# Some Deficiencies Of The Revised Penal Code*

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THE backbone of the present Revised Penal Code is the Penal Code of Spain of 1870, which was in force in this country up to December 31st, 1931, and as such, belongs to the old or Classical School in the opinion of Judge Guillermo B. Guevara, a member of the Committee which drafted the Revised Penal Code under the chairmanship of Justice Anacleto Diaz of our Supreme Court. It is eminently retributive in its purpose and considers crime only as an issue of free human will, as a juridical concept pure and simple, paying little or no attention to the person. Judge Guevara's opinion carries weight, not only because he was a member of the codifying committee but also because he is one of our few acknowledged criminologists in this country.

If our Revised Penal Code is classical in its conception and therefore considers crime as a mere juridical concept and penalty a mere juridical tutelage, we are led to no other conclusion than that our Code has not wholly kept abreast with the progress of penal science. The tendency of modern penology is not to punish but to reform and if possible to prevent the commission of crimes. If this be so, then the interest of the individual must be of paramount consideration.

If it is admitted by no less than a member of the codifying committee that our present Revised Penal Code pays little or no attention, to the person, then we can safely assert that it needs urgent revision to the end that its present imperfections be immediately corrected or otherwise eliminated. It is my intention to point out to you some of the deficiencies which I think now exist in our Criminal Code.

In examining our present Penal Code, I have not lost sight of the fact that the codifiers thereof have had to encounter serious difficulties. They had to take into account the prevailing social conditions, which were the offshoot of the blending of American and Spanish civilizations. Moreover, we have our own native culture, our native social traits, modified to a great extent by American and Spanish cultural tendencies. These and sundry other circumstances had to be taken into account in order to evolve a Penal Code which would meet the peculiar needs of our socio-political conditions. As was very well said in the explanatory notes of the Revised Penal Code in the Speech delivered by the then Representative Quintin Paredes on the floor of the House of Representatives, on October 31st, 1930, as sponsor of House Bill No. 3366, providing for the Revised Penal Code, "Your committee has tried to retain such provisions of the present Penal Code (referring to the old Penal Code of

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Spain of 1870) which was replaced by the Revised Penal Code as are still applicable, and to suppress those which, corresponding to the peculiar political make-up of the past sovereignty and to certain principles and theories dominating during the period of its promulgation, have by force gone out of use with the change of conditions. To adjust the present Code to the new order of things brought about by democratic doctrines, which have greatly influenced our mode of living and our customs, has been the principal aim of the Committee."

Without minimizing the creditable work of the Committee, it can still be said that the Code is deficient in some respects. As proof thereof, several amendments have already been approved, the purpose of which being to liberalize the provisions of the Code; to punish more effectively some offenses; and to curb their commission.

Of the first category are Acts 3999, amending article 329, which now penalizes the crime of malicious mischief wherein the damages caused do not exceed ₱200.00 or cannot be estimated, with a more lenient penalty than that heretofore prescribed; Act 3940 which amends article 125, changing the period of one (1) hour to six (6) within which a public officer or employee should deliver a detained person to the proper judicial authorities. This amendment was motivated by the difficulties encountered by peace officers in making delivery of detained persons. Act 4000 amending article 48, Act 217 amending articles 61, 70 and 71; Acts 4117 and Commonwealth Act 99 amending article 80. Other laws which have been subsequently promulgated to liberalize the provisions of the Code, and which may be considered as amendatory thereof, are Acts Nos. 4103, 4225, 4221 and 81 amending Act No. 2489. The first two are the ones commonly known by the Bar as the Indeterminate Sentence Law, the former (Act 4103) being the original and the latter its amendment, which grant to those found guilty of a crime except those convicted of certain specified offenses, the benefit of a sentence the maximum of which cannot be more than the period fixed by law, and whose minimum has to be within the penalty immediately lower.

