo v. People*,[94] penned by Justice Moran. There, the accused was charged with Frustrated Homicide for stabbing the victim.[95] Less than 15 hours after the accused pleaded guilty to the charge, the victim died.[96] The prosecution filed an amended Information charging the accused with Consummated Homicide.[97] The accused moved to quash the amended Information on the ground of double jeopardy.[98] The Supreme Court held the filing of the

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92 N.J.L. 474 (1919) (U.S.); Love v. State, 41 Okla. Crim. 291 (1928) (U.S.); Smith v. State, 159 Tenn. 674 (1929) (U.S.); U.S. v. Gustilo, 19 Phil. 208 (1911); *Capurro*, 7 Phil.; Grey v. U.S., 172 Fed. 101 (7th Cir. 1909) (U.S.); Morey v. Commonwealth, 108 Mass. 433 (1871) (U.S.); State v. Hooker, 145 N.C. 581 (1907) (U.S.); Blair v. State, 81 Ga. 629 (1888) (U.S.); State v. White, 123 Iowa 425 (1904) (U.S.); Ruble v. State, 51 Ark. 170 (1889) (U.S.); Com. v. Rody, 12 Pick. 496, 503 (1832) (U.S.); & State v. Kingsbury, 147 Wash. 426, 432 (1928) (U.S.)).

91. *Tarok*, 73 Phil. at 272 (J. Moran, dissenting opinion).

92. *Id.* at 276.

93. *Id.* at 278.

94. Melo v. People, 85 Phil. 766 (1950).

95. *Id.* at 767.

96. *Id.*

97. *Id.*

98. *Id.*

amended Information to be valid.[99] It first declared that the meaning of identical or same offense is "restated" in the Rules —

> Under said Rules there is identity between two offenses not only when the second offense is exactly the same as the first, but also when the second offense is an attempt to commit the first or a frustration thereof, or when it necessarily includes or is necessarily included in the offense charged in the first Information.[100]

It then held that

> [t]his rule of identity does not apply, however, when the second offense was not in existence at the time of the first prosecution, for the simple reason that in such case there is no possibility for the accused, during the first prosecution, to be convicted for an offense that was then inexistent. Thus, where the accused was charged with physical injuries and after conviction the injured person dies, the charge for homicide against the same accused does not put him twice in jeopardy.[101]

C. 1964 *Rules of Court*

The wording of the rule on former jeopardy in the 1940 Rules was adopted verbatim in the 1964 Rules of Court.[102]

D. 1985 *Rules of Criminal Procedure*

The 1985 Rules of Criminal Procedure[103] amended the Rule on double jeopardy by codifying the ruling in *Melo v. People*. Rule 117, Section 7 reads —

> *Former conviction or acquittal; double jeopardy*. — When an accused has been convicted or acquitted, or the case against him dismissed or otherwise terminated without his express consent by a court of competent jurisdiction, upon a valid complaint or Information or other formal charge sufficient in form and substance to sustain a conviction and after the accused had pleaded to the charge, the conviction or acquittal of the accused or the dismissal of the case shall be a bar to another [prosecution] for the offense charge[ ], or

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99. *Id*.

100. *Melo*, 85 Phil. at 768-69 (citing 1940 RULES OF CRIMINAL PROCEDURE, rule 113, § 9; U.S. v. Lim Suco, 11 Phil. 484 (1908); U.S. v. Ledesma, 29 Phil. 431 (1915); & People v. Martinez, 55 Phil. 6 (1906)).

101. *Id*. at 769.

102. 1964 RULES OF CRIMINAL PROCEDURE, rule 117, § 7.

103. 1985 RULES OF CRIMINAL PROCEDURE.

> for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or Information.
>
> However, the conviction of the accused shall not be a bar to another prosecution for an offense which necessarily includes the offense charged in the former complaint or Information under any of the following instances:
>
> (a) the graver offense developed due to supervening facts arising from the same act or omission constituting the former charge;
>
> (b) the facts constituting the graver charge became known or were discovered only after the filing of the former complaint or Information; or
>
> (c) the plea of guilty to the lesser offense was made without the consent of the fiscal and of the offended party.
>
> In any of the foregoing cases, where the accused satisfies or serves in whole or in part the judgment, he shall be credited with the same in the event of conviction for the graver offense.[104]

The 1985 Rules likewise codified the following ruling in *Melo*, that "when a person who has already suffered his penalty for an offense ... charged with a new and greater offense under the Diaz doctrine herein reiterated, said penalty may be credited to him in case of conviction for the second offense."[105]

Apart from codifying the ruling in *Melo*, the Rules added another exception to the general rule that an accused cannot be prosecuted anew for a graver offense that is necessarily included in the offense previously charged, i.e., that the plea of guilty to the lesser offense in the previous charge was made without the consent of the fiscal and of the offended party.[106]

E. 2000 Rules of Criminal Procedure

The 2000 Rules of Criminal Procedure[107] has retained verbatim the Rule on double jeopardy[108] found in the 1985 Rules.

As can be seen from these Rules, the bar to another prosecution is not only with respect to the offense that has already been charged but also covers the lesser phases of an offense, i.e., the "attempted" phase and the "frustrated"

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104. *Id.* rule 117, § 7.

105. *Melo*, 85 Phil. at 771.

106. 1985 RULES OF CRIMINAL PROCEDURE, rule 117, § 7 (c).

107. 2000 REVISED RULES OF CRIMINAL PROCEDURE.

108. *Id.* rule 117, § 7.

phase.[109] Thus, if one has been charged with and convicted of Attempted Murder, one cannot later on be charged with Frustrated Murder. This is, of course, subject to the exceptions set forth under the Rules (greater offense developed due to supervening facts, etc.).[110]

In addition, the "same offense" has been construed to mean an offense that necessarily includes the elements of another offense or that is necessarily included in another offense.[111]

Section 5 of Rule 120 defines the meaning of the phrases "necessarily includes" and "is necessarily included in." Section 5 provides —

> *When an offense includes or is included in another.* — An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or Information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form [a] part of those constituting the latter.[112]

Thus, for example, if one has been charged with and convicted (or acquitted) of Murder, one cannot be subsequently charged with Homicide or if one has been charged with and convicted (or acquitted) of Homicide, one cannot be subsequently charged with Murder. That Homicide is necessarily included in Murder or that Murder necessarily includes Homicide is easy to demonstrate. The elements of Homicide are:

(1) "a person was killed;"[113]

(2) "the accused killed him without any justifying circumstance;"[114]

(3) "the accused had the intention to kill, which is presumed; and"[115]

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* rule 120, § 5.

113. Ocampo y Atilano v. People, G.R. No. 242911, Mar. 11 2019, at 4, *available at* https://sc.judiciary.gov.ph/3654 (last accessed Nov. 30, 2020) (citing Wacoy v. People, 760 Phil. 570, 578 (2015)).

114. *Id.*

115. *Id.*

(4) "the killing was not attended by any of the qualifying circumstances of Murder, or by that of Parricide or Infanticide."[116]

If, however, the killing of a person was attended by any of the qualifying circumstances under Article 249 of the Revised Penal Code (e.g., with treachery or in consideration of price, reward, or promise),[117] then the crime committed would be Murder.[118] Or if the person killed is a child less than three days old, then the crime committed would be Infanticide punishable under Article 255.[119] Or if the person killed by the accused is his father, mother, or child, whether legitimate or illegitimate, or any of his ascendants, or descendants, or his spouse, then the crime committed would be Parricide punishable under Article 246 of the Revised Penal Code (RPC).[120]

The elements of Homicide are identical to that of Murder, Infanticide, and Parricide, but the latter three offenses have additional elements.

Theft and Qualified Theft is another example which indisputably falls within the phrase "any offense which necessarily includes or is necessarily included in the offense charged[.]"[121]

The elements of Theft are:

(1) there was a "taking of personal property;" [122]

(2) "the property belongs to another;"[123]

(3) "the taking ... [was] without the consent of the owner;"[124]

(4) "the taking ... [was] done with intent [to] gain;"[125] and

116. *Id.*

117. REV. PENAL CODE, art. 248.

118. *Id.*

119. *Id.* § 255.

120. *Id.* § 246.

121. REVISED RULES OF CRIMINAL PROCEDURE, rule 117, § 7.

122. U.S. v. De Vera, 43 Phil. 1000, 1003 (1921).

123. *Id.*

124. *Id.*

125. *Id.*

(5) "the taking ... [was] accomplished without violence or intimidation against [the] person[ ] or force upon things."[126]

The elements of Qualified Theft are:

(1) There was a taking of personal property[;]

(2) The said property belongs to another[;]

(3) The taking was done without the consent of the owner[;]

(4) The taking was done with intent to gain[;]

(5) The taking was accomplished without violence or intimidation against person[s], or force upon things[; and]

(6) The taking was done under any of the circumstances enumerated in Article 310 of the RPC, i.e., [committed by a domestic servant].[127]

The elements of Theft and Qualified Theft are identical except that in Qualified Theft, there is the additional element that the theft is "committed by a domestic servant, or with grave abuse of confidence, or if the property stolen is large cattle or consists of coconuts, or fish taken from a fishpond or fishery."[128]

The same can be said of Theft and Robbery. The elements of Robbery with Violence or Intimidation of Persons are: "(a) that the subject is personal property belonging to another; (b) that such property is unlawfully taken; (c) that the taking must be with intent to gain; and (d) that the taking must be through violence against or intimidation of any person."[129]

The elements of Theft and Robbery are identical except that in Robbery there is the additional element of violence against or intimidation of any person.

In other words, if *Law A* punishes an act with elements 1, 2, 3, and 4 and *Law B* punishes an act with elements 1, 2, and 3, conviction or acquittal under *Law A* precludes another prosecution under *Law B* and vice versa.

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126. *Id.*

127. Matrido v. People, G.R. No. 179061, 592 SCRA 534, 541 (2009) (citing People v. Bago, 386 Phil. 310, 334-35 (2000)) (emphasis omitted).

128. REV. PENAL CODE, art. 310.

129. People v. Mendoza y Zapanta, G.R. No. 115809, 284 SCRA 705, 711 (1998).

Related to Section 5 of Rule 120 is Section 4, which provides —

> *Judgment in case of variance between allegation and proof.* — When there is variance between the offense charged in the complaint or Information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.[130]

Under Section 4, if what is charged is Homicide and what is proved is Murder, the accused shall be convicted of Homicide. If what is charged is Murder, and what is proved is Homicide, the accused shall be convicted of Homicide.

Other examples of offenses that necessarily include or are necessarily included in other offenses are:

Unjust Vexation, although "concededly different from the crime of [A]cts of [L]asciviousness, is embraced by the latter crime or is necessarily included therein[;]" [131] Acts of Lasciviousness is included in Rape; [132] Reckless Imprudence Resulting in Falsification of Public Document is necessarily included in the intentional felony of Falsification of Public Document under Article 171 (4) of the Revised Penal Code ("upon the theory that the greater includes the lesser offense" [133]); Illegal Possession of Drugs is necessarily included in Illegal Importation of Drugs;[134] Illegal Possession of Drugs is included in Transportation of Drugs;[135] Other Deceits under Article 318 of the RPC "is necessarily included in [E]stafa by means of deceit [under Article 315 (2) (d) and Estafa by means of deceit] under Article 315 (2) (a)[;]"[136] Serious Physical Injuries is included in Murder;[137] Slight Illegal Detention is necessarily included in Kidnapping for Ransom;[138] Possession is necessarily

130. REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 4.

131. Maghilum y Portacion v. People, G.R. No. 227564 (2017).

132. People v. Llona y Abrencillo, G.R. No. 232498 (2018).

133. Sevilla v. People, G.R. No. 194390, 732 SCRA 687, 699 (2014) (citing Samson v. Court of Appeals, et al., 103 Phil. 277, 285 (1958)) (emphasis omitted).

134. People v. Chi Chan Liu, G.R. No. 189272, 746 SCRA 476, 494 (2015).

135. Musa v. People, G.R. No. 242132, Sept. 25, 2019, at 10, *available at* https://sc.judiciary.gov.ph/8247 (last accessed Nov. 30, 2020).

136. Osorio v. People, G.R. No. 207711, 869 SCRA 274, 295 (2018).

137. People v. Glino, G.R. No. 173793, 539 SCRA 432, 459 (2007).

138. People v. Pagalasan, G.R. No. 131926, 404 SCRA 275, 301 (2003).

included in Sale of illegal drugs;[139] Reckless Imprudence Resulting in Homicide is necessarily included in Murder;[140] Slight Physical Injuries is necessarily included in Assault Upon a Person in Authority;[141] Less Serious Physical Injuries is necessarily included in Assault Upon a Person in Authority;[142] and Denial of Support is necessarily included in a violation of Section 5 (i) of Republic Act No. 9262.[143]

While the Supreme Court has held that Unjust Vexation is necessarily included in Acts of Lasciviousness, and Acts of Lasciviousness is necessarily included in Rape,[144] in *People v. Contreras*,[145] it held that "the elements of unjust vexation do not form part of the crime of rape as defined in Art. 335 of the Revised Penal Code."[146]

Also, strictly speaking, there is no correspondence in the elements of Unjust Vexation and Acts of Lasciviousness or the elements of Acts of Lasciviousness and Rape, but the Supreme Court has considered the "lesser" offenses (lesser in terms of gravity of the offense and the imposable penalty) to be necessarily included in the "greater" offenses.[147] The ruling makes intuitive

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139. People v. Posada y Urbano, G.R. No. 194445, 667 SCRA 790, 812 (2012).

140. People v. Carmen, G.R. No. 137268, 355 SCRA 267, 279 (2001).

141. People v. Marapao, 85 Phil. 832, 834 (1950).

142. Tacas v. Cariaso, G.R. No. L-37406, 72 SCRA 527, 532 (1976).

143. Melgar v. People, G.R. No. 223477, 855 SCRA 522, 533-34 (2018).

144. *Maghilum y Portacion*, G.R. No. 227564.

145. People v. Contreras, G.R. No. 137123, 338 SCRA 622 (2000).

146. *Id.* at 646.

147. *See* People v. Caralipio, G.R. Nos. 137766, 393 SCRA 59, 70-71 (2002). The Supreme Court held —

> The elements of acts of lasciviousness are:
>
> (1) the offender commits any act of lasciviousness or lewdness;
> (2) the act is done under any of the following circumstances[:]
> (a) when force or intimidation is used, or[;]
> (b) when the offended party is deprived of reason or is otherwise unconscious, or[;]
> (c) when the offended party is under 12 years of age, or[;]
> (3) when the offended party is another person of either sex.
>
> Undeniably, the evidence shows that appellant committed lewd acts against the victim with the use of force and intimidation when he mashed her body while pointing a bolo at her. Although the Information

sense but substantively, Unjust Vexation is different from Acts of Lasciviousness, and Acts of Lasciviousness is different from Rape.

Finally, the Rules do not distinguish between offenses defined by the Revised Penal Code and offenses defined by special laws. Rule 117, Section 7 refers to "any" offense being necessarily included or necessarily including another "offense."[148] However, case law has, inexplicably, created a dichotomy between Revised Penal Code offenses and special law offenses.

F. Loney v. People

In *Loney v. People*,[149] the Supreme Court held that a *malum prohibitum* offense cannot include a *malum in se* offense.[150]

In that case, several officers of a mining company, Marcopper Mining Corporation, were charged with violating several criminal laws in relation to the discharge of millions of tons of tailings into the Boac and Makalupnit Rivers in the province of Marinduque.[151] The case provided that

> [t]he Department of Justice separately charged [the officers] in the Municipal Trial Court of Boac, Marinduque [ ] with violation of Article 91 (B), subparagraphs 5 and 6 of Presidential Decree No. 1067 or the Water Code of the Philippines ... , Section 8 of Presidential Decree No. 984 or the National Pollution Control Decree of 1976 ... , Section 108 of Republic Act No. 7942 or the Philippine Mining Act of 1995 ... , and Article 365 of the Revised Penal Code [ ] for Reckless Imprudence Resulting in Damage to Property.[152]

> filed was for the crime of rape, he may be convicted of acts of lasciviousness only. To repeat, the latter is necessarily included in a charge of rape through force.

Id. at 71.

148. REVISED RULES OF CRIMINAL PROCEDURE, rule 117, § 7.

149. Loney v. People, G.R. No. 152644, 482 SCRA 194 (2006).

150. *Id.* at 212.

151. *Id.* at 197.

152. *Id.* at 197-201 (citing A Decree Instituting a Water Code, Thereby Revising and Consolidating the Laws Governing the Ownership, Appropriation, Utilization, Exploitation, Development, Conservation and Protection of Water Resources [WATER CODE], Presidential Decree No. 1067, Series of 1976, art. 91 (B) (5)–(6) (1976); Providing for the Revision of Republic Act No. 3931, Commonly known as the Pollution Control Law, and for Other Purposes, Presidential Decree No.

The officers of the mining company argued that

> they should be charged with one offense only — Reckless Imprudence Resulting in Damage to Property — because (1) all the charges filed against them 'proceed from and are based on a single act or incident of polluting the Boac and Makulapnit rivers thru dumping of mine tailings' and (2) the charge for violation of Article 365 of the RPC 'absorbs' the other charges since the element of 'lack of necessary or adequate protection, negligence, recklessness and imprudence' is common among them.[153]

The Supreme Court rejected this argument, pointing out that a single act can result in the violation of multiple laws.[154]

It then proceeded to identify the elements of each of the laws the mining company officers were charged with violating, and concluded that for each offense, there is at least one element not required by the other offenses.[155]

On the other issue, whether violation of Article 365 of the RPC absorbs the other three offenses, the Supreme Court held —

> On petitioners' claim that the charge for violation of Article 365 of the RPC 'absorbs' the charges for violation of PD 1067, PD 984, and RA 7942, suffice it to say that a *mala in se* felony (such as Reckless Imprudence Resulting in Damage to Property) cannot absorb *mala prohibita* crimes (such as those violating PD 1067, PD 984, and RA 7942). What makes the former a felony is criminal intent (*dolo*) or negligence (*culpa*); what makes the latter crimes are the special laws enacting them.[156]

This pronouncement by the Supreme Court is not supported by any citation.[157] First, as mentioned, the Rules of Criminal Procedure, which apply both to cases punishable under the Revised Penal Code and cases punishable under special laws, do not distinguish between *mala in se* and *mala prohibita* offenses insofar as it defines the scope of double jeopardy. Second, offenses punishable under special laws can be *mala in se* crimes. Republic Act No. 7080

984, § 8 (1976); An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942, § 108 (2000); & REV. PENAL CODE, art. 365).

153. *Loney*, 482 SCRA at 209.

154. *Id.*

155. *Id.* at 211-12.

156. *Id.* at 212.

157. *See id.*

(the Plunder Law)[158] is one example.[159] If so, then there are crimes punishable by special laws that can be absorbed by crimes defined under the Revised Penal Code. Third, why cannot *mala in se* crimes absorb *mala prohibita* crimes? The principle is that the greater embraces the lesser. In *Sevilla v. People*,[160] the Supreme Court held that reckless imprudence resulting in falsification of public document is necessarily included in the intentional felony of falsification of public document —

> To stress, reckless imprudence resulting to falsification of public documents is an offense that is necessarily included in the willful act of falsification of public documents, the latter being the greater offense. As such, he can be convicted of reckless imprudence resulting to falsification of public documents notwithstanding that the Information only charged the willful act of falsification of public documents.[161]

A *malum in se* offense is the "greater" offense because it is committed with malice or a criminal mind or moral turpitude.[162] It is morally reprehensible. This is in contrast to a *malum prohibitum* crime, where the act that is punished is not "inherently immoral."[163]

G. Offenses Not Necessarily Included in Other Offenses

Some examples of offenses that are not necessarily included in other offenses or do not include other offenses are: Bigamy and Concubinage,[164] Consented Abduction and Qualified Seduction,[165] Discharge of Firearm and Alarm and Scandal,[166] Section 3 (e) and Section 3 (g) of R.A. No. 3019,[167]

158. An Act Defining and Penalizing the Crime of Plunder, Republic Act No. 7080 (1991).

159. Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 567 (2001).

160. Sevilla v. People, G.R. No. 194390, 732 SCRA 687 (2014).

161. *Id.* at 700.

162. Dela Torre v. Commission on Elections, G.R. No. 121592, 258 SCRA 483, 487 (1996).

163. *Id.* at 484.

164. People v. Schneckenburger, 73 Phil. 413, 416 (1941).

165. Perez v. Court of Appeals, G.R. No. L-80838, 168 SCRA 236, 245 (1988).

166. People v. Doriquez, G.R. No. L-24444-45, 24 SCRA 163, 171 (1968).

167. Braza v. Sandiganbayan, G.R. No. 195032, 691 SCRA 471, 491 (2013).

Rape and Frustrated Homicide,[168] Rape and Robbery,[169] and Illegal Recruitment and Estafa.[170]

Of the cases cited above, most of the offenses do not arise from the same "act." In Bigamy, for example, there is the additional act of getting married a second time, while in Concubinage, there is the additional act of cohabitation.[171] In Qualified Seduction, unlike in Consented Abduction, there is the additional act of having sexual intercourse with the victim.[172] In fact, in *Perez v. Court of Appeals*,[173] the case for Qualified Seduction was filed after the case for Consented Abduction was dismissed.[174] Rape and Frustrated Homicide and Rape and Robbery self-evidently involve different acts.

While Alarms and Scandals and Discharge of Firearm can arise from the act of firing a gun, an accused can be convicted of either but not both offenses since "the indispensable element of the former crime is the discharge of a firearm calculated to cause alarm or danger to the public, while the gravamen of the latter is the discharge of a firearm against or at a certain person, without intent to kill."[175] Again, we have here a situation where the facts proved by the prosecution did not satisfy the elements of both offenses.[176] The accused did not face the prospect being punished for both discharge of firearm and alarm and scandal.[177]

The cases of Illegal Recruitment in Large Scale and Estafa are, however, a different matter. In *People v. Serrano y Damian*,[178] the accused was convicted of both offenses arising from the same set of facts[179] (although it can be argued that Illegal Recruitment involves the additional act — or omission — of recruiting without a "license"). The accused in that case represented to three individuals that she had the capacity and authority to recruit workers for

168. People v. Parazo y Francisco, G.R. No. 121176, 272 SCRA 512, 520 (1997).

169. People v. Cabigquez y Alastra, G.R. No. 185708, 631 SCRA 654, 673 (2010).

170. People v. Serrano y Damian, G.R. No. 212630 (2016).

171. *Schneckenburger*, 73 Phil. at 416.

172. *Perez*, 168 SCRA at 246.

173. Perez v. Court of Appeals, G.R. No. L-80838, 168 SCRA 236 (1988).

174. *Id.* at 239.

175, *Doriquez*, 24 SCRA at 171.

176. *Id.* at 172.

177. *Id.*

178. *Serrano*, G.R. No. 212630.

179. *Id.*

deployment to Guam, U.S. and that she could deploy them abroad in three weeks for a fee.[180] These three individuals paid the accused the fee she charged.[181] However, the accused was not able to find them work abroad.[182] The accused was charged with both Illegal Recruitment and Estafa.[183]

The elements of Illegal Recruitment in Large Scale are:

(1) "'the person charged undertook a recruitment activity under Article 13 (b) or any prohibited practice under Article 34 of the Labor Code;'"[184]

(2) "'he [or] she did not have the license or the authority to lawfully engage in the recruitment and placement of workers;'"[185] and

(3) "'he [or] she committed the prohibited practice against three or more persons individually or as a group.'"[186]

The elements of Estafa are:

(1) "'that there must be a false pretense or fraudulent representation as to his power, influence, qualifications, property, credit, agency, business or imaginary transactions;'"[187]

(2) "'that such false pretense or fraudulent representation was made or executed prior to or simultaneously with the commission of the fraud;'"[188]

(3) "'that the offended party relied on the false pretense, fraudulent act, or fraudulent means and was induced to part with his money or property;'"[189] and

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Serrano*, G.R. No. 212630 (citing People v. Domingo, G.R. No. 181475, 584 SCRA 669, 667 (2009)).

185. *Id.*

186. *Id.*

187. *Serrano*, G.R. No. 212630 (citing People v. Chua, G.R. No. 187052, 680 SCRA 575, 592 (2012)).

188. *Id.*

189. *Id.*

(4) "'that, as a result thereof, the offended party suffered damage.'"[190]

The Supreme Court upheld the conviction in both offenses.[191] It held —

> Clearly, the acts of appellant as above-described constitute illegal recruitment punishable under Article 38 of the Labor Code. It is also in large scale as the same was committed against at least three persons. Moreover, a representative from the Philippine Overseas Employment Administration testified that appellant is neither licensed nor authorized to recruit workers for deployment overseas.
>
> ...
>
> Likewise, both the [Regional Trial Court (RTC)] and [Court of Appeals (CA)] correctly convicted appellant of *estafa*. It has long been settled that a person may be convicted of illegal recruitment and *estafa* at the same time.
>
> > As to the conviction of appellant for two counts of *estafa*, it is well established that a person may be charged and convicted of both illegal recruitment and *estafa*. *People v. Comila*, enlightens:
> >
> > > [ ]The reason therefor is not hard to discern: *illegal recruitment is malum prohibitum, while estafa is malum in se. In the first, the criminal intent of the accused is not necessary for conviction. In the second, such an intent is imperative. Estafa under Article 315, paragraph 2, of the Revised Penal Code, is committed by any person who defrauds another by using fictitious name, or falsely pretends to possess power, influence, qualifications, property, credit, agency, business or imaginary transactions, or by means of similar deceits executed prior to or simultaneously with the commission of fraud.*
> >
> > Appellant, who did not have the authority or license to recruit and deploy, misrepresented to the complaining witnesses that he had the capacity to send them abroad for employment. This misrepresentation, which induced the complaining witnesses to part off with their money for placement and medical fees, constitutes *estafa* under Article 315, [paragraph 2 (a)] of the Revised Penal Code.
> >
> > ...
> >
> > It is settled that 'the same pieces of evidence which establish appellant's liability for illegal recruitment in large scale likewise confirm her culpability

190. *Id.*

191. *Serrano*, G.R. No. 212630.

> for estafa.' As adverted above, appellant represented herself as having the capacity to send private complainants to work abroad; that in fact, appellant had no license or authority to recruit workers for deployment abroad; that because of such false pretenses, private complainants were induced to part with their monies; that private complainants were not actually deployed; and neither were they reimbursed of their monies.[192]

The elements of Illegal Recruitment and Estafa are concededly distinct; thus, one offense cannot be said to necessarily include the other. Estafa can be committed without necessarily committing Illegal Recruitment. The same holds true for Illegal Recruitment in Large Scale: it can be committed without necessarily committing Estafa. A recruiter may indeed have contacts abroad and may be forthright that he or she does not have a license to recruit. However, as will be discussed further in the Analysis portion of this Article, a person whose acts constitute the offense of Illegal Recruitment should be punished for that offense only unless the law expressly authorizes the imposition of multiple penalties for a single act or transaction.

IV. RATIONALE BEHIND THE DOUBLE JEOPARDY CLAUSE

The right against double jeopardy is so fundamental that it is given a place in the Bill of Rights.[193]

The Supreme Court has identified three "related" protections provided by the Double Jeopardy Clause. These are: (i) protection "against a second prosecution for the same offense after acquittal;"[194] (ii) protection "against a second prosecution for the same offense after conviction;"[195] and (iii) protection "against multiple punishments for the same offense."[196] Citing *United States v. Wilson*,[197] the Supreme Court has held that the interests underlying these protections are "quite similar."[198] The ruling in *United States v. Wilson* reads —

> *The interests underlying these three protections are quite similar. ... [W]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he* [*not be*] *subjected to the possibility of further*

192. *Id.* (citing *Domingo*, 584 SCRA at 678-79 & *Chua*, 680 SCRA at 591).

193. PHIL. CONST. art. III, § 21.

194. *Velasco*, 340 SCRA at 227 (citing North Carolina v. Pearce, 395 U.S. 711 (1969)).

195. *Id.*

196. *Id.*

197. United States v. Wilson, 420 U.S. 332 (1975).

198. *Velasco*, 340 SCRA at 227 (citing *Wilson*, 420 U.S. at 343).

> *punishment by being [again] tried or sentenced for the same offense. ... [W]hen a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.'*[199]

As for the policy of avoiding multiple trials, it has been regarded as so important, that exceptions to the principle have been only grudgingly allowed. Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant. It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, even though the Government enjoyed no similar right.[200]

The issue boils down to one of fairness and the power imbalance between the State and the individual.

The reason the law bars the filing of a second charge (for the same offense) against a person who has been previously acquitted is that the law can become an instrument of harassment and oppression,[201] especially considering that the contest between the State and the individual is an unequal one. Moreover, an accused who has been acquitted is entitled to "repose."[202] The State, with its unlimited resources, can keep on filing cases until it can finally obtain a conviction.[203] To prevent the State from oppressing an individual, the law gives the State no more than one shot at obtaining a conviction (for the same offense). The Supreme Court expounded on these reasons in *People v. Velasco*[204] —

> The fundamental philosophy highlighting the finality of an acquittal by the trial court cuts deep into 'the humanity of the laws and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State[.]' Thus *Green* expressed the concern that '[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of

199. *Velasco*, 340 SCRA at 343-44 (citing Ex parte Lange, 18 Wall 163 (1874) (U.S.); *Nielsen*, 131 U.S.; Green v. United States, 355 U.S. 184, 187-88 (1957); United States v. Gibert, 25 F.Cas. 1287 (1834) (U.S.); & United States v. Ball, 163 U.S. 662 (1896)) (emphasis supplied).

