MODERN TREND OF CRIMINAL JUSTICE

As incorporated in the proposed
CODE OF CRIMES

By GUILLERMO B. GUEVARA *

As we all know, crimes and criminals have pre-eminently engaged the attention of rulers and jurists since the early dawn of history. Some 4,000 years ago, King Hammurabi through his "lex taliones" tried to solve the vexing problem of crimes and criminals with the application of the famous formula of "an eye for an eye and a tooth for a tooth."

I believe that all of us agree that the formula did not work, for we know that crimes and criminals have increased in geometrical progression with the population of the world.

Since the "lex taliones" of Hammurabi up to the present, plenty of water passed under the bridge. Scores of theories regarding the justification and purpose of penal laws have been expounded and put into practice; but so far, society as a whole, feels that it is not sufficiently protected against the perennial onslaught of criminals.

It would be too presumptuous of me to engage your attention on the discussion of the merits or demerits of absolute, relative and mixed theories. I shall confine myself to expound, as briefly as possible, the characteristics of the leading schools which now prevail in the juridical world, namely, the Classical School, the Positivist School and the Criminal Politic.

Briefly speaking, the first school or the Classical School, is eminently philosophical, juristic and dogmatic. It attaches more importance to the crime, or to the act, than to the criminal or to the actor itself. For this reason penalty under this theory, should be inflicted in proportion to the magnitude of the damage caused by the criminal.

On the other hand, the Positivist School is eminently realistic and experimental. It considers the crime, not as a mere juridical entity or creation of the law, but rather a social or natural phenomenon. This being the case, the man-criminal, or the delinquent, and not the crime or the act, should be the main concern of the criminal law, under the tenets of this school.

The classicist has chiefly in mind the attainment of retributive justice, through the infliction of punishment or penalty, which they consider as a payment due to society by whomsoever violates the penal law.

The positivist on the other hand, has as principal aim, the social defense, or the defense of society. It is not concerned whether the offense is avenged, or whether the offender receives its due punishment. For the positivists the whole question boils down to whether or not the offender is dangerous or, very likely, will be a menace to society. That is why, instead of the classical penalty or retribution, the positivists have the *security measure.*

The third school or the Criminal Politic, is a happy medium between the above two opposing camps. It believes in short detentive penalty, without prejudice to imposing security measures upon dreadful criminals or socially dangerous persons.

As we all know, the present Revised Penal Code of 1930 is patterned after the classical Spanish Code of 1870, a school of thought conceived originally by Cesare Bonesa, better known as Marquis de Bacarria in 1764, and elevated to the highest degree of scientific perfection by that genial professor of Pissa, the eminent Dr. Francisco Carrara. The essence of this school, as we know, is that crime is a pure and simple fiction of law. In other words, there is no crime unless there is some law defining and punishing it; that criminal responsibility can only be demanded or exacted, so long as the element of imputability exists; and finally, that penalty which is inflicted upon the perpetrators of a crime by way of retribution and moral coercion, must be *proportionate* to the harm or crime committed, not only *quantitatively,* but also *qualitatively.*

When Professor Carrara bewildered the juridical world in 1850 with his scientific classification of penalties into graduated scales, and into different grades and periods, so that one particular kind of crime may only be punished with one specific set of penalties, mathematically measured in terms of years, months and days, very few thought then, perhaps, not even the most stubborn iconoclast,

* Former Member of the Code Commission.

AN APPRAISAL OF THE PROPOSED CODE OF CRIMES

By AMBROSIO PADILLA *

Fellow members of the Bar,

By Executive Order No. 48, the Code Commission was created for the purpose of "revising all existing substantive laws of the Philippines and of codifying them in conformity with the customs, traditions and idiosyncracies of the Filipino people and with modern trends in legislation and the progressive principles of law." The Code Commission submitted a Civil Code project, which, with slight modifications, was approved by Congress as Republic Act No. 386 known as the Civil Code of the Philippines. The same Code Commission submitted its second project — the proposed Code of Crimes, which is intended to substitute for the Revised Penal Code.

It is not my purpose today to discuss our Civil Code, whose provisions I have attempted to expound and clarify in my work on Civil Law. But I intend, with your indulgence, to discuss with you the merits or demerits of the proposed criminal code. The members of the Code Commission, particularly its Chairman, have earnestly advocated for the prompt passage of this new Code, but no legislative action has been taken thereon up to the present. It is, therefore, proper, that the members of the Bar should interest themselves in appraising this new codification, because its enactment into law will vitally affect, favorably or adversely, the peace and order conditions in our country and the apprehension, prosecution and punishment of violators of our penal laws.

Our Revised Penal Code, Act No. 3815 as amended, was revised in 1930 based on the Spanish Penal Code of 1870 and took effect on January 1st, 1932. Our jurisprudence is rich in court decisions applying the provisions of our Revised Penal Code, which seem fully adequate to cope with the various forms of crime and all types of criminals. Dean Roscoe Pound once said: "Law must be stable, but it cannot stand still." We should, therefore, welcome every improvement or advance towards more effective legislation. But any change should be for the *better,* for the Code Commission itself admits that the proposed changes should not be "merely for the sake of innovation." (p. 43 of report). We do not have to stress originality, for the concept of crime, which arises from the evil nature of man, is as old as humanity itself. We need not adopt new "trends and objectives" merely for the sake of being modern, unless they are sound and are in conformity with our own customs and traditions as a people. The Code Commission was entrusted with the duty to *revise* existing laws and codify them, not necessarily *create* new crimes. At the same time, we should not remain stagnant, for adherence to the static may mean not only a refusal to advance but an actual step backwards.

