NOTES *and* COMMENT

The Pleasant Penalty of Destierro

By HERACLEO HERRERA TAN

OF destierro, our Supreme Court said: "It cannot be and is not claimed to be a cruel punishment. For the exile there is only one prohibition—that of entering the place designated in the judgment. All other parts of the territory are free and open to his person." (*Legarda v. Valdez. 1 Phil. 146*).

Manifestly, nothing can be nearer the truth. And we have gone at length inquiring into the motives that influenced the retention of the penalty in the statutes. For we could, indeed, with reason, enlarge upon the utterance of the tribunal and regard destierro as no penalty at all. It is not difficult to attribute to one temporarily transported from some limited confines no greater annoyance than to one restricted in his obsession to pry into prohibited and secret places. On the contrary, we may ascribe to the exile an opposite desire to avoid the scenes of his wrongdoing by self-imposed absence. Apparently, no better reason for the penalty exists than that it was laid down in the Fuero Juzgo. Does it, then, simply persists from a "blind imitation of the past?"

Of course, slavish reverence of old values naturally grows out of sentimental considerations, and three centuries under Spanish rule may justify a lingering devotion to Castillian culture. About penalties, however, we could have been more scientific.

Destierro is classified by the Revised Penal Code as a correctional penalty, a scale above that of arresto menor. The classification substantially followed that of the Old Penal Code (Art. 25). The codifiers probably placed the penalty among the correctional ones more on account of its duration (Art. 27, par. 4, R. P. C.) than anything else. Essentially, it is lighter than arresto menor; and specific provisions in the old Code (Arts. 91, 127 (5), 423) as well as in the Revised Penal Code (Arts. 70 and 284) impliedly recognize its lighter penal character. Wittingly or unwittingly, this fundamental truth was not appreciated when Article 71 was amended. As it is, the article would, barring judicial legislation, give rise to anomalous cases.

Article 71, R. P. C. as amended by Commonwealth Act No. 217 provides:

> In the cases in which the law prescribes a penalty lower or higher by one or more degrees than another given penalty, the rules prescribed in Article 61 shall be observed in graduating such penalty.
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> The lower and higher penalty shall be taken from the graduated scale in which is comprised the given penalty. The courts in applying such lower or higher penalty, shall observe the following graduated scales:
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> Scale No. 1
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> 1. * * *
> 6. Arresto Mayor

7. *Destierro*
8. Arresto Menor

Suppose a man is convicted of a crime and punished with the penalty of destierro, what penalty shall be imposed upon his accomplice? The answer is obvious—the next lower in degree (Art. 52) or that of arresto menor in accordance with Articles 61 and 71 as amended, *supra*. And so we have the anomaly of a principal or author of the crime practically walking the streets a free man, while his accomplice (of lesser dreadfulness) is confined or subjected to strict police surveillance. Obviously a manifest injustice.

Again, what penalty shall be imposed upon the frustration of an offense that carries with it the penalty of destierro? Although a cursory examination of the crimes specifically penalized with destierro (Arts. 247, 284, and 334) would dispel any idea of a case of the kind arising under the Code, it does not require much imagination to conjure a case of an exceptional character under the first mentioned article or one under a subsequent legislative enactment that would permit of its application. The possibility is admittedly remote, but the possibility is still there. The answer would be similar to that of the first question and for identical reasons (see Art. 50, R. P. C.). And so, again, we have an anomalous situation where the criminal who has not the efficiency or depravity to successfully consummate his crime is punished with a penalty graver than that to which he would have been subjected had he accomplished his criminal purpose. Another manifest injustice.

Finally, what penalty shall be imposed upon evasion of destierro? The Old Penal Code, in its Article 127, specifically provided for the imposition of a distinct penalty for the evasion of practically every kind of penal sentence. In this respect, the old Code is considerably better. The only provision in the present Code of similar character and of probable applicability in our case is Article 157. It reads:

> The penalty of prision correccional in its medium and maximum periods shall be imposed upon any convict who shall evade service of sentence by escaping during the term of his imprisonment by reason of final judgment.

No express or implied reference to destierro can be gleaned from this article. The word "escape" alone presupposes the idea of confinement and an intentional departure or deliverance therefrom. In penal law "Imprisonment" cannot mean anything but forcible restraint, and more specifically, restraint by the application of physical agencies (locks, bars, etc.). The distinctions are marked and certain. (*See Groizard, Vol. 2, p. 511*).

Could such evasion be punished by virtue of some authority other than that granted by the provision of Article 157? Would not such evasion constitute contempt of the court that rendered the judgment of conviction? Evasion of the former penal sentence of deportation (Art. 111, Penal Code) was held not a contempt by opinion of a unanimous court, for judgment having become final, the court had lost all jurisdiction over the defendant. The remedy is for the executive department to enforce the terms of the sentence again. (*U. S. v. Loo Hoe, 36 Phil. 867*). We find no compelling reason to justify a departure from the above judicial pronouncement.

This obviously, would leave the exile free to visit his former haunts with impunity, and without hindrance outside of a possible executive action to persuade him out of the designated territory under police escort, perhaps. Nothing more. He may return as he pleases, leave when forced to, return again, until the term of sentence has expired. A pleasant penalty, indeed!

Our courts, we fear, will have to clarify the anomalies arising out of the application of Article 71, and remedy the inadequacy of Article 157. In this, the courts would inevitably legislate, for, by nothing short of legislation, can judicial action depart from the literal meaning of statutes of indubitable clarity. Judicial power in this respect has been admitted to exist. (*See Holmes, J. in Roschen v. Ward, 277 U. S. 337; Southern Pacific v. Jensen, 244 U. S. 205; Frank, Law and the Modern Mind, pp. 118-147*). Its exercise is of immense value. (*See Cardozo, Nature of Judicial Process*). But we would rather have the power exercised by the governmental agency where it is lodged than by one which, in its exercise, roams into fields without constitutional limits.