To punish some offenses more severely and others more effectively, articles 302 and 310 of the Code have been amended by Acts Nos. 273 and 417; article 195 by Act No. 235; articles 139, 142 and 154 by Acts Nos. 264 and 351; article 315 subsection 2, paragraph (e) by Act No. 157 and article 150 by Act No. 52. And among the laws enacted to prevent the commission of offenses and which may be considered as complementing, if not amending the Code, we have Act No. 417, Act 4002 punishing disobedience of children, Act No. 4081 which defines and punishes the exercise or practice of midwifing without the supervision of a licensed physician, Commonwealth Act 46 as supplementary to articles 187, 188 and 189 prohibits and punishes fraudulent advertising, mislabeling or misbranding of any product, stock bonds, Commonwealth Act 578 amending article 152 making teachers, professors, and persons charged with the supervision of public or duly recognized private schools persons in authority.

In view of the short time allotted me, I cannot now discuss in detail the provisions of said amendatory laws. Suffice it to say, they were approved in order to remedy certain imperfections in the Code. (Please refer to Address delivered by Justice Diaz before the student body of the College of Law, U. P., on Nov. 6, 1939).

It is now my purpose to call your attention to other articles which I believe need modification or outright repeal.

Authors on criminal law, almost unanimously, lay down as an irrebuttable rule that "ignorance of the law does not excuse from compliance therewith." (*ignorantia legis non excusat*). This principle, or rather presumption, does not accord with reality. On the contrary, it is well known that a great majority of people are not acquainted with the penal laws. Nevertheless, such a rule must be accepted for the reason that the welfare of society and the safety of the State depend upon the enforcement of the law. If a person accused of crime were to shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. Moreover, the rule lies at the root of the administration of justice. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration. There is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment, that would be introduced into every trial by conflicting evidence upon the question of ignorance. (*People vs. O'Brien, 96 Cal., 171; State vs. Boyett, 32 N. C., 336*).

This being the case, the Legislature or the law-making body, in the exercise of its power to declare what shall constitute a crime or punishable offense must inform the citizen with reasonable precision what acts it intends to prohibit so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of the criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or undertake to make the statute difinite and certain. If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that man of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law (American Jurisprudence, Vol. 14, pp. 773, 774). Therefore, those provisions in our present Code which are not clear or which are ambiguous and susceptible of varied interpretations, should immediately be subjected to clarify-

ing amendments in order to avoid doubts and dispel uncertainties.

Assemblyman Soliven, in a bill (Bill No. 1172) which he recently presented, called the attention of our law-making body to the fact that habitual delinquency is not clearly defined in article 62, Rule 5, last paragraph of the Code as it contains obscurities and should be clarified. The period of ten (10) years required to be counted from the conviction of an accused of his last crime to his conviction or release for his immediately preceding crime, may refer to two (2) periods or to only one according to the mood of the interpreter; it may be from the immediately prior conviction to the last one, or from the date of release after serving sentence until the last conviction, but the fact is that the law does not speak with clearness. It is likewise silent with respect to the case of a convicted person who has served any portion of his penalty immediately preceding because of his pardon. Mr. Justice Diaz, in his address delivered before the student body of the College of Law of the University of the Philippines, on November 16th, 1939, (supra) proposed the following amendment to said article:

"For the purpose of this article, a person shall be deemed to be a habitual delinquent if, within the period of ten years from the date of his last conviction of *robo, hurto, estafa,* or falsification, he commits and is found guilty of any of said felonies, a third time or oftener, without having served his penalty by reason of pardon; or from the date of his release in case he should have served his penalty totally or partially." (Art. 62, rule 5 last par. Refer Soliven's proposed bill.)

Assemblyman Soliven, in another bill, proposed that a penalty be prescribed for those who evade the penalty of destierro. Article 157 as it appears in our Revised Penal Code punishes only evasion of sentences consisting of deprivation of liberty and confinement in prison and this seems to be clear because the said article speaks of evasion or escape by means of unlawful entry, by breaking doors, windows, grates, walls, roofs or floors or by using picklocks, false keys, disguise, deceit, violence or intimidation or through connivance with other convicts or employees of the penal institution. It does not include the evasion of the sentence of destierro which is a penalty consisting in a relative restriction or limitation upon one's freedom. This article must be amended so as to include the evasion of the sentence of destierro.