I invite you, therefore, fellow members of the Bar, to discuss with me the *pros* and *cons* of the proposed Code of Crimes to help crystalize legal opinion as to the wisdom of its adoption into, or rejection from, our penal system.

The shift from the classical to the positivist —

The first basic departure from the Revised Penal Code is the shift from the classical or juristic theory of penology to the positivist or realistic theory. Following the classical principle in our present Code, criminal responsibility is founded on the actor's knowledge and free will. The positivist school, however, denies or minimizes the exercise of free volition and considers the criminal as a victim of circumstances which predispose him to crime, for the Code Commission states that "criminality depends mostly on social factors, environment, education, economic conditions, and the inborn or hereditary character of the criminal himself." (p. 22 of report) The classical theory stresses the *objective* standard of crime and imposes a proportionate punishment therefor, but the positivist school considers the deed as secondary and the offender as primary, and provides for means of repression to protect society from the actor — to "forestall the social danger and to achieve social defense" (p. 3 of report), because it takes the view that "crime is essentially a social and natural phenomenon" (p. 3 of report). In other words, the classical view imposes responsibility for an act maliciously perpetrated or negligently performed ,while positivists view the criminal not so much an object

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that there could be any better system than the classical school. Among the confirmed believers in the virtue of the Classical School, were Spanish and Filipino jurists, who, for the last 70 years, have been laboring under the impression that penalty, being retributive in nature, must be exactly proportionate to the harm done, and for that reason, must be prefixed, determined and specific.

But the scientific reputation which the classical school gained was soon shaken in the early 1800 with the publication of a book entitled "Crimes, its Causes and Remedies," written by an Italian physician, Dr. Ceasare Lambrose, wherein, for the first time, the attention of the juridical world was arrested to the existence of a criminal type or delinquent man. It is not my purpose here to make a lenghty exposition and analysis of Dr. Lambrose's book. Suffice it to say, that his ideas kindled the fertile minds of two other Italian masters, Professors Rafael Garofalo and Enrico Ferri, and eventually gave rise to the birth of a new, vigorous and realistic school of thought in criminal science, what is known as the Positivist or experimental school. Thanks to the books of Lambrose on criminal type; to "Criminology" of Professor Garofalo, and to "Criminal Sociology" of Professor Ferri, the juridical world has fallen heir to a precious legacy in the matter of treatment and approach to the eternal problem of crime and criminals. Thanks to these three evangelists of the gospel of Positivism, the juridical world has finally realized that society cannot be defended against the continuous onslaught of criminals by the machine-like applications of pre-fixed penalties, and the excessive use of abstract legal principles. What matters, in our fight against crime and criminals, is the study of the man-criminal himself, the selection of ways and means whereby a criminal would be deprived of an opportunity to commit crime, or if he has already committed any, that he may not be given a chance to repeat his anti-social activities.

Since the gospel of Positivism is now widely spread over Europe and South American countries, and its tenets found expression in the Penal Codes of the majority of the countries in both Continents, the Code Commission felt that it would be recreant of its duties, should it fail to open its eyes to reality, and accept obligingly the benefit of the experience of Europe and America. It is in this thought and spirit that our proposed Code of Crimes has been conceived.

The proposed Code of Crimes does not belong exclusively to any of the two opposing schools. If at all, it belongs to the third school, or to Criminal Politic, being the result of a compromise between the two fundamental and conflicting criteria.

The Code Commission still believes that free will should be the basis of criminal responsibility, instead of the dreadfulness of the offender, as vigorously maintained by the Positivists. For this reason, the proposed Code, like the present Classical Code, declares in Articles 22 and 23, exempt from criminal liability those persons who are deprived of freedom, intelligence or intention. As a necessary consequence of the declaration, the proposed Code had to recognize in Article 24, as sufficient cause for diminishing or mitigating criminal responsibility, any circumstances which can or may hinder the exercise of the free will of the doer.

With regard to the concept of penalty, the Commission has adopted a happy medium between the criterion that penalty is a *punishment* or *retribution* for the wrong done, and the idea that it is a social defense.

The proposed Code, for this reason, represses, with either fine or deprivation of liberty in the form of confinement or imprisonment, the commission of crimes. Death sentence may also be inflicted in extreme cases, as a means of eliminating hopelessly dangerous persons.

To erase as much as possible all traces of punishment, the period of repression, which, will take the place of the penalties of the present Code, has been greatly shortened. The longest period of imprisonment, which is heavy imprisonment, is from 9 to 15 years, while the shortest (the confinement) is from 1 to 14 days.