200. *Id.*

201. *Velasco*, 340 SCRA at 229.

202. *Id.* at 240.

203. *See* People v. Court of Appeals, G.R. No. 159261, 516 SCRA 383, 397 (2007).

204. *Velasco*, 340 SCRA at 211.

> jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.'
>
> It is axiomatic that on the basis of humanity, fairness[,] and justice, an acquitted defendant is entitled to the right of repose as a direct consequence of the finality of his acquittal. The philosophy underlying this rule establishing the absolute nature of acquittals is 'part of the paramount importance criminal justice system attaches to the protection of the innocent against wrongful conviction.' The interest in the finality-of-acquittal rule, confined exclusively to verdicts of not guilty, is easy to understand: it is a need for 'repose,' a desire to know the exact extent of one's liability. With this right of repose, the criminal justice system has built in a protection to insure[,] that the innocent, even those whose innocence rests upon a jury's leniency, will not be found guilty in a subsequent proceeding.
>
> Related to his right of repose is the defendant's interest in his right to have his trial completed by a particular tribunal. This interest encompasses his right to have his guilt or innocence determined in a single proceeding by the initial jury empaneled to try him, for society's awareness of the heavy personal strain which the criminal trial represents for the individual defendant is manifested in the willingness to limit Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. The ultimate goal is prevention of government oppression; the goal finds its voice in the finality of the initial proceeding. As observed in *Lockhart v. Nelson*, '[t]he fundamental tenet animating the Double Jeopardy Clause is that the State should not be able to oppress individuals through the abuse of the criminal process.' Because the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.[205]

205. *Id.* at 241 (citing U.S. v. Sanges, 144 U.S. 310 (1892); Crist v. Bretz, 437 U.S. 28 (1978); Lockhart v. Nelson, 488 U.S. 33 (1988); Arizona v. Washington, 434 U.S. 497 (1978); Ronald A. Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences*, 18 AM. CRIM. L. REV. 51 (1980); Peter K. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980); Dan Arthur Kusnetz, *The Proposed Federal Criminal Code and The Government's Right to Appeal Sentences: After The Supreme Court's Green Light - Dare We Proceed?*, 56 TUL. L. REV. 693 (1982); Rick A. Bierschbach, *One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy*, 94 MICH. L. REV. 1346

In *Republic v. Agoncillo*,[206] the Supreme Court held —

> Nor can there be any difference of view as to the significance to be attached to the jeopardy clause of the Constitution on which insistence is laid by defendants. The assumption is that after a trial, the accused is either found guilty or freed of the criminal charge against him. If the former, he should expiate for his offense. If the latter, the law leaves him alone to enjoy the liberty that is his by right. In its solicitude for the welfare of every human being, there is the further protection that this constitutional provision affords. He is safeguarded from the risk entailed by a new prosecution upon his being acquitted or convicted to follow the express language of the Constitution or upon the case against him being terminated in any other manner without his consent. Thus[,] he is spared from the anguish and anxiety as well as the expense unavoidable in any new indictment for that offense. The constitutional mandate is thus a rule of finality. A single prosecution for any offense is all the law allows. It protects an accused from harassment, enables him to treat what had transpired as a closed chapter in his life, either to exult in his freedom or to be resigned to whatever penalty is imposed, and is a bar to unnecessary litigation, in itself time-consuming and expense-producing for the state as well. It has been referred to as 'res judicata dressed in prison grey.' The ordeal of a criminal prosecution is inflicted only once, not whenever it pleases the state to do so.[207]

An appeal by the Government from a judgment of acquittal is prohibited.[208] It is considered a second trial.[209] The rationale behind the prohibition against the filing of an appeal from an acquittal is essentially the same as the rationale for barring the bringing of another charge for the same offense after an acquittal.[210] The proscription against appeals from acquittals applies regardless of whether the acquittal was won at the trial court level or at the appellate court level.[211] This is not to say, however, that an acquittal is beyond judicial review. Courts have the power to nullify acquittals where the

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(1996); & George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827 (1988)).

206. Republic v. Agoncillo, G.R. No. L-27257, 40 SCRA 579 (1971).

207. *Id.* at 584-85 (citing *Twice in Jeopardy*, 75 YALE L.J. 262, 277 (1965)).

208. *Nazareno*, 595 SCRA at 450.

209. *Id.*

210. *See Court of Appeals*, 516 SCRA at 397.

211. *Velasco*, 340 SCRA at 240.

judgment was rendered in grave abuse of discretion or the prosecution was denied due process.[212]

On the other hand, the reason why the law bars the filing of a second charge (for the same offense) against a person who has been previously convicted is that it would be unfair and oppressive to punish him multiple times for a single offense. As held in *United States v. Wilson*, "[w]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." [213] The same principle should apply to concurrent or simultaneous multiple prosecutions for violations of various offenses arising from the same act or transaction where the offenses are the "same." Thus, an accused should not be charged with, convicted of, and punished for both Murder and Homicide or Rape and Acts of Lasciviousness. Oppression is not limited to the repeated filing of charges. Oppression may come in the form of multiple penalties for essentially the same offense or in the imposition of penalties not intended by the legislature to be imposed.

The three "protections" under the Double Jeopardy Clause[214] may be availed of only when the offenses are the "same." If they are not the same, the State may file as many cases as there are laws violated and the courts may impose as many penalties as may be provided for in these laws.

A. When to Invoke Double Jeopardy

Rule 117, Section 3 of the 2000 Rules of Criminal Procedure[215] enumerates the grounds to quash an Information. One of the grounds to quash is the ground of double jeopardy. Section 3 reads: "The accused may move to quash the complaint or Information on any of the following grounds: ... (i) That the accused has been previously convicted or acquitted of the offense charged, or the case against him was dismissed or otherwise terminated without his express consent."[216]

For double jeopardy to be successfully invoked, Section 3 (i) requires that: (i) the accused had been previously convicted of the offense charged; (ii) the accused had been previously acquitted of the offense charged; or (iii) "the

212. *Yuchengco*, 376 SCRA at 543.

213. *Wilson*, 420 U.S. at 343.

214. *Velasco*, 340 SCRA at 227.

215. REVISED RULES OF CRIMINAL PROCEDURE, rule 117, § 3.

216. *Id.*

[previous] case against the accused [had been] dismissed or otherwise terminated without his [or her] express consent."[217]

This means that an accused may be charged with and prosecuted for multiple offenses arising from the same act. The accused cannot invoke the ground of double jeopardy at the time of the filing of the multiple Informations or at the time he enters his or her pleas for the multiple Informations or at any time before conviction, acquittal, or dismissal of the case without express consent of the accused.

As held by the Supreme Court in *Tangan v. People*[218] —

> To raise the defense of double jeopardy, three requisites must be present: (1) a first jeopardy must have been attached prior to the second; (2) the first jeopardy must have been validly terminated; and (3) the second jeopardy must be for the same offense as that in the first ... .
>
> Legal jeopardy attaches only: (a) upon a valid indictment; (b) before a competent court; (c) after arraignment; (d) a valid plea having been entered; and (e) the case was dismissed or otherwise terminated without the express consent of the accused ... .[219]

The first jeopardy does not terminate until conviction becomes final.[220]

Notably, the Rules do not limit termination of the first jeopardy to acquittal or conviction.[221] Termination of the first jeopardy likewise covers dismissals without the express consent of the accused.[222] The Supreme Court has described this as an "expansive" view —

> Commenting on the double jeopardy protection embodied in the Rules of Court, Chief Justice Enrique M. Fernando, in his book 'The Bill of Rights' makes the following significant commentary and We quote: 'It is to be noted that the Rules of Court in providing for a motion to quash, did extend further the reach of the double jeopardy protection. If the literal language of the constitutional provision were followed, either a previous acquittal or conviction is necessary before such a plea would lie. As already noted, the Rules adopted an expansive view with the mention of the termination or

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217. *Id.*

218. Tangan v. People, G.R. No. 73963, 155 SCRA 435 (1987).

219. *Id.* at 441-42 (citing People v. Bocar, 138 SCRA 166 (1985) & Buscayno v. Military Commission, 109 SCRA 273 (1981)).

220. People v. Sy, G.R. No. L-27537-44, 30 SCRA 150, 153 (1969).

221. REVISED RULES OF CRIMINAL PROCEDURE, rule 117, § 21.

222. *Mogol*, 131 SCRA at 304.

> dismissal of the prosecution without the express consent of the defendant, a stage short of either acquittal or conviction. In specifying the grounds of a motion to quash, it was explicitly set forth therein that even prior to such a disposition of the case as above indicated, once jeopardy has attached, a motion to quash would lie.'[223]

Thus, if an accused has already been arraigned but the prosecution during trial fails to present its evidence and, over the objection of the accused, the court dismisses the case, such dismissal results in the termination of the first jeopardy.

Also, there are two instances where a dismissal "with" the consent of the accused operates as an acquittal of an accused.[224] These are (i) "when there is insufficiency of evidence to support the charge against him;"[225] and (ii) "where there has been an unreasonable delay in the proceedings, in violation of the accused's right to speedy trial."[226]

V. DEFINING THE "SAME OFFENSE"

The issue that lies at the heart of the Double Jeopardy Clause is the meaning of the words "same offense."

Various types of "tests" have been devised or proposed to determine whether offenses are the "same."

A. Identity Test

This test requires that the offenses should be identical.[227] Same means same. This is a test advocated by Akhil R. Amar and Jonathan L. Marcus.[228] The upshot of this theory is that a person convicted of Murder can be charged with Homicide since these offenses are not identical. One can defend against the second charge of Homicide but on grounds of due process or perhaps the

223. *Id.* at 303-04 (citing ENRIQUE M. FERNANDO, THE BILL OF RIGHTS 286 (1972 ed.)).

224. Condrada v. People, G.R. No. 141646, 398 SCRA 482, 486 (2003).

225. *Id.* (citing People v. Verra, G.R. No. 134732, 382 SCRA 542 (2002) & Almario v. Court of Appeals, G.R. No. 127772, 355 SCRA 1 (2001)).

226. *Id.*

227. Thomas III, *supra* note 53, at 1033 (*citing* Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 28-38 (1995)).

228. *Id.*

Cruel and Unusual Punishment Clause, but not on the ground of double jeopardy.

This test has been criticized as disregarding the history of double jeopardy.[229] The understanding of the "same" offense, at least as far back as the time of Blackstone, has not been confined to identical offenses.[230] Murder and manslaughter have been historically understood to be the same offense.[231] Moreover, "[a] test that considers a single killing to be the different offenses of murder and manslaughter may earn an 'A' in logic, but it flunks the elementary test of common sense."[232]

The Philippines has never used this test.

B. Blockburger Test

The *Blockburger* test is the test embodied in our Rules of Court.

In the U.S. case of *Blockburger v. United States*,[233] petitioner was charged with five counts of violation of the provisions of the Harrison Narcotic Act.[234]

The relevant provisions read —

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.
>
> ...
>
> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged,

229. *Id.*

230. *Id.*

231. Thomas III, *supra* note 53, at 1033 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 336 (1753)).

232. Thomas III, *supra* note 53, at 1034 (citing Amar & Marcus, *supra* note 227, at 37-38).

233. Blockburger v. United States, 284 U.S. 299 (1932).

234. *Id.* at 301.

> or given on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.[235]

Of the five counts, the jury found him guilty of the three counts that pertained to the selling of morphine hydrochloride to the same purchaser.[236]

The petitioner was found guilty of the charge of "sale on a specified day of ten grains of the drug not in or from the original stamped package;"[237] of the charge of "a sale on the following day of eight grains of the drug not in or from the original stamped package;"[238] and of the charge that "the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute."[239]

The petitioner was sentenced to imprisonment of five years and "a fine of [U.S.]$2,000 upon each count [with] the terms of imprisonment to [be served] consecutively."[240]

On appeal, he raised the issue of double jeopardy.[241] His first argument was that while the sale of ten grains of the drug and the sale of eight grains of drugs took place on different days, they were "made to the same person [and, hence,] constitute[d] a single offense."[242] His second argument was that he could not be convicted of the sale of the eight grains of drugs not in or from the original stamped package, and at the same time convicted, with respect to the same eight grains of drugs, of making a sale not in pursuance of a written order of the purchaser because the sale constituted only a single offense.[243]

The first argument was more easily disposed of than the second argument. For the first argument, the U.S. Supreme Court found that while petitioner sold the 10 grains and eight grains to the same person, there were two separate sales or transactions that took place on two separate days.[244] The facts showed that after the first sale was consummated, petitioner made an additional

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235. *Id.* at 300 n. 1-2 (citing Harrison Narcotic Act, Pub. L. 63-223, 38 Stat. 785, §§ 1-2 (1914) (U.S.)).

236. *Blockburger*, 284 U.S. at 301.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Blockburger, 284 U.S. at 301.

243. *Id.*

244. *Id.*

payment for the second sale.[245] Hence, petitioner could be convicted of two counts of violation of the law.[246]

It was the second argument that gave birth to the *Blockburger* test. The U.S. Supreme Court held that the offense of selling a prohibited drug not in or from the original stamped package was a separate and distinct offense from a sale not made in pursuance of a written order of the purchaser as required by the statute.[247] Its ruling reads —

> *Two*. Section 1 of the Narcotic Act creates the offense of selling any of the forbidden drugs except in or from the original stamped package; and section 2 creates the offense of selling any of such drugs not in pursuance of a written order of the person to whom the drug is sold. Thus, upon the face of the statute, two distinct offenses are created. Here[,] there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses[,] or only one.
>
> The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in [S]ections 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act.
>
> ...
>
> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. ... In that case, this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth* ... [—]
>
> 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'[248]

Thus, while there was only one sale with respect to the eight grains of morphine, two offenses were committed: one was the selling of morphine

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245. *Id.*

246. *Id.* at 302–03.

247. *Id.* at 304.

248. *Blockburger*, 284 U.S. at 304 (citing Alston v. United States, 274 U.S. 289, 294 (1927); Nigro v. United States, 276 U.S. 332, 341, 345, & 351 (1928); *Gavieres*, 220 U.S. at 342; & Morey v. Commonwealth, 108 Mass. 433 (1871) (U.S.)).

without the original packaging and the other was the selling of morphine without a written order.[249] Each offense had an element which the other did not have, namely, absence of original packaging for one, and absence of a written order for another.[250] However, if Offense A has elements 1, 2, 3, and 4, and Offense B has elements 1, 2, and 3, then the offenses are the same under the *Blockburger* test.[251]

The *Blockburger* test is a means of determining legislative intent.[252] The test assumes that if the elements are different, then the legislature intended the offenses to be punished separately and cumulatively.[253]

It has been noted that "[a]lthough the [U.S.] Court has embraced the venerable *Blockburger* test, no [U.S.] Court majority exists on how to apply the test."[254] The test enunciated in *Blockburger* has been criticized as follows —

> More importantly, element distinction has no necessary link to distinct blameworthiness. Suppose a legislature passed an aggravated robbery statute that, in one section, proscribed robbery while wearing a white shirt, and, in another section, proscribed robbery on a Sunday. Those offenses would be different *Blockburger* offenses even if proved on the same act-token of robbery, a result that seems very unlikely to manifest [ ] legislative intent behind creating different types of aggravated robbery.[255]

The same author adds —

> But the best proof of Blockburger's inadequacy is that sufficiently different descriptions will make a single homicide into different offenses. Felony murder, for example, is a different Blockburger offense from premeditated murder. Felony murder requires proof of the underlying felony; premeditated murder requires proof of premeditation. While this may seem an excessively technical application of Blockburger, it has been urged several times on the Michigan courts (unsuccessfully, so far[ ]).[256]

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249. *Blockburger*, 284 U.S. at 304.

250. *Id.*

251. *See* Thomas III, *supra* note 53, at 1033.

252. Whalen v. United States, 445 U.S. 684, 692 (1980) (J. Rehnquist, dissenting opinion).

253. *Id.* at 693.

254. Thomas III, *supra* note 53, at 1032.

255. *Id.* at 1035.

256. *Id.* at 1036 (People v. Johnson, 297 N.W.2d 713, 718 (Mich. Ct. App. 1980) (U.S.); People v. Ramsey, 280 N.W.2d 840, 842-44 (Mich. Ct. App. 1979)

Indeed, it is easy enough to make or make up distinctions between the elements of different offenses. For example, Indirect Bribery is defined as follows under Article 211 of the Revised Penal Code: "The penalties of *arresto mayor*, suspension in its minimum and medium periods, and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his office."[257]

On the other hand, P.D. No. 46, which likewise punishes the giving of gifts to public officials by reason of their office,

> make[s] it punishable for any public official or employee, whether of the national or local governments, to receive, directly or indirectly, and for private persons to give, or offer to give, any gift, present or other valuable thing to any occasion, including Christmas, when such gift, present or other valuable thing is given by reason of his official position, regardless of whether or not the same is for past favor or favors or the giver hopes or expects to receive a favor or better treatment in the future from the public official or employee concerned in the discharge of his official functions. Included within the prohibition is the throwing of parties or entertainments in honor of the official or employees or his immediate relatives.[258]

The prosecution will have a field day drawing distinctions between the two offenses since Article 211 simply refers to the giving of gifts to public officials by reason of their office,[259] while P.D. No. 46 makes mention of Christmas and hope of future favors and the throwing of parties and of the public official's relatives.[260] Unless laws are identically worded, distinctions can always be made or made up.

C. Grady Test

Another "same offense" test derived from U.S. case law is the *Grady* test.

In *Grady v. Corbin*,[261] the U.S. Supreme Court, modifying the *Blockburger* test, held that "[t]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the

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(U.S.); People v. Sparks, 266 N.W.2d 661, 665 (Mich. Ct. App. 1978) (U.S.); People v. Crown, 254 N.W.2d 843, 848-49 (Mich. Ct. App. 1977) (U.S.)).

257. REV. PENAL CODE, art. 211.

258. P.D. No. 46, s. 1972.

259. REV. PENAL CODE, art. 211.

260. P.D. No. 46, s. 1972.

261. Grady v. Corbin, 495 U.S. 508 (1990).

government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[262]

The respondent, Thomas J. Corbin, while driving under the influence of alcohol, struck another vehicle on the opposite side of the road, causing the death of the driver, Brenda Dirago, and causing physical injury to her husband, Daniel Dirago.[263] That same evening, respondent was served with two traffic tickets directing him to appear at the justice court.[264] One ticket charged him with the misdemeanor of driving while intoxicated, the other charged him with failing to keep right of the median.[265] On the date of the hearing, Corbin pleaded guilty to the two traffic violations.[266]

Two months later, a grand jury indicted Corbin, "charging him with reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide for causing the death of Brenda Dirago; third-degree reckless assault for causing physical injury to Daniel Dirago; and driving while intoxicated."[267]

Corbin moved to dismiss the indictment on the ground of double jeopardy, having previously been convicted in the traffic violation cases.[268]

The New York Court of Appeals found that the subsequent charges violated his right against double jeopardy.[269]

The U.S. Supreme Court affirmed the ruling of the New York Court of Appeals.[270] It held that the first step was to apply the *Blockburger* test.[271] If the test is not satisfied, meaning that the elements of one offense are included in the other offense, then the inquiry ends and the second case should be dismissed.[272] But if the test is satisfied and the prosecution is able to show that each offense has an element distinct from the other, the court has to next make

262. *Id.* at 510.

263. *Id.* at 511.

264. *Id.*

265. *Id.*

266. *Id.* at 513.

267. *Grady*, 495 U.S. at 513.

268. *Id.* at 514.

269. *Id.* at 515.

270. *Id.*

271. *Id.*

272. *Id.* at 516.

a determination whether "to establish an essential element of an offense charged in that [second] prosecution, [the] government will prove conduct that constitutes an offense for which the defendant has already been prosecuted[.]"[273] According to the U.S. Supreme Court, "a subsequent prosecution must do more than merely survive the *Blockburger* test."[274] It must likewise satisfy a "same conduct" test.[275]

Applying this new test to the facts of the case, the Supreme Court held that the double jeopardy clause barred the subsequent prosecutions —

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted [—] driving while intoxicated and failing to keep right of the median [—] to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution, and the New York Court of Appeals properly granted respondent's petition for a writ of prohibition. This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).[276]

D. United States v. Dixon

Three years later, in *United States v. Dixon*,[277] the U.S. Supreme Court reverted to the *Blockburger* test.

The U.S. Supreme Court decided two cases in the appeal before it: one involving Alvin Dixon and the other involving Michael Foster.[278]

Alvin Dixon, who had been arrested for second-degree murder, had violated one of the conditions of his bail bond, namely, that he was not to commit "any criminal offense."[279] The violation of the bail conditions would

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273. *Grady*, 495 U.S. at 510.

274. *Id.* at 521.

275. *Id.*

276. *Id.* at 523.

277. United States v. Dixon, 509 U.S. 688 (1993).

278. *Id.* at 692.

279. *Id.*

subject him "'to revocation of release, an order of detention, and prosecution for contempt of court.'"[280]

Dixon committed a criminal offense (cocaine possession) while he was awaiting trial.[281] He was indicted for possession of cocaine with intent to distribute.[282] He was also prosecuted for and found guilty of criminal contempt.[283] Upon conviction for criminal contempt, he moved to dismiss the cocaine charge on the ground of double jeopardy, which motion the trial court granted.[284]

In the other case, Michael Foster's estranged wife had obtained a civil protection order (CPO) against him.[285] The CPO provides that he should not "molest, assault, or in any manner threaten or physically abuse" his wife.[286] Several motions for contempt were subsequently filed against him by his wife for alleged threats and assaults in violation of the CPO.[287] The Court found him guilty of four counts of criminal contempt and sentenced him accordingly.[288]

Foster was subsequently indicted for simple assault, threat to injure another, and assault with intent to kill.[289] He moved to dismiss these indictments on the ground of double jeopardy, citing his previous conviction for criminal contempt.[290] The trial court denied his motion.[291]

Both the Dixon and Foster cases went on appeal and were consolidated by the District of Columbia Court of Appeals.[292] Relying upon *Grady v.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Dixon*, 509 U.S. at 692.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Dixon*, 509 U.S. at 693.

290. *Id.*

291. *Id.*

292. *Id.*

Corbin, the appellate court held that the subsequent prosecutions against both Dixon and Foster were barred by double jeopardy.[293]

The issue before the U.S. Supreme Court was whether the criminal contempt and the underlying offenses are different offenses.[294]

The U.S. Supreme Court held that criminal contempt, albeit enforced through a non-summary proceeding, was a "crime in the ordinary sense"[295] and, therefore, the protection of the Double Jeopardy Clause attached to Dixon and Foster.

It then applied the same elements test or the *Blockburger* test (i.e., whether each offense contains an element not contained in the other).[296] If the offenses fail (or "cannot survive") this test, then the subsequent prosecutions will be barred.[297]

Applying the test to Dixon, the U.S. Supreme Court held —

> So too here, the 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition. The *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies. Here, as in *Harris*, the underlying substantive criminal offense is 'a species of lesser-included offense.'[298]

The U.S. Supreme Court arrived at the same conclusion in the case of Foster insofar as the simple assault charge was concerned since it was "based on the same event that was the subject of his prior contempt conviction."[299] However, as to the remaining charges against Foster (assault with intent to kill and threats to injure), the U.S. Supreme Court held that they were not barred under the *Blockburger* test.[300] With respect to the charge of assault with intent to kill, the U.S. Supreme Court held —

> On the basis of the same episode, Foster was then indicted for violation of [Section] 22-501, which proscribes assault with intent to kill. Under

293. *Id.*

294. *See id.*

295. *Dixon*, 509 U.S. at 696.

296. *Id.* at 697.

297. *Id.*

298. *Id.* at 698.

299. *Id.* at 700.

300. *Id.* at 701.

> governing law, that offense requires proof of specific intent to kill; simple assault does not. ... Similarly, the contempt offense required proof of knowledge of the CPO, which assault with intent to kill does not. Applying the *Blockburger* elements test, the result is clear: These crimes were different offenses, and the subsequent prosecution did not violate the Double Jeopardy Clause.[301]

As to the threat charges, the Supreme Court held —

> Counts II, III, and IV of Foster's indictment are likewise not barred. These charged Foster under [Section] 22-2307 (forbidding anyone to 'threate[n] ... to kidnap any person or to injure the person of another or physically damage the property of any person') for his alleged threats on three separate dates. Foster's contempt prosecution included charges that, on the same dates, he violated the CPO provision ordering that he not 'in any manner threaten' Ana Foster. Conviction of the contempt required willful violation of the CPO [—] which conviction under [Section] 22-2307 did not; and conviction under [Section] 22-2307 required that the threat be a threat to kidnap, to inflict bodily injury, or to damage property [—] which conviction of the contempt (for violating the CPO provision that Foster not 'in any manner threaten') did not. Each offense therefore contained a separate element, and the *Blockburger* test for double jeopardy was not met.[302]

It then proceeded to consider whether these charges would be barred by the *Grady* double jeopardy test and found that it would.[303] It held —

> Having found that at least some of the counts at issue here are not barred by the *Blockburger* test, we must consider whether they are barred by the new, additional double jeopardy test we announced three [t]erms ago in *Grady* v. *Corbin*. They undoubtedly are, since *Grady* prohibits 'a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution [here, assault as an element of assault with intent to kill, or threatening as an element of threatening bodily injury], the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted [here, the assault and the threatening, which conduct constituted the offense of violating the CPO].'[304]

It, however, decided to overrule *Grady*.[305] It held that "[u]nlike [the] *Blockburger* analysis, whose definition of what prevents two crimes from being

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301. *Dixon*, 509 U.S. at 701 (citing Logan v. United States, 483 A.2d 664, 672-73 (D.C. 1984) (U.S.)).

302. *Dixon*, 509 U.S. at 702.

303. *Id.* at 704.

304. *Id.* at 703-04.

305. *Id.*

the 'same [offense],' U.S. [Constitution Amendment] 5, has deep historical roots and has been accepted in numerous precedents of this [c]ourt, *Grady* lacks constitutional roots."[306]

Justice David H. Souter dissented. [307] On the issue of multiple punishments for a given act, his position was that legislative intent is decisive.[308] He explained that the *Blockburger* test involved only a "question of statutory construction."[309] If the elements of the offenses passed the test, then the inference to be drawn is that the legislature intended to impose multiple punishments. [310] His dissent reads in relevant part —

> In addressing multiple punishments, 'the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.' ... Courts enforcing the federal guarantee against multiple punishment therefore must examine the various offenses for which a person is being punished to determine whether, as defined by the legislature, any two or more of them are the same offense. Over 60 years ago, this [c]ourt stated the test still used today to determine 'whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment,' [—]
>
> '[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'
>
> The *Blockburger* test 'emphasizes the elements of the two crimes.' ... Indeed, the determination whether two statutes describe the 'same [offense]' for multiple punishment purposes has been held to involve only a question of statutory construction. We ask what the elements of each offense are as a matter of statutory interpretation, to determine whether the legislature intended 'to impose separate sanctions for multiple offenses arising in the course of a single act or transaction.' ... (noting, in applying Blockburger, that state courts' 'have the final authority to interpret ... [a] State's legislation' ... The Court has even gone so far as to say that the *Blockburger* test will not prevent multiple punishment where legislative intent to the contrary is clear, at least in the case of state law. 'Where ... a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of

306. *Id.* (citing U.S. CONST. amend. V).

307. *Dixon*, 509 U.S. at 744 (J. Souter, concurring and dissenting opinion).

308. *Id.* at 746.

309. *Id.*

310. *Id.*

> statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'
>
> With respect to punishment for a single act, the *Blockburger* test thus asks in effect whether the legislature meant it to be punishable as more than one crime. To give the government broad control over the number of punishments that may be meted out for a single act, however, is consistent with the general rule that the government may punish as it chooses, within the bounds contained in the Eighth and Fourteenth Amendments. With respect to punishment, those provisions provide the primary protection against excess. 'Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent.'[311]

Justice Souter then proceeded to discuss the import of successive prosecutions.[312] To him, the prohibition against successive prosecutions is the "central protection" of the Double Jeopardy Clause.[313] He explains the purpose of the protection as follows —

> The Double Jeopardy Clause prevents the government from 'mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.' ... The Clause addresses a further concern as well, that the government not be given the opportunity to rehearse its prosecution, 'honing its trial strategies and perfecting its evidence through successive attempts at conviction,' ... because this 'enhanc[es] the possibility that even though innocent [the defendant] may be found guilty[.]'[314]

His concern with successive prosecutions was that the prosecution could easily "manipulate the definitions of offenses, creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same criminal conduct."[315] Since definitions of offenses can be

311. *Id.* at 745-46 (citing Brown v. Ohio, 432 U.S. 161, 165 (1977); *Blockburger*, 284 U.S. at 304; Iannelli v. United States, 420 U. S. 770, 785 n. 17 (1975); Garner v. Louisiana, 368 U.S. 157, 169 (1961); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); & Ohio v. Johnson, 467 U. S. 493, 499 n. 8 (1984)).