As to the penalty of censure which is prescribed for some offenses like those mentioned in articles 200 and 211, and perhaps other articles, Justice Diaz has observed that there is no certainty as to whether the said "censure" should be public or private due to the fact that articles 25, 200 and 211 of the Spanish text—which should prevail because the Code was approved in Spanish, refer to it as merely "censure" and in Act No. 217, amending articles 70 and 71, it is referred to as "public censure"; however, it is not stated in what it consists or how it should be executed. This ambiguity should be clarified by an amendment. It is to be noted that articles 115 and 116 of the old Penal Code described how public and

private censure should be administered.

Mr. Justice Diaz, in his address above-alluded to, has called the public's attention to other glaring deficiencies in the present Code. Article 117, which defines and punishes the crime known as espionage should be corrected and clarified in order to avoid reaching illogical results for the reason that under said article, a person who has shown greater perversity is treated with relative leniency. He has, likewise proposed an amendment to article 14 of the Code on recidivism, in the sense that it should have a prescriptive period just like any other crime defined and punished in the Code. And with reason. For it is obviously unfair to take into account against an accused a former conviction for another crime which took place 5, 10 or 15 years ago and yet consider a minor offense as having prescribed in 5 or 2 years.

Another deficiency pointed out by Mr. Justice Diaz is found in article 29 of the Code. This article provides that a person convicted of an offense and thereafter sentenced to imprisonment is entitled to an allowance equivalent to one-half of his preventive imprisonment, except when there are present in his case the circumstances of recidivism or reiteration, or when required to serve his sentence, he should refuse to appear voluntarily, or when he is convicted of robbery, theft, estafa, malversation, falsification, vagrancy and prostitution. However, neither the said article nor any other article of the Code specifies who is to grant the same allowance, should it be proper to do so; and while it is to be presumed, observes Mr. Justice Diaz, that the Court taking cognizance of the case may grant the same because it is so provided in the last paragraph of article 93 of the Provisional Law for the application of the provisions of the Penal Code of 1884 which, being procedural, should be considered as supplementary to the Code of Criminal Procedure the fact is, that in many cases, this duty is neglected, because the accused, except when he pleads guilty, is not concerned with the said allowance for fear that, in asking for it he may be actually believed to be guilty; and even in cases where he confesses his guilt, through inadvertence or lack of the exact data to insist that he be credited with the said allowance, he does not ask for it. To avoid omissions and to protect a prisoner who is entitled, by express provisions of law, to an allowance of preventive imprisonment, article 99 should be amended so as to specify the person or officer who is to grant said allowance.

Aside from these deficiencies already pointed out by Mr. Justice Diaz, there are still others which should occupy our attention. One of the characteristics of criminal law is territoriality, that is, that the criminal law of the State applies to all crimes committed within its territory and by territory is meant the area comprised within its frontiers. Article 2 of the Code, however, provides that the Code should also be enforced outside of its territorial frontiers or waters, against those who:

1. Should commit an offense while on a Philippine ship or airship;

2. Should forge or counterfeit any coin or currency note of the Philippine Islands or obligations

and securities issued by the Government of the Philippine Islands;

3. Should he be liable for acts connected with the introduction into these Islands of the obligations and securities mentioned in the preceding number;

4. While being public officers or employees, should commit an offense in the exercise of their functions; or

5. Should commit any of the crimes against national security and the law of nations, defined in Title One of Book II of this Code.

This article is an innovation in our Revised Penal Code. It is almost an exact reproduction of article 2 of the proposed Correctional Code of 1916. It constitutes an exception to the territoriality rule of criminal statutes. There seems to be, however, a serious difficulty in its operation. Should it be applicable to foreigners who commit any of the crimes therein enumerated, especially if the foreigner can be prosecuted criminally for the same act under the criminal laws of his own country? Mr. Justice Villamor, commenting upon the provisions of Section 2 of the proposed Correctional Code of 1916 from which this article was taken says:

"This section involves one of the most debated questions in international law, the territorial jurisdiction, in criminal cases. Some nations whose jurisprudence is based on Roman law such as Germany, France, Spain, Belgium, and Switzerland, claim the right to try and punish their own citizens for crimes committed by them in foreign countries. Others, like Russia, Holland, and Greece claim the right to punish foreigners who, while in their own territory commit crimes against the security of the State, and still others like Austria and Italy even go farther as to claim the right to punish foreigners who commit crimes against the persons of their citizens although such crimes are committed in foreign countries. (Weslake, International Law, Part 1, pp. 251-253).