But, as I have stated, the repressions, be they confinement or imprisonment, are imposed for the sole purpose of satisfying the ends of justice, that is, for ethical reasons. Such repressions surely

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of punishment or retribution but as a patient deserving of social consideration for reformation, to the end that society may be protected. The Code Commission has practically abandoned the classical concept of retributive justice providing for punishment for crime freely executed, and has adopted instead the new theory that repression of crime is "applied for social defense, to forstall social danger, to rehabilitate, cure or educate" the transgressors of criminal law (Art. 34). Should such a shift from the classical to the positivist theory of criminal law be adopted as a sound step forward and as being more in harmony with Filipino customs and traditions? It would be a dangerous theory — to minimize, if not negate, the exercise of free will based on knowledge of the actor that the act committed is a transgression of our penal law. In fact, such a theory would conflict with the stubborn fact of our own experience that a criminal is not a desperate instrument of evil compelled by forces or circumstances beyond his control, but rather that he strays beyond the strict and narrow path of good conduct knowingly and voluntarily. For without knowledge or without free will an actor must be exempt from criminal liability (Art. 12, Revised Penal Code).

Mala in se or mala prohibita —

The proposed Code of Crimes contains 951 articles, as compared with the 367 articles of the Revised Penal Code. The increase in size is due to the considerable number of additional offenses. It has included offenses now punishable under special laws. For example, Title VII dealing with "Crimes Against The People's Will" is covered by our Revised Election Code. The new Code has penalized unfair labor practices (Arts. 506-507) which are covered under Republic Act No. 875, otherwise referred to as the Magna Carta of Labor. It has included "Motor Vehicle Crimes" (Arts. 712-718) which fall under the Revised Motor Vehicle Law (Act No. 3992 as amended). The inquiry arises: Should the penal code include in its provisions all reprehensible acts that should be punished or repressed, or rather should they be limited to inherently wrongful acts which are commonly known as *mala per se*, as distinguished from *mala prohibita?*

The penal code is the basic and fundamental law on crimes. It must, therefore, be stable and should not vary with every changing circumstances, because the acts penalized therein should be limited to evil acts which are such by the very nature of man as decreed by Divine Law and reflected to human reason as the Natural Law. Thus, to kill or to steal are *mala per se* — expressly prohibited by the Ten Commandments. They are inherently wrong at all times, in any place, and under every circumstance. No advance of civilization, no vestige of modernity, can ever justify such inherently evil acts. The proposed Code of Crimes, however, considers that an act, criminal when committed, may subsequently lose "its dangerous or criminal character by reason of a change in the criminal law, or the alteration of the social or political situation" (Art. 15). The reason is that the proposed Code seeks to include offenses subject to special penal laws, for some acts, in themselves colorless, become transgressions of the law because of the peculiar purpose to be attained, dependent on certain prevailing circumstances. Thus, the possession of firearms is regulated by special laws (Sec. 2692, Amd. Code; Com. Act No. 56; Rep. Act No. 4), and penalizes as a crime the illegal possession thereof, to control loose firearms and discourage irresponsible gun-wielders. Similarly, our election law forbids any person to enter a polling precinct with arms, regardless of the intention of the actor — whether or not the arm is intended to be used to coerce or intimidate voters. Likewise, the Motor Vehicle Law penalizes a person who drives without a license. Obviously, however, the act of possessing a firearm, of entering a precinct with arms, or driving a car without a license, as the case may be, do not render said acts intrinsically or inherently wrong. They are only prohibited acts, and such prohibitions will continue as long as the law has an objective to achieve, but such purpose or objective may be lost by a change of circumstances. In such case, the prohibited act would cease to be criminal. The Code Commission should not have included in the proposed Code of Crimes — the basic or fundamental law on crimes — violations of special laws, which are not *mala in se* but only *mala prohibita*.

The proposed Code of Crimes has included many misdemeanors which should be the proper subjects of municipal ordinances. Thus,

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will not protect the community from the nefarious and anti-social activities of certain types of criminals whom the Code classifies as "socially dangerous person." For this type of offenders, the proposed Code reserves, in addition to the conventional repression, the security measures, which consist in the internment of the offender for an indefinite period, in some agricultural colony or labor establishment.

Under the provisions of Article 109 of the proposed Code of Crimes, the above-described security measure may be imposed in two instances: firstly, upon any person who has been sentenced to medium imprisonment or longer (from 3 years up); and secondly, upon any offender, even though sentenced to a shorter term, provided the Court finds in the offender, a "certain morbid disposition, congenital or acquired by habit, which by destroying or enervating the inhibitory control, favors the inclination to commit a crime." (Art. 107).

Under the provisions of the proposed Code, the internment of socially dangerous persons shall not terminate until the courts, upon report of a competent board of psychiatrists and technicians in penology shall be fully convinced that the internee is no longer socially dangerous.

It is believed that an indeterminate security imposed upon hardened or professional criminals will be a far better safeguard to society than the present pre-fixed penalties of our present classical code. With an indefinite internment in a labor establishment or agricultural colony, criminals of the type of Parulan, Dick-a-do, and others, could not have caused havoc to society. It is the considered opinion of the Commission that the security measures of the proposed Code of Crimes, if rightly enforced, will reduce to the minimum the risk of the community from anti-social activities of professional and dangerous criminals.

Another innovation of decidedly Positivistic tendency is the provision of Article 17, in connection with Article 62 of the proposed Code, which confers upon the Court the power to repress, either with the repression one degree lower, or the same repression intended for the *consummated offense*, any frustrated, or attempted crime, proposal to commit an offense, bearing in mind the nature of the crime, the means and ways of the perpetration thereof, the intensity of the criminal intent, the extent of the resulting injury, and the personal antecedents of the actor.