312. *Dixon*, 509 U.S. at 747 (J. Souter, concurring and dissenting opinion).

313. *Id.*

314. *Id.* (citing Green v. United States, 355 U. S. 184, 187 (1957) & Tibbs v. Florida, 457 U. S. 31, 41 (1982)).

315. *Dixon*, 509 U.S. at 747 (J. Souter, concurring and dissenting opinion).

manipulated, the prosecution can "rehearse" its prosecution and "hon[e] its trial strategies," enabling it to increase the chances of obtaining a conviction in subsequent trials.[316] He concludes —

> Thus, '[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.'[317]

Justice Souter gives the following example and explanation to drive home his point —

> An example will show why this should be so. Assume three crimes: robbery with a firearm, robbery in a dwelling, and simple robbery. The elements of the three crimes are the same, except that robbery with a firearm has the element that a firearm be used in the commission of the robbery while the other two crimes do not, and robbery in a dwelling has the element that the robbery occur in a dwelling while the other two crimes do not.
>
> If a person committed a robbery in a dwelling with a firearm and was prosecuted for simple robbery, all agree he could not be prosecuted subsequently for either of the greater offenses of robbery with a firearm or robbery in a dwelling. Under the lens of *Blockburger*, however, if that same person were prosecuted first for robbery with a firearm, he could be prosecuted subsequently for robbery in a dwelling, even though he could not subsequently be prosecuted on the basis of that same robbery for simple robbery. This is true simply because neither of the crimes, robbery with a firearm and robbery in a dwelling, is either identical to or a lesser included offense of the other. But since the purpose of the Double Jeopardy Clause's protection against successive prosecutions is to prevent repeated trials in which a defendant will be forced to defend against the same charge again and again, and in which the government may perfect its presentation with dress rehearsal after dress rehearsal, it should be irrelevant that the second prosecution would require the defendant to defend himself not only from the charge that he committed the robbery, but also from the charge of some additional fact, in this case, that the scene of the crime was a dwelling. If, instead, protection against successive prosecutions were as limited as it would be by *Blockburger* alone, the doctrine would be as striking for its anomalies as for the limited protection it would provide. Thus, in the relatively few successive prosecution cases we have had over the years, we have not held

316. *Id.* at 747.

317. *Id.* at 748 (citing *Brown*, 432 U.S. at 166-67 n. 6).

> that the *Blockburger* test is the only hurdle the government must clear (with one exception ...).[318]

Justice Souter's example, if subjected to Philippine Rules, would yield the same conclusion.

E. Same Evidence Test

Another test is the "same evidence" test.

The same evidence test permits the filing of a second charge for the same act "'unless the evidence required to support the finding of guilt upon one of them would have been sufficient to warrant the same result upon the other.'"[319] This test was first applied in the English case of *Rex v. Vandercomb & Abbott*,[320] and it has been adopted by a majority of American jurisdictions.[321] The test is not uniformly applied as it has several "variations."[322]

For example, as mentioned, under Philippine law, P.D. No. 46, punishes

> any public official or employee, whether of the national or local governments, to receive, directly or indirectly, and for private persons to give, or offer to give, any gift, present[,] or other valuable thing to any occasion, including Christmas, when such gift, present[,] or other valuable thing is given by reason of his official position, regardless of whether or not the same is for past favor or favors or the giver hopes or expects to receive a favor or better treatment in the future from the public official or employee concerned in the discharge of his official functions. Included within the prohibition is the throwing of parties or entertainments in honor of the official or employees or his immediate relatives.[323]

On the other hand, Article 211 of the Revised Penal Code (Indirect Bribery) punishes "any public officer who shall accept gifts offered to him by reason of his office."[324]

Applying the "same evidence" test, the subsequent filing of a case for Indirect Bribery after a conviction (or acquittal) in a previously filed case for violation of P.D. No. 46 will be barred since "the evidence required to support

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318. *Dixon*, 509 U.S. at 748-49 (J. Souter, concurring and dissenting opinion).

319. English, Jr., *supra* note 52, at 89 (citing *Morey*, 108 Mass. at 434).

320. Rex v. Vandercomb & Abbott, 163 Eng. Rep. 455 (Ex. 1796) (U.K.).

321. English, Jr., *supra* note 52, at 89 (citing *Note*, 7 BROOK. L. REV. 79, 81 (1937)).

322. English, Jr., *supra* note 52, at 89-91.

323. P.D. No. 46, s. 1972.

324. REV. PENAL CODE, art. 211.

the finding of guilt upon one of them would have been sufficient to warrant the same result upon the other."[325] In other words, if the prosecution presents evidence in the first case (P.D. No. 46) that the accused gave a Rolex watch to a public officer by reason of his public office in the hopes that sometime in the future, he (the accused) can get "favorable" treatment from the public officer, that very same evidence, which is sufficient to convict for violation of P.D. No. 46, would be sufficient to convict for Indirect Bribery.

There are "variations" to this same evidence test.[326]

One such variation is the "backwards test,"[327] which focuses on the actual evidence presented at the second trial and not on "the evidence or facts alleged in the second indictment."[328] If the actual evidence presented in the second trial is the same as the evidence presented in the first trial, and if the defendant can be convicted in the second offense on the basis of such evidence, then the offense is the same.

In contrast, the original rule looks at the evidence at the first trial and determines whether "the evidence required to support [a] finding of guilt upon one of them would have been sufficient to warrant the same result upon the other."[329] The question that is asked is: What evidence is necessary to convict under the first offense? If that same evidence is sufficient to convict in the second offense, then the two offenses are the "same."[330]

Another variation of this test is the "distinct element" test.[331] This test was applied by the U.S. Supreme Court in *Gavieres v. United States*.[332] There, the defendant was charged with and convicted of violation of a city ordinance, which provides —

> No person shall be drunk or intoxicated or behave in a drunken, boisterous, rude, or indecent manner in any public place open to public view; or be

325. English, Jr., *supra* note 52, at 89 (citing *Morey*, 108 Mass. at 434).

326. English, Jr., *supra* note 52, at 89-91.

327. *Id.* at 89 (citing *Note*, *supra* note 321, at 81).

328. English, Jr., *supra* note 52, at 89 (citing *Vandercomb & Abbott*, 163 Eng. Rep.).

329. English, Jr., *supra* note 52, at 89 (citing *Morey*, 108 Mass. at 434).

330. English, Jr., *supra* note 52, at 89.

331. *Id.* at 90 (citing *Gavieres*, 220 U.S. at 342).

332. Gavieres v. United States, 220 U.S. 338 (1911).

> drunk or intoxicated or behave in a drunken, boisterous, rude, or indecent manner in any place or premises to the annoyance of another person.[333]

Subsequently, he was charged with and convicted of violating Article 257 of the Penal Code of the Philippine Islands,[334] which provides, "[t]he penalty of *arresto mayor* shall also be imposed on those who outrage, insult, or threaten, by deed or word, public officials or agents of the authorities, in their presence, or in a writing addressed to them."[335]

The U.S. Supreme Court held that the two offenses were not the same since Article 257 of the Revised Penal Code contained an additional element, i.e., that the words and conduct of the defendant were directed to a public officer, an element not found in the ordinance.[336] It concluded —

> Applying these principles, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case[,] it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof[,] there could have been no conviction in the second case. The requirement of insult to a public official was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place, open to public view; the insult to a public official need only be in his presence or addressed to him in writing. Each offense required proof of a fact which the other did not. Consequently[,] a conviction of one would not bar a prosecution for the other.[337]

In other words, the evidence required to convict in one offense (violation of city ordinance punishing rude, boisterous behavior) was not the same to convict in the other offense (violation of the Revised Penal Code provision punishing outrage to public officials).[338] If, in the first case, the prosecution limited their evidence to proving the rude, boisterous behavior of the accused in a public place open to public view, without mentioning that it was directed towards a public officer, such evidence would not be sufficient to convict the accused under the Revised Penal Code and, hence, a second charge is permitted.

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333. *Id.* at 341.

334. *Id.*

335. *Id.*

336. *Id.* at 342.

337. *Id.* at 343-44.

338. *Gavieres*, 220 U.S. at 343-44.

The holding of the Supreme Court in *Gavieres* is that "[e]ach offense required proof of *a fact* which the other did not."[339] In another part of the decision, the Supreme Court held that "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of with had an *element* not embraced in the other."[340] It seems that the Supreme Court used the words "fact" and "element" interchangeably. If so, then this so-called "distinct element" test is no other than the *Blockburger* test.

Another variation of the "same evidence" test is the "identity test,"[341] i.e., whether the offenses are the same "in law and in fact."[342] This test permits a second prosecution to be brought against the defendant for an offense that is necessarily included in the offense that was previously charged.[343]

F. Same Transaction Test

Another test is the "same transaction" test.[344] The focus of this test is on the transaction or the intent behind the transaction.[345] What is examined is the "defendant's behavior, rather than the evidence presented or the laws governing the offense."[346]

This test has the advantage of promoting arguably the most important interest of the Double Jeopardy Clause: the right not to be prosecuted successively for the same offense.[347] Successive or repeated prosecutions is the type of governmental tyranny that the Double Jeopardy Clause is designed to protect.[348] Under Justice William J. Brennan Jr.'s definition of the same transaction test in his concurring opinion in *Ashe v. Swenson*,[349] the prosecution is required, "except in most limited circumstances, to join at one

339. *Id.* at 344.

340. *Id.* at 345 (emphasis supplied).

341. English, Jr., *supra* note 52, at 90 (citing *Twice in Jeopardy*, *supra* note 207).

342. *Id.* (citing Burton v. United States, 202 U.S. 344, 380 (1906)).

343. English, Jr., *supra* note 52, at 90.

344. *Id.* at 91.

345. *Id.* (citing Otto Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 534 (1949)).

346. English, Jr., *supra* note 52, at 90 (citing Frank Edward Horack Jr., *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 812-14 (1937)).

347. *See Twice in Jeopardy*, *supra* note 207, at 275.

348. *See* Pace, *supra* note 21, at 801.

349. Ashe v. Swenson, 397 U.S. 436 (1970).

trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[350] According to Justice Brennan,

> [t]his 'same transaction' test of 'same [offense]' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.[351]

Kirstin Pace identifies the following advantages of the "same transaction" test —

(1) it bars the filing of subsequent charges, thus protecting a person from government harassment;[352]

(2) it reduces the risk of wrongful convictions as the prosecution will not be given an opportunity to perfect its trial strategy;[353] and

(3) it increases "judicial efficiency and economy"[354] since all offenses relating to the same transaction will be tried in one case.[355]

Numerous states have adopted this test.[356]

W. John English, Jr. notes that this test "has not been given constitutional dimensions."[357]

English, Jr. has this to say about the same transaction test —

> The same transaction test is more restrictive than any of the other presently accepted approaches, and seems more representative of the layman's idea of fair play under the double jeopardy guarantee. At first glance, it appears that the guarantee would become more meaningful if the same transaction test

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350. *Id.* at 453-54.

351. *Id.* at 454.

352. Pace, *supra* note 21, at 801 (citing *Ashe*, 397 U.S. at 454 (J. Brennan, concurring opinion) & William L. Carroway, *Pervasive Multiple Offense Problems — A Policy Analysis*, 1971 UTAH L. REV. 105, 115 (1971)).

353. Pace, *supra* note 21, at 802.

354. *Id.* (citing *Ashe*, 397 U.S. at 454 (J. Brennan, concurring opinion); Petite v. United States, 361 U.S. 529, 530 (1960); & *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 968 (1980)).

355. *Id.*

356. Pace, *supra* note 21, at 802.

357. English, Jr., *supra* note 52, at 92.

> were given wider acceptance. Admittedly, its application would bar second prosecutions in many cases where neither the same evidence test nor any of its variations would have protected the defendant, but this theory is just as easily circumvented as is the same evidence test. 'Transaction' is an amorphous term and the manner in which it is defined will determine its utility. One author has stated the problem as follows [—]
>
> 'The principal shortcoming of this approach is that any sequence of conduct can be defined as an 'act' or 'transaction'. An act or transaction test itself determines nothing ... . Whether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying the lather to one's face an act? ... [*ad infinitum*].'
>
> Thus[,] many courts refuse to apply the theory as a bar to a second prosecution by merely ruling that two offenses are not part of one transaction unless the offenses are identical in law and fact — one of the same methods also used to limit application of the same evidence test.[358]

Another author has written that while the "same transaction" test is the "most robust" same offense test,[359] it is nonetheless an "obviously flawed definition of [the] same offense"[360] because

> [n]othing in the text, history, or policy of forbidding more than one trial for the same offense remotely suggests that different offenses committed as part of a single transaction must be tried together or not at all. The constitutional question is whether offenses are the same, not whether the transaction is the same.[361]

He observes that

> the equivalence of 'offense' and 'transaction' would preclude more than one conviction [for] the same transaction even if sought at a single trial. What this means, borrowing the words of Chief Justice Burger, is 'that the second and third and fourth criminal acts are 'free' if part of the same transaction, which 'does not make good sense and ... cannot make good law.'[362]

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358. *Id.* (citing *Twice in Jeopardy*, *supra* note 207 & Harris v. State, 193 Ga. 109 (1941) (U.S.)).

359. Thomas III, *supra* note 53, at 1037.

360. *Id.*

361. *Id.*

362. *Id.* at 1038 (citing *Ashe*, 397 U.S. at 469 (C.J. Burger, dissenting opinion)).

He adds that this test "diminishes the legislative power to create offenses"[363] since "the criminal actor and the prosecutor define double jeopardy offenses by the manner in which the crimes are committed and charged."[364]

It seems that "transaction" and "act" are synonymous. If so, the "same transaction" test must overcome the express language of the 1987 Constitution, which makes a distinction between an "offense" and an "act."[365] But if an accused is prosecuted for a second offense involving an additional act (e.g., the possession and use of an unlicensed firearm in the killing of a person), then the transaction — and offense — are no longer the same. In the case of *People v. Argosino, et al.*;[366] however, the "transaction" is the same for all four charges.[367]

Also, under the Rules, the consolidation of cases is not mandatory.[368] Rule 119, Section 22 (*Consolidation of trials of related offenses*), provides that "[c]harges for offenses founded on the same facts or forming part of a series of offenses of similar character may be tried jointly at the discretion of the court."[369] Thus, successive criminal prosecutions for different offenses can be brought against an accused for the same transaction. In the case of *Argosino, et al.*, for example, nothing can stop the prosecution from filing in succession the cases for Plunder, Direct Bribery, P.D. No. 46, and Section 3 (e) of R.A. No. 3019, assuming these are not the "same" offenses. However, the Rules can be readily amended to require the mandatory consolidation of cases arising the same transaction.

The Author does not see how the same transaction test diminishes the power of the lawmaker to create offenses. A transaction or act is a crime if the lawmaker deems it so. The lawmaker, in defining offenses, has in mind specific acts or transactions that deserves to be punished. The lawmaker thinks in terms of punishable acts and transactions. So long as an offender is punished in

363. Thomas III, *supra* note 53, at 1038.

364. *Id.*

365. PHIL. CONST. art. III, § 21.

366. People v. Argosino, et al., SB-18-CRM-0240-43, Aug. 28, 2020, *available at* https://sb.judiciary.gov.ph/RESOLUTIONS/2020/H_Crim_SB-18-CRM-0240-0243_People%20vs%20Argosino,%20et%20al_08_28_2020.pdf (last accessed Nov. 30, 2020).

367. *Id.*

368. REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 22.

369. *Id.*

accordance with the lawmaker's intent, then the legislative power to create offenses is preserved. The issue is whether the lawmaker, in fact, intends to punish a specific act multiple times.

G. Collateral Estoppel Theory

The collateral estoppel theory posits that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[370]

English, Jr. traces the origin of this theory to the case of *United States v. Oppenheimer*.[371] There, the defendant was charged with conspiracy to conceal assets from a trustee in bankruptcy.[372] He raised the defense of a previous adjudication on a charge for the same offense holding that it was barred by the statute of limitations ("an adjudication since held to be wrong in another case").[373] The U.S. Supreme Court held —

> Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits ... , and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law:
>
> 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. ... In this respect, the criminal law is in unison with that which prevails in civil proceedings.' ... The finality of a previous adjudication as to the matters determined by it is the ground of decision in [*Commonwealth v. Evans*] ... , the criminal and the civil law agreeing, as Mr. Justice Hawkins says. ... Seemingly the same view was taken in [*Frank v. Mangum*] ... , as it was also in [*Coffey v. United States*] ... .
>
> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that, when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended

370. *Ashe*, 397 U.S. at 443.

371. United States v. Oppenheimer, 242 U.S. 85 (1916).

372. *Id.* at 85.

373. *Id.* at 86 (citing U.S. v. Rabinowich, 238 U.S. 78 (1915)).

> to do away with what, in the civil law, is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.[374]

English, Jr., hastens to distinguish between *res judicata* and collateral estoppel.[375] Under *res judicata*, the filing of a second civil action is barred by a prior judgment.[376] Under collateral estoppel, on the other hand, what is barred is the re-litigation of an issue or issues that have been previously decided.[377] He then explains the application of the collateral estoppel theory as follows —

> Thus, under the hypothetical case given above, if *A* were first tried for simple battery, *A* might defend by establishing and proving an alibi that he was elsewhere when *B* was attacked. If the jury accepted the alibi and acquitted *A*, then he could not later be tried for robbing or murdering *B*, since the jury had already ruled that *A* was not present when *B* was attacked. In *Ashe v. Swenson*, the petitioner had been charged with the robbery of six poker players, each robbery being charged in a separate count; at the first trial on one count, the prosecution witnesses could not identify petitioner as one of the robbers and he was acquitted. Later, petitioner was charged with a second count of robbery and was convicted. In reversing his conviction, the United States Supreme Court held that the collateral estoppel theory was a basic and essential part of the prohibition against double jeopardy.[378]

Under this theory, the acquittal of the defendant based on findings of fact favorable to him or her can be invoked to defeat a second prosecution for another offense where this second offense requires the presentation of these facts to obtain a conviction.[379] On the other hand, a conviction of the defendant in the first offense will not preclude him or her from contesting anew the facts or that he or she unsuccessfully raised in the first trial.[380] Thus, for example, if in a Direct Bribery case, the accused is acquitted because the prosecution failed to prove the giving of a gift to a public official, the prosecution is then estopped from proving the fact of giving a gift in a

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374. *Oppenheimer*, 242 U.S. at 87-88 (citing United States v. Barber, 219 U.S. 72, 78 (1911); The Queen v. Miles, 24 Q.B.D. 423, 431 (1890) (U.K.); Commonwealth v. Ellis, 160 Mass. 165 (1893) (U.S.); Brittain v. Kinnaird, 129 E.R. 789 (1819) (U.K.); & Jeter v. Hewitt, 63 U.S. 352 (1859)).

375. English, Jr., *supra* note 52, at 93.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

subsequent Plunder case against the same public official. If, however, the accused is convicted in the Direct Bribery case, he can still present evidence to disprove the charge of gift-giving (this is, of course, on the assumption that these offenses are not the same).

To successfully invoke collateral estoppel, there has to be a valid and final judgment on the merits in the first case.[381]

English, Jr. stresses the importance of the joinder of parties and offenses (those that arise from the same transaction) under this theory.[382] He explains that joinder benefits both the defendant and the prosecution.[383] On the one hand, it benefits the defendant because second prosecutions will be avoided as all charges will be tried jointly.[384] On the other hand, it "subtly" benefits the prosecution because the defendant can no longer point to a favorable ruling on issues resolved in a previous trial.[385] If charges are tried jointly, the jury can convict the defendant in one offense and acquit in another.[386]

English, Jr. points out a potential problem in applying the collateral estoppel theory in criminal cases and that is that there are times when the basis of a general verdict of acquittal is not clear.[387] In contrast to issues in civil cases, which are "sharply drawn" on account of the "detailed pleadings" of the parties, the basis for verdicts in jury trials are not conclusively established.[388] To address this difficulty, the U.S. Supreme Court

> has ruled that when a prior acquittal was based upon a general verdict, the courts should examine the record of the prior proceeding, including the pleadings, evidence, and other relevant matter, and determine whether a rational jury could have based its verdict upon any issue other than that which the defendant seeks to bar from consideration in the subsequent trial.[389]

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381. English, Jr., *supra* note 52, at 92.

382. *Id.* at 95-96.

383. *Id.* at 96-98.

384. *Id.* at 97.

385. *Id.*

386. *Id.* at 97-98.

387. English, Jr., *supra* note 52, at 99.

388. *Id.* at 99.

389. *Id.* (citing Daniel K. Meyers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)).

As can be seen from the foregoing discussion, the collateral estoppel theory focuses on preventing multiple trials. It is not focused on what constitutes the same offense insofar as the issue is what offenses a defendant can be convicted of.

H. Blameworthy Act Approach

George C. Thomas III proposes a different approach to interpreting the meaning of the "same offense." He characterizes the U.S. Supreme Court's *Blockburger* approach as "mis-guided" because it "substitutes formalism for substance, a mechanical test for a test that asks whether the offenses are substantively the same."[390] The "mechanical test" is a test that merely "compares statutory elements and is only sometimes related to substantive sameness."[391] His thesis is —

> I will argue that offenses are the same under the Double Jeopardy Clause when they manifest singular blameworthiness. Blameworthiness is singular when the legislature intended to authorize a single conviction for what occurred. Because legislat[ors] rarely express intent on this question, my task is to structure a set of presumptions about what the legislature probably meant (or would have meant had it thought about the issue).
>
> It is at this stage that action theory is useful. When X kills Y, there is only one homicide, even though that one offense may be described in several ways (premeditated murder, felony murder, second-degree murder, manslaughter, vehicular homicide, etc.). We would say that premeditated murder is more blameworthy than manslaughter, but we would still say that X's one act is only one homicide offense, however it is described under the various state statutes.
>
> My working hypothesis, then, is that legislatures think in terms of different blameworthy acts when they think of distinct blameworthiness. Conversely, when the same blameworthy act proves more than one statutory offense, it is likely that the legislature intended to create singular blameworthiness. Courts should (and usually do) find only one double jeopardy offense when two criminal [law] statutes proscribe the same blameworthy act. On my positivist view, however, action theory provides presumptions only. The legislature is the ultimate source of the meaning of [the] 'offense' and thus of 'same offense.'[392]

390. Thomas III, *supra* note 53, at 1028.

391. *Id.*

392. *Id.* at 1029.

He notes "the necessary relationship between an act and an 'offense'"[393] and describes this as "one of the irreducible principles in substantive criminal law."[394] Criminal liability arises when a person's particular act "fits the act description contained in the criminal prohibition."[395]

He bases his proposed approach on "action theory,"[396] which he describes as follows —

> Action theory draws the same distinction between descriptions of acts, called 'universals' or 'act-types,' and particular acts in the world, called 'event-particulars' or 'act-tokens.' Act-types are found in statutory proscriptions. The offense of larceny consists, in part, of the act-type of taking and the act-type of carrying away. Each particular instance of an act-type is known as an act-token. For example, the larceny at the Watergate Hotel was an act-token.[397]

He agrees with the *Blockburger* test insofar as it inquires whether an offense is included in another offense but proposes that the inclusion be limited to "blameworthy act-types."[398] One way to determine whether two offenses are the same is if the "core or common act-type" is subtracted or removed from both offenses.[399] If after taking away the core or common act-type, there remain blameworthy act-types in the two offenses, then the offenses are different.[400]

For example, if one were to remove the core or common act-type from both Indirect Bribery and P.D. No. 46, i.e., the giving of something of value to a public officer by reason of his or her office, there is no left-over element that is a blameworthy act-type. Thus, under this approach, the blameworthy act-types Indirect Bribery and P.D. No. 46 are identical.

To Thomas, the only important question is: "whether offenses are substantively different."[401] He thinks that courts have avoided asking this question because "it is virtually impossible to answer as an unstructured

393. *Id.* at 1030.

394. *Id.*

395. *Id.*

396. Thomas III, *supra* note 53, at 1030.

397. *Id.* at 1028.

398. *Id.* at 1041.

399. *Id.* at 1042.

400. *Id.*

401. *Id.* at 1048.

inquiry."[402] He is of the opinion that selling narcotics outside the original stamped package is the "same substantive offense" as selling narcotics without a purchaser's written order, contrary to the ruling in *Blockburger*.[403]

While acknowledging that there are difficulties in his proposed substantive test, he believes that it is "the only way to produce a satisfying account of when offenses are truly the same."[404]

His blameworthy-act theory is based on the premise that "legislatures create criminal blameworthiness" and that "[l]egislative intent as to whether that blameworthiness is singular or distinct is therefore the sole meaning of double jeopardy offense."[405] The theory merely raises the presumption that two offenses are the same. The presumption may be overcome by "crystal-clear" legislative intent that the legislature had intended to treat the offenses as different offenses by authorizing the cumulation of penalties on the same blameworthy act-type.[406] Thus, under this theory, the lawmaker is free to enact laws that specifically authorize the imposition of additional penalties for the same blameworthy act-type.[407] Thus, if P.D. No. 46 expressly provides that the penalties imposed thereunder are in addition to penalties that are imposable under the Revised Penal Code for Direct Bribery or Indirect Bribery, that would be permissible.

VI. PHILIPPINE JURISPRUDENCE

A. Gavieres v. United States

One of the earlier cases to deal with the issue of double jeopardy was the previously mentioned *Gavieres v. United States*, decided by the U.S. Supreme Court. In this case, Vicente Garcia Gavieres was charged with and convicted of violation of a Manila City ordinance, which punished drunken, boisterous, or rude behavior in any public place open to public view.[408]

402. Thomas III, *supra* note 53, at 1048.

403. *Id.*

404. *Id.*

405. *Id.* at 1049.

406. *Id.* at 1051-53.

407. *Id.*

408. *Gavieres*, 220 U.S. at 341.

Subsequently, he was charged with and convicted for the violation of Article 257 of the Penal Code of the Philippine Islands, which punished outrages, insults, or threats to public officials.[409]

The two offenses arose from the same act of "calumniating, outraging, and insulting a public official in the exercise of his office by word of mouth and in his presence."[410] Gavieres appealed to the U.S. Supreme Court, invoking the double jeopardy clause found in the Act of 1 July 1902.[411]

The U.S. Supreme Court (with Justice Marshall Harlan II dissenting) held that the two offenses were not the same since each offense contained an element or fact not found in the other.[412] Article 257 of the Revised Penal Code contained an additional element or fact, i.e., that the words and conduct of the defendant were directed to a public officer, an element or fact not found in the ordinance.[413] On the other hand, the ordinance required that the outrageous behavior be exhibited in public,[414] an element or fact not contained in Article 257.

B. People v. Alvarez

In *People v. Alvarez*,[415] the accused, Pedro Alvarez, mortgaged his automobile to Philippine Automobile Exchange, Inc.[416] A few months later, without the consent of the mortgagee, he sold the same automobile to Anselmo Singian, who was not aware that the automobile had been earlier mortgaged to a creditor.[417] Alvarez defaulted on his loan and Philippine Automobile Exchange, Inc. took possession of the automobile, seizing it from Singian.[418]

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* at 345.

413. REV. PENAL CODE, art. 257.

414. *Gavieres*, 220 U.S. at 343.

415. People v. Alvarez, 45 Phil. 472 (1923).

416. *Id.* 473.

417. *Id.*

418. *Id.*

Alvarez was charged with and convicted of Act No. 1508[419] (the Chattel Mortgage Law) for having sold the automobile without the consent of the mortgagee.[420]

He was also subsequently charged with and convicted of Estafa (swindling) under the Revised Penal Code.[421] He raised the issue of double jeopardy.[422]

The Supreme Court, citing *Gavieres*, held that the two offenses were not the same.[423] On the one hand, he was found guilty of violation of the Chattel Mortgage Law since he sold the mortgaged property without the consent of the creditor.[424] On the other hand, he was found guilty of Estafa since he concealed the fact of the encumbrance from the buyer.[425] It summed up the ruling in *Gavieres* as follows, "where two different laws define two crimes, the conviction of one of them is no obstacle to that of the other, although both offenses arise from the same facts, if each crime involves some important act which is not an essential element of the other."[426]

Three justices dissented. The dissent of Justice George A. Malcolm, concurred in by Justices Ignacio B. Villamor and Charles A. Johns, cites the "same transaction test."[427] Justice Malcolm was of the opinion that the Chattel Mortgage Law was intended to be the applicable law in cases where mortgaged property is removed or sold without authority.[428] According to him —

> The interests of the offended party have been protected by the prosecution of the accused for a violation of the Chattel Mortgage Law. The interest[ ] of the public have likewise been protected by his conviction in that case. Further prosecutions of the accused for crimes, which the ingenuity of man

419. An Act Providing for the Mortgaging of Personal Property and for the Registration of the Mortgages So Executed [Chattel Mortgage Law], Act No. 1508 (1906).

420. *Alvarez*, 45 Phil. at 475.