"The right of the State to try and punish those of its subjects who while abroad commit crimes against the security of the State, generally is not disputed, invoking for this the right of self-defense. In fact, the Institute of International Law gave its sanction to the legislation of the first countries mentioned above adding, however, to the condition: the facts constitute an attack against the social existence of the State concerned and disturb its security' that 'said acts are not punished by the Penal Law of the country in whose jurisdiction they took place.' But many authors do not agree as to the crimes committed by foreigners in their own territory. Fiore maintains the right of each State to punish, without distinction, all persons whether a citizen or a stranger when, by their acts committed outside of its territory, they violate the laws of the country which have for their object the protection of its institutions or when they commit disturbances either against the rights of the State or of the persons who come under the protection of the said State. Against this opinion are those of Westlake, Oppenheim, Hall, Taylor and Maxey, who maintain that a person can not be criminally apprehended in a country that is not his own for acts not committed therein for the reason that the prosecution lacks the territorial basis of the place of the

crime as well as the personal basis of the nationality of the accused, and furthermore because it involves the pretension of the State that so claims the right to regulate by means of penalties the conduct of persons who are neither its subjects nor reside within its territory. The opinion of these well known writers was supported by the Department of State of the United States in the case of Cutting, wherein the point of view of the United States in regard to the right of the other States to punish a foreigner is clearly given. The facts of this case briefly stated are: On June 18, 1886, A. Cutting, a citizen of the United States published in a newspaper of El Paso, Texas, an article regarding certain proceedings of Emigdio Medina, a citizen of Mexico, for the criminal offense of libel. The Mexican government claimed the right to prosecute him under the provisions of paragraph 186 of the Penal Code of Mexico which confers jurisdiction on the Criminal Courts of Mexico to try and punish offenses committed against Mexican citizens by foreigners in foreign territories. After making an apology the accusation against Mr. Cutting was withdrawn and he was allowed to return to the United States, where the greater the sentiment for liberty is, the stronger the discretion to use it, he published another article in THE SENTINEL, which is the same paper in which his former article appeared, reiterating the former charges in addition to others to the effect that the conduct of Medina had been contemptible and cowardly. He then returned to Mexico where he was arrested, tried, and convicted and sentenced to one year imprisonment with forced labor, and a fine of $600.-00. The case was appealed to the Supreme Court of the State of Chihuahua which confirmed the sentence of the lower court, but setting the accused at liberty on the ground that the complaint had been withdrawn from the trial. Meanwhile, the United States intervened through its Minister to protect its citizens. The government gave instructions to the Minister to secure the liberty of Mr. Cutting basing the demand on the following grounds:

'The paper was not published in Mexico, and the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible and is peremptorily denied by this Government. It is equivalent to ascertain that Mexico can take jurisdiction over the authors of various criticism of Mexican business operations which appears in the newspapers of the United States. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the Government of the United States nor the government of our several states will submit. They will each mete out the justice to all offenses committed in their respective jurisdiction. They will not permit that this prerogative shall in any degree be usurped by Mexico, nor, aside from the fact of the exclusiveness of their jurisdiction over acts done

within their own boundaries, will permit a citizen of the United States to be called to account by Mexico for acts done by them within the boundaries of the United States. On this ground, therefore, you will demand Mr. Cutting's release.' (House Executive Documents, 2nd Sess., 49th Cong., 1886-87; Foreign—13—relations of the U. S. 1886 P. 700 [No. 317], Serial No. 2460).