The present criterion of the classical school of *lowering* always by one or two degrees the penalty for the frustrated or attempted crime, without any regard to the personal antecedents of the doer, the nature of the offense, the intensity of criminal intent, etc., does not seem to be sound. Few, if ever, will be convinced, that a hardened and professional criminal who has put into execution all means within his command to rob and murder his victim, but only out of sheer luck of the victim, the bullet missed him, should deserve less condemnation or less repressive measure, than an occasional criminal who happens to consummate the same offense. The right and sensible criterion, therefore, is not to base necessarily upon the degree of the consummation of the offense or the harm done, the repression to be imposed upon a doer, but rather upon the circumstances already mentioned.

Another striking innovation in your proposed Code is the conversion of accessoryship after the fact (*encumbrimiento* in Spanish), into the category of an independent and separate crime. Under our present classical code, as we all know, an accessory after the fact is one who helps in the flight of a murderer, or conceals the body or instrument of a crime, or knowingly hides or receives stolen property. Under the present set-up, the responsibility of an accessory after the fact is subordinated to that of the principal; so that, if the principal is acquitted or not prosecuted, the accessory after the fact, no matter how conclusive is the evidence against him, cannot be punished. The flaw of our present system is self-evident. If the proposed Code of Crimes is finally approved by Congress, the hiding, concealing or receiving of stolen property shall be one kind of crime against property and the abetting in the escape of a criminal, destroying the body or the instruments of the crime, or the wiping out of traces of the same, shall be another kind of crime against the administration of justice. These crimes can be prosecuted independently, and without regard to the prosecution or conviction of the thief, in the case of stolen property, nor of the criminal to whom help was given, in the latter cases.

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social gatherings between 2:00 and 5:00 in the morning (Art. 756), dancing or music (Art. 757), or sale of liquor (Art. 900) between said hours, should be covered by municipal ordinances. Even smoking in a first-class theatre (Art. 921) should not be declared a misdemeanor under the penal code.

The proposed Code of Crimes also penalizes violations of Civil Law provisions which should remain within the realm of Civil Law. In seeking greater protection for family solidarity, it would penalize alienation of affection between the husband and the wife (Art. 616), the disturbance of family relations by any intrigue (Art. 617), collusion for legal separation or annulment of marriage (Art. 619), deprivation of the legitime of compulsory heirs (Art. 626), or refusal to discuss compromise of a civil litigation among members of a family (Art. 635). But not every act which involves a violation or infringement of a civil right should give rise to criminal prosecution, since liability for civil damages would be adequate relief. Art. 624 penalizes a lessor who fails to cancel a lease of his house or building after knowing that the building is being used for prostitution. Art. 852 punishes a lessor who wilfully violates the terms of a lease by refusing or failing to furnish a service or facility agreed upon. Likewise, a lessee who wilfully abandons the premises without first having settled his rental indebtedness to the lessor commits a misdemeanor under Art. 853 which would amount to sanctioning imprisonment for debt. These are purely civil matters which affect the private rights of the contracting parties. Neither the violation by the lessor nor by the lessee should give rise to a criminal offense, unless such violation would constitute a specific crime by itself.

Similar provisions —

There are some provisions which are presented as new, but are essentially a reiteration of the prevailing rule. Thus, when a criminal act is perpetrated by a legal entity which, as a juridical person, can not commit a crime, the persons responsible therefor are the president, manager or director, either as principals or for criminal negligence (Art. 30). Article 178 imposes special subsidiary liability upon employers engaged in any kind of business or industry for the payment of the fine imposed on their employees. This is similar to the subsidiary liability now provided in Art. 103 of the Revised Penal Code. Article 180 imposes solidary liability on principal and accomplices. The same rule is prescribed in Article 110 of the Revised Code. The proposed Code considers accessoryship as a separate crime (p. 13 of report), but the legal effect is the same because the accessory receives a penalty two degrees lower than the principal in a consummated offense. The proposed Code has abolished the concept of quasi-offense, or a crime committed thru negligence. The abolition, however, is more apparent than real, because the same concept remains and is called culpable or without criminal intent, when the injurious or dangerous result takes place in consequence of neglipence, recklessness or lack of skill (Art. 14). Moreover, crime thru negligence is repressed lower by one or two categories prescribed for the intentional crime (p. 28 of report).

Good innovations —

There are, however, some new provisions in the proposed Code which deserve favorable study and adoption.

Art. 445 is a provision against dishonest accumulation of wealth, so that property grossly in excess of the normal and probable earnings of a public official will be forfeited to, and declared property of, the State. This will be an effective deterrent against so much graft and corruption in government and its subsidiary corporations, where public service and the general welfare have been sacrificed for personal material advantages. Art. 823 penalizes nepotism and Art. 824 the evasion of the law against nepotism, which are good provisions in view of the prevalent custom of our officialdom.

Art. 446 limits the provision against self-incrimination and demands the testimony or production of books and papers in an investigation and trial. The same rule is provided in Art. 342 where a person, duly summoned to testify before any court or congressional committee, shall not be excused from testifying or producing documents, although he shall not be prosecuted for any statement or admission he might make or because of such document.

Art. 194 subjects a person who attempts to commit suicide to curative security measures, including detention in a hospital for treatment. This is a reform to Art. 253 of the Revised Penal Code,

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The mechanism of application of penalty or repression has been greatly simplified. The principal repressions consist, as I have already stated, of deprivation of liberty and fine. Death penalty has been preserved, but it can only be imposed in extreme cases. With the limitations imposed by the proposed Code, it can be safely stated that death penalty has been practically abolished.