421. *Id.* at 474.

422. *Id.* at 476.

423. *Id.* at 475.

424. *Id.* at 476.

425. *Id.* at 474.

426. *Alvarez*, 45 Phil. at 478.

427. *Id.* at 480.

428. *Id.*

> finds falling under these same facts changes a prosecution to a persecution. To punish a man twice for the same offense shocks one's sense of justice.[429]

He cited with approval the ruling of the Supreme Court in the 1911 case of *United States v. Gustilo*,[430] where the following "well-considered doctrine" was enunciated —

> We are confident that that portion of the Philippine Bill embodying the principle that no person shall be twice put in jeopardy of punishment for the same offense should, in accordance with its letter and spirit, be made to cover as nearly as possible every result which flows from a single criminal act impelled by a single criminal intent. The fact should not be lost sight of that it is [ ] injury to the public which a criminal action seeks to redress, and by such redress to prevent its repetition, and not the injury to individuals. In so far as a single criminal act, impelled by a single criminal intent, in other words, one volition, is divided into separate crimes and punished accordingly, just so far are the spirit of the Philippine Bill and the provisions of article 89 of the Penal Code violated.[431]

C. People v. Quijada

In *People v. Quijada*,[432] the Supreme Court (*en banc*) addressed the issue of whether the accused, Daniel Quijada, could be prosecuted for and convicted of both Murder under Article 248 of the Revised Penal Code[433] and Illegal Possession of Firearm in its aggravated form under Presidential Decree No. 1866 (P.D. No. 1866).[434]

The accused shot and killed the victim, Diosdado Iroy, with a .38 cal. revolver.[435] Two Informations were filed against him, one for Murder under Article 248 of the Revised Penal Code (which alleged that the killing was attended by the qualifying circumstance of treachery, abuse of superior

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429. *Id.* at 482.

430. United States v. Gustilo, 19 Phil. 208 (1911).

431. *Id.* at 212.

432. People v. Quijada, G.R. Nos. 115008-09, 259 SCRA 191 (1996).

433. REV. PENAL CODE, art. 248.

434. Codifying the Laws on Illegal/Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition, of Firearms, Ammunition or Explosives or Instruments Used in the Manufacture of Firearms, Ammunition or Explosives, and Imposing Stiffer Penalties For Certain Violations Thereof and for Relevant Purposes, Presidential Decree No. 1866, § 1 (1983) & *Quijada*, 259 SCRA at 204.

435. *Quijada*, 259 SCRA at 204.

strength, and premeditation), and the other for violation of Illegal Possession of Firearm under P.D. No. 1866 in its aggravated form (which alleged that he possessed an unlicensed firearm which he used in killing Diosdado Iroy).[436]

Section 1 of P.D. No. 1866 reads —

> Unlawful Manufacture, Sale, Acquisition, Disposition or Possession of Firearms or Ammunition or Instruments Used or Intended to be Used in the Manufacture of Firearms or Ammunition. [—] The penalty of *reclusion temporal* in its maximum period to *reclusion perpetua* shall be imposed upon any person who shall unlawfully manufacture, deal in, acquire, dispose, or possess any firearm, part of firearm, ammunition or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition.
>
> *If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed.*[437]

The two cases were consolidated and joint hearings were held.[438] The Regional Trial Court convicted the accused of the two offenses and imposed on him the penalty of *reclusion perpetua* for the crime of Murder and an indeterminate penalty ranging from 17 years, four months, and one day, as minimum, to 20 years and one day, as maximum, for violation of P.D. No. 1866.[439]

The case was initially assigned to the Third Division of the Supreme Court but due to the "problematical issue" of previous conflicting decisions, it was later on referred to the Supreme Court *en banc*.[440]

The Supreme Court sustained the decision of the trial court.[441] Citing previous jurisprudence, it held that the offense of Murder, punishable under the Revised Penal Code and a crime against persons, and the offense of aggravated Illegal Possession of an Unlicensed Firearm, punishable under a special law (P.D. No. 1866) and a crime against peace and order, are two separate offenses.[442] One of the cases it cited was *People v. Tiozon*,[443] where it

436. *Id.* at 204-05.

437. Presidential Decree No. 1866, § 1 (emphasis supplied).

438. *Quijada*, 259 SCRA at 205.

439. *Id.* at 208.

440. *Id.* at 203.

441. *Id.* at 210.

442. *Id.* at 217.

443. People v. Tiozon, G.R. No. 89823, 198 SCRA 368 (1991).

held that Illegal Possession of Firearms cannot possibly absorb Homicide or Murder because Murder and Homicide are "more serious crime[s] defined and penalized [under] the Revised Penal Code" in contrast to Illegal Possession of Firearm, which is "absorbed by a statutory offense, which is just a malum prohibitum."[444] The ruling in *Tiozon* reads —

> It may be loosely said that homicide or murder qualifies the offense penalized in said Section 1 because it is a circumstance which increases the penalty. It does not, however, follow that the homicide or murder is absorbed in the offense; otherwise, an anomalous absurdity results whereby a more serious crime defined and penalized in the Revised Penal Code is absorbed by a statutory offense, which is just *a malum prohibitum*. The rationale for the qualification, as implied from the exordium of the decree, is to effectively deter violations of the laws on firearms and to stop the 'upsurge of crimes vitally affecting public order and safety due to the proliferation of illegally possessed and manufactured firearms, ...' In fine then, the killing of a person with the use of an unlicensed firearm may give rise to separate prosecutions for (a) violation of Section 1 of P.D. No. 1866 and (b) violation of either Article 248 (Murder) or Article 249 (Homicide) of the Revised Penal Code. The accused cannot plead one as a bar to the other; or, stated otherwise, the rule against double jeopardy cannot be invoked because the first is punished by a special law while the second, homicide or murder, is punished by the Revised Penal Code.[445]

It also cited the previous case of *People v. Doriquez*,[446] where it held —

> It is a cardinal rule that the protection against double jeopardy may be invoked only for the same offense or identical offenses. A simple act may offend against two (or more) entirely distinct and unrelated provisions of law, and if one provision requires proof of an additional act or element which the other does not, an acquittal or conviction or a dismissal of the Information under one does not bar prosecution under the other. Phrased elsewise, where two different laws (or articles of the same code) define[ ] two crimes, prior jeopardy as to one of them is not obstacle to a prosecution of the other, although both offenses arise from the same fact, if each crime involves some important act which is not an essential element of the other.[447]

There are two parts in the *Doriguez* ruling. The first refers to a "simple act" (presumably a single act) which may offend against two or more distinct provisions of law and where the test is to determine if one of the provisions

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444 *Quijada*, 259 SCRA at 216 (citing *Tiozon*, 198 SCRA at 171) (emphasis omitted).

445. *Id.*

446. People v. Doriquez, G.R. No. L-24444-45, 24 SCRA 163 (1968).

447. *Quijada*, 259 SCRA at 217 (citing *Doriquez*, 24 SCRA at 171).

requires proof of an additional element.[448] The test is not identical to the *Blockburger* test in that it requires that only one of the two laws have an additional element, unlike *Blockburger*, which requires that each of the two laws have an additional element.[449] That said, the Supreme Court actually applies the *Blockburger* test since under the Rules of Court, an offense is the "same" if it is included in or includes another offense.[450] An offense that necessarily includes or is necessarily included another offense fails the *Blockburger* test.

The second part refers to a separate "act." The act of possessing a firearm is separate from the act of killing a person.[451] Each act is punished under different laws.[452]

The Supreme Court next proceeded to discuss the meaning of the text of P.D. No. 1866 and why it is a distinct crime from Murder. [453] It identified the "gravamen" of the offense to be the possession of a firearm without a license.[454] It pointed out that the act of possession is distinct from the act of killing.[455] It concluded that "the homicide or murder is not absorbed in the crime of possession of an unlicensed firearm; neither is the latter absorbed in the former."[456]

The Supreme Court next cited the case of *People v. Jumamoy*,[457] where it held that double jeopardy cannot be invoked where one offense is punished by a special law and the other is punished by the Revised Penal Code.[458] Moreover, it reasoned that an "anomalous absurdity" would result if Murder, the "more serious crime" is absorbed by P.D. No. 46, a position which Justice Florenz D. Regalado endorsed in his dissent.[459] Its ruling reads —

448. *Quijada*, 259 SCRA at 217.

449. *Blockburger*, 284 U.S. at 299-305.

450. REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 5.

451. *Quijada*, 259 SCRA at 218.

452. *Id.*

453. *Id.* at 218-19.

454. *Id.* at 220.

455. *Id.*

456. *Id.* at 221 (citing People v. Barros, G.R. No. 101107-08, 245 SCRA 312 (1995) (J. Regalado, dissenting opinion)) (emphasis omitted).

457. People v. Jumamoy, G.R. No. 101584, 221 SCRA 333 (1993).

458. *Quijada*, 259 SCRA at 219.

459. *Id.* at 247 (J. Regalado, dissenting opinion).

> In *Jumamoy*, we reiterated *Caling* and amplified the rationale on why an accused who kills another with an unlicensed firearm can be prosecuted and punished for the two separate offenses of violation of the second paragraph of Section 1 of P.D. No. 1866 and for homicide or murder under the Revised Penal Code. Thus —
>
> Coming to the charge of illegal possession of firearms, Section 1 of P.D. No. 1866 penalizes, *inter alia*, the unlawful possession of firearms or ammunition with *reclusion temporal* in its maximum period to *reclusion perpetua*. However, under the second paragraph thereof, the penalty is increased to death if homicide or murder is committed with the use of an unlicensed firearm. *It may thus be loosely said that homicide or murder qualifies the offense because both are circumstances which increase the penalty. It does not, however, follow that the homicide or murder is absorbed in the offense. If these were to be so, an anomalous absurdity would result whereby a more serious crime defined and penalized under the Revised Penal Code will be absorbed by a statutory offense, one which is merely malum prohibitum. Hence, the killing of a person with the use of an unlicensed firearm may give rise to separate prosecutions for (a) the violation of Section 1 of P.D. No 1866 and (b) the violation of either Article 248 (Murder) or Article 249 (Homicide) of the Revised Penal Code.* The accused cannot plead one to bar the other; *stated otherwise, the rule against double jeopardy cannot be invoked as the first is punished by a special law while the second — Murder or Homicide — is punished by the Revised Penal Code. ...* Considering, however, that the imposition of the death penalty is prohibited by the Constitution, the proper imposable penalty would be the penalty next lower in degree, or *reclusion perpetua*.[460]

The Supreme Court then noted its previous contrary ruling in the case of *People v. Barros*,[461] where it held that

> appellant may not in the premises be convicted of two separate offenses [of illegal possession of firearm in its aggravated form and of murder], but only that of illegal possession of firearm in its aggravated form, in light of the legal principles and propositions set forth in the separate opinion of Mr. Justice Florenz D. Regalado, to which the Members of the Division, the ponente included, subscribe.[462]

After re-examining the conflicting doctrines, the Supreme Court decided that treating Homicide or Murder and Illegal Possession of Firearms as separate crimes is the better doctrine.[463] In reaching this conclusion, the Supreme Court explained that it was the lawmaker's intent or purpose that is controlling

460. *Id*. at 219-20 (emphases supplied).

461. People v. Barros, G.R. No. 101107, 245 SCRA 312 (1995).

462. *Id*. at 322.

463. *Quijada*, 259 SCRA at 224-25.

and its decision in this case "upholds and enhances the lawmaker's intent or purpose in aggravating the crime of illegal possession of firearm when an unlicensed firearm is used in the commission of murder or homicide."[464] It found that there was nothing in the text of P.D. No. 1866 that indicated any intention to modify Article 248 of the Revised Penal Code or to "reduce" the crime of murder into a mere "aggravating circumstance" of illegal possession.[465] The "only purpose" of P.D. No. 1866 in increasing the penalty to death where the unlicensed firearm was used to kill someone was to punish the "accused's manifest arrogant defiance and contempt of the law in using an unlicensed weapon to kill another[.]"[466]

The Supreme Court then discussed the difference between crimes that are *mala in se* and *mala prohibita*, explaining that P.D. No. 1866 is a special law that is *malum prohibitum* while Murder or Homicide, punishable under the Revised Penal Code, are *mala in se*.[467]

It presumably saw a need to discuss this distinction to emphasize that the two offenses are different.[468] Should "malice" be considered an "element" of the offense? If so, then Murder or Homicide would have the additional element of "malice" or criminal intent. If so, then generally crimes punishable under special laws would be "different" from crimes punishable under the Revised Penal Code, assuming that the special law has an element not found in the Revised Penal Code.

To arrive at a different conclusion would be, according to the Supreme Court, to engage in judicial legislation.[469]

Significantly, the Supreme Court refused to be drawn into an analysis of the concept of a single integrated crime.[470] It held that the "legislature may even create from a single act or transaction various offenses for different purposes subject only to the limitations set forth by the Constitution."[471]

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464. *Id.* at 225.

465. *Id.* at 232.

466. *Id.*

467. *Id.* at 228.

468. *Id.*

469. *Quijada*, 259 SCRA at 227-28.

470. *Id.* at 229.

471. *Id.* at 234.

It then went on to identify the constitutional limitation on Congress's power to define crimes — the Double Jeopardy Clause.[472] It, however, held that the issue double jeopardy was inapplicable to the case.[473]

The majority disagreed with the dissenting opinion on the use of the "same evidence" test.[474] According to the Supreme Court, "the so-called 'same-evidence' test is not a conclusive, much less exclusive, test in double jeopardy cases of the first category under the Double Jeopardy Clause ... ."[475]

It then discussed the difference between same "offense" under the first sentence of the Double Jeopardy Clause and same "act" in the second sentence of the Double Jeopardy Clause.[476] The first sentence, according to it, prohibits punishment for the same "offense" whereas the second sentence prohibits the punishment of the same "act" if punishable under both a national statute and an ordinance.[477] In this case, what is at issue is whether the act of killing using a firearm is against two laws, and not a law and an ordinance.

It then proceeded to hold that in determining whether a person is being subjected to the "same offense," the following rule is applicable: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."[478] Citing the case of *Blockburger*, among other cases, the Supreme Court referred to this as the "additional element" test —

> This *additional-element* test in *Lutero* and *Relova* and in *Blockburger, Gore*, and *Missouri* would safely bring the second paragraph of Section 1 of P.D. No. 1866 out of the proscribed double jeopardy principle. For, undeniably, the elements of illegal possession of firearm in its aggravated form are different from the elements of homicide or murder, let alone the fact that these crimes are defined and penalized under different laws and the former is *malum prohibitum*, while both the latter are *mala in se*. Hence, the fear that the

472. *Id.*

473. *Id.* at 235.

474. *Id.* at 234-35.

475. *Quijada*, 259 SCRA at 235.

476. *Id.* at 236.

477. *Id.* (citing People v. Relova, G.R. No. L-45129, 148 SCRA 292, 303-04 (1987) (citing Yap v. Lutero, 105 Phil. 1307, 1308 (1959))).

478. *Quijada*, 259 SCRA at 237 (citing *Blockburger* 284 U.S. at 299; Gore v. United States, 357 U.S. 386 (1958); & Missouri v. Hunter, 459 U.S. 359 (1983)).

> majority's construction of the subject provision would violate the constitutional bar against double jeopardy is unfounded.[479]

Based on the wording of the above paragraph, the Supreme Court seems to be saying that the fact that the offenses are *mala in se* and *mala prohibita* is an additional reason they should be considered different offenses. Thus, even if the elements of both offenses are the same, if one offense is *malum in se* and the other offense is *malum prohibitum*, then they are different offenses for double jeopardy purposes.

Justice Regalado registered a vigorous dissent.[480] While he agreed that the accused was properly convicted of Murder with the use of an illegally possessed firearm (i.e., under P.D. No. 1866), he should not have been convicted under Article 248 of the Revised Penal Code.[481] Justice Regalado's position is that the crime of Murder should be deemed absorbed in the crime of Illegal Possession of Unlicensed Firearm in its aggravated form since Homicide or Murder becomes a "component" part of P.D. No. 1866 in its aggravated form and, therefore, should not be punished separately.[482]

He also considered the "punitive" standpoint and likened the case to special complex crimes, which imposes only a single penalty for two or more offenses.[483]

In response to the majority's argument that it would be absurd for a *malum prohibitum* crime to absorb a *malum in se* crime, Justice Regalado raised the point that the penalty for the *malum prohibitum* offense is greater than the *malum in se* offense.[484]

Justice Regalado next argued that even assuming *arguendo* that the penalty for Homicide and Murder is greater than the penalty for illegal possession in its aggravated form, it would not be unheard of for the lesser crime to absorb

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479. *Quijada*, 259 SCRA at 238.

480. *Id.* at 265 (J. Regalado, dissenting opinion).

481. *Id.* at 239-40.

482. *Id.* at 243.

483. *Id.*

484. *Id.* at 249 (There is a difference in the manner in which the majority and Justice Regalado define a "greater" offense. In determining which of the two offenses is the greater offense, the majority considers the nature of the offenses: the killing of a person is greater than the possession of an unlicensed firearm. Justice Regalado, for his part, considers the severity of the imposable penalty.).

a greater crime.[485] His cited as an example the offense of rebellion, which absorbs Murder, Homicide, Robbery, and other crimes if done in furtherance of the rebellion.[486]

On the claim that Revised Penal Code crimes are *mala in se* crimes and special law crimes are *mala prohibita* crimes, Justice Regalado wrote that this is not necessarily so — there are special laws that are, in fact, *mala in se* and there are offenses under the Revised Penal Code that are *mala prohibita* (e.g., correspondence in time of war with a hostile country or territory occupied by enemy troops; failure of an accountable public officer to issue the required receipt for any sum of money officially collected by him; and unauthorized possession of picklocks or similar tools).[487]

On the issue of "judicial legislation," Justice Regalado argued that it was the majority that engaged in it by taking what was otherwise a single, integrated crime (murder using an unlicensed firearm) and dividing it into two crimes.[488]

He next asked the "implacable question" whether two sets of penalties should be imposed on the accused for killing the same victim[489] —

> What is then the focus of the inquiry in the present case which applies with equal force to the aforestated composite crimes is merely whether or not, *apart from and in addition to the penalty* imposable on the offender if he violates any of the foregoing decrees or commits robbery in any of its stages *and which penalty is increased precisely if accompanied by an unlawful killing*, he should be further and separately punished for such homicidal or murderous taking of human life. The implacable question is whether or not *two separate penalties* should be imposed on him for *killing the same victim* since those decrees and the Code *already provide a single but increased penalty for the crimes therein if accompanied by an unlawful killing and thereby constituting a composite crime*. Whether the death of the victim supervened as 'a result or on the occasion,' or 'by reason or on occasion,' or 'with the use' of the firearm or poisonous substances availed of by the accused is immaterial even if liberally viewed in the context of the *mens rea* as proposed by the majority.[490]

485. *Quijada*, 259 SCRA at 250 (J. Regalado, dissenting opinion).

486. *Id.* at 250–51.

487. *Id.* at 252 (citing REV. PENAL CODE, arts. 120, 213, & 304).

488. *Quijada*, 259 SCRA at 255 (J. Regalado, dissenting opinion).

489. *Id.* at 259.

490. *Id.*

Justice Regalado then pointed out that if the prosecution were to charge an accused with Murder and with Illegal Possession of Unlicensed Firearm in its aggravated form, it would be incumbent on the prosecution to prove the crime of Murder in both instances.[491] In the charge for Murder, the type of weapon used is immaterial as it is not an element of the offense.[492] In the charge for Illegal Possession in its aggravated form, the failure to prove Murder (or Homicide) will give rise to criminal liability for Simple Illegal Possession.[493] In other words, the evidence to be presented in the Murder case would be the same evidence that would be presented in the second case and, therefore, proving the same offense.[494] If so, the "same-evidence" test should bar the filing of a second charge.[495]

He then next compared the case to complex, compound, and special complex crimes, where the law imposes only a single penalty for their violation —

> In fact, we can extrapolate this constitutional and reglementary objection to the cases of the other composite crimes for which a single penalty is imposed, such as the complex, compound[,] and so-called special complex crimes. Verily, I cannot conceive of how a person convicted of [*estafa*] through falsification under Article 48 can be validly prosecuted anew for the same offense of either [*estafa*] or falsification; or how the accused convicted of robbery with homicide under Article 294 can be legally charged again with either of the same component crimes of robbery or homicide; or how the convict who was found guilty of rape with homicide under Article 335 can be duly haled before the court again to face charges of either the same rape or homicide. Why, then, do we now sanction a second prosecution for murder in the cases at bar since the very same offense was an indispensable component for the other composite offense of illegal possession of firearm with murder? Why would the objection of *non bis in idem* as a bar to a second jeopardy lie in the preceding examples and not apply to the cases now before us?[496]

The answer, this Author believes, lies in the fact that in the examples given by Justice Regalado (Estafa through Falsification, Robbery with Homicide,

491. *Id.* at 260.

492. *Id.*

493. *Id.*

494. *Quijada*, 259 SCRA at 259-60 (J. Regalado, dissenting opinion).

495. *Id.*

496. *Id.* at 260-61.

and Rape with Homicide),[497] the laws are clear. The law itself provides the answer — it prescribes the penalty for Estafa through Falsification. In contrast, in this case, two laws with seemingly distinct elements exist side by side. It boils down to legislative intent.

Justice Regalado then discussed the "additional element" test.[498] He acknowledged the validity of such a test "if properly understood and correctly applied."[499] He stated that it is applicable where "the two offenses continue to exist independently of each other, with their respective penalties remaining unaffected by the commission of or penalty for the other offense."[500] As an example, he cited the offenses of Batas Pambansa Blg. 22 (B.P. 22)[501] and Estafa.[502] A person who issues a bouncing check can be punished under both laws.[503] The punishable acts under B.P. 22 is issuance of a check that bounces, whereas to be punishable for Estafa, the additional elements of deceit and damage have to be proven.[504] Moreover, Section 5 of B.P. 22 provides that "[p]rosecution under this Act shall be without prejudice to any liability for violation of any provision of the Revised Penal Code."[505]

He then concluded by saying that the additional element test has no application in the present case because there is only one offense, the "erstwhile separate offenses" of Murder and Illegal Possession in its aggravated form having juridically united in a "new and different composite crime punished by another and gravely higher penalty."[506]

He ends with the following observation and warning —

> I am aware that I have raised a number of what may appear as discomposing views[,] but these should provoke a more thorough reexamination of the issues [o]n these cases. On the other hand, I apprehend that the decision handed down herein may have opened a Pandora's box of legal curiosities[,]

497. *Id.* at 261.

498. *Id.*

499. *Id.*

500. *Quijada*, 259 SCRA at 262 (J. Regalado, dissenting opinion) (emphasis omitted).

501. An Act Penalizing the Making or Drawing and Issuance of a Check Without Sufficient Funds or Credit and for Other Purposes, Batas Pambansa Blg. 22 (1979).

502. *Quijada*, 259 SCRA at 262 (J. Regalado, dissenting opinion).

503. *Id.*

504. *Id.*

505. Batas Pambansa Blg. 22, § 5.

506. *Quijada*, 259 SCRA at 263 (J. Regalado, dissenting opinion) (emphasis omitted).

> and the swarm thus released will in due time return to the Court to roost. I can only hope that the Court's mavens of penal law who are responsible for the majority opinion here can fortify the same to meet the diverse and adverse reactions that it will predictably create.[507]

1. Epilogue to *People v. Quijada*

In 1997, Congress passed a law amending P.D. No. 1866.[508] One of the amendments to the law was the inclusion of a provision that reads, "[i]f homicide or murder is committed with the use of an unlicensed firearm, such use of an unlicensed firearm shall be considered as an aggravating circumstance."[509]

Thus in *People v. Molina*,[510] the Supreme Court held —

> Fortunately for appellants, however, [R.A. No.] 8294 has now amended the said decree and considers the use of an unlicensed firearm simply as an aggravating circumstance in murder or homicide, and not as a separate offense. The intent of Congress to treat as a single offense the illegal possession of firearm and the commission of murder or homicide with the use of such unlicensed firearm is clear from the following deliberations of the Senate during the process of amending Senate Bill No. 1148[.][511]

A great part of the problem in *Quijada* seems to lie in the severity of the penalties imposed by the Revised Penal Code for Murder and by P.D. No. 1866. It is understandable that the crime of Murder be punished with *reclusion temporal* (or even death).[512] But the mind balks at the imposition of the penalty of *reclusion temporal* in its maximum period to *reclusion perpetua* for the mere possession of an unlicensed firearm.[513] When the law provides that "[i]f [H]omicide or [M]urder is committed with the use of an unlicensed firearm,

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507. *Id.* at 265.

508. An Act Amending the Provisions of Presidential Decree No. 1866, as Amended, Entitled "Codifying the Laws on Illegal/Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunition or Explosives or Instruments Used in the Manufacture of Firearms, Ammunition or Explosives, and Imposing Stiffer Penalties for Certain Violations Thereof, and for Relevant Purposes", Republic Act No. 8294 (1997).

509. Republic Act No. 8294, § 1.

510. People v. Molina, G.R. No. 115835, 292 SCRA 742 (1998).

511. *Id.* at 779-80.

512. REV. PENAL CODE, art. 248.

513. Presidential Decree No. 1866, § 1 (This section has been amended by Republic Act No. 8294 and the penalties for possession are lowered.).

the penalty of death shall be imposed[,]"[514] it is only because there is no higher penalty than *reclusion perpetua* but death. There is thus the sense that what is *actually* being punished is the act of killing a human being because of the severity of the penalty — death. Why would a person who commits murder using an unlicensed firearm be punished more severely (with death) than a person who commits murder using a knife or poison or a piece of rock? The Author suspects that it is this issue that caused the Supreme Court to flipflop and generated the passionate and scholarly dissent from Justice Regalado.

Significantly, the issue of "same offense" was laid to rest, at least insofar as the offenses of Murder (or Homicide) and P.D. No. 1866 are concerned, with the passage of an amendatory law[515] making clear the legislative intent not to punish the same act twice. This would indicate that the power to define crimes and, concomitantly, the power to determine the "same offenses" is lodged with the legislature.[516]

2. Rape as Defined Under Article 266-A of the Revised Penal Code as Amended by R.A. No. 8353, and Violation of Section 5 (b) of R.A. No. 7610

The issue of double jeopardy also arose more recently with respect to the crime of Rape. Both the Revised Penal Code, as amended by Republic Act No. 8353 (R.A. No. 8353),[517] and Republic Act No. 7610 (R.A. No. 7610)[518] punish sexual intercourse with a female minor 12 years old and above but below 18.[519] Unlike the issue relating to Murder and Illegal Possession of Unlicensed Firearm, which involves an act of killing[520] and an act of possessing

514. *Id.*

515. Republic Act No. 8294.

516. *Quijada*, 259 SCRA at 267 (J. Hermosisima, Jr., concurring opinion).

517. An Act Expanding The Definition of the Crime of Rape, Reclassifying the Same as a Crime Against Persons, Amending For the Purpose Act No. 3815, as Amended, Otherwise Known as the Revised Penal Code, and For the Purposes [The Anti-Rape Law of 1997] Republic Act No. 8353 (1997).

518. An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes, Republic Act No. 7610 (1992).

519. The Anti-Rape Law of 1997, § 2 & Republic Act No. 7610, § 5 (b).

520. REV. PENAL CODE, art. 248.

an unlicensed firearm,[521] the issue of sexual intercourse with such minor involves only a single act.

In cases where the victim of rape "through force, threat, or intimidation" [522] (an element under the Revised Penal Code) and/or "coercion or influence"[523] (an element under R.A. No. 7610) is above 12 years of age but below 18, the issue of which between Article 266-A of the Revised Penal Code and Section 5 (b) of R.A. No. 7610 is the applicable law has bedeviled the courts.

Article 266-A provides —

Rape: When And How Committed. [—] Rape is Committed [—]

(1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

    (a) Through force, threat, or intimidation;

    (b) When the offended party is deprived of reason or otherwise unconscious;

    (c) By means of fraudulent machination or grave abuse of authority; and

    (d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

(2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.[524]

On the other hand, Section 5 (b) of R.A. No. 7610 provides —

Child Prostitution and Other Sexual Abuse. Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

521. Presidential Decree No. 1866, § 1.

522. The Anti-Rape Law of 1997, § 2.

523. Republic Act No. 7610, § 5.

524. The Anti-Rape Law of 1997, § 2.

> The penalty of reclusion temporal in its medium period to *reclusion perpetua* shall be imposed upon the following:
>
> ...
>
> (b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subject to other sexual abuse; *Provided*, That when the victims is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: *Provided*, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period[.][525]

The two laws essentially punish the crime of rape. The difficulty encountered by the Supreme Court in resolving the rape of minors above 12 years old arises from the fact that the same act of rape is punished by two different laws, one by the Revised Penal Code, the other by a special law.