"The instructions of the Department of State of the United States to the American Minister in Mexico contained, moreover, reasons based upon the violation of the laws of criminal procedure; but the principal argument of the demand, and for which it was given attention by the Mexican government is the lack of jurisdiction of Mexico to try an American citizen for acts committed by him outside the Mexican territory."

Should our government some day, remarks Mr. Justice Albert, a recognized authority on criminal law, apply the Code to a subject of an alien power who may have counterfeited in his country, for instance, coin of legal tender in the Philippines, his nation could, on the strength of the case cited by Justice Villamor, challenge the right of our government to proceed against her citizen and claim the power to try and sentence him in accordance with her own laws. Upon the other hand, if the alien has already been punished in his own country for counterfeiting our money, and being later found within our territory, should be tried again for the same offense, would it not be downright injustice to punish him twice for the same act contrary to the principle *non bis in idem?* If the State to which the culprit owes allegiance should not claim the right to try him either because he had already been convicted by its courts, or because said State is not concerned with the matter, what evidence could our government produce to establish the guilt of the offender, it being a constitutional right of the accused to be exempt from testifying against himself?

Justice Albert says that it would be preferable to increase the severity of our penal laws in their application to crimes perpetrated within our territory, or commenced therein and frustrated or consummated abroad whenever the acts committed within our country constitute a crime, leaving to the State in whose territory it has been consummated or frustrated the punishment of the acts therein performed. By so doing, according to Justice Albert, our courts would not have to punish the offender twice for the same offense, nor would it be involved in an exchange of diplomatic notes, from which its prestige would suffer on all occasions, in view of its peculiar political status.

If I may venture my own humble opinion, I would suggest that this article be so amended as to prevent situations similar to the Cutting case from arising in its application and enforcement. No situations fraught with dangerous possibilities should be allowed to confront our courts if such could be prevented by clarifying the language of the law.

Attention should be called to paragraph 5 of the said article. Instead of using general terms and phrases such as, "Crimes against national security and the law of nations, defined in Title I of Book

II of this Code," it seems better that said crimes be specifically mentioned in order to avoid error. That such is possible can be easily demonstrated. A well-known commentator of the Code cites as examples of crimes under paragraph 5 of art. 2, the crimes of rebellion, insurrection and sedition which are not found in Title One of Book Two of this Code.

Article 5 provides:

"Whenever a court has knowledge of any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision, and shall report to the Chief Executive, through the Department of Justice, the reasons which induce the court to believe that said act should be made the subject of penal legislation."

The above provision seems to be of no practical application for the reason that almost all acts which are brought to the attention of the courts are those already covered by penal legislation. Why not amend said article so as to authorize the prosecuting officials to report to the Chief Executive, thru the Department of Justice, acts which they think should be considered criminal? After all, they have a more direct contact with the people than members of the judiciary.

I now wish to call your attention to the provisions of the last paragraph of Article 15, which reads:

"The intoxication of the offender shall be taken into consideration as a mitigating circumstance when the offender has committed a felony in a state of intoxication if the same is not habitual or subsequent to the plan to commit the felony; but if it is habitual or intentional it shall be considered as an aggravating circumstance."

There has been a divergence of opinion among criminologists as to whether intoxication should be considered an exempting circumstance or only as mitigating. The Austrian Penal Code provides that intoxication should be a cause of exemption basing its stand on the old Roman jurisprudence *"Ebrius punitur non propter delictum, sed propter ebrietatem,"* but adds that the crime committed by an intoxicated offender should be punished as a grave violation of police regulation. On the other hand, the criminal statutes of England provide that a person who commits a crime in a state of intoxication should be made responsible therefor. The Spanish Penal Code from which the above-quoted paragraph was taken adopted a middle ground by providing that intoxication should be considered mitigating if the same is not habitual or subsequent to the plan to commit the crime and aggravating if it is habitual or intentional. I submit that the English law represents the better policy for the reason that as our law now stands, it seems that we give a premium to intoxication provided, however, it is not habitual or intentional.