The deprivation of liberty is classified into: life imprisonment which at most lasts 25 years; heavy imprisonment, from 9 to 15 years; medium imprisonment from 3 to 9 years; light imprisonment from 6 months to 3 years; confinement from 15 days to 6 months; and restraint from 1 to 14 days.

According to the provisions of Article 57, the repression prescribed by the Code shall be imposed upon the principal of the crime. The presence of modifying circumstances in the commission of the crime will have the effect of imposing the repression either in the lower half, or in the upper half, depending upon whether circumstances are mitigating or aggravating. Thus, if the penalty prescribed for the crime is heavy imprisonment (from 9 to 15 years), and there is or there are one or two mitigating circumstances, the judge will have full power to impose any penalty ranging from 9 years and one day to 12 years; and conversely, if there is or there are only one or two aggravating circumstances, the judge can impose anywhere between 12 years and one day to 15 years. If there are no modifying circumstances, or the existing one offsets each other, the court would be justified in imposing the penalty in the neighborhood of 12 years. Moreover, under Article 73 "every divisible repression shall be divided into the upper half and the lower half. Within either half, the Court shall impose that repression which in its sound discretion shall best accomplish the purposes of repression as enunciated in Article 34 of this Code, after considering the nature and number, if any, of the mitigating or aggravating circumstances, and the actor's social and family environment, education, previous conduct, habits, economic condition and other personal factors."

It is thus seen that rather than mathematical sub-division and fractions which characterize the mechanism of the classical school, what the judge will need in the application of the proposed Code, if finally approved, would be profound knowledge of human nature and psychology.

The conditional sentence is another step forward in the proposed Code. Under it, a judge has ample discretion to suspend a sentence of conviction when the accused is a first offender, and the term of the sentence does not exceed one year, provided the accused fully indemnifies the damage, if any, inflicted upon the victim. Should the convict observe good conduct during 5 months, if he does not commit any offense during said period, the sentence shall totally prescribe; otherwise it will be enforced.

If the proposed Code is approved, fines shall have the same effect upon the rich and the poor. It will be truly democratic; unlike what happens under the present set-up, when fine is painless, nay, insensible, as far as the moneyed class is concerned. Fine shall be imposed, not in terms of pesos, but in terms of days of earning. An executive, for instance, with an income of ₱300 a day, who is sentenced, side by side with a laborer earning ₱5 a day, to suffer 5 days of earning each, will suffer exactly the same pinch or burden as the latter; for this ₱1,500 which is the equivalent of his 5 days, has the same weight or value of the ₱25 to the laborer.

In line with the criterion that repression is more of a sanction and social defense than a punishment, the proposed Code has provided for pre-delictual security measure. Under the provision of Article 108, a person may be judicially declared dangerous, and then be subjected to security measures described even if he has not been prosecuted for any specific crime when he shows any symptoms, evidences or manifestations of habitual rowdism and ruffianism. With this provision it is expected that many holdups, kidnappings, and murders can be prevented. The police records and investigations of holdups, kidnappings, and murders invariably show that they have been committed by professional ruffians, police characters or "butañgeros" in local parlance. Because of the absence of a provision regarding predelictual security measures in the present Code, our law enforcement agencies have been absolutely helpless to neutralize the anti-social activities of professional rowdies or "butañgeros," unless they are surprised "infragranti."

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which penalizes a person who assists another to commit suicide but does not prescribe a penalty for the person so attempting.

In view of the difficulty in prosecuting arson suspects, Art. 689 raises a *prima facie* presumption of guilt in some prosecutions for arson. This good provision is not in violation of the presumption of innocence because the Revised Penal Code itself contains *prima facie* presumptions of guilt.

Art. 667 provides for special or additional aggravating circumstances in theft. This is much more satisfactory than the present provision on qualified theft, which limits the enumeration of property to "motor vehicle, mail matter, large cattle, coconuts taken from a plantation or fish taken from a fishpond" (Art. 310, Revised Penal Code).

Innovations subject to criticisms —

There are, however, many new provisions in the proposed Code of Crimes, or changes advocated, which deserve careful study and scrutiny.

(a) *Attemptcd vs. Frustrated —*

The new Code proposes to abolish the distinction between attempted and frustrated crimes (Art. 6, Revised Penal Code). On the other hand, it imposes repression upon the principal of an attempted crime, or upon the conspirators, or upon the proponent of a crime (Art. 62). Under the Revised Penal Code conspiracy and proposal to commit a felony are not punishable, except in specific cases where the law specially provides a penalty (Art. 8, R.P.C.). There seems to be no valid reason for the elimination of the different stages of execution, for the differences between consummated, frustrated and attempted (Art. 6, R.P.C.) are clear and real. It is true that in crimes like bribery, which is consummated by mere agreement, there is no frustrated stage; and in crimes like abduction, adultery or arson, the distinction between frustrated and attempted is rather difficult. But such difficulty which obtains only in few particular felonies would not justify total abolition, for, certainly, an offender who merely commences the commission of a felony directly by overt acts, and does not perform all the acts of execution should not be held to the same degree or responsibility as the offender who performs all the acts of execution which should produce the felony as a consequence (Art. 6, R.P.C.). Moreover, why should conspiracy and proposal be made punishable when the offenders or offender have not translated their intention into positive acts falling within the purview of the penal law? While the moral law does not wait for external acts and seeks to control man's innermost thoughts as violative of the moral code, the same standard can not be applied to felonies falling under our penal laws. Again, we can not rely on the subjective standard but must apply the objective test. Even the present law on impossible crime (Art. 4, par. 2, R.P.C.) is limited to the performance of an act which would be an offense against persons or property.