D. People v. Abay

In *People v. Abay*,[526] the accused, Roberto Abay, "was charged with rape in relation to Section 5 (b), Article III of [R.A. No.] 7610 ... under the following Information"[527] —

> That sometime in December 1999, in the City of Manila, Philippines, [appellant] by means of force and intimidation, did then and there willfully, unlawfully and knowingly commit sexual abuse and lascivious conduct against [AAA], a minor, 13 years of age, by then and there kissing her breast and whole body, lying on top of her and inserting his penis into her vagina, thus succeeded in having carnal knowledge of her, against her will and consent thereafter threatening to kill her should she report the incident, thereby gravely endangering her survival and normal growth and development, to the damage and prejudice of [AAA].
>
> CONTRARY TO LAW.[528]

525. Republic Act No. 7610, § 5.

526. People v. Abay, G.R. No. 177752, 580 SCRA 235 (2009).

527. *Id.* at 236.

528. *Id.*

The RTC found the accused guilty beyond reasonable doubt of the crime of rape[529] —

> WHEREFORE, finding [appellant] Roberto Abay y Trinidad guilty beyond reasonable doubt of committing the crime of rape under Article 335 of the Revised Penal Code in relation to Section 5, Article III of RA 7610 against [AAA], the Court imposes upon him the death penalty, and to pay private complainant moral damages in the amount of Fifty Thousand (₱50,000) Pesos.
>
> SO ORDERED.[530]

The CA then "affirmed the findings of the RTC but modified the penalty and award of damages. In view of the enactment of [R.A. No.] 8353 ... , the CA found appellant guilty only of simple rape and reduced the penalty imposed to *reclusion perpetua*."[531]

The Supreme Court (First Division), in turn, modified the decision of the CA.[532] It explained that if the rape victim is below 12 years of age, the applicable law is Article 266-A (1) (d) of the Revised Penal Code.[533] If, on the other hand, the victim is 12 years or older, the offending party may be charged with *either* violation of Article 266-A of the Revised Penal Code or violation of Section 5 (b) of R.A. No. 7610, but not with violation of both laws.[534] According to the Supreme Court, "[t]he offender cannot be accused of both crimes for the same act because his right against double jeopardy will be prejudiced. A person cannot be subjected twice to criminal liability for a single criminal act."[535] Its ruling reads —

> We affirm the decision of the CA with modifications.
>
> Under Section 5 (b), Article III of [R.A. No.] 7610 in relation to [R.A. No.] 8353, if the victim of sexual abuse is below 12 years of age, the offender should not be prosecuted for sexual abuse but for statutory rape under Article 266-A (1) (d) of the Revised Penal Code and penalized with *reclusion perpetua*. On the other hand, if the victim is 12 years or older, the offender should be charged with either sexual abuse under Section 5 (b) of [R.A. No.] 7610 or rape under Article 266-A (except paragraph 1 [d]) of the Revised Penal

529. *Id.* at 237.

530. *Id.* 237-38.

531. *Id.* at 238.

532. *Abay*, 580 SCRA at 239.

533. *Id.*

534. *Id.* at 240.

535. *Id.* (citing PHIL. CONST. art. III, § 21 & People v. Optana, 404 Phil. 316 (2001)).

> Code. However, the offender cannot be accused of both crimes for the same act because his right against double jeopardy will be prejudiced. A person cannot be subjected twice to criminal liability for a single criminal act. Likewise, rape cannot be complexed with a violation of Section 5 (b) of [R.A. No.] 7610. Under Section 48 of the Revised Penal Code (on complex crimes), a felony under the Revised Penal Code (such as rape) cannot be complexed with an offense penalized by a special law.
>
> In this case, the victim was more than 12 years old when the crime was committed against her. The Information against appellant stated that AAA was 13 years old at the time of the incident. Therefore, appellant may be prosecuted either for violation of Section 5 (b) of [R.A. No.] 7610 or rape under Article 266-A (except paragraph 1 [d]) of the Revised Penal Code. While the Information may have alleged the elements of both crimes, the prosecution's evidence only established that appellant sexually violated the person of AAA through force and intimidation by threatening her with a bladed instrument and forcing her to submit to his bestial designs. Thus, rape was established.[536]

The Supreme Court arrived at the conclusion that Rape under Article 266-A was committed despite the finding that the Information had alleged the elements of both crimes.[537] It did not explain why it considered the elements of Article 266-A to have been proven, and the elements of Section 5 (b) as not having been proven. It simply held that "[w]hile the Information may have alleged the elements of both crimes, the prosecution's evidence only established that appellant sexually violated the person of AAA through force and intimidation by threatening her with a bladed instrument and forcing her to submit to his bestial designs. Thus, rape was established."[538]

Indisputably, there were two laws involved, one punishable under the Revised Penal Code and the other a special law. Notably, however, the Supreme Court referred to the "same act" or a "single criminal act" and did not even try to justify punishing that single act under both two laws.[539] There was no discussion on legislative intent. Either the Supreme Court assumed that it was the intent of Congress to give the prosecution the option of charging an accused either under Revised Penal Code or R.A. No. 7610, or it was of

536. *Abay*, 580 SCRA at 238-41 (citing PHIL. CONST. art. III, § 21; *Optana*, 404 Phil.; People v. Araneta, 48 Phil. 650 (1926); & People v. Pioquinto, G.R. No. 168326, 520 SCRA 712, 724 (2007)).

537. *Abay*, 580 SCRA at 241.

538. *Id.*

539. *Id.* at 240.

the mind that Congress, regardless of its intention, could not punish the same act of rape twice.

E. People v. Dahilig

Two years later, in *People v. Dahilig*,[540] the Supreme Court (Second Division) reiterated its holding in *Abay*.[541]

The Information charged the accused, Eduardo Dahilig, with rape as follows —

> Criminal Case No. 121472-H
>
> The undersigned 2nd Assistant Provincial Prosecutor accuses EDUARDO DAHILIG Y AGARAN, of the crime of Rape (Violation of Article 266-A par. 1 in relation to Article 266-B, [1st par. of the Revised Penal Code, as amended by [R.A. No.] 8353 and in further relation to Section [5 (a) of R.A. No.] 8369), committed as follows [—]
>
> That on or about the 17th day of December 2000, in the municipality of San Juan, Metro Manila, Philippines, and within the jurisdiction of this Honorable Court, the above named accused, by means of force and intimidation, and taking advantage of night time and in the dwelling of complainant, did, then and there, [willfully], unlawfully[,] and feloniously have carnal knowledge with one AAA, sixteen (16) year old minor at the time of the commission of the offense, against her will and consent.
>
> CONTRARY TO LAW.[542]

It is not clear from the wording of the Information which law the accused is charged with violating. It is not clear if the prosecution considered the rape committed by the accused to be a violation of two laws or if it considered the two laws as one.

The RTC convicted the accused of the crime of Rape and sentenced him to suffer the penalty of *reclusion perpetua*.[543]

The CA affirmed the findings of fact of the RTC but held that the crime charged should have been Child Abuse as defined and penalized in Section 5 (b) of R.A. No. 7610.[544] Its conclusion was based on the fact that the victim

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540. People v. Dahilig, G.R. No. 187083, 651 SCRA 778 (2011).

541. *Id.* at 788-90.

542. *Id.* at 779-80.

543. *Id.* at 783.

544. *Id.* at 783-84.

was a minor (she was 16 years of age at the time of the commission of the offense) and that she was subject of sexual abuse.[545] There was no dispute that the accused had sexual intercourse with the victim.[546]

On appeal, the Supreme Court set aside the decision of the CA and reinstated the decision of the RTC.[547] It addressed the issue of what crime was actually committed and declared *Abay* to be "enlightening and instructional."[548] It concluded, relying on the holding in *Abay*, that the prosecution could indict the accused *either* for Rape or Child Abuse but not both[549] —

> The question now is what crime has been committed? Is it Rape (Violation of Article 266-A[, paragraph] 1 in relation to Article 266-B, [first paragraph]. of the Revised Penal Code, as amended by R.A. No. 8353), or is it Child Abuse, defined and penalized by [Section] 5, (b), R.A. No. 7610?
>
> As elucidated by the RTC and the CA in their respective decisions, all the elements of *both* crimes are present in this case. The case of *People v. Abay*, however, is enlightening and instructional on this issue. It was stated in that case that if the victim is 12 years or older, the offender should be charged with either sexual abuse under Section 5 (b) of R.A. No. 7610 or rape under Article 266-A (except paragraph 1 [d]) of the Revised Penal Code. However, the offender cannot be accused of both crimes for the same act because his right against double jeopardy will be prejudiced. A person cannot be subjected twice to criminal liability for a single criminal act.[550]

Specifically, *Abay* reads —

> Accordingly, the accused can indeed be charged with either Rape or Child Abuse and be convicted therefor. Considering, however, that the Information correctly charged the accused with rape in violation of Article 266-A[, paragraph 1] in relation to Article 266-B, [first paragraph] of the Revised Penal Code, as amended by R.A. No. 8353, and that he was convicted therefor, the CA should have merely affirmed the conviction.[551]

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545. *Id.* at 784.

546. *Dahilig*, 651 SCRA at 784.

547. *Id.* at 790.

548. *Id.* at 788.

549. *Id.*

550. *Id.* at 788-89.

551. *Id.* at 789-90.

Interestingly, the Supreme Court found that the elements of both offenses were satisfied.[552] It, however, desisted from finding that the accused violated both laws.[553] It decided to adhere to the ruling in *Abay* that an accused can be charged with (and convicted of) either violation of Article 266-A or Section 5 (b) but not both.[554]

The Supreme Court set aside the decision of the CA finding the accused guilty of "child abuse" under R.A. No. 7610 and reinstated the decision of the RTC finding the accused guilty of Rape under Article 266-A for the reason that this was the crime charged in the Information.[555]

F. People v. Udang

In the more recent case of *People v. Udang*,[556] the Supreme Court (Third Division) again dealt with the issue of Article 266-A of the Revised Penal Code and Section 5 (b) of R.A. No. 7610.[557] In the very first paragraph of its decision, the Supreme Court declared —

> A single act may give rise to multiple offenses. Thus, charging an accused with rape, under the Revised Penal Code, and with sexual abuse, under Republic Act No. 7610, in case the offended party is a child 12 years old and above, will not violate the right of the accused against double jeopardy.[558]

The accused in this case, Bienvenido Udang, Sr., was charged with two counts of child abuse.[559] The first Information reads —

> The undersigned Prosecutor II accuses BIENVINIDO UDANG for the crime of CHILD ABUSE, committed as follows [—]
>
> That in the later of December 2003, at more or less 9:00 o'clock in the evening, at Lumbia, Cagayan de Oro City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully, feloniously and sexually abuse one [AAA], 14 [years]. old, minor by committing the following acts, to wit: accused together

552. *Dahilig*, 651 SCRA at 788.

553. *Id.* at 789.

554. *Id.* at 788.

555. *Id.* at 790 (It was not actually clear from the Information what crime the accused was being charged with.).

556. People v. Udang, G.R. No. 210161, 850 SCRA 426 (2018).

557. *Id.* at 430-31.

558. *Id.*

559. *Id.* at 431.

> with Bienvinido Udang, Jr., Betty Udang and the offended party [drank] three (3) bottles of pocket size of [T]anduay rum in the house of the accused and when offended party became intoxicated, accused brought and carried her inside the room and undressed her by removing her ... clothes and panty and accused placed himself on top of her and have sexual intercourse with offended party herein, which acts of the accused had clearly debased, degraded or demeaned the intrinsic worth and dignity of the said minor as a human being.
>
> Contrary to and in Violation of Article 266-A in relation to [Section] 5 (b) of R.A. [No.] 7610.[560]

The second Information reads —

> The undersigned Prosecutor II accuses BIENVINIDO UDANG for the crime of CHILD ABUSE, committed as follows [—]
>
> That in the later part of September 2002, at more or less 9:00 o'clock in the evening, at Lumbia, Cagayan de Oro City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully, feloniously, and sexually abuse one [AAA], 14 [years]. old, minor by committing the following acts, to wit: accused together with his [daughter] Betty Udang, Renate Yana and the offended party [drank] five (5) bottles of pocket size [T]anduay rum in the house of the accused and when offended party became intoxicated, accused brought her inside his room, her [clothing] were removed and then and there accused placed himself on top of her and have sexual intercourse with the offended party herein, which acts of the accused had clearly debased, degraded or demeaned the intrinsic worth and dignity of the said minor as a human being.
>
> Contrary to and in Violation of Article 266-A in relation to [Section] 5 (b) of R.A. [No.] 7610.[561]

The RTC convicted Udang of two counts of Rape under Article 266-A (1) of the Revised Penal Code, and not of sexual abuse under Section 5 (b) of R.A. No. 7610.[562] It reasoned that while the allegations in the first and second Informations satisfied the elements of Rape under the first and third paragraphs of Article 266-A, "the charges can only be one (1) for rape under the first paragraph of Article 266-A because '[an] accused cannot be prosecuted twice

560. *Id.* at 431-32.

561. *Id.* at 432-33.

562. *Udang*, 850 SCRA at 436.

for a single criminal act.'"[563] It imposed the penalty of *reclusion perpetua* for each of the two counts of rape.[564]

It is not clear from the decision of the Supreme Court what the RTC meant exactly when it (the RTC) held that "charges can only be one (1) for rape under the first paragraph of Article 266-A because '[an] accused cannot be prosecuted twice for a single criminal act.'"[565]

By the first and third paragraphs of Article 266-A, the RTC was presumably referring to the manner in which the rape was committed, i.e., "through force, threat, or intimidation" and "by means of fraudulent machination or grave abuse of authority[.]"[566] What the RTC was, therefore, saying or appeared be saying was that it could not convict the accused under both paragraph 1 (a) and 1 (c). However, it referred to a "single act" rather than a "single offense" when it discussed the issue of double jeopardy.

The Court of Appeals affirmed *in toto* the decision of the RTC.[567]

Udang appealed the decision to the Supreme Court.[568] In resolving the appeal, the Supreme Court disagreed with the RTC's conclusion that the crime charged in the two Information was Rape rather than Child Abuse.[569] According to it, "the Informations actually charged Udang with sexual abuse, under Section 5 (b) of Republic Act No. 7610, and not with rape, under Article 266-A (1) of the Revised Penal Code."[570] It then held that the prosecution was able to prove the elements of Child Abuse under R.A. No. 7610 and sentenced the accused to "suffer the penalty of twelve (12) years of *prision mayor* as minimum to seventeen (17) years, four (4) months, and one (1) day of *reclusion temporal* as maximum for each count."[571]

The Supreme Court, however, did not limit the resolution of the appeal to the issue of whether the RTC had convicted the accused of the offense that was actually charged in the Informations. It decided to address the RTC's

563. *Id.* at 436-37.

564. *Id.* at 438.

565. *Id.* at 437.

566. *Id.* at 436 n. 24 (citing REV. PENAL CODE, art. 266-A (as amended)).

567. *Udang*, 850 SCRA at 431.

568. *Id.* at 439.

569. *Id.* at 453.

570. *Id.*

571. *Id.* at 463.

pronouncement on double jeopardy.[572] The Supreme Court took the position that the accused could be charged with *both* Rape and violation of Section 5 (b) of R.A. No. 7610.[573] It compared the elements of both offenses and concluded that the elements were distinct from each other.[574] Its ruling reads —

> However, this Court disagrees with the trial court's ruling that charging Udang with both rape, under Article 266-A (1) of the Revised Penal Code, and sexual abuse, under Section 5 (b) of Republic Act No. 7610, would violate his right against double jeopardy.
>
> The right against double jeopardy is provided in Article III, Section 21 of the Constitution [—]
>
> Section 21. No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.
>
> The first sentence of the provision speaks of 'the same offense,' which this Court has interpreted to mean offenses having identical essential elements. Further, the right against double jeopardy serves as a protection: first, 'against a second prosecution for the same offense after acquittal'; second, 'against a second prosecution for the same offense after conviction'; and, finally, 'against multiple punishments for the same offense.'
>
> Meanwhile, the second sentence of Article III, Section 21 speaks of 'the same act,' which means that this act, punished by a law and an ordinance, may no longer be prosecuted under either if a conviction or acquittal already resulted from a previous prosecution involving the very same act.
>
> For there to be double jeopardy, 'a first jeopardy [must have] attached prior to the second; ... the first jeopardy has been validly terminated; and ... a second jeopardy is for the same offense as that in the first.'
>
> A first jeopardy has attached if: first, there was a 'valid indictment'; second, this indictment was made 'before a competent court'; third, 'after [the accused's] arraignment'; fourth, 'when a valid plea has been entered'; and lastly, 'when the accused was acquitted or convicted, or the case was dismissed or otherwise terminated without his express consent.' Lack of express consent is required because the accused's consent to dismiss the case means that he or she actively prevented the court from proceeding to trial based on merits and rendering a judgment of conviction or acquittal. In other

572. *Id.* at 445.

573. *Udang*, 850 SCRA at 452.

574. *Id.* at 447-48.

words, there would be a waiver of the right against double jeopardy if consent was given by the accused.

To determine the essential elements of both crimes for the purpose of ascertaining whether or not there is double jeopardy in this case, below is a comparison of Article 266-A of the Revised Penal Code punishing rape and Section 5 (b) of Republic Act No. 7610 punishing sexual abuse:

Rape under Article 266-A (1) of the Revised Penal Code	Sexual Abuse under Section 5 (b) of Republic Act No. 7610
Article 266-A. *Rape; When and How Committed.* — Rape is committed — (1) By a man who shall have carnal knowledge of a woman under any of the following circumstances: (a) Through force, threat, or intimidation; (b) When the offended party is deprived of reason or otherwise unconscious; (c) By means of fraudulent machination or grave abuse of authority[.]	SECTION 5. Child Prostitution and Other Sexual Abuse. — Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse. The penalty of [*reclusion temporal*] in its medium period to [*reclusion perpetua*] shall be imposed upon the following: ... (b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse; Provided, That when the victim is under twelve (12) years of age, the perpetrators

	shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: Provided, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period[.]

> The provisions show that rape and sexual abuse are two (2) separate crimes with distinct elements. The 'force, threat, or intimidation' or deprivation of reason or unconsciousness required in Article 266-A (1) of the Revised Penal Code is not the same as the 'coercion or influence' required in Section 5 (b) of Republic Act No. 7610. Consent is immaterial in the crime of sexual abuse because 'the [mere] act of [having] sexual intercourse ... with a child exploited in prostitution or subjected to ... sexual abuse' is already punishable by law.[575]

575. *Id.* at 445-48 (citing PHIL. CONST. art. III, § 21; People v. Relova, 232 Phil. 269, 283 (1987); People v. Dela Torre, 430 Phil. 420, 430 (2002); People v. Cawaling, 355 Phil. 1, 24 (1998); People v. Salico, 84 Phil. 722, 726 (1949); REV. PENAL CODE, art. 266-A (1) & Republic Act No. 7610, § 5 (b)) (emphasis omitted).

As support for its holding that consent is "immaterial" under R.A. No. 7610,[576] The Supreme Court cited the case of *Malto v. People*,[577] where it previously held that —

> Unlike rape, therefore, *consent is immaterial in cases involving violation of Section 5, Article III of* [*R.A. No.*] *7610*. The 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*, an evil that is proscribed.[578]

The confusion arises because of the wording of the two laws. In *Abay* and *Dahilig*, the Supreme Court interpreted the Revised Penal Code as punishing sexual intercourse with a female "through force, threat, or intimidation" (without distinction as to age) and R.A. No. 7610 as punishing sexual intercourse with a child, male or female, 12 years of age or older through "coercion and influence."[579] Thus, under this interpretation, there is an overlap between the two laws when the victim is a female child who is 12 years of age or older but below 18 and where "force, threat, or intimidation" or "coercion and influence" is applied. Given this overlap, the Supreme Court in *Abay* and *Dahilig* held that an accused can be prosecuted and convicted under *either* law but not both.[580]

In *Udang*, citing *Malto*, the Supreme Court held that there is a difference between Rape and Child Abuse because in Rape, consent is a defense.[581] The reason given in *Malto* is that "a child is presumed by law to be incapable of giving rational consent to any lascivious act or sexual intercourse."[582] Thus, the Supreme Court seems to be saying that the Revised Penal Code permits the defense of consent even if the victim is a child (12 years and older), but R.A. No. 7610 does not.

The Supreme Court's ruling in *Malto*, cited in *Udang*, is that "[t]he 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

576. *Udang*, 850 SCRA at 448.

577. Malto v. People, G.R. No. 164733, 533 SCRA 643 (2007).

578. *Udang*, 850 SCRA at 449-50 (citing *Malto*, 533 SCRA at 664).

579. *See Abay*, 580 SCRA at 239-40 & *Dahilig*, 651 SCRA at 789-90.

580. *Id.*

581. *Udang*, 850 SCRA at 448.

582. *Id.* at 450 (citing *Malto*, 533 SCRA at 664).

offense. It is a *malum prohibitum*, an evil that is proscribed."[583] This is significant since, in a later decision, the Supreme Court will expound on its meaning.

On the premise that the elements of Rape and Child Abuse are different, the Supreme Court declared that its ruling in *Abay* must be abandoned.[584]

Setting aside the issue of whether the holding of the Supreme Court on the issue of double jeopardy is mere *obiter dictum*, under what circumstances can an accused be possibly prosecuted, convicted, and punished for violation of both offenses? If an accused did not use force, threat, or intimidation, then he cannot be prosecuted for Rape under the Revised Penal Code since, as held by the Supreme Court, consent is a defense.[585] He can only be punished under R.A. No. 7610 on the premise that consent is not material. The only other possible scenario is where the accused used force, threat, or intimidation in having sexual intercourse with a female victim 12 years of age or older (but below 18 years of age). Can the accused be punished under both the Revised Penal Code and R.A. No. 7610 in that scenario? He can certainly be punished under the Revised Penal Code since, by definition, the sexual intercourse was done with force, threat, or intimidation.[586] But can he be punished under R.A. No. 7610 as well? An argument can, of course, be made that if the presence of consent does not excuse the act of having sexual intercourse with a minor 12 years old and above, then with all the more reason that the accused should be punished if he uses force, threat, or intimidation. But could this have been the intent of Congress?

G. People v. Ejercito

Adding to the confusion is the case of *People v. Ejercito*,[587] decided a mere six months after *Udang*. The Information charged the accused, Francisco Ejercito, with Rape defined and penalized under Article 266-A, in relation to Article 266-B, of the Revised Penal Code, as amended by Republic Act No. 8353, otherwise known as The Anti-Rape Law of 1997.[588]

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583. *Udang*, 850 SCRA at 449-50 (citing *Malto*, 533 SCRA at 664).

584. *Udang*, 850 SCRA at 451.

585. *Id.* at 448.

586. The Anti-Rape Law of 1997, § 2.

587. People v. Ejercito, G.R. No. 229861, July 2, 2018, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64370 (last accessed Nov. 30, 2020).

588. *Id.*

The accusatory portion of the Information reads —

> That on or about the 10th day of October, 2001 at past 7:00 o'clock in the evening, at ... Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design and by means of force and intimidation, did then and there willfully, unlawfully and feloniously lie and succeed in having carnal knowledge with [AAA], a minor, who is only fifteen (15) years old at the time of the commission of the offense against her will and consent and which act demeans the intrinsic worth and dignity of said minor as a human being.
>
> CONTRARY TO LAW.[589]

The RTC found the accused guilty of the crime charged.[590] The CA affirmed the findings of the RTC but modified the penalty imposed on the accused.[591]

The Supreme Court found the appeal to be without merit.[592] However, it held that in modifying the RTC ruling, the CA had erroneously applied the old Rape Law (i.e., Article 335 of the RPC).[593] At the time the subject rape was committed, R.A. No. 8353, which resulted in the new rape provisions of the RPC under Article 266-A in relation to 266-B, had already been enacted.[594]

Again, the Supreme Court did not confine itself to determining whether or not the elements of Article 266-had been proven beyond reasonable doubt by the prosecution (it found that the prosecution did, in fact, meet its burden of proof).[595] It went further and noted that Section 5 (b) of R.A. No. 7610 "equally penalizes those who commit sexual abuse, by means of either (a) sexual intercourse or (b) lascivious conduct, against 'a child exploited in prostitution or subjected to other sexual abuse[.]'"[596]

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589. *Id.*

590. *Id.*

591. *Id.*

592. *Id.*

593. *Ejercito*, G.R. No. 229861.

594. *Id.*

595. *Id.*

596. *Id.* (citing Republic Act No. 7610, § 5 (b)) (emphasis omitted).

Section 5 (b) defines "children exploited in prostitution and other sexual abuse" as follows —

> *Child Prostitution and Other Sexual Abuse.* Children, whether male or female, who for money, profit, or any other consideration or *due to the coercion or influence of any adult*, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.[597]

The phrase "coercion or influence of any adult" overlaps with the phrase "through force, threat, or intimidation" under Article 266-A of the Revised Penal Code.[598]

Since the phrases overlap, facts proving the existence of "coercion or influence" would likewise prove "force, threat, or intimidation." This point was discussed by the Supreme Court *en banc* in *Quimvel v. People*,[599] a case cited by the Supreme Court in *Ejercito*.[600] In *Quimvel*, the Supreme Court held —

> The term '*coercion and influence*' as appearing in the law is broad enough to cover '*force and intimidation*' as used in the Information. To be sure, Black's Law Dictionary defines '*coercion*' as '*compulsion; force; duress*' while '[undue] *influence*' is defined as '*persuasion carried to the point of overpowering the will.*' On the other hand, '*force*' refers to '*constraining power, compulsion; strength directed to an end*' while jurisprudence defines '*intimidation*' as '*unlawful coercion; extortion; duress; putting in fear.*' As can be gleaned, the terms are used almost synonymously. It is then of no moment that the terminologies employed by [R.A. No.] 7610 and by the Information are different. And to dispel any remaining lingering doubt as to their interchangeability, the Court enunciated in *Caballo v. People* that [—]
>
> sexual intercourse or lascivious conduct under the *coercion or influence of any adult exists when there is some form of compulsion equivalent to intimidation which subdues the free exercise of the offended party's free will.* Corollary thereto, Section 2 (g) of the Rules on Child Abuse Cases conveys that sexual abuse involves the element of influence which manifests in a variety of forms. It is defined as [—]

597. *Ejercito*, G.R. No. 229861 (citing Republic Act No. 7610, § 5) (emphasis supplied).

598. *Ejercito*, G.R. No. 229861.

599. Quimvel v. People, G.R. No. 214497, 823 SCRA 192 (2017).

600. *Ejercito*, G.R. No. 229861.

> The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another person to engage in, sexual intercourse or lascivious conduct or the molestation, prostitution, or incest with children.
>
> To note, the term '*influence*' *means the* '*improper use of power or trust in any way that deprives a person of free will and substitutes another's objective*.' Meanwhile, '*coercion*' *is the* '*improper use of … power to compel another to submit to the wishes of one who wields it*.'[601]

Taking note of its ruling in *Quimvel*, the Supreme Court then held —

> Thus, the Court, in *Quimvel*, observed that although the Information therein did not contain the words 'coercion or influence' (as it instead, used the phrase 'through force and intimidation'), the accused may still be convicted under Section 5 (b) of [R.A. No.] 7610. Further, following the rules on the sufficiency of an Information, the Court held that the Information need not even mention the exact phrase 'exploited in prostitution or subjected to other abuse' for the accused to be convicted under Section 5 (b) of [R.A. No.] 7610; it was enough for the Information to have alleged that the offense was committed by means of 'force and intimidation' for the prosecution of an accused for violation of Section 5 (b) of [R.A. No.] 7610 to prosper.[602]

In other words, following the reasoning of *Quimvel*, a person accused of using "force and intimidation" in having sexual intercourse with a female victim who is a minor could be held liable under Section 5 (b) of R.A. No. 7610. In fact, based on the evidence presented by the prosecution in the case of *Ejercito*, the accused could be convicted of violation of Section 5 (b). However, according to the Supreme Court, the accused should be held liable for Rape only.[603] The justification given by the Supreme Court is that R.A. No. 8353, which amended the Revised Penal Code, is a special law (the law which is "more special in nature" as opposed to a general law).[604] Its ruling reads —

> In this case, it has been established that Ejercito committed the act of sexual intercourse against and without the consent of AAA, who was only fifteen (15) years old at that time. As such, she is considered under the law as a child who is 'exploited in prostitution or subjected to other sexual abuse;' hence, Ejercito's act may as well be classified as a violation of Section 5 (b) of [R.A. No.] 7610.

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601. *Id.* (citing *Quimvel*, 823 SCRA at 230-31) (emphasis supplied).

602. *Id.*

603. *Ejercito*, G.R. No. 229861.

604. *Id.* (citing Teves v. Sandiganbayan, 488 Phil. 311 (2004)).