Another article to which I would wish to call your attention is Article 284 in connection with Article 5, which provides that a person may be sentenced to give bond to keep the peace and that the person so sentenced is required to present two (2) sufficient sureties who shall undertake that such person will not commit the offense sought to be prevented. It seems that said penalty is imposable only in the commission of the

crime of threats, either grave under Article 282, or light under Article 283. Article 284 is peculiar because under it, a person making a threat may be required to put up bond for good behavior with or without criminal prosecution for the crime of threat. (Commentaries on the Revised Penal Code, by Guevara, 3rd Edition, p. 544). And the person who fails to give such bail shall be sentenced to destierro. In legal effect, under this article, a person's freedom may be restricted even without the necessity of a trial. I doubt if this article could survive constitutional scrutiny for under our Constitution, no person shall be held to answer for a criminal offense without due process of law.

Another article of the Code, which I believe to be of doubtful constitutionality is Article 145 thereof, as amended by Commonwealth Act No. 264, Section 1, which reads as follows:

"*Violation of Parliamentary Immunity.*—The penalty of *prisión mayor* shall be imposed upon any person who shall use force, intimidation, threats, or fraud to prevent any member of the National Assembly from attending the meetings of the Assembly or of any of its committees or subcommittees, constitutional commissions or committees or divisions thereof, from expressing his opinions or casting his vote; and the penalty of *prisión correccional* shall be imposed upon any public officer or employee who shall, while the Assembly is in regular or special session, arrest or search any member thereof, except in case such member has committed a crime punishable under this Code by a penalty higher than *prisión mayor.*"

I should like to engage your attention to the latter part of the aforecited provision which provides that the penalty of *prisión correccional* shall be imposed upon any public officer or employee who shall, while the Assembly is in regular or special session, arrest or search any member thereof, except in case such member has committed a crime punishable under this Code by penalty higher than *prisión mayor.* Under this provision, when a public officer or an employee, arrests or searches any member of the Assembly while the latter is in regular or in special session for a crime the penalty for which is less than *prisión mayor* or from six (6) years and one (1) day to twelve (12) years, the public officer or an employee shall be amenable to prosecution and punishment under said article. The query now is, is this provision in contravention with our Constitution?

Article 6, Section 6 of our Constitution provides:

"The Members of the National Assembly shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of the National Assembly, and in going to and returning from the same; and for any speech or debate therein, they shall not be questioned in any other place."

From the aforequoted constitutional provision, it is apparent that the members of the National Assembly are not privileged from arrest if they commit the crimes of treason, breach of the peace or any felony. Felony has been defined by our Revised Penal Code, Article 3, paragraph 1 thereof, as

any act or omission punishable by law and since the Revised Penal Code has suppressed entirely the concept of misdemeanors, all the acts punishable therein are now considered felonies, either grave or less grave or light. Under the constitutional provision just cited, a member of the National Assembly is not privileged from arrest if he commits a felony, yet under Article 145 of our Revised Penal Code, as amended by Commonwealth Act No. 264, Section 1, a public officer who arrests a member of the National Assembly for having committed a crime punishable with a penalty less than *prisión mayor* is liable criminally. The inconsistency between these two provisions of the Constitution and the Revised Penal Code is obvious and any law approved by our National Assembly which is repugnant to our Constitution must be considered void for being unconstitutional. It is, therefore, submitted that said article of the Code (Art. 145), as amended, by Commonwealth Act No. 264, be repealed or otherwise amended or modified so as to remove its objectionable features. This conclusion finds support in the case of Williamson v. U. S. (207 U. S. 425, 52 Law ed., 278), decided by the Supreme Court of the United States, where it was held, "The terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, except from the operation of the privilege all criminal offenses." The privilege from arrest to which the constitutional provision above adverted to refers is arrest only in civil cases.