(b) *Socially dangerous without committing specific crime —*

Article 561 of the proposed Code is a strange provision. For although a person may not have committed any specific crime, he could be declared socially dangerous and be subject to curative security measures and may therefore be confined or hospitalized until such time as he is no longer dangerous to society (Art. 562). Article 108 likewise provides that a person, even if he has not been prosecuted for a specific crime, may be subjected to detentive security measures (Art. 114), when he shows any symptoms, evidences or manifestations of habitual rowdyism or ruffianism (Art. 209). If the Code Commission recognizes the basic principle of *nulla poena sine lege*, why should a person be deprived of his liberty and subjected to curative or detentive security measures on vague and uncertain manifestations that he may be socially dangerous, if he has not in fact performed an overt act constituting a specific crime?

The proposed Code, following its purpose of repression, which is for social defense, to forestall social danger against possible transgressors of criminal law (Art. 34), considers the "actor's social and family environment, education, previous conduct, habits, economic condition and other personal factors" (Art. 73), and would impose detentive security measures which "shall last until the court has pronounced that the subject is no longer socially dangerous" (Art. 114). Hence, the Code authorizes indefinite detention even for gun-wielders or rowdies (Arts. 108 and 209). And even if a convict has already served the maximum of his term of imprisonment, he may not be

released if the court should declare that he is still socially dangerous. Too much discretion is given the trial court. In fact, in the imposition of the terms of repression, which should really be terms of imprisonment, the proposed Code does not follow the objective, though mathematical, proportion between the felony and its penalty as aggravated or mitigated by circumstances in the Revised Penal Code, but leaves a greater degree of latitude to judicial discretion. If we must curb or lessen judicial abuse of discretion, we should limit the extent of such discretion. If the standards are not objective but more subjective, there can always be an apparent justification for unequal, if not arbitrary, discrimination among accused persons similarly situated.

If an accused, after a first offense, is declared no longer socially dangerous, we find difficulty in explaining the provision on habitual criminal (Art. 67); and more so, a professional criminal (Art. 68) for, if after his first conviction he is not capable of reformation but continues to be a threat to the State and the public, he should then suffer indefinite confinement. But how can judicial discretion determine whether a person has been reformed and is no longer a danger to society, or that he still constitutes a menace to the public, if he remains under confinement?

(c) *Neither hero nor criminal* —

Art. 804 penalizes as a misdemeanor against the public administration the refusal of any person to aid an officer of the law in the arrest of any lawbreaker, or in the maintenance of peace and order. To the same effect is Art. 810, No. 1, which punishes a person who fails to render assistance in case of a calamity or misfortune, like earthquake, fire or inundation. It is praiseworthy to inculcate in our people higher concepts of civic-mindedness. We extol to the heights of heroism a person who, in disregard of his own self, serves the community specially in times of stress. But the vast majority of the people can not be expected to be heroes. And if an ordinary mortal, with feet of clay, can not rise to the extraordinary demands of community service, such as in the arrest of a lawbreaker or in putting out a fire, why should his failure to act, his indifference, or if you wish, his cowardice, be branded as a criminal offense? That was the same error committed by some Filipinos in the United States who were beyond the clutches of the Japanese oppressor, when, after liberation, as self-proclaimed heroes, they accused their brothers in occupied Philippines, particularly the occupation leaders, of treason just because the latter did not defy the Japanese invaders by sacrificing their lives, but rather pretended to cooperate for national survival. One per cent of the population may have been heroic; another per cent may have been inclined to treason by bartering their birthrights for selfish advantages; but ninety-eight per cent were neither heroes nor traitors. They were just plain mortals subject to human weaknesses and frailties. Certainly, a man who can not rise as a hero should not be condemned as a criminal.

(d) *Criticism of the State or civil institution* —

Art. 324 penalizes under sedition any priest or minister who shall utter or write words derogatory to the authority of the State, or shall attack civil marriage, the public school, or any similar civil institution established by the State. Art. 423 penalizes any priest or minister who, in any manner, violates the principles of separation between Church and State. Any school professor or teacher who shall refuse to use textbooks or other books prescribed by the Government (Art. 933) commits a misdemeanor against good customs. These provisions would make of the State and its officials infallible, beyond the scope of free speech and constructive criticism. This would be a step backwards glorifying the erroneous assumption that the "king can do no wrong" and reviving the obnoxious crime then known as *"les majeste"*. It would be contrary to the accepted principle that the State must promote the general welfare, and if it should fail or falter in that sacred trust, it becomes not only the right but the duty of a citizen to protect his inalienable rights, which antedate the State. Likewise, the Church is dedicated to the salvation of human souls and, within the exercise of religious freedom, it can advocate its religious doctrines and principles, even if they contravene some policies of the State. Thus, if the public schools become godless institutions, as, when contrary to the constitutional provision guaranteeing optional religious instruction, the holding of religiouss classes is prevented or discouraged, the priest and ministers would be perfectly justified in their sermons and writings to advocate a change in the conduct of such civil institutions. There must be liberty under the law, and the scope of the exercise of such liberties or speech or of the press can not exclude the State and its political institutions. And such free exercise of the rights of free men should not fall under the penal sanction.