> Between Article 266-A of the RPC, as amended by [R.A. No.] 8353, as afore-discussed and Section 5 (b) of [R.A. No.] 7610, the Court deems it apt to clarify that Ejercito should be convicted under the former. Verily, penal laws are crafted by legislature to punish certain acts, and when two (2) penal laws may both theoretically apply to the same case, then the law which is more special in nature, regardless of the time of enactment, should prevail. In *Teves v. Sandiganbayan* —
>
> It is a rule of statutory construction that where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; *but if there is any conflict, the latter shall prevail regardless of whether it was passed prior to the general statute*. Or where two statutes are of contrary tenor or of different dates but are of equal theoretical application to a particular case, *the one designed therefor specially should prevail over the other.*
>
> After much deliberation, the Court herein observes that [R.A. No.] 8353 amending the RPC should now be uniformly applied in cases involving sexual intercourse committed against minors, and not Section 5 (b) of [R.A. No.] 7610. Indeed, while [R.A. No.] 7610 has been considered as a special law that covers the sexual abuse of minors, [R.A. No.] 8353 has expanded the reach of our already existing rape laws. These existing rape laws should not only pertain to the old Article 335 of the RPC but also to the provision on sexual intercourse under Section 5 (b) of [R.A. No.] 7610 which, applying *Quimvel*'s characterization of a child 'exploited in prostitution or subjected to other abuse,' virtually punishes the rape of a minor.[605]

It then proceeded to discuss why R.A. No. 8353 is "special in nature."[606] The factors taken into account by the Supreme Court in considering Rape under the Revised Penal Code to be special in nature are:

(1) its reclassification from being a crime against chastity to a crime against persons;[607]

(2) it "account[s] for the circumstance of minority under certain peculiar instances" (under Article 266-B, Rape is punishable with death if, *inter alia*, the following circumstances are present: "When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by

605. *Ejercito*, G.R. No. 229861 (citing REV. PENAL CODE, art. 335; Republic Act No. 7610, § 5 (b); & Teves v. Sandiganbayan, 488 Phil. 311, 332 (2004) (emphasis supplied)).

606. *Ejercito*, G.R. No. 229861.

607. *Id.*

> consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim" and "When the victim is a child below seven (7) years old");[608]
>
> (3) the law amending the Revised Penal Code is more recent than R.A. No. 7610;[609] and
>
> (4) it is "the more comprehensive law on rape."[610]

For these reasons, the Supreme Court concluded that "the provisions of [R.A. No.] 8353 amending the RPC ought to prevail over Section 5 (b) of [R.A. No.] 7610 although the latter also penalizes the act of sexual intercourse against a minor."[611]

It then rejected the "focus of evidence" approach that was applied in earlier cases.[612] In several cases, the Supreme Court had held that an accused could be convicted of either Rape *or* violation of R.A. No. 6710 depending on the focus of the prosecution's evidence, i.e., whether or not the focus of the prosecution's evidence was to prove the existence of "coercion and influence" or to prove the existence of "force and intimidation."[613] The Supreme Court in *Ejercito* found this approach to be erroneous.[614] It explained that the "fundamental error" lay in this approach's "[reliance] on evidence appreciation, instead of legal interpretation."[615] The facts may establish violation of both R.A. No. 8353 and R.A. No. 7610, but if so, the question then arises, which law should accused be charged with? The focus of evidence approach is unable to resolve the conflict between R.A. No. 8353 and R.A. No. 7610. The ruling reads —

> However, the mistaken interpretation of *Quimvel* in *Tubillo, et al.* only compounds the fundamental error of the 'focus of evidence' approach, which is to rely on evidence appreciation, instead of legal interpretation. Ultimately, there is no cogent legal basis to resolve the possible conflict between two (2) laws by ascertaining what was the focus of the evidence presented by the prosecution. Presentation of evidence leads to determining what act was

608. *Id.* (citing The Anti-Rape Law of 1997, § 2).

609. *Ejercito*, G.R. No. 229861.

610. *Id.*

611. *Id.*

612. *Id.*

613. *Id.*

614. *Ejercito*, G.R. No. 229861.

615. *Id.*

> committed. Resolving the application of either [R.A. No.] 8353 amending the RPC or Section 5 (b) of [R.A. No.] 7610 already presupposes that evidentiary concerns regarding what act has been committed (i.e., the act of sexual intercourse against a minor) have already been settled. Hence, the Court is only tasked to determine what law should apply based on legal interpretation using the principles of statutory construction. In other words, the Court need not unearth evidentiary concerns as what remains is a pure question of law [—] that is: *in cases when the act of sexual intercourse against a minor has been committed, do we apply* [*R.A. No.*] *8353 amending the RPC or Section 5 (b) of* [*R.A. No.*] *7610?* Herein lies the critical flaw of the 'focus of evidence' approach, which was only compounded by the mistaken reading of *Quimvel* in the cases of *Tubillo, et al.* as above-explained.[616]

The Supreme Court also held that in determining the applicable law, the gravity of the penalty was not controlling.[617] In other words, one does not look at the penalties imposed by R.A. No. 8353 and R.A. No. 6710 and see which between the two laws applies the higher penalty and then apply the law with the higher penalty. The first step is to determine which law applies and then apply the penalty under that law —

> Neither should the conflict between the application of Section 5 (b) of [R.A. No.] 7610 and [R.A. No.] 8353 be resolved based on which law provides a higher penalty against the accused. The superseding scope of [R.A. No.] 8353 should be the sole reason of its prevalence over Section 5 (b) of [R.A. No.] 7610. The higher penalty provided under [R.A. No.] 8353 should not be the moving consideration, given that penalties are merely accessory to the act being punished by a particular law. The term '[p]enalty' is defined as '[p]unishment imposed on a wrongdoer usually in the form of imprisonment or fine'; '[p]unishment imposed by lawful authority upon a person who commits a deliberate or negligent act.' Given its accessory nature, once the proper application of a penal law is determined over another, then the imposition of the penalty attached to that act punished in the prevailing penal law only follows as a matter of course. *In the final analysis, it is the determination of the act being punished together with its attending circumstances* [—] *and not the gravity of the penalty ancillary to that punished act* [—] *which is the key consideration in resolving the conflicting applications of two penal laws.*[618]

616. *Id.* (emphasis supplied).

617. *Id.*

618. *Id.*

In conclusion, the Supreme Court held that

> [b]ased on the foregoing considerations, the Court therefore holds that in instances where an accused is charged and eventually convicted of having sexual intercourse with a minor, the provisions on rape under [R.A. No.] 8353 amending the RPC should prevail over Section 5 (b) of [R.A. No.] 7610. Further, to reiterate, the 'focus of evidence' approach used in the *Tubillo, et al.* rulings had already been abandoned.[619]

Notably, the Supreme Court did not address the issue of double jeopardy. However, it is obvious from its decision that the Supreme Court's unarticulated premise is that an accused cannot be convicted under both R.A. No. 8353 and R.A. No. 7610 — or at least it did not discern an intent on the part of Congress to punish twice the same act of sexual intercourse with a female minor 12 years old and above but below 18. This explains why it devoted a good part of its decision to providing a justification why Rape under R.A. No. 8353 should be the applicable law. To the Supreme Court, it was a given that an accused could not be prosecuted and convicted under both laws. It was presumably inconceivable to the Supreme Court that Congress had intended to twice punish a single act with a single criminal intent, at least in this context. That there were two laws is beyond dispute. But were there two "offenses"? Clearly, the Supreme Court has been struggling with the problem. But what makes the issue difficult to resolve? The difficulty is presumably caused by the fact that the elements of the two laws are essentially identical.[620] The only difference between the two laws is that in one law the rape is committed through "force and intimidation," while in the other law it is committed through "coercion and influence."[621] The issue still stubbornly boils down to one of legislative intent. The Supreme Court is apparently of the mind that it was not the intention of Congress to punish the act of rape of a minor above 12 years old twice.[622]

This can be differentiated from the case of Homicide/Murder and Illegal Possession of Unlicensed Firearm, where there are two discrete acts — the act of possession an unlicensed firearm and the act of killing a person. But even then, the issue of punishment was not that clear until Congress expressed its intent in a later law.

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619. *Id.*

620. The Supreme Court will give a different interpretation to Section 5 (b) in a later case.

621. *See Ejercito*, G.R. No. 229861 (citing 823 SCRA at 230-31).

622. *Ejercito*, G.R. No. 229861

H. People v. Tulagan

Most recently, in *People v. Tulagan*,[623] the Supreme Court, this time sitting *en banc*, resolved, hopefully definitively, the issue of which law to apply in cases where the female victim of rape is 12 years old or older but below 18. Is it the Revised Penal Code? R.A. No 6710? Or both?

In *Tulagan*, the Supreme Court laid down the following rule —

> [W]hen the offended party is 12 years old or below 18 and the charge against the accused is carnal knowledge through 'force, threat or intimidation,' then he will be prosecuted for rape under Article 266-A (1) (a) of the RPC. In contrast, in case of sexual intercourse with a child who is 12 years old or below 18 and who is deemed 'exploited in prostitution or other sexual abuse,' the crime could not be rape under the RPC, because this no longer falls under the concept of statutory rape, and the victim indulged in sexual intercourse either 'for money, profit or any other consideration or due to coercion or influence of any adult, syndicate or group,' which deemed the child as one 'exploited in prostitution or other sexual abuse.'[624]

The Supreme Court then proceeded to "dissect" the meaning and import of the phrase "exploited in prostitution" or "other sexual abuse."[625] There are two parts to this phrase, the first part referring to children "exploited in prostitution," the second part referring to children subjected to "other sexual abuse."[626]

According to the Supreme Court —

> [T]he phrase 'children exploited in prostitution' contemplates four (4) scenarios: (a) a child, whether male or female, who for money, profit or any other consideration, indulges in lascivious conduct; (b) a female child, who for money, profit or any other consideration, indulges in sexual intercourse; (c) a child, whether male or female, who due to the coercion or influence of any adult, syndicate or group, indulges in lascivious conduct; and (d) a

623. People v. Tulagan, G.R. No. 227363, Mar. 12, 2019, *available at* https://sc.judiciary.gov.ph/2825 (last accessed Nov. 30, 2020).

624. *Id.* at 24-25.

625. *Id.* at 25.

626. *Id.*

> female, due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse.[627]

On the other hand, the phrase "other sexual abuse" should be construed in relation to the definitions of "child abuse" under Section 3, Article I of R.A. No. 7610 and "sexual abuse" under Section 2 (g) of the Rules and Regulations on the Reporting and Investigation of Child Abuse Cases.[628] Child abuse refers to "the maltreatment, whether habitual or not, of the child which includes sexual abuse, among other matters."[629] Sexual abuse "includes the employment, use, persuasion, inducement, enticement[,] or coercion of a child to engage in, or assist another person to engage in, sexual intercourse or lascivious conduct or the molestation, prostitution, or incest with children."[630]

On the meaning of the phrase "coercion or influence," which was the root of all the confusion, the Supreme Court, this time around, held that the coercion or influence referred to is the coercion or influence exerted on the child by "any adult, syndicate[,] or group," and not by the person who has sexual intercourse with the child.[631] The person who has sexual intercourse with the child is different from the "adult, syndicate[,] or group" who coerced or influenced the child to enter into prostitution and who are liable under Section 5 (a) of R.A. No. 7610.[632] This is in contrast to the person who has sexual intercourse with the child, who is liable under Section 5 (b).[633]

It is this coercion or influence exerted by the adult, syndicate, or group that pushes the minor into prostitution (and in this sense becomes "exploited in prostitution").[634] Because such a child engages in prostitution, her consent to sexual intercourse with the offender is "voluntary."[635] The ruling reads —

> In *Quimvel*, it was held that the term 'coercion or influence' is broad enough to cover or even synonymous with the term 'force or intimidation.' Nonetheless, it should be emphasized that 'coercion or influence' is used in

627. *Id.*

628. *Id.* (citing Rules and Regulations Implementing Special Protection of Children Against Abuse, Exploitation and Discrimination Act, Republic Act No. 7610, § 2 (g) (1993)).

629. *Tulagan*, G.R. No. 227363, at 25.

630. *Id.*

631. *Id.* at 25-26.

632. *Id.* at 26.

633. *Id.*

634. *Id.* at 27.

635. *Tulagan*, G.R. No. 227363, at 27.

> Section 5 of R.A. No. 7610 to qualify or refer to the means through which 'any adult, syndicate or group' compels a child to indulge in sexual intercourse. On the other hand, the use of 'money, profit or any other consideration' is the other mode by which a child indulges in sexual intercourse, without the participation of 'any adult, syndicate or group.' In other words, 'coercion or influence' of a child to indulge in sexual intercourse is clearly exerted NOT by the offender whose liability is based on Section 5 (b) of R.A. No. 7610 for committing sexual act with a child exploited in prostitution or other sexual abuse. Rather, the 'coercion or influence' is exerted upon the child by 'any adult, syndicate, or group' whose liability is found under Section 5 (a) for engaging in, promoting, facilitating or inducing child prostitution, whereby the sexual intercourse is the necessary consequence of the prostitution.[636]
>
> ...
>
> As can be gleaned above, 'force, threat or intimidation' is the element of rape under the RPC, while 'due to coercion or influence of any adult, syndicate or group' is the operative phrase for a child to be deemed 'exploited in prostitution or other sexual abuse,' which is the element of sexual abuse under Section 5 (b) of R.A. No. 7610. The 'coercion or influence' is not the reason why the child submitted herself to sexual intercourse, but it was utilized in order for the child to become a prostitute. Considering that the child has become a prostitute, the sexual intercourse becomes voluntary and consensual because that is the logical consequence of prostitution as defined under Article 202 of the RPC, as amended by R.A. No. 10158 where the definition of 'prostitute' was retained by the new law[.][637]

The Supreme Court then concluded that an accused who has sexual intercourse with a minor cannot be punished under both laws[638] —

> Therefore, there could be no instance that an Information may charge the same accused with the crime of rape where 'force, threat or intimidation' is the element of the crime under the RPC, and at the same time violation of Section 5 (b) of R.A. No. 7610 where the victim indulged in sexual intercourse because she is exploited in prostitution *either* 'for money, profit or any other consideration *or* due to coercion or influence of any adult, syndicate or group' — the phrase which qualifies a child to be deemed

636. *Id.* at 26.

637. *Id.* at 27 (citing An Act Decriminalizing Vagrancy, Amending for This Purpose Article 202 of Act No. 3815, as Amended, Otherwise Known as The Revised Penal Code, Republic Act No. 10158 (2012)).

638. *Tulagan*, G.R. No. 227363, at 27.

> 'exploited in prostitution or other sexual abuse' as an element of violation of Section 5 (b) of R.A. No. 7610.[639]

It is, in other words, the facts of the case that determine the applicable law. Once the facts are established, there is a correct law that must be applied to it. Congress, therefore, did not intend to give the prosecution the discretion to charge either offense or give the prosecution the authority to prosecute the accused for both offenses.

VII. DEFINING CRIMES

The issue of interpreting the Double Jeopardy Clause is intertwined not only with criminal procedure but with criminal law as well. Does Congress intend to punish a single act multiple times?[640]

Legislative power is vested in Congress.[641] The power of Congress to make laws is plenary[642] —

> Police power is an inherent attribute of sovereignty. It has been defined as the power vested by the Constitution in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and for the subjects of the same. The power is plenary[,] and its scope is vast and pervasive, reaching and justifying measures for public health, public safety, public morals, and the general welfare.[643]

Needless to say, while "plenary," the power to make laws does not include the power to make laws that are repugnant to the Constitution.[644]

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639. *Id.* (emphasis supplied).

640. At some point, of course, the issue becomes an issue of substantive due process, as when the penalty is excessive or draconian (e.g., death to jaywalkers), but that is beyond the scope of this Article.

641. PHIL. CONST. art. VI, § 1.

642. Gancayco v. City Government of Quezon City, G.R. No. 177807, 658 SCRA 853, 863 (2011) (citing MMDA v. Bel-Air Village Association, G.R. No. 135962, 328 SCRA 836, 843-44 (2000)).

643. *Id.*

644. *Id.*

The power to legislate includes "[t]he power to define crimes and prescribe [the] corresponding penalties[.]"[645] In *U.S. v. Pablo*,[646] the Supreme Court held —

> The right of prosecution and punishment for a crime is one of the attributes that by [ ] natural law belongs to the sovereign power instinctively charged by the common will of the members of society to look after, guard[,] and defend the interests of the community, the individual and social rights and the liberties of every citizen[,] and the guaranty of the exercise of his rights.
>
> The power to punish evildoers has never been attacked or challenged, as the necessity for its existence has been recognized even by the most backward peoples. At times the criticism has been made that certain penalties are cruel, barbarous, and atrocious; at others, that they are light and inadequate to the nature and gravity of the offense, but the imposition of punishment is admitted to be just by the whole human race, guided by their natural perception of right and wrong, and even barbarians and savages themselves, who are ignorant of all civilization, are no exception.[647]

Generally, where there is no criminal intent, there is no crime.[648] As held by the Supreme Court in *People v. Pacana*[649] —

> Ordinarily, evil intent must unite with an unlawful act for there to be a crime. *Actus non facit reum, nisi mens sit rea.* There can be no crime when the criminal mind is wanting. Ignorance or mistake as to particular facts, honest and real, will, as a general rule, exempt the doer from criminal responsibility. The exception, of course, is neglect in the discharge of a duty or indifference to consequences, which is equivalent to a criminal intent. The element of malicious intent is supplied by the element of negligence and imprudence.[650]

Acts punished by penal laws can be classified either as *mala in se* or *mala prohibita*.[651] In *mala in se* offenses, which involve "inherently immoral" acts, Congress punishes the criminal intent.[652] In *mala prohibita* cases, Congress

645. People v. Siton, G.R. No. 169364, 600 SCRA 476, 485 (2009).

646. United States v. Pablo, 35 Phil. 94 (1916).

647. *Id.* at 100.

648. People v. Pacana, 47 Phil. 48, 55 (1924).

649. People v. Pacana, 47 Phil. 48 (1924).

650. *Id.* at 55.

651. *See* ABS-CBN Corp. v. Gozon, G.R. No. 195956, 753 SCRA 1, 63-64 (2015) (citing *Dela Torre*, 258 SCRA at 487-88).

652. *ABS-CBN Corp.*, 753 SCRA at 65.

punishes a particular act, regardless of intent.[653] The acts punished under the Revised Penal Code are generally *mala in se*.[654] There must be "a concurrence of freedom, intelligence and intent which together make up the 'criminal mind' behind the 'criminal act.'"[655] The acts punished under special laws are generally *mala prohibita*.[656] "When an act is prohibited by a special law, it is considered injurious to public welfare, and the performance of the prohibited act is the crime itself."[657]

The Revised Penal Code contains a provision on "complex crimes."[658] Article 48 of the RPC provides, "When a single act constitutes two or more crimes, 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."[659]

Article 48 imposes a single penalty for two classes of crimes: (1) *delito compuesto* ("where a single act constitutes two or more grave or less grave felonies"[660]), and (2) *delito complejo* ("when an offense is a necessary means for committing the other"[661]).

> The reason for this benevolent spirit of Article 48 is readily discernible. When two or more crimes are the result of a single act, the offender is deemed, *less* perverse than when he commits said crimes thru separate and distinct acts. Instead of sentencing him for each crime independently from the other, he must suffer the maximum of the penalty for the more serious one, on the assumption that it is less grave than the sum total of the separate penalties for each offense.[662]

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653. *Id.* at 63.

654. People v. Dimalanta, G.R. No. 157039, 440 SCRA 55, 64 (2004) (citing People v. Ojeda, et al., G.R. No. 104238, 430 SCRA 436 (2004)).

655. *Id.*

656. *ABS-CBN Corp.*, 753 SCRA at 63.

657. *Id.* at 65 (citing People v. Lacerna, 344 Phil. 100, 122-23 (1997)).

658. REV. PENAL CODE, art. 48.

659. *Id.*

660. People v. Pineda, G.R. No. L-26222, 20 SCRA 748, 751 (citing CUELLO CALÓN, DERECHO PENAL, TOMO I 635 (1960 ed.)).

661. *Id.*

662. People v. Hernandez, 99 Phil. 515, 543 (1956).

Congress has also created "special complex crimes" or "composite crimes."[663] Examples of these are Robbery with Homicide, Robbery with Rape, Kidnapping with Serious Physical injuries, Kidnapping with Murder or Homicide, and Rape with Homicide.[664] These crimes do not have the same basis as complex crimes under Article 48 of the Revised Penal Code "since they do not consist of a single act giving rise to two or more grave or less grave felonies [compound crimes] nor do they involve an offense being a necessary means to commit another [complex crime proper]."[665] They are composed of two or more offenses but, like complex crimes, only a single penalty is imposed on the composite offenses.[666] The rationale for creating special complex crimes was explained by Justice Jose C. Vitug in his concurring opinion in *People v. Escote, Jr.*[667] as follows —

> Distinct penalties prescribed by law in *special complex* crimes is in recognition of the primacy given to criminal intent over the overt acts that are done to achieve that intent. This conclusion is made implicit in various provisions of the Revised Penal Code. Thus, practically all of the justifying circumstances, as well as the exempting circumstances of accident (paragraph 4, Article 12) and lawful or insuperable cause (paragraph 7, Article 12), are based on the lack of criminal intent. In felonies committed by means of [*dolo*,] as opposed to those committed by means of [*culpa*] (including offenses punished under special laws), criminal intent is primordial and overt acts are considered basically as being mere manifestations of criminal intent. Paragraph 2, Article 4, of the Revised Penal Code places emphasis on 'intent' over effect, as it assigns criminal liability to one who has committed an 'impossible crime,' said person having intended and pursued such intent to commit a felony although, technically, no crime has actually been committed. Article 134 of the same Code, penalizing the crime of rebellion, imposes a distinct penalty, the rebel being moved by a single intent which is to overthrow the existing government, and ignores individual acts committed in the furtherance of such intent.[668]

Not all criminal laws are crafted in the same way. Generally, the Revised Penal Code punishes relatively specific acts. One example is Article 261, which

663. People v. Laog y Ramin, G.R. No. 178321, 658 SCRA 654, 673 (2011).

664. *Id.* (citing People v. Larrañaga, G.R. Nos. 138874-75, 421 SCRA 530 (2004)).

665. *Laog y Ramin*, 658 SCRA at 673.

666. *Id.* at 673-74 (citing *Barros*, 245 SCRA at 328-29).

667. People v. Escote, Jr., G.R. No. 140756, 400 SCRA 603 (2003).

668. *Id.* at 647-48 (J. Vitug, concurring opinion).

punishes "Challenging to a Duel."[669] Another example is Article 253, which punishes "Giving Assistance to Suicide."[670] Some offenses are more broadly defined, such as Estafa under Article 315.[671]

In contrast, some criminal statutes define particular offenses far more broadly. For example, Section 3 (e) and 3 (g) of R.A. No. 3019 provide as follows —

> Section 3. Corrupt practices of public officers. — In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:
>
> ...
>
> (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.
>
> ...
>
> (g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.[672]

In fact, these two provisions have been questioned before the Supreme Court for being vague.

In *Gallego v. Sandiganbayan*, [673] the accused argued that the term "unwarranted" is a "highly imprecise and elastic term which has no common law meaning or settled definition by prior judicial or administrative precedents[.]"[674] The Supreme Court, however, made short shrift of the argument —

> We hold that Section 3 (e) of the Anti-Graft and Corrupt Practices Act does not suffer from the constitutional defect of vagueness. The phrases 'manifest

669. REV. PENAL CODE, art. 261.

670. *Id.* § 253.

671. *Id.* § 315.

672. Anti-Graft and Corrupt Practices Act, § 3 (e) & (g).

673. Gallego v. Sandiganbayan, G.R. No. L-57841, 115 SCRA 793 (1982).

674. *Id.* at 796.

> partiality,' 'evident bad faith[,]' and 'gross inexcusable negligence' merely describe the different modes by which the offense penalized in Section 3 (e) of the statute may be committed, and the use of all these phrases in the same Information does not mean that the indictment charges three distinct offenses.[675]

In *Dans, Jr. v. People*,[676] the Supreme Court similarly disagreed that Section 3 (g) was vague.[677] Its ruling reads —

> Is Section 3 (g), R.A. No. 3019, as amended, c*onstitutional*?
>
> The validity of this provision is being assailed by petitioner Marcos on grounds of vagueness and superfluity. She claims that the phrase 'manifestly and grossly disadvantageous to the government' is vague for it does not set a definite standard by which the court will be guided, thus, leaving it open to human subjectivity.
>
> There is, however, nothing 'vague' about the statute. The assailed provision answers the basic query 'What is the violation?' Anything beyond this, the 'how's' and the 'why's,' are evidentiary matters which the law itself cannot possibly disclose in view of the uniqueness of every case. The 'disadvantage' in this instance is something that still has to be addressed by the State's evidence as the trial progresses. It may be said that the law is intended to be flexible in order to allow the judge a certain latitude in determining if the disadvantage to the government occasioned by the act of a public officer in entering into a particular contract is, indeed, gross and manifest.[678]

While Sections 3 (e) and 3 (g) are, from a constitutional standpoint, not vague, they are indisputably worded broadly.

Because some laws are crafted more broadly than other laws, because they cast a wider net, so to speak, it is inevitable that a particular single act or transaction gets punished more than once. For example, Presidential Decree No. 401 (P.D. No. 401)[679] specifically punishes the theft of electrical meters and wires and of electricity by tampering with electrical meters and jumpers. The same act of theft is likewise incidentally punishable as Theft under Article

675. *Id.* at 796-97.

676. Dans, Jr. v. People, G.R. No. 127073, 285 SCRA 504 (1998).

677. *Id.* at 526.

678. *Id.*

679. Penalizing the Unauthorized Installation of Water, Electrical or Telephone Connections, the Use of Tampered Water or Electrical Meters, and Other Acts, Presidential Decree No. 401 (1974).

308 of the Revised Penal Code.[680] Another example would be the Labor Code,[681] which specifically punishes Illegal Recruitment,[682] but which act may also be incidentally punishable as Estafa under Article 315 of the Revised Penal Code.[683] Another example would be Section 3 (b) of R.A. No. 3019, which specifically punishes the act of "[d]irectly or indirectly requesting or receiving any gift, present, share percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other party, wherein the public officer in his official capacity has to intervene under the law."[684] This act has been held to be also punishable under the relatively more broadly defined offense of Direct Bribery under the Revised Penal Code.[685]

In the interpretation of laws, the intent of the lawmaker controls. The issue, then, that must be addressed is: What is the intention of the lawmaker in passing penal laws that end up punishing a single act impelled by a single intent?

VIII. ANALYSIS

It is Congress that defines an offense and prescribes the penalty for that offense.[686] It is the central thesis of this Article that, in making criminal statutes, Congress has in mind specific acts (whether they be *mala in se* or *mala prohibita*) that it wants punished but which acts are not yet punishable under any existing law.

Going back to the Sandiganbayan case of *People v. Argosino, et al.*, four penal laws were allegedly violated in a single transaction.[687] These laws are: (1) Violation of R.A. No. 7080 (Plunder); (2) Violation of Article 210 of the Revised Penal Code (Direct Bribery); (3) Violation of Section 3 (e) of R.A.

680. REV. PENAL CODE, art. 308.

681. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442 (1974).

682. *Id.* art. 38.

683. REV. PENAL CODE, art. 315.

684. Anti-Graft and Corrupt Practices Act, § 3 (b).

685. REV. PENAL CODE, art. 210.

686. *Siton*, 600 SCRA at 485.

687. *Argosino, et al.*, SB-18-CRM-0240-43, at 1.

No. 3019; and (4) Violation of P.D. No. 46.[688] Three of these laws are "special laws," meaning that they are not punished under the Revised Penal Code.

In making these four laws, Congress had in mind different offenses or, more accurately, different acts that the lawmakers defined as offenses. In the words of the Supreme Court in *Ejercito*, "penal laws are crafted by legislature to punish certain acts[.]"[689] There is no point, after all, in punishing the same act with a second identical law unless the intent is to increase the penalty, in which case Congress can simply amend the original law to increase the penalty rather than make a second essentially identical law imposing another penalty for the same act.

The test of identity of offenses under the Rules is whether an offense necessarily includes another offense or is necessarily included in another offense.[690] To necessarily include an offense or to be necessarily included in an offense presupposes that (1) one offense has at least one more element than the other offense, and (2) the rest of the elements of the two offenses are the same. Thus, if Offense A has elements 1, 2, 3, and 4, and Offense B has elements 1, 2, and 3, then Offense A necessarily includes Offense B or, put another way and which amounts to the same thing, Offense B is necessarily included in Offense A. If Offense A has elements 1, 2, 3, and 4, and Offense B has elements 3, 4, and 5, then the test under the Rules is not met. Each offense has an element which the other law does not have, i.e., Offense A does not have element 5, while Offense B does not have elements 1 and 2.

Do the offenses in the case of *Argosino, et al.* pass this *Blockburger* test?

The elements of Plunder are:

(1) That the offender is a public officer who acts by herself [or himself] or in connivance with members of her [or his] family, relatives by affinity or consanguinity, business associates, subordinates or other persons;

(2) That the offender amasses, accumulates or acquires ill-gotten wealth through a combination or series of the following overt or criminal acts: (a) through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury; (b) by receiving, directly or indirectly, any commission, gift, share, percentage, kickback or any other form of pecuniary benefits from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer; (c) by the illegal or fraudulent

688. *Id.*

689. *Ejercito*, G.R. No. 229861.

690. REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 5.

> conveyance or disposition of assets belonging to the National Government or any of its subdivisions, agencies[,] or instrumentalities of Government [ ]owned or [ ]controlled corporations or their subsidiaries; (d) by obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including the promise of future employment in any business enterprise or undertaking; (e) by establishing agricultural, industrial[,] or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or (f) by taking advantage of official position, authority, relationship, connection[,] or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines; and,
>
> (3) That the aggregate amount or total value of the ill-gotten wealth amassed, accumulated or acquired is at least ₱50,000,000.00.[691]

The elements of Direct Bribery are:

> (1) that the accused is a public officer;
>
> (2) that he [or she] received directly or through another some gift or present, offer[,] or promise;
>
> (3) that such gift, present or promise has been given in consideration of his [or her]commission of some crime, or any act not constituting a crime, or to refrain from doing something which it is his [or her] official duty to do; and
>
> (4) that the crime or act relates to the exercise of his [or her] functions as a public officer.[692]

The elements of violation of Section 3 (e) of R.A. No. 3019 are:

> (1) The accused must be a public officer discharging administrative, judicial[,] or official functions;
>
> (2) He [or she] must have acted with manifest partiality, evident bad faith[,] or gross inexcusable negligence; and
>
> (3) That his [or her] action caused any undue injury to any party, including the [G]overnment, or giving any private party unwarranted benefits, advantage[,] or preference in the discharge of his functions.[693]

691. Macapagal-Arroyo v. People, 797 SCRA 241, 329-30 (2016) (citing *Estrada*, 369 SCRA at 432).

692. Manipon, Jr. v. Sandiganbayan, G.R. No. L-58889, 143 SCRA 267, 273 (1986).

693. Uriarte v. People, G.R. No. 169251, 511 SCRA 471, 486 (2006)

The elements of P.D. No. 46 are:

(1) That the accused is a public official or employee, whether of the national or local governments;[694]

(2) That he [or she] received directly or indirectly any gift, present[,] or other valuable thing on any occasion, including Christmas;[695]

(3) That such gift, present or other valuable thing is given by reason of his [or her] official position, regardless of whether or not the same is for past favor or favors or the giver hopes or expects to receive a favor or better treatment in the future from the public official or employee concerned in the discharge of his [or her] official functions (Included within the prohibition is the throwing of parties or entertainments in honor of the official or employee or his [or her] immediate relatives.).[696]

It seems clear that Plunder necessarily includes Direct Bribery. In fact, in one case, the Supreme Court held that "[a]n examination of the 'overt or criminal acts as described in Section 1 (d)' of R.A. No. 7080 would make the similarity between plunder and bribery even more pronounced since bribery is essentially included among these criminal acts."[697] It seems equally clear that it necessarily includes P.D. No. 46.

Also, Direct Bribery necessarily includes P.D. No. 46. P.D. No. 46 punishes: (1) a public official; (2) who receives a gift; and (3) by reason of his or her office.[698] Direct Bribery punishes (1) a public official; (2) who receives a gift; (3) by reason of his or her office; and (4) in consideration of such gift, performs a criminal act or refrains from performing an official duty.[699] In fact, P.D. No. 46 is, in essence, no different from Indirect Bribery,[700] which is punishable under Article 211 of the Revised Penal Code. Indirect Bribery is committed by "any public officer who shall accept gifts offered to him [or her]by reason of his [or her] office."[701] Thus, the elements of Indirect Bribery are: (1) the accused is a public officer; (2) he or she accepts gifts offered to him

694. P.D. No. 46, s. 1972, para. 1.

695. *Id.*

696. *Id.*

697. Ejercito v. Sandiganbayan, G.R. No. 157294, 509 SCRA 190, 213 (2006).

698. P.D. No. 46, s. 1972.

699. REV. PENAL CODE, art. 210.

700. *Id.* art. 211.

701. *Id.*

or her; and (3) the gifts are given "by reason of his [or her] office."[702] It is obvious that Indirect Bribery is necessarily included in Direct Bribery as the elements of the former are necessarily included in the latter.

It is, of course, easy to come up with "distinctions" between the elements of offenses no matter how superficial or trivial or insignificant the distinctions may be. As observed by Justice Souter in *Dixon*, "[i]f a separate prosecution were permitted for every offense arising out of the same conduct, the government could manipulate the definitions of offenses, creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same criminal conduct."[703] One can thus, for example, argue that under P.D. No. 46, the gift may be given for a hope of some future favor yet to be determined, whereas in Direct Bribery, the gift is in exchange for some definite act to be performed or for the public officer to refrain from performing some act. Or that P.D. No. 46 contemplates the throwing of parties for the relatives of a public officer. But this is all just another way of saying that the laws are not identically worded. The gravamen of the offenses, however, is the same. The act (and evil) that P.D. No. 46 specifically seeks to punish is the giving of gifts to public officers by reason of their office, whether it be given to the public officer directly or whether it be given to him indirectly by throwing a party for his relatives.[704] By this standard (gravamen of the offense or "blameworthy act"), it is clear that P.D. No. 46 is necessarily included in Direct Bribery.

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702. *Id. See also* Pozar v. Court of Appeals, G.R. No. L-62439, 132 SCRA 729 (1984). The Supreme Court held —

> It is well to note and distinguish direct bribery from indirect bribery. In both crimes, the public officer receives gift. While in direct bribery, there is an agreement between the public officer and the giver of the gift or present, in indirect bribery, usually no such agreement exist. In direct bribery, the offender agrees to perform or performs an act or refrains from doing something, because of the gift or promise; in indirect bribery, it is not necessary that the officer should do any particular act or even promise to do an act, as it is enough that he accepts gifts offered to him by reason of his office.

Id.

703. *Dixon*, 509 U.S. at 747.

704. P.D. No. 46, s. 1972.

What is not apparent is whether or not Section 3 (e) of R.A. No. 3019 is necessarily included in Plunder or whether it necessarily includes Direct Bribery and P.D. No. 46. Its elements, given the wording of the law, do not match the elements of Plunder, Direct Bribery, and P.D. No. 46.

To begin with, it must be noted that R.A. No. 3019 contains the following provision: "In addition to acts or omissions of public officers already penalized by existing law, the following [acts] shall constitute corrupt practices of any public officer and are hereby declared to be unlawful[.]"[705] Citing this provision, the Supreme Court has held that

> [o]ne may therefore be charged with violation of [R.A. No.] 3019 in addition to a felony under the Revised Penal Code for the same delictual act, that is, either concurrently or subsequent to being charged with a felony under the Revised Penal Code. There is no double jeopardy if a person is charged simultaneously or successively for violation of Section 3 of [R.A. No.] 3019 and the Revised Penal Code.[706]

Section 3 is an expression of legislative intent to allow the punishment of acts that are likewise punishable under other laws. But is there significance or value in such an expression of intent? Does the absence of such expression of intent in other laws mean that, insofar as those other laws are concerned, an accused should not be punished more than once for a given act? Thus, for example, the Plunder Law does not contain any provision stating that it is in addition to laws punishing a given act. If so, does this mean that the act punishable under the Plunder Law should not be additionally punished under any other law? Assuming this to be the correct interpretation, can this prohibition of punishment under a second law for the same act not be circumvented by also charging a defendant under R.A. No. 3019? Assuming that one cannot be punished both for Plunder and Direct Bribery because neither the Plunder Law nor the Revised Penal Code provides that the penalties of either law may be imposed in addition to the penalties of the other law, one can conceivably be punished under both for Plunder and Direct Bribery *if* one were at the same time charged with and punished under R.A. No. 3019. This is because R.A. No. 3019 states that it is punishing acts "in addition to acts or omissions of public officers already penalized by existing law[.]"[707]

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705. Anti-Graft and Corrupt Practices Act, § 3.

706. Merencillo v. People, G.R. No. 142369, 521 SCRA 31, 43-44 (2007).

707. Anti-Graft and Corrupt Practices Act, § 3.

Moreover, what is the value of a statutory provision stating that the law is penalizing certain acts "in addition to acts or omissions of public officers already penalized by existing law"[708] *if* the Rules provide that a person cannot be punished for offenses necessarily included in the offense charged or for offenses that necessarily include the offense charged?[709] Such a provision should yield to the Rules, especially since the Rules are, in this instance, an interpretation and implementation of a constitutional right in the Bill of Rights. Such an expression of legislative intent can be given effect only if the offenses pass the *Blockburger* test, i.e., if one offense does not necessarily include or is not necessarily included in another offense.

On the issue of whether Section 3 (e) of R.A. No. 3019 necessarily includes or is necessarily included in Plunder, Direct Bribery, or P.D. No. 46, it would seem that its elements are "distinct" from the elements of the other three offenses.

In *Merencillo v. People*,[710] the Supreme Court resolved the issue of whether or not an accused could be charged with and convicted of both Direct Bribery and violation of Section 3 (b) of R.A. No. 3019.[711]

Section 3 (b) punishes the following act by a public officer, "[d]irectly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other party, wherein the public officer in his official capacity has to intervene under the law."[712]

The Supreme Court broke down the elements of Section 3 (b) as follows:

(1) the offender is a public officer;

(2) he requested or received a gift, present, share, percentage[,] or benefit;

(3) he made the request or receipt on behalf of the offender or any other person;

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708. *Id.*

709. REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 5.

710. Merencillo v. People, G.R. No. 142369, 521 SCRA 31 (2007).

711. *Id.* at 43.

712. Anti-Graft and Corrupt Practices Act, § 3 (b).

(4) the request or receipt was made in connection with a contract or transaction with the government[;] and

(5) he has the right to intervene, in an official capacity under the law, in connection with a contract or transaction has the right to intervene.[713]

It then compared these elements to the elements of Direct Bribery, to wit:

(1) the offender is a public officer;

(2) the offender accepts an offer or promise or receives a gift or present by himself or through another;

(3) such offer or promise be accepted or gift or present be received by the public officer with a view to committing some crime, or in consideration of the execution of an act which does not constitute a crime but the act must be unjust, or to refrain from doing something which it is his official duty to do[;]and

(4) the act which the offender agrees to perform or which he executes is connected with the performance of his official duties.[714]

Comparing the two sets of elements, the Supreme Court held that they were dissimilar. Its ruling reads —

> Clearly, the violation of Section 3 (b) of [R.A. No.] 3019 is neither identical nor necessarily inclusive of direct bribery. While they have common elements, not all the essential elements of one offense are included among or form part of those enumerated in the other. Whereas the mere request or demand of a gift, present, share, percentage or benefit is enough to constitute a violation of Section 3 (b) of [R.A. No.] 3019, acceptance of a promise or offer or receipt of a gift or present is required in direct bribery. Moreover, the ambit of Section 3 (b) of [R.A. No.] 3019 is specific. It is limited only to contracts or transactions involving monetary consideration where the public officer has the authority to intervene under the law. Direct bribery, on the other hand, has a wider and more general scope: (a) performance of an act constituting a crime; (b) execution of an unjust act which does not constitute a crime; and (c) agreeing to refrain or refraining from doing an act which is his official duty to do.
>
> Although the two charges against petitioner stemmed from the same transaction, the same act gave rise to two separate and distinct offenses. No double jeopardy attached since there was a variance between the elements of

713. *Merencillo*, 521 SCRA at 45 (citing Chang v. People, G.R. No. 165111, 496 SCRA 321, 331-32 (2006)).

714. *Merencillo*, 521 SCRA at 45-46 (citing Tad-y v. People, G.R. No. 148862, 466 SCRA 474, 493 (2005)).

> the offenses charged. The constitutional protection against double jeopardy proceeds from a second prosecution for the same offense, not for a different one.[715]

The Supreme Court could just as easily have held that the two offenses are identical. For one, the Information for violation of Section 3 (b) alleged that the accused public officer "received" the money.[716] Second, if Direct Bribery has a "wider and more general scope"[717] than Section 3 (b), then it would include Section 3 (b), which is specific.[718]

If one were to follow the logic in *Merencillo*, Plunder would not include Direct Bribery even if the ill-gotten wealth was amassed through bribery, because the Plunder Law enumerates other methods by which ill-gotten wealth can be amassed (e.g., raids on the public treasury).[719] The courts, therefore, should look not just at the law but also at the allegations in the Informations charging the offenses. While it is true that Section 3 (b) of R.A. No. 3019 punishes mere demand or request of a gift,[720] it also punishes receipt of a gift, and receipt was what was in fact alleged in the Information for Section 3 (b).[721] Thus, so long as the allegations in the Information correspond to or are intended to prove an element of an offense, then the courts should consider that particular element when applying the *Blockburger* test, and not elements that are irrelevant to the case (e.g., the element of "request" or "demand" in *Merencillo*).

From the foregoing, the reasonable conclusion is that, at the very least, Plunder, Direct Bribery, and P.D. No. 46 can pass the "necessarily included offense" test under the Rules. However, there is an obstacle to hurdle. In *Loney v. People*, the Supreme Court held —

> On petitioners' claim that the charge for violation of Article 365 of the RPC 'absorbs' the charges for violation of [P.D. No.] 1067, [P.D. No.] 984, and [R.A. No.] 7942, suffice it to say that a *mala in se* felony (such as Reckless Imprudence Resulting in Damage to Property) cannot absorb *mala prohibita* crimes (such as those violating [P.D. No]. 1067, [P.D. No.] 984, and [R.A.

715. *Merencillo*, 521 SCRA at 46 (citing Suero v. People, G.R. No. 156408, 450 SCRA 350, 360 (2005)).

716. *Merencillo*, 521 SCRA at 35.

717. *Id.* at 46.

718. *Id.*

719. Republic Act No. 7080, § 1 (d) (1).

720. Anti-Graft and Corrupt Practices Act, § 3 (b).

721. *See Merencillo*, 521 SCRA at 34-35.

> No.] 7942). What makes the former a felony is criminal intent (*dolo*) or negligence (*culpa*); what makes the latter crimes are the special laws enacting them.[722]

There does not seem to be any reasonable legal basis for this distinction. First of all, the Rules do not distinguish between *mala in se* and *mala prohibita* offenses. It provides without distinction that offenses are considered identical if one necessarily includes the other or is necessarily included in the other.[723] Secondly, *mala in se* crimes are arguably the "greater" crimes since they are crimes committed with malice or evil intent.[724] It is illogical to hold that Direct Bribery, a *mala in se* offense, necessarily includes Indirect Bribery, another *mala in se* offense, but not gift-giving under P.D. No. 46, presumably a *mala prohibita* offense. Offenders who act with criminal intent are let off the hook for the lesser necessarily included offenses but those who actions are not impelled by any malicious motive can be held accountable for the lesser *mala prohibita* offense in addition to the *mala in se* offense. Thirdly, even if one were to assume that malice or *mens rea* is an additional element, that will simply mean that the *malum in se* offense has an additional element compared to the *malum prohibitum* offense and not necessarily that *each* offense has an additional element, which is the requirement under the *Blockburger* test. Thus, if the *mala in se* offense has elements a, b, c, and d, with d representing malice or evil intent, and the *malum prohibitum* offense has elements a, b, and c only, then the *malum prohibitum* offense would be necessarily included in the *mala in se* offense.

Another case that has caused similar mischief is the case of *People v. Quijada*, citing the case of *People v. Jumamoy*. In *Quijada*, the Supreme Court held that "the rule against double jeopardy cannot be invoked as the first is punished by a special law while the second — Murder or Homicide — is punished by the Revised Penal Code."[725] Its ruling reads —

> Coming to the charge of illegal possession of firearms, Section 1 of P.D. No. 1866 penalizes, *inter alia*, the unlawful possession of firearms or ammunition with *reclusion temporal* in its maximum period to *reclusion perpetua*. However, under the second paragraph thereof, the penalty is increased to death if homicide or murder is committed with the use of an unlicensed firearm. *It may thus be loosely said that homicide or murder qualifies the offense because both are circumstances which increase the penalty. It does not, however, follow that the homicide*

722. *Loney*, 482 SCRA at 212.

723. REVISED RULES OF CRIMINAL PROCEDURE, rule 120, § 5.

724. *ABS-CBN Corp.*, 753 SCRA at 65.

725. *Quijada*, 259 SCRA at 219.

> *or murder is absorbed in the offense. If these were to be so, an anomalous absurdity would result whereby a more serious crime defined and penalized under the Revised Penal Code will be absorbed by a statutory offense, one which is merely malum prohibitum. Hence, the killing of a person with the use of an unlicensed firearm may give rise to separate prosecutions for (a) the violation of Section 1 of P.D. No. 1866 and (b) the violation of either Article 248 (Murder) or Article 249 (Homicide) of the Revised Penal Code*. The accused cannot plead one to bar the other; stated otherwise, the rule against double jeopardy cannot be invoked as the first is punished by a special law while the second — Murder or Homicide — is punished by the Revised Penal Code. ... Considering, however, that the imposition of the death penalty is prohibited by the Constitution, the proper imposable penalty would be the penalty next lower in degree, or *reclusion perpetua*.[726]

Jumamoy, in turn, merely lifts verbatim this statement from *People v. Tiozon*, citing *People v. Doriquez*. The ruling in *Jumamoy* reads —

> Coming to the charge of illegal possession of firearms, Section 1 of P.D. No. 1866 penalizes, *inter alia*, the unlawful possession of firearms or ammunition with *reclusion temporal* in its maximum period to *reclusion perpetua*. However, under the second paragraph thereof, the penalty is increased to death if homicide or murder is committed with the use of an unlicensed firearm. It may thus be loosely said that homicide or murder qualifies the offense because both are circumstances which increase the penalty. It does not, however, follow that the homicide or murder is absorbed in the offense. If this were to be so, an anomalous absurdity would result whereby a more serious crime defined and penalized under the Revised Penal Code will be absorbed by a statutory offense, one which is merely *malum prohibitum*. Hence, the killing of a person with the use of an unlicensed firearm may give rise to separate prosecutions for (a) the violation of Section 1 of P.D. No. 1866 and (b) the violation of either Article 248 (Murder) or Article 249 (Homicide) of the Revised Penal Code. The accused cannot plead one to bar the other; stated otherwise, the rule against double jeopardy cannot be invoked as the first is punished by a special law while the second — Murder or Homicide — is punished by the Revised Penal Code. Considering, however, that the imposition of the death penalty is prohibited by the Constitution, the proper imposable penalty would be the penalty next lower in degree, or *reclusion perpetua*.[727]

726. *Id*. at 219-20 (citing *Jumamoy*, 221 SCRA at 347 (citing PHIL. CONST. art. III, § 19 (1))).

727. *Jumamoy*, 221 SCRA at 347 (citing PHIL. CONST. art. III, § 19 (1) & *Tiozon*, 198 SCRA at 379 (citing *Doriquez*, 24 SCRA)).

However, while *People v. Tiozon* does cite *People v. Doriquez*, it cited *Doriquez* as basis for the ruling that "[a] simple act may offend against two (or more) entirely distinct and unrelated provisions of law,"[728] and not for the holding that "the rule against double jeopardy cannot be invoked [as] the first is punished by a special law while the second, [H]omicide or [M]urder, is punished by the Revised Penal Code."[729] The ruling in *Tiozon* reads —

> It may be loosely said that homicide or murder qualifies the offense penalized in said Section 1 because it is a circumstance which increases the penalty. It does not, however, follow that the homicide or murder is absorbed in the offense; otherwise, an anomalous absurdity results whereby a more serious crime defined and penalized in the Revised Penal Code is absorbed by a statutory offense, which is just a *malum prohibitum*. The rationale for the qualification, as implied from the exordium of the decree, is to effectively deter violations of the laws on firearms and to stop the 'upsurge of crimes vitally affecting public order and safety due to the proliferation of illegally possessed and manufactured firearms ... .' In fine then, the killing of a person with the use of an unlicensed firearm may give rise to separate prosecutions for (a) violation of Section 1 of P.D. No. 1866 and (b) violation of either Article 248 (Murder) or Article 249 (Homicide) of the Revised Penal Code. The accused cannot plead one as a bar to the other; or, stated otherwise, the rule against double jeopardy cannot be invoked because the first is punished by a special law while the second, homicide or murder, is punished by the Revised Penal Code.[730]

In [*People v. Doriquez*,] We held —

> It is a cardinal rule that the protection against double jeopardy may be invoked only for the same offense or identical offenses. A simple act may offend against two (or more) entirely distinct and unrelated provisions of law, and if one provision requires proof of an additional fact or element which the other does not, an acquittal or conviction or a dismissal of the Information under one does not bar prosecution under the other. Phrased elsewise, where two different laws (or articles of the same code) define[ ] two crimes, prior jeopardy as to one of them is no obstacle to a prosecution of the other, although both offenses arise from the same facts, if each crime involves some important act which is not an essential element of the other.[731]

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728. *Tiozon*, 198 SCRA at 379 (citing *Doriquez*, 24 SCRA at 171).

729. *Tiozon*, 198 SCRA at 379.

730. *Id.*

731. *Id.* (citing *Doriquez*, 24 SCRA at 171).

The holding at issue is said to have originated from *People v. Doriquez*, yet *Doriquez* involves the violation of two provisions of the Revised Penal Code, namely, alarm and scandal and discharge of firearm,[732] and not a special law and the Revised Penal Code.

Thus, the provenance of this questionable doctrine is not *Doriquez*, but *Tiozon* and *Tiozon* does not cite any basis for its holding. It merely made the gratuitous pronouncement that "[t]he accused cannot plead one as a bar to the other; or, stated otherwise, the rule against double jeopardy cannot be invoked because the first is punished by a special law while the second, homicide or murder, is punished by the Revised Penal Code."[733]

This doctrine does not hold up to scrutiny. There is no reason why the *Blockburger* test cannot be applied where one or more offenses are punishable under special laws and one or more offenses are punishable under the Revised Penal Code. The usual reason given for the dichotomy between special laws and the Revised Penal Code is that acts punishable under special laws are *mala prohibita* while acts punishable under the Revised Penal Code are *mala in se*. This generalization is too sweeping. Special laws may be *mala in se*, depending on the nature of the act that is punished. Conversely, there are offenses in the Revised Penal Code that are *mala prohibita*. Thus, a special offense such as Plunder, which is *mala in se*, can necessarily include a Revised Penal Code offense such as Direct Bribery, which is likewise *mala in se*. There is no reason that it cannot. A reasonable argument can actually be made that P.D. No. 46 is not *malum prohibitum* but *malum in se*. It requires knowledge that the person to whom the gift is being given is a public officer and that it is being given by reason of the public office. In any event, should it matter, for purposes of determining whether an offense is the "same" in the context of the Double Jeopardy Clause, that one offense is *malum prohibitum* and the other *malum in se* if one necessarily includes or is necessarily included in another? There is no basis for creating this artificial dichotomy except for the possible argument that one offense has the element of malice while the other does not. But as discussed, the addition of this element does not necessarily lead to the creation of different offenses under the *Blockburger* rule. Also, it must be remembered that what is involved here is an interpretation of a constitutional right and, therefore, an interpretation that expands the scope of the right should be preferred, provided, of course, that that interpretation is reasonable and promotes the interests of the Double Jeopardy Clause.

732. *Doriquez*, 24 SCRA at 171.

733. *Tiozon*, 198 SCRA at 379.

Having established that the obstacle to subjecting *mala in se* and *mala prohibita* offenses to the *Blockburger* test is not insurmountable (it can be addressed by amending the Rules), the question that has to be answered next is: Does Section 3 (e) of R.A. No. 3019 pass the *Blockburger* test as embodied in our Rules? If one were to look at the elements of Section 3 (e) given the wording of the law, then they do not seem to necessarily include nor do they seem to be necessarily included in Plunder, Direct Bribery, or P.D. No. 46. Section 3 (e) is broadly worded and broadly worded penal statutes can ensnare a whole lot of acts. Thus, the act of giving gifts or something of value to a public officer, which is punishable under Direct Bribery and P.D. No. 46, may likewise conceivably fall in the wide net of Section 3 (e), which punishes a public officer for "[c]ausing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage[,] or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence."[734]

Another way to approach the issue is to look at the Plunder Law and the intent behind it. In *Estrada v. Sandiganbayan (Third Division)*,[735] the Supreme Court held that the Plunder Law "was crafted to avoid the mischief and folly of filing multiple Informations."[736] Its ruling reads —

> A study of the history of R.A. No. 7080 will show that the law was crafted to avoid the mischief and folly of filing multiple Informations. The Anti-Plunder Law was enacted in the aftermath of the Marcos regime where charges of ill-gotten wealth were filed against former President Marcos and his alleged cronies. Government prosecutors found no appropriate law to deal with the multitude and magnitude of the acts allegedly committed by the former President to acquire illegal wealth. They also found that under the then existing laws such as the Anti-Graft and Corrupt Practices Act, the Revised Penal Code and other special laws, the acts involved different transactions, different time and different personalities. Every transaction constituted a separate crime and required a separate case and the over-all conspiracy had to be broken down into several criminal and graft charges. The preparation of multiple Informations was a legal nightmare but eventually, thirty-nine (39) separate and independent cases were filed against practically the same accused before the Sandiganbayan. R.A. No. 7080 or the Anti-Plunder Law was enacted precisely to address this procedural

734. Anti-Graft and Corrupt Practices Act, § 3 (e).

735. Estrada v. Sandiganbayan (Third Division), G.R. No. 148965, 377 SCRA 538 (2002).

736. *Id.* at 554.

> problem. This is pellucid in the Explanatory Note to Senate Bill No. 733, viz[.]:
>
> 'Plunder, a term chosen from other equally apt terminologies like kleptocracy and economic treason, punishes the use of high office for personal enrichment, committed thru a series of acts done not in the public eye but in stealth and secrecy over a period of time, that may involve so many persons, here and abroad, and which touch so many states and territorial units. *The acts and/or omissions sought to be penalized do not involve simple cases of malversation of public funds, bribery, extortion, theft*[,] *and graft but constitute plunder of an entire nation resulting in material damage to the national economy*. The above-described crime does not yet exist in Philippine statute books. Thus, the need to come up with a legislation as a safeguard against the possible recurrence of the depravities of the previous regime and as a deterrent to those with similar inclination to succumb to the corrupting influence of power.'[737]

This ruling implies that the filing of a Plunder case forecloses the filing of all other cases, including R.A. No. 3019.

Assuming that Section 3 (e), when compared with Plunder, Direct Bribery, and P.D. No. 46, passes the *Blockburger* test and assuming further that it was not the intent of Congress to foreclose the filing of cases involving the predicate offenses in addition to Plunder, can Section 3 (e) pass the *Grady* test?

The *Grady* test states that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[738] This test refers to a subsequent prosecution, but there is no reason why it should not be equally applicable to joint or concurrent prosecutions since it is designed to determine whether two offenses are the same.

Assuming that the conduct for which *Argosino, et al.* is prosecuted constitutes an offense punishable under Section 3 (e), the prosecution will be establishing that same conduct as an element of the Plunder, Direct Bribery, and P.D. No. 46 charges. Section 3 (e), therefore, fails the *Grady* test. In fact, in *Serapio v. Sandiganbayan*,[739] the Supreme Court held that "[t]he acts alleged in the Information are not charged as separate offenses but as predicate acts of the crime of plunder" and that "the predicate acts merely constitute acts of

737. *Id.* at 554-55 (citing H.B. No. 22752, explan. n., 8th Cong., Reg. Sess. (1990)) (emphasis supplied).

738. *Grady*, 495 U.S. at 510.

739. Serapio v. Sandiganbayan, G.R. No. 148468, 396 SCRA 443 (2003).

plunder and are not crimes separate and independent of the crime of plunder."[740]

A. Same Evidence Test

The same evidence test permits the filing of a second charge for the same act "unless the evidence required to support the finding of guilt upon one of them would have been sufficient to warrant the same result upon the other."[741] Put another way, the "theory is that if the defendant upon the first indictment could not have been convicted of the offense described in the second, then an acquittal or conviction upon the former is no bar to the latter."[742]

This test also refers to a subsequent charge. However, as pointed out, it is a test that determines whether offenses are the same and, therefore, is relevant to the issue of imposition of multiple punishments for the same offense.

If the evidence presented in the first prosecution is sufficient to convict the accused not only in the first prosecution but also the offense in the second prosecution, the same evidence test bars the filing of the second prosecution on the ground that they are the same offense.

The prosecution in *Argosino, et al.* presented the same evidence in all four cases. Assuming that the court finds the accused guilty in these four cases on the basis of such same evidence, then, under the same evidence test, they will be convicted of the "same" offense.

B. Same Transaction Test

The focus of this test is on the transaction or the intent behind the transaction.[743] The subject of inquiry is "defendant's behavior, rather than the evidence presented or the laws governing the offense."[744] It requires that all offenses arising from the transaction be joined in one trial.[745]

740. *Id.* at 462.

741. English, Jr., *supra* note 52, at 89 (citing *Morey*, 108 Mass. at 434).

742. Margaret Jones, *What Constitutes Double Jeopardy*, 38 J. CRIM. L. & CRIMINOLOGY 379, 383 (1948).

743. English, Jr., *supra* note 52, at 91 (citing Kirchheimer, *supra* note 345, at 534).

744. *Id.* (citing Horack, *supra* note 346, 812 & 814).

745. English, Jr., *supra* note 52, at 91.

In the case of *Argosino, et al.*, the transaction would be the alleged giving of money for the release of the detained foreign nationals.[746] A joint trial is allowed under the Rules and is governed by Rule 119, Section 22, which provides, "Charges for offenses founded on the same facts or forming part of a series of offenses of similar character may be tried jointly at the discretion of the court."[747]

Notably though, the consolidation of "related offenses" is not mandatory.[748] Thus, successive prosecutions for the same transaction is allowed.