Another article of the Code which has been recently amended and which amendment has produced absurd and ridiculous results is Article 71, amended by Commonwealth Act No. 217. Under this article, as amended, the National Assembly has inserted in Scale No. 1 between the penalty of *arresto mayor* and *arresto menor*, the penalty of *destierro*. This article needs elucidation that you may easily grasp the points which I wish to bring out. In this article, there is what is known as scale No. 1 to be distinguished from the scale appearing in article 70. The scale in the latter refers to the order of the respective severity of the different penalties while that in the former refers to the graduation of penalties, that is, the determination of penalties higher or lower to a given penalty. The order in scale No. 1, of Article 71 follows:

(1) *Death;* (2) *reclusión perpetua;* (3) *reclusión temporal;* (4) *prisión mayor;* (5) *prisión correccional;* (6) *arresto mayor;* (7) *destierro;* (8) *arresto menor;* (9) *public censure;* (10) *fine.*

*Arresto mayor* and *arresto menor* are penalties involving terms of imprisonment, the duration of *arresto mayor* being from 1 month and 1 day to 6 months and the duration of *arresto menor* from 1 to 30 days. *Destierro* is however served by the offender not in jail but outside of jail. The person serving this sentence is prohibited from entering a certain specified radius, otherwise, he is completely free. The duration of *destierro* is from 6 months and 1 day to 6 years. It is evident, therefore, that *destierro* is a penalty absolutely distinct in nature and in effect from that of *arresto mayor* and *arresto menor* yet *destierro* was inserted between *arresto mayor*

and *arresto menor*. The legal incongruities resulting from the amendment can best be explained by the following illustrations:

1st.—Supposing that in the commission of a crime punishable by *arresto mayor* or imprisonment from 1 month and 1 day to 6 months, three (3) persons have participated, A, B and C. Let us say that A acted as principal, B, as accomplice, and C, as an accesory after the fact. If all are found guilty for the consummated offense, A, under the rules of penalties, will suffer the penalty of *arresto mayor*, B, the accomplice, will be given the penalty of *destierro*, and C, the accessory after the fact, the penalty of *arresto menor*. It is evident even to a common layman that an accomplice in a crime evinces greater criminal perversity than an accessory after the fact and yet under this article as amended, B, the accomplice, will not enter jail, while C, the accessory after the fact, will have to be confined for a period of 30 days. The absurdity becomes more patent in the following situation. In the case just cited, A, the principal, can be prosecuted in the Municipal Court if the crime is committed in the City of Manila or in a Justice of the Peace Court if committed in the province. Yet the accomplice who is less criminally responsible than the principal cannot be prosecuted in the Municipal Court or in the Justice of the Peace Court but must be prosecuted in the Court of First Instance, a court of superior jurisdiction, for the reason that municipal courts and justice of the peace courts cannot impose the penalty of *destierro*.

Still another incongruity may result. In the problem cited above, if C, the accessory after the fact, evades the service of his sentence, he can be prosecuted criminally under the provisions of Article 157 of the Code and may be given the penalty of *prisión correccional* in its medium and maximum period, which ranges from 2 years, 4 months and 1 day to 6 years. And yet if B, the accomplice, who was given the penalty of *destierro*, evades the service of his sentence, he cannot be prosecuted under the same article (Art. 157 for the reason that under the present Revised Penal Code, there is no penal sanction to the evasion of the service of *destierro*. In view of the absurduties which result in the application of article 71 as amended and for still other reasons pointed out by Justice Hontiveros in the case of People v. Cham Po, 38 Off. Gaz., No. 119, p. 269, said article as amended should be immediately reamended to make it conform with the spirit that pervades the entire structure of our Penal Code,—the dispensing of real justice to all and sundry who run afoul of the law.

In view of the very limited time that has been given me, I cannot, on this occasion, discuss with you all the deficiencies in the Revised Penal Code, which I think, should be corrected. I shall only discuss one more article before closing, and that is Article 247, which provides:

"Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury.

shall suffer the penalty of *destierro*.

If he shall inflict upon them physical injuries of any other kind, he shall be exempt from punishment.

These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eighteen years of age, and their seducers, while the daughters are living with their parents.

Any person who shall promote or facilitate the prostitution of his wife or daughter, or shall otherwise have consented to the infidelity of the other spouse shall not be entitled to the benefits of this article."