(e) *Misfeasance by judicial officers — appeal by State in criminal cases* —

Similar to the provisions on malfeasance and misfeasance in office by judges and prosecutors (Arts. 204-208, R.P.C.), the proposed Code penalizes a judge who fails, within the time prescribed by law or regulations, to try, hear, or dispose of a case or proceeding (Art. 374); or who shall require a manifestly excessive bail for the temporary release of the accused (Art. 402); a judicial officer who, with abuse of discretion, impairs or denies the rights of the accused (Art. 413); any judge who shall maliciously render an unjust judgment, order or resolution (Art. 454). These provisions are praiseworthy, because they are designed to protect an accused from the arbitrary exercise of judicial power, but like the provisions of the present Penal Code (Arts. 204-208), they are dormant and inert provisions, because it is very hard to prove malice on the part of the judge who renders an unjust judgment or interlocutory order. While members of the Bar should not countenance the continuance in office of a judicial officer who, contrary to his oath, does not render decisions in accordance with the law and the evidence, without fear or favor, still that sad situation exists. And it is more so in criminal cases, where no appeal lies against a judgment of acquittal or dismissal, even on the ground that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. Once the prosecuting fiscal moves for dismissal after the accused has pleaded, and without the latter's consent, or a judgment of acquittal is rendered by the court after judicial proceedings, the State, including the offended party, is rendered powerless to have a review of such judgment, because the judicial interpretation to the double jeopardy clause in the Constitution has rendered such a review by way of appeal impossible. That ruling was based on the majority decision in the case of Kepner vs. U.S., 195 U.S. 100; 11 Phil. 669. Decisions previous to that 5 to 4 decision in the Kepner case had unanimously adhered to the sound view that the provision against double jeopardy (see Art. 414) does not preclude an appeal by the Government from a judgment of acquittal, for while jeopardy may have attached, it has not terminated — the appeal is not a new or separate proceeding. The greatest restraint against arbitrary power by inferior courts is the exposure of their errors on appeal. To give finality to an order of dismissal or acquittal by a trial court is to stamp it with some semblance of infallibility. If the trial had been infected with error adverse to the accused, he has a right to purge the vicious taint. Why should not a reciprocal privilege be granted the State so that the discretion of the trial judge may neither be arbitrary nor oppressive?

(f) *Stricter rules of morality* —

The new Code "advocates more strict rules of morality" and proposes "more severe and more rigid standards of morality and good conduct" (p. 44 of report). It seeks to establish "the single standard of morality" (p.46) among spouses. Thus, Art. 568 provides for adultery not only by a married woman having intercourse with a man not her husband, but also by a married man who has one sexual intercourse with a woman not his wife. Likewise, the three modes of committing concubinage (Art. 334, R.P.C.) are made applicable to a wife (Art. 569, No. 2). A single standard of morality between husband and wife may be desirable in the moral order, but these new provisions are hardly in accord with human experience or human nature. One act of infidelity on the part of the husband can not cause as much havoc as an act of infidelity on the part of the wife.

Art. 572 of the proposed Code considers as a crime the act of any unmarried man and woman of living together under the same roof, regardless of scandal. The birth, therefore, of a natural child would be conclusive proof of the commission of this offense. *A fortiori*, the birth of an illegitimate child would be convincing evidence that his father, as a married man, committed several acts of adultery. And yet, the same Code Commission inserted in the new Civil Code the substantial change of granting illegitimate children successional rights as compulsory heirs.

Art. 871 penalizes a person who marries without obtaining a

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The above provisions are the best answer to the persistent clamor of the community for preventive measures against the imminent and probable onslaught of professional gangsters. After all an ounce of prevention is worth more than a pound of cure.

Another striking innovation of the proposed Code is the extra-territorial effect given to its provisions. Our present concept of criminal law is exceedingly provincial. With the exception of crimes committed on board our ships and men of war, while navigating on high seas or on foreign territory, and crimes committed by public officials abroad in connection with the performance of their official duties, or falsification and forgery of our securities and coins, the provisions of our present Code are effective only within the Philippine Republic. Under the proposed Code, any serious crime committed abroad by nationals or even by foreigners when the victim is a national or the State, may be prosecuted here under certain conditions.

These are the salient features of the ground work of the new Code. The catalog of specific crimes has been greatly enriched so as to cover all conceivable forms of criminality and immorality. Suffice it to say that the proposed Code is 3 times longer than the present one.

It would be too presumptuous of anybody to claim that an ideal or perfect code can be drafted. As I said from the beginning, the civilized world has been trying to produce for the last four thousand years some penal code which would deal a death blow to crime and criminals. But little or no progress at all has been achieved to obtain the desired goal.

I do not, I cannot claim, that the proposed Code would serve the purpose of a miraculous panacea to all of our social and moral ills. But I venture to say in all modesty that it tries to embody the most progressive principles of the penal science.