There is actually no justification for allowing a second prosecution since Rule 119, Section 19, gives the prosecution an opportunity to file the "proper" Information at any time before judgment.[749] Section 19 provides —

> *When mistake has been made in charging the proper offense.* — When it becomes manifest at any time before judgment that a mistake has been made in charging the proper offense and the accused cannot be convicted of the offense charged or any other offense necessarily included therein, the accused shall not be discharged if there appears good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper Information.[750]

If, in the words of Section 19, it becomes manifest that a mistake has been made in charging the proper offense, the remedy is to file the proper Information.

C. Collateral Estoppel Theory

As held by the U.S. Supreme Court in *Ashe v. Swenson* —

> 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer* ... . As Mr. Justice Holmes put the matter in that case, 'It cannot be that the

746. *Argosino, et al.*, SB-18-CRM-0240-43, at 7.

747. REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 22.

748. *Id.*

749. *Id.* rule 119, § 19.

750. *Id.*

> safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.'[751]

The theory of "collateral estoppel" likewise applies to a subsequent prosecution. An accused is allowed to invoke in a subsequent prosecution a favorable ruling in a previous case on some ultimate fact or facts.[752]

This theory has no application in the case of *Argosino, et al.* since these four cases are being jointly tried. The court trying the consolidated cases will presumably make uniform findings of fact in all four cases.

D. Blameworthy Act Approach

The blameworthy act theory posits that "legislatures think in terms of different blameworthy acts when they think of distinct blameworthiness. Conversely, when the same blameworthy act proves more than one statutory offense, it is likely that the legislature intended to create singular blameworthiness."[753]

Applying this approach to *Argosino, et al.*, the offenses of Direct Bribery and P.D. No. 46 would be considered the same offense since they have a common blameworthy act — giving a gift to a public officer by reason of his or her public office.

On the other hand, Plunder and Section 5 (b) of R.A. No. 3019 would not be considered the same offense nor would Plunder be considered the same offense as Direct Bribery or P.D. No. 46. The blameworthy act of Plunder would be the act of amassing ill-gotten wealth.[754]

As for Section 3 (e), there are two blameworthy acts by public officers. The first one is the act of causing undue injury to any party.[755] The second one is the act of favoring or giving preference to anyone.[756] There seems to be some overlap with the other three offenses. For example, in Direct Bribery, the public officer grants some benefit to the bribe giver. Or in Plunder, it can be argued that there is injury to the Government. However, strictly speaking, the essence of the blameworthy acts under Section 3 (e) is not the same as the essence of the blameworthy acts of the other three offenses.

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751. *Ashe*, 397 U.S. at 443.

752. English, Jr., *supra* note 52, at 92-93.

753. Thomas, III, *supra* note 53, at 1029.

754. Republic Act No. 7080, § 2.

755. Republic Act No. 3019, § 3 (e).

756. *Id.*

E. Suggested Approach

The significance of the various tests can be seen from the fact that the results vary depending on the test that is applied.

This Article is primarily concerned with defining offenses insofar as it relates to the imposition of multiple punishments. Several of the tests that have been applied or proposed focus on the interest of protecting against successive trials. While there is no denying the importance of such an interest, the Author believes that the issue of multiple punishments is of equal importance. The Constitution, after all, speaks of jeopardy of "punishment" for the "same offense."[757]

The Author agrees with the approach adopted by the Supreme Court in resolving the cases involving the issue of Rape under the Revised Penal Code and Child Abuse under Section 5 (b) of R.A. No. 7610. It took several decisions before the Supreme Court had come to settle on which law was the applicable law in cases where the accused has sexual intercourse with a female victim who is 12 years of age and older but below 18. The significance of these cases lies not so much in arriving at the "correct" conclusion (although that is, of course, of utmost importance and *the* bottom line in the resolution of all cases), but in the Supreme Court's attitude in approaching two laws that punished the same act. The Supreme Court could have simply adopted the "mechanical" formula it used in *Udang* (i.e., the *Blockburger* test coupled with the *mala in se* and *mala prohibita* dichotomy).[758] To its credit, however, it took pains to analyze the intent behind the two seemingly overlapping statutes.

It was clear from the start that the Supreme Court had issues with two laws (one the Revised Penal Code, the other a special law) punishing the same act. Except for *Udang*, its starting point was that Congress did not intend to punish the single act of intercourse with a minor of 12 years and older.[759] To be sure, there was uncertainty on its part as to what the applicable law was, but it assumed, absent any legislative indication to the contrary, that there was a correct law. Thus, in *Abay* and in *Dahilig*, conscious of the double jeopardy implications, it took the position that the correct law depended upon the facts of the case: if there was "force, threat or intimidation," then the Revised Penal Code applied; if, on the other hand, there was "coercion or influence," then R.A. No. 7610 applied.[760] Then in *Ejercito*, it rejected the "focus of evidence"

757. PHIL. CONST. art. III, § 21.

758. *See Udang*, 850 SCRA at 450.

759. *Id.*

760. *Abay*, 580 SCRA at 239-40.

approach.[761] It relied on "legal interpretation" rather than on "evidence appreciation."[762]

Several months later, in *Tulagan*, the Supreme Court *en banc* would settle upon an interpretation that would be different from the interpretation in *Ejercito* but which would nonetheless be consistent with its decisions in *Abay*, *Dahilig*, and *Ejercito* that the single act of intercourse was not punishable twice. According to *Tulagan*, if the victim is 12 years and older and if force, threat or intimidation is used in getting her to have sexual intercourse, then the crime is punishable under the Revised Penal Code.[763] If, on the other hand, the victim is a child exploited in prostitution or subjected to other sexual abuse, the person having consensual sex with her is punishable under R.A. No. 7610.[764] Based on the latest interpretation of the Supreme Court in *Tulagan*, sexual intercourse with the minor under R.A. No. 7610 assumes that the sexual intercourse is "consensual" because the minor, already coerced or influenced by some other adult, syndicate, or group to engage in prostitution, has become a prostitute and, therefore, by definition, the "consent" to have sex is "voluntary."[765] The Supreme Court, on this point, could have held that since the minor was coerced or influenced into prostitution by an adult, group, or syndicate, then her consent cannot be voluntary and, therefore, any sexual intercourse with her (a child exploited in prostitution), whether through force or not, amounted to a violation of R.A. No. 7610, a *malum prohibitum* offense where lack of knowledge of the minor's status as a child exploited in prostitution is immaterial. Had it proceeded down this path, then the conclusion that sexual intercourse with such minor using force, threat, or intimidation amounted to violation of both the Revised Penal Code and R.A. No. 7610 would be permitted. But it desisted from taking the path that would lead to imposing multiple punishments on a single act in the absence of a clear legislative intent to the contrary.

Special penal laws are passed presumably because Congress is of the belief that the act it is subjecting to punishment is not covered by the Revised Penal Code or any existing law for that matter. If an act is already punishable under the Revised Penal Code (or any other law), there would be no need to pass a new law. If the intention is to increase the penalty of an existing offense, then

761. *Ejercito*, G.R. No. 229861.

762. *Id.*

763. *Tulagan*, G.R. No. 227363, at 23.

764. *Id.* at 22.

765. *Id.* at 27.

Congress, as mentioned, can and will simply pass a law increasing the penalty for that existing offense. However, as fine a criminal code as the Revised Penal Code is, the life of the law, as has been noted by Oliver Wendell Holmes, Jr., is not logic, but experience.[766] No mind, however brilliant, can anticipate all the acts that need to be punished from now until the end of human civilization. Thus, Congress continues to churn out new laws. What has been said of books by Ecclesiastes may be said of laws — of making many laws there is no end.[767]

Congress passes penal laws to punish acts that are not yet proscribed and punished. Congress passed the Plunder Law because it wanted to punish an act that was not yet punished under the Revised Penal Code. As stated in the Explanatory Note to Senate Bill No. 733, "The above-described crime does not yet exist in Philippine statute books."[768] The same is true with the act of "terrorism." If the offense of terrorism was already in the statute books, there would have been no need to create a new law to punish acts of terrorism.

In passing penal laws, Congress has in mind specific acts it wants to punish. Thus, in passing the Plunder Law, it had in mind the specific act of plunder. It did not have in mind Direct Bribery, or Indirect Bribery or gift-giving on Christmas under P.D. No. 46. The same logic applies to other penal laws.

It is also possible for Congress to pass laws that punish specific acts that, as it turns out, may likewise be punishable under other laws. For example, the intention of Congress in defining illegal recruitment in the Labor Code as a crime is to punish it as Illegal Recruitment. However, it so happened that it is also punishable under the Revised Penal Code.[769] The Author doubts that Congress, in punishing acts that constitute Illegal Recruitment as defined under the Labor Code, was conscious of the fact that the acts it was defining as Illegal Recruitment was punishable or could be punished, depending on the confluence of circumstances, as Estafa under the Revised Penal Code. Because the punishment of the same act was not intended (the legislative intent was to punish illegal recruitment), then the act of recruitment without a license to do so should be punished under the Labor Code only unless there is a provision that expressly authorizes the imposition of additional penalties for violation of other offenses.

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766. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). "The life of the law has not been logic: it has been experience." *Id*.

767. *Ecclesiastes* 12:12 (King James).

768. *Estrada*, 377 SCRA at 555 (citing H.B. No. 22752, explan. n.).

769. *Serrano*, G.R. No. 212630.

There may also be instances where a law already punishes a broad class of acts. For example, the Revised Penal Code penalizes the theft of "personal property."[770] Then comes along P.D. No. 401. The intention of the lawmaker in issuing P.D. No. 401 is to punish specifically the theft of electricity using devices and the theft of electrical wires and meters.[771] It carved out the relatively more specific act of stealing electricity from the general act of theft of personal property. Thus, where the thing stolen is electricity using some device or electrical wires and meters, then the correct law is P.D. No. 401. The accused should not be punished a second time under Article 308 of the Revised Penal Code, contrary to the ruling in *Diaz v. Davao Light and Power Co., Inc.*[772] unless the law expressly says so.

Another example of a law that was passed penalizing an act already punishable under the Revised Penal Code is Republic Act No. 9165 (the Comprehensive Dangerous Drugs Act of 2002 or R.A. No. 9165).[773] The acts of possession and use of prohibited drugs were punishable under the Revised Penal Code.[774] However, Congress saw fit to enact a comprehensive special law that addressed the drug problem. Unlike P.D. No. 401, R.A. No. 9165 contains a provision indicating Congress' awareness of a law (i.e., the Revised Penal Code) punishing the same act. Section 98 of R.A. No. 9165 provides —

> *Limited Applicability of the Revised Penal Code.* [—] Notwithstanding any law, rule or regulation to the contrary, the provisions of the Revised Penal Code (Act No. 3815), as amended, shall not apply to the provisions of this Act, except in the case of minor offenders. Where the offender is a minor, the penalty for acts punishable by life imprisonment to death provided herein shall be *reclusion perpetua* to death.[775]

770. REV. PENAL CODE, art. 308.

771. Presidential Decree No. 401, Series of 1974.

772. Diaz v. Davao Light and Power Co., Inc., G.R. No. 160959, 520 SCRA 481 (2007).

773. An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Republic Act No. 6425, Otherwise Known as the Dangerous Drugs Act of 1972, as Amended, Providing Funds Therefor, and for Other Purposes [Comprehensive Dangerous Drugs Act of 2002], Republic Act No. 9165 (2002).

774. REV. PENAL CODE, arts. 190-94.

775. Comprehensive Dangerous Drugs Act of 2002, § 98.

Another example is R.A. No. 10667 (the Philippine Competition Act),[776] which is a comprehensive special law that establishes a competition framework. It contains the following repealing clause —

> *Repealing Clause*. [—] The following laws, and all other laws, decrees, executive orders[,] and regulations, or part or parts thereof inconsistent with any provision of this Act, are hereby repealed, amended or otherwise modified accordingly:
>
> (a) Article 186 of Act No. 3815, otherwise known as the Revised Penal Code: *Provided*, That violations of Article 186 of the Revised Penal Code committed before the effectivity of this Act may continue to be prosecuted unless the same have been barred by prescription, and subject to the procedure under Section 31 of this Act;
>
> (b) Section 4 of Commonwealth Act No. 138;
>
> (c) Section 43 (u) on Functions of the ERC of Republic Act No. 9136, entitled 'An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes[,]' otherwise known as the 'Electric Power Industry Reform Act of 2001[,]' insofar as the provision thereof is inconsistent with this Act;
>
> (d) Section 24 on Illegal Acts of Price Manipulation and Section 25 on Penalty for Illegal Acts of Price Manipulation of Republic Act No. 9502, entitled 'An Act Providing for Cheaper and Quality Medicines, Amending for the Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6675 or the Generics Act of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes[,]' otherwise known as the 'Universally Accessible Cheaper and Quality Medicines Act of 2008[.]' insofar as the provisions thereof are inconsistent with this Act; and
>
> (e) Executive Order No. 45, Series of 2011, Designating the Department of Justice as the Competition Authority, Department of Justice Circular 005 Series of 2015, and other

776. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

> related issuances, insofar as they are inconsistent with the provisions of this Act.[777]

It is submitted, however, that the absence of an express repeal of existing laws does not give rise to the presumption that such laws will remain effective insofar as the punishable specific acts are concerned. For example, had not R.A. No. 9165 provided for the limited repeal of the relevant provisions of the Revised Penal Code, the legal presumption should be that they no longer apply since they punish the same act of drug possession and use, et al. There should be no implied intent to punish the same act twice. The intent to punish the same act more than once should be express.

The U.S. case of *Missouri v. Hunter*[778] is instructive. In that case, the defendant was charged with robbery in the first degree and armed criminal action.[779]

> Missouri's statute proscribing robbery in the first degree ... provides:
>
> 'Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.'
>
> Mo. Stat. App. ... prescribes the punishment for robbery in the first degree and provides in pertinent part:
>
> 'Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years ... .'[780]

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777. *Id.* § 55.

778. Missouri v. Hunter, 459 U.S. 359 (1983).

779. *Id.* at 361.

780. *Id.* at 361-62 (citing MO. ANN. STAT. APP., § 560.120 (Vernon 1979) (U.S.) & MO. ANN. STAT. APP., § 560.135 (Vernon 1979) (U.S.)).

On the other hand —

> Mo. Stat. App. ... proscribes armed criminal action and provides in pertinent part:
>
> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release[,] or suspended imposition or execution of sentence for a period of three calendar years.[781]

The trial court sentenced the defendant to "concurrent terms of [10] years' imprisonment for the robbery; [ ] 15 years for armed criminal action; and [ ] to a consecutive term of five years' imprisonment for assault [—] for a total of 20 years."[782]

In his appeal to the Missouri Court of Appeals, "respondent claimed that his sentence for both robbery in the first degree and armed criminal action violated the Double Jeopardy Clause[.]"[783] The Missouri Supreme Court denied the State's request for review.[784]

The U.S. Supreme Court vacated the judgment of the Court of Appeals.[785] It held —

> However, we are not bound by the Missouri Supreme Court's legal conclusion that these two statutes violate the Double Jeopardy Clause, and we reject its legal conclusion.
>
> Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule

781. *Id.*

782. *Hunter*, 459 U.S. at 362.

783. *Id.*

784. *Id.* at 363.

785. *Id.*

> only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. *Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.*
>
> *Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end,* and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.[786]

At the very least, then, Congress should expressly make known its intention to punish a single act or transaction cumulatively or multiple times.

An example of a statute that expressly authorizes the multiple punishment of a single act is B.P. Blg. 22, Section 5 of which provides, "[p]rosecution under this Act shall be without prejudice to any liability for violation of any provision of the Revised Penal Code."[787] The following act is punishable under Article 315, 2 (d) of the Revised Penal Code —

> (2) By means of any of the following false pretenses or fraudulent acts executed prior to or simultaneously with the commission of the fraud:
>
> ...
>
> (d) By postdating a check, or issuing a check in payment of an obligation when the offender had no funds in the bank, or his funds deposited therein were not sufficient to cover the amount of the check. The failure of the drawer of the check to deposit the amount necessary to cover his check within three (3) days from receipt of notice from the bank and/or the payee or holder that said check has been dishonored for lack or insufficiency of funds shall be prima facie evidence of deceit constituting false pretense or fraudulent act.[788]

But this express authorization by Congress is circumscribed by the *Blockburger* test reflected in the Rules. In other words, while Congress may express its intention of having an act punished under various laws, the offenses must pass the *Blockburger* test if an accused is to be tried successively or punished multiple times for a single act or transaction.

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786. *Id.* at 368-69 (emphasis supplied).

787. Batas Pambansa Blg. 22, § 5.

788. REV. PENAL CODE, art. 315 (2) (d).

In several cases, the Supreme Court has held that Congress "is presumed to know the existing laws on the subject and not to have enacted inconsistent or conflicting statutes."[789] The Supreme Court makes this presumption because its objective is, as much as possible, to harmonize laws out of respect for a co-equal branch —

> While the two provisions *differ in terms*, neither is this fact sufficient to create repugnance. In order to effect a repeal by implication, the later statute must be so irreconcilably inconsistent and repugnant with the existing law that they cannot be made to reconcile and stand together. The clearest case possible must be made before the inference of implied repeal may be drawn, for inconsistency is never presumed. 'It is necessary, says the court in a case, before such repeal is deemed to exist that it be shown that the statutes or statutory provisions deal with the same subject matter and that the latter be inconsistent with the former. There must be a showing or repugnance clear and convincing in character. The language used in the later statute must be such as to render it irreconcilable with what had been formerly enacted. An inconsistency that falls short of that standard does not suffice.' For it is a well-settled rule of statutory construction that repeals of statutes by implication are not favored. The presumption is against inconsistency or repugnance and, accordingly, against implied repeal. *For the legislature is presumed to know the existing laws on the subject and not to have enacted inconsistent or conflicting statutes*.[790]

This method of statutory construction should not, however, be extended to cases where the issue is whether or not a person should be prosecuted and punished multiple times for a single act or transaction. It would be fallacious to argue that since Congress is presumed to know the existing laws on the subject and that it does not enact inconsistent or conflicting statutes, therefore, by enacting a statute that happens to punish an act that is already punishable under an existing criminal statute, Congress intended for that act to be punished multiple times. It is submitted that, in enacting a criminal statute, the presumption of Congress is that it is punishing an act that is hitherto not punishable under existing laws.

789. Agujetas v. Court of Appeals, G.R. No. 106560, 261 SCRA 17, 35 (1996).

790. *Id.* at 34-35 (emphases supplied).

IX. RECOMMENDATION

The premise of this Article is eloquently summarized in the 1911 case of *U.S. v. Gustilo*, cited by Justice Malcolm in his dissent in *People v. Alvarez*.[791] The ruling reads —

> We are confident that that portion of the Philippine Bill embodying the principle that no person shall be twice put in jeopardy of punishment for the same offense should, in accordance with its letter and spirit, be made to cover as nearly as possible every result which flows from a single criminal act impelled by a single criminal intent. The fact should not be lost sight of that it is the injury to the public which a criminal action seeks to redress, and by such redress to prevent its repetition, and not the injury to individuals. In so far as a single criminal act, impelled by a single criminal intent, in other words, one volition, is divided into separate crimes and punished accordingly, just so far are the spirit of the Philippine Bill and the provisions of article 89 of the Penal Code violated.[792]

Based on the foregoing analysis, and guided by the principle laid down in *U.S. v. Gustilo*, the Author recommends the following:

(1) Assuming *arguendo* that the ruling in *Loney v. People* is more than mere *obiter dictum*, it should be abandoned. There is no sound basis to hold that "a [*malum*] *in se* felony (such as Reckless Imprudence Resulting in Damage to Property) cannot absorb *mala prohibita* crimes (such as those violating [P.D. No.] 1067, [P.D. No.] 984, and [R.A. No.] 7942)."[793]

(2) The Supreme Court should likewise reject the holding in *Quijada*, *Jumamoy*, and *Tiozon* that the rule against double jeopardy cannot be invoked if an act is punishable under a special law and the Revised Penal Code.

To implement the first two recommendations, Rule 117, Section 7 should be amended as follows —

> Section 7. *Former conviction or acquittal; double jeopardy*. — When an accused has been convicted or acquitted, or the case against him dismissed or otherwise terminated without his express consent by a court of competent jurisdiction, upon a valid complaint or Information or other formal charge sufficient in form and substance to sustain a conviction and after the accused had pleaded to the charge, the conviction or acquittal of the accused or the

791. *Alvarez*, 45 Phil. at 481 (J. Malcolm, dissenting opinion).

792. *Id.* at 481-82 (citing *Gustilo*, 19 Phil. at 212).

793. *Loney*, 482 SCRA at 212.

> dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or Information, *regardless whether the offenses are special offenses or offenses punishable under the Revised Penal Code*. (emphasis supplied)

Rule 120, Section 4 should also be correspondingly amended as follows —

> Section 4. *Judgment in case of variance between allegation and proof.* — When there is variance between the offense charged in the complaint or Information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved, *regardless whether the offenses are special offenses or offenses punishable under the Revised Penal Code*. (emphasis supplied)

(3) Offenses founded on the same act or transaction should be mandatorily joined. The State's interest in prosecuting the guilty will still be protected since the Rules allow the prosecution an opportunity to file another Information in substitution of the previous Information. Rule 119, Section 19 provides —

> Section 19. *When mistake has been made in charging the proper offense*. — When it becomes manifest at any time before judgment that a mistake has been made in charging the proper offense and the accused cannot be convicted of the offense charged or any other offense necessarily included therein, the accused shall not be discharged if there appears good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper Information.[794]

Rule 119, Section 22 of the Rules of Criminal Procedure, should, therefore, be amended to make the concurrent or simultaneous filing of related offense mandatory, as follows —

> Section 22. *Consolidation of trials of related offenses*. — Charges for offenses founded on the same facts or forming part of a series of offenses of similar character shall be tried jointly at the discretion of the court. *The filing of subsequent charges founded on the same facts or transaction shall be barred*.

(4) If two or more offenses happen to punish the same act or transaction (e.g., the Chattel Mortgage Law and Estafa in *People v. Alvarez*, or Illegal Recruitment and Estafa in *People v. Serrano*),

794. REVISED RULES OF CRIMINAL PROCEDURE, rule 119, § 19.

the presumption should be that Congress did not intend multiple punishments. The presumption is that the later special law is the "correct" law because it was crafted to target acts not found in the Revised Penal Code or other special laws (e.g., Plunder) or hitherto believed not to be punished under any existing law or to create more comprehensive laws punishing acts already punishable under existing law (e.g. Dangerous Drugs Act of 2002, the Philippine Competition Act) or punish acts that are more specific than the acts that are already punishable under existing law (e.g. P.D. No. 40).

(5) The presumption, however, is a rebuttable one and can be overcome only if the special law expressly provides that its penalties are in addition to penalties imposed in other laws that happen to punish the same act. Thus, if a law such as the Chattel Mortgage Law in *People v. Alvarez* does not expressly provide that the penalties thereunder are in addition to penalties under other laws, then a person who sells the mortgaged property without the consent of the creditor-mortgagee should be punished under the Chattel Mortgage Law *only*.[795] If, on the other hand, the Chattel Mortgage Law contains such an express authorization, then there is no impediment under the Double Jeopardy Clause to additionally punishing that person for Estafa under the Revised Penal Code, provided that the offenses pass the *Blockburger* test. Congress should identify the particular law or laws whose penalties may be cumulated with other laws, as it did in enacting, for example, B.P. Blg. 22, which specifically provides that "Prosecution under this Act shall be without prejudice to any liability for violation of any provision of the Revised Penal Code."[796] There is, of course, nothing to stop the lawmakers from providing that prosecution under a given law shall be without prejudice to any liability for violation of any provision of "any other law," but if they do, they would, in effect, surrender to the courts part of the power to define crimes. Also, a sweeping declaration that a penalty under a given law is without prejudice to the imposition of penalties under "any other law" would

795. It is doubtful that, in enacting the Chattel Mortgage Law, Congress had considered that it could be punishable as Estafa under the Revised Penal Code as well.

796. Batas Pambansa Blg. 22, § 5.

indicate that Congress is not really cognizant of any other law or laws that may actually be implicated by a particular act.

The absence of a repealing clause in a new penal law should not give rise to the presumption that other laws punishing the same act have not been repealed.

(6) Assuming that the new penal law expressly authorizes the imposition of additional penalties prescribed by other already existing laws punishing the same act or offense, these offenses must survive the *Blockburger* test. If not, then these offenses will be deemed the same.

It is only when each of the offenses contains an element which the other does not should multiple punishments be allowed.

Moreover, in applying the *Blockburger* test, there is a need to consider both the elements of the offense vis-à-vis the specific allegations charged in the Informations. In *Merencillo*, the elements that the Supreme Court should have considered with respect to Section 3 (b) were the elements as alleged in the Information for violation of Section 3 (b). In that case, the Supreme Court held that the elements of Section 3 (b) and Direct Bribery are different because one element of Section 3 (b), i.e., a request or demand by a public official of a gift, is not found in Direct Bribery.[797] However, the charge against the accused in *Merencillo* is that he received the gift (money) in an entrapment operation.[798] Receipt of gift is a common element of both Section 3 (b) and Direct Bribery. If the logic in *Merencillo* were upheld, then almost no offense will ever be considered the "same" as another offense since all the prosecution has to do it point to some element found in the law but not found in the actual charge.

(7) Under the approach proposed in this Article, many offenses which the Supreme Court has found to be "different" offenses in various cases will be deemed to be the "same" offense. In order not to disturb what is already firmly settled law and to avoid the confusion that such disturbance will surely engender, these recommendations should be made to apply prospectively to future penal laws.

797. *Merencillo*, 521 SCRA at 46.

798. *Id.* at 34-35.

X. CONCLUSION

There are several ways to construe the words "same offense" in the Double Jeopardy Clause. One way is to construe the words to mean identical offense. Same means same. If the first charge is for Murder, a second charge for Homicide may be filed since Murder and Homicide are not identical offenses. Any challenge to the second charge has to be made on the basis of a constitutional provision other than the Double Jeopardy Clause (e.g., the Due Process Clause). But this interpretation drains the double jeopardy protection of much of its substance. At the other end of the spectrum, "same offense" can be construed to mean same "act." However, this construction cannot be credibly endorsed or defended since "offense" is different from "act" and especially so since the Constitution expressly distinguishes between "offenses" punishable by national laws and an "act" punishable by a national law and a local ordinance. Thus, where an act is punishable under two or more national laws, the accused may not, on the indefensible theory that "offense" and "act" mean the same thing, argue that his or her act can be punished only once.

At present, the test embodied in the Rules of Court is the *Blockburger* test. Under this test, offenses are not the same for double jeopardy purposes if each offense contains an element not found in the other offense. If the offenses fail the *Blockburger* test (i.e., an offense includes or is necessarily included in another offense), then the offenses are the same and, therefore, a person cannot be prosecuted successively or punished twice of this "same" offense. Under U.S. jurisprudence, even if offenses fail the *Blockburger* test, a person may still be subjected to multiple prosecutions and punishments if there is express authorization from Congress to do so.

The approach proposed in this Article differs from the *Blockburger* test in that even offenses that pass the *Blockburger* test are *presumptively* the same offense if they punish the same act or transaction. The premise of this Article is that when Congress passes penal laws, it has a specific act in mind that it wants punished and that which is not yet punishable under existing laws. If it transpires later on that there is incidentally an overlap between the new law and some existing law, then it was just an oversight on the part of Congress as Congress presumably did not intend a particular act to be punished twice. The exception is when, in passing a new law, Congress expressly provides that the penalty thereunder is in addition to penalties provided under existing laws. This exception is subject to the double jeopardy test contained in Rule 117, Section 7, and Rule 120, Section 5.

Furthermore, if the offenses defined by Congress fail the *Blockburger* test, Congress cannot do anything about it. This is contrast to the holding in *Missouri v. Hunter*, where the U.S. Supreme Court held that where two or more statutes authorize the imposition of multiple penalties, then the will of Congress prevails, "regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*[.]"[799] Under the Philippine jurisdiction, Congress cannot override the Rule that embodies the *Blockburger* test since not only is it a procedural rule — which only the Supreme Court has the power to adopt and modify — but it is a procedural rule that interprets and implements a constitutional guarantee, a matter beyond the legislative power of Congress. In other words, even if Congress authorizes the imposition of cumulative penalties, the offenses must still hurdle the *Blockburger* test.

This Article also proposes that the *mala in se* and *mala prohibita* dichotomy be abandoned in applying the *Blockburger* test. There is no basis in reason to automatically conclude that offenses fail the *Blockburger* test simply because one is *malum in se* and one is *malum prohibitum*.

The final proposal of the Article is for the Rules to make mandatory the joining of charges arising from the same facts or transaction.

These proposals better serve the interests protected by the Double Jeopardy Clause. They bar the imposition of multiple punishments not intended by Congress and they prohibit successive trials while at the same time ensuring that the State is given its day in court.

799. *Missouri*, 459 U.S. at 368.