I wish to call your attention particularly to the first paragraph of said article. Our Supreme Court in construing said paragraph in the case of People vs. Gonzales, G. R. No. 46310, promulgated October 31, 1939, held:

"The fact that a husband surprises his wife with her paramour near the latter's toilet, amidst shrubs, about one foot distant from each other, the wife in the act of standing and lowering her skirt, the paramour already standing but buttoning his trousers, does not entitle him to the provisions of article 247 of the Revised Penal Code in case he should kill his wife upon such occasion, because the circumstances described do not show that he surprised his wife "in the act of committing sexual intercourse with another person."

It is, therefore, necessary for a husband to be entitled to the beneficent provisions of Article 247, that is, to the imposition of the penalty of *destierro* instead of *reclusión perpetua* to death which should be imposed upon him if he kills his wife under other circumstances, that he surprise his wife in the *very act of committing sexual intercourse*. With all due respect to our highest Tribunal, I cannot subscribe to said doctrine. The interpretation is too literal and narrow. As was very well said by Mr. Justice Laurel in his dissenting opinion in the aforesaid case:

"* * *. It is true that this article of the Code is limited in its application to cases where the offended spouse surprises the other "in the act of committing sexual intercourse," but considering the purpose which the legislator must have had in mind in extending the extraordinary or special attenuating circumstance to the offended spouse, this requirement should not invariably be given a literal interpretation, but each case should be subjected to the rigid judicial scrutiny to prevent abuse but not to frustrate the legislative rationale. To require performance of carnal act before the offended spouse could raise the chastising hand is to require the impossible in the majority of cases. Under the reasoning of the majority of my brethren, if a married woman at the appointed hour, in response to a common purpose, should meet her paramour at a designated place, both to enter a room alone, then and thereafter to undress themselves, perform mutual acts of the character of *abusos deshonestos*, all *in preludiis* to the carnal act, the offended husband must look on in the meantime and wait until the very physical act of coition takes place, if he were to receive the benefit of the special attenuation provided in Section 247 of the Revised Pe-

nal Code. This interpretation is far from being rational and certainly does violence to the reason and purpose of the law. The circumstances are not for mature reflection or for the husband to engage in mathematical calculation. Precision was not contemplated by the legislator and could not have been. * * *"

No more emphatic or more forceful words can be used. No more serious indictment can be hurled. But since we follow in this jurisdiction the doctrine of *stare decicis,* we have no alternative other than to adhere to said pronouncement until such time as the Court reverses itself or until the article concerned is amended. Resort should be made to the latter because judicial legislation should not be encouraged. Further, I would suggest that if this article were amended, that no penalty, not even destierro, be imposed upon any legally married person who surprises his spouse committing any act of marital infidelity. This may sound old-fashioned to those who have imbibed the nectar of our ultra-modern civilization but I can never prevail myself to disregard the stubborn fact that in the scheme of life there are certain eternal verities that no tinselled trappings of regnant fashions can eclipse. In fact, says Justice Laurel, the laws of Solon, the Roman Law, the laws among the Goths and other ancient laws—not excluding our own native laws, view the infidelity of the wife with severity; and there are modern codes which justify the killing of the wife and her paramour who are caught in the act of adultery, such as the Penal Codes of Chile, Columbia and Ecuador. In Argentina and Switzerland, the same result is reached by judicial determination, because the crime is deemed committed in a state of mental desequilibrium. But even in the absence of precedent, we should not waiver and vaccillate for fundamentally and rationally, the codes and laws of all countries express the same sentiment: the condemnation of the iniquity at demolition of the fundamental unit of social order and the destruction of the felicity of family and home.

In closing, may I say, that in spite of its deficiencies, our Revised Penal Code, is not far behind the progress made in other countries on penal science, for as Justice Diaz has said,

"A comparison of our Code with those of other countries—notwithstanding the limitations that it contains, as it does not take in many other prohibited acts punishable under other laws of a special character in the sense that this phrase is used in Act No. 3226, so as not to destroy the entirety of said laws—will disclose that from the standpoint of foresight, objectives, and justice, it does not lag behind any of them. We may state with all fidelity to truth that, without overlooking existing conditions in our country, our Code is abreast of the progress made in penal law."