The bill of rights in our Constitution as well as in the Federal Constitution of the United States; and even the Magna Carta of the human rights, the famous Declaration of the Rights of Men proclaimed by the French Revolution, are all wonderful, but onesided, documents. The authors and framers of these immortal documents have only specialized and endeavored to undertake the defense of the rights of men, the rights of individual persons; but none of them has given serious thought to the defense of the rights of society. The proposed Code of Crimes, submitted to your consideration, is an endeavor to fill the gap.

The Committee, I am sure, will find, after a mature consideration of the Book I of the proposed Code, that, if the same is approved, society will in the future find itself on an equal footing with the individual person, as far as protection of the rights are concerned.

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certificate from the health authorities that he is not suffering from any of the diseases therein mentioned, such as tuberculosis, cholera or dysentery. This article makes marriage not only difficult but also as constituting an offense. The previous article (Art. 572) makes cohabitation without marriage likewise an offense. Although eugenics may justify the postponement of marriage when one of the parties is not physically fit, a marriage ceremony should never be made a penal offense, because marriage is not only a social institution but a divine sacrament, which the State may perhaps regulate but can not control, much less penalize.

(g) *Death by spouse under exceptional circumstances* —

Art. 247 of the Revised Penal Code is practically an exempting circumstance for any spouse who surprises the other in the act of committing sexual intercourse with another. Art. 185 of the proposed Code would change the principle and provide for a repression with imprisonment, on the ground that "only God, and in extreme cases the State, may dispose of human life" (p. 59 of report). Verily, no man but only God has the right over life and death, but when an offender commits a grievous act of aggression, such as an attack on one's life or against family honor, the killing of the aggressor is justified, because the offender has thus forfeited his right to his own life. Otherwise, we would have no basis for the justifying circumstances of self-defense, defense of relative and of stranger (Art. 11, pars. 1, 2 and 3, R.P.C.). The new Code wants to give greater protection to family solidarity and yet it would deprive the spouse of his or her right, under exceptional circumstances, to kill the very intruder who has assaulted and undermined the sacred foundation of family solidarity.

The sacred respect for human life which the proposed Code professes is not found in Art. 193 on mercy killing, which practically allows a person to cause the death of another at the latter's request through mercy or pity. Neither is human life or personality upheld under Art. 203, which allows abortion of the foetus to save the life of the mother.

The proposed Code has made the penal law so strict that it has risen to the level of a *moral* code. And yet, some of its provisions have relaxed the present rules. Thus, malversation (Art. 217, R.P.C.) includes under the concept of public funds Red Cross, Anti-Tuberculosis and Boy Scout funds, and such funds are extended to property attached, seized or deposited by public authority even if such property belongs to a private individual (Art. 222, R.P.C.). Art. 444 of the proposed Code, however, provides that money or property collected or raised by public voluntary contribution for any civic, charitable, religious, educational, political, or recreational purpose is not deemed or included as public funds or property. Why the change? Likewise, the law on treason (Art. 114, R.P.C.) requires evidence based on the testimony of at least two witnesses to the same overt act. The new Code proposes to relax the rule by inserting the phrase "or different overt acts", and the reason given is that the present rule makes it difficult for the prosecution to secure a conviction for treason difficult.

Art. 435, which prohibits any public officer from accepting the construction of any monument in his honor or the naming of any public street or building, would render many of our political leaders subject to confinement.

R e s u m e —

I have attempted to bring to your attention some meritorious provisions of the proposed Code of Crimes which could be adopted under special laws or by way of amendatory acts to the present Revised Penal Code. I have likewise invited attention to many provisions which may be unsatisfactory, if not totally objectionable. The good features may be adopted without enacting the proposed Code into statute, but its deleterious provisions can hardly be avoided without positive action to reject its enactment into law.

The enactment of Republic Act No. 386 as the New Civil Code of the Philippines has not met with the universal approbation of the Bench and the Bar. In fact, it has met with some serious criticisms. If the proposed Code of Crimes be recommended for enactment into law greater criticism will ensue, for it constitutes a drastic departure from the basic philosophy of our penal law and its new trends and objectives are hardly in consonance with the customs and traditions of the Filipino people.

Recommendations —

This appraisal of the proposed Code of Crimes would remain academic if no suggestions or recommendations are advanced. Hence, I take the liberty of submitting the following:

1. The Code Commission should now be abolished, for no person or group of persons can claim such mastery of all branches of substantive law as to constitute a *permanent* body to codify various laws, such as civil, penal, commercial, labor, taxation, and other branches of the law. Congress may always avail itself of the help and services of tried men in their respective fields. Thus, if a tax code be recommended, experts on taxation should form the commission to draft such legislation. If a labor code is advisable, another group of labor experts coming from management and labor, and other economic factors, should be considered in the composition of such committee.

2. Remedial measures should be studied to allow the State, including the offended party, to appeal from a judgment of acquittal or dismissal in a criminal case, for such appellate review in meritorious cases would constitute the most effective restraint against erroneous or arbitrary actuations of inferior courts, and such appeal would not strictly violate the constitutional provision against double jeopardy.

3. Some good provisions in the proposed Code of Crimes should be adopted under special laws or as amendments to the Revised Penal Code.

4. The new codification would not be a decisive step forward towards a more stable and satisfactory Penal Code, and accordingly Congress should *not* be persuaded to enact into law this project of the Code of Crimes as our new Penal Code.