OBSERVATIONS ON THE PROPOSED CODE OF CRIMES *

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Introduction.—The submission to Congress of the proposed Code of Crimes has posed the question of whether there is any compelling need to jettison the existing Revised Penal Code enacted in 1930 to give way to a new Criminal Code.

As stated in the report of the Code Commission, the proposed Code establishes a new orientation in criminal law. It leans toward the positivist school, which considers the man rather than the act itself. It has abandoned the classical concept of retribution. But the classical school is not entirely eliminated because it is impliedly recognized in the fixing of definite periods of imprisonment (repressions), after which security measures are taken. The proposed Code is an amalgam of the positivist and the classical systems, with a strong tendency toward the former.

With all due respect to the learned members of the Code Commission, it is submitted that the present Revised Penal Code, although enacted thirty years ago, is still good for our times. Neither expediency nor wisdom dictates that it should be overhauled.

President Manuel Roxas in his Executive Order No. 48 dated March 20, 1947 created a Code Commission to undertake the task 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."

This directive was appropriate with respect to the Spanish Civil Code, many of whose provisions had been repealed by the Code of Civil Procedure and special laws. A similar need exists for the revision of the Spanish Code of Commerce and the codification of existing commercial laws. However, it is exceedingly doubtful if President Roxas had in mind the penal laws when he issued his directive for codification.

Noteworthy is the fact that there has been no insistent and clamorous agitation for the repeal of the Revised Penal Code, for a change in penal philosophy or for a new orientation or approach to the repression of crime.

The present Code was intended for the two-fold purpose "of prevention and repression of crimes."[1]

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* Submitted to the House Committee on Revision of Laws.
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[1] Speech of Representative Paredes before the House of Representatives in 1930.

The proposed Code of Crimes was submitted to Congress in 1950. If for nine years no action has been taken by the Committee on Revision of Laws of Congress on said Code, it must be because the past Committees had realized that the new Code is too radical for our times, that the present Code is satisfactory, and that there is no ineluctable urgency for revising our penal laws.

The Code of Crimes was prepared in twenty-two months by learned jurists only one of whom, Judge Guevara, is a recognized expert on criminal law. On the other hand, the Revised Penal Code was prepared by a Committee composed of Anacleto Diaz, Quintin Paredes, Alex Reyes, Mariano H. de Joya and Guillermo Guevara, all experts on penal law with considerable experience in the prosecution of criminal cases. Justice Diaz is dead. Paredes, Reyes and De Joya, like Guevara, are still alive. They had no hand in the preparation of the Code of Crimes. The opinions on the Code of Crimes of these surviving members of the old Code Committee, which drafted the Revised Penal Code, would be useful and should carry weight.

In this connection, the elaborate procedure and the cautiousness employed by the American Law Institute in drafting the Model Penal Code, a work started in 1923, may be noted. Says the Chief Reporter for the American Institute's Model Code of Penal Law:

> "To carry on the work we have the usual equipment of the Institute: a group of reporters who assume responsibility for exploration of particular topics, including in this instance Louis S. Schwartz of the University of Pennsylvania, and Paul W. Tappan, former Chairman of the United States Board of Parole, who is a specialist in the field of correction.
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> "The submissions of the reporters are, in turn, presented to a strong advisory committee, including Judges Parker, Learned Hand, Philipps and Goodrich, of the federal judiciary; experienced state judges such as Flood, Bok and Sloane of Philadelphia, Fuld and Breitel of New York; lawyers experienced in prosecution and defense, including Floyd Thompson of Chicago, Thomas D. McBride of Philadelphia; practical penologists in the persons of James V. Bennett, the Director of the Federal Bureau of Prisons, and his predecessor, Sanford Bates; the leading academic students of the penal law and criminology, including Dean Albert J. Harno, Sheldon Glueck, John Barker Waite and Thorstein Sellin; three of the leaders of forensic psychiatry, Drs. Winfrid Overholser, Director of St. Elizabeth's in Washington, Manfred Guttmacher, Chief of the Medical Office of the Supreme Bench of Baltimore City, and Lawrence Freedman of Connecticut.
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> "In addition, we have the help of one of the draftsmen of the Louisiana Penal Code and the Wisconsin revision, Dale E. Bennett and Frank Remington, respectively.
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> "As one of those whose work has been subjected to critical appraisal of this most ecclectic group, I am prepared to testify that theirs is not a summary approval. Nor does the process of appraisal stop with the committee. After the cynical acid has been applied by them and a draft

is revised accordingly, it proceeds to the Council of the Institute, where happily Judges Parker, Hand, Philipps, Flood and Thompson and Dean Harno are again participants in the deliberations, but the group as a whole is new, including such close critics in criminal law as Judge Hutcheson of Texas, Judget Fee of Oregon, Judge Hyde of Missouri, John C. Buchanan of Pittsburgh, Judge Sims of Birmingham and many others.

"I do not recite these names to place the blame for any of our sins on these distinguished heads, but only to make clear what is the truth: that we are doing what we can, within the limitations of the cost of transportation, to obtain the broadest base that we can get for criticism and evaluation of the work of the reporters.

"Before the product is submitted to the Institute, it must survive the screening of a group as diversified in background, talent and experience, as any private body can command. And then there is a further presentation to a meeting of the Institute, with even broader base for critical evaluation.

"As a final caution, we regard all drafts and votes as tentative, until the time, which is still far away, when final promulgation may be sought.

"If our work is slow, and I admit it is, the reason is that we spend almost half a year in presentation, in discussion and revision for every half a year devoted to producing new material. But if our pace is slow, we hope that as a compensating consequence our tread is fairly solid." [2]

Revision of the present Penal Code and Prison Law should be based on relevant data as to criminality.—Dean Harno notes that the enactment of an effective Penal Code depends on research: not mere research into the foreign Codes and the treatises of criminalists and penologists but research into the conditions that spawn criminality or the etiology of crime, the methods of criminal law enforcemant and the treatment of criminals. Unless the rules in a Penal Code are based on data gathered through intensive research, such rules may operate *in vacuo*, good on paper but unworkable and inappropriate in practice. They would fall into the category of *"Utopian criminological concepts that have no relation to the facts of criminal treatment."*

Changes in the present penal system must be based on actual studies and surveys on the administration of criminal law. The effect of the present Penal Code on criminality must first be ascertained. If the present Penal Code is ineffective, the reasons for its inefficaciousness should be investigated. It may be that its ineffectiveness is due to inadequate implementation.

It is possible that some of the new provisions introduced by the Code Commission are sound a *priori rules*, good subjectively, but not objectively.

The scrapping of the Revised Penal Code must perforce be based on the postulate that it is unsatisfactory or that it is an ineffectual instrument to prevent crime and reform criminals.

[2] Wechsler, 32 Am. Bar Assn. Journal, p. 321-323.

This postulate cannot be taken for granted. It must be proven by facts and figures. Why is the present Penal Code undesirable or even intolerable? A crime commission should study the matter and its report should be the basis for the revision of the existing penal laws.

The Code Commission should be commended for being *au courant* with the latest theories in criminal law and for attempting to introduce here what it considers as the wholesome provisions of the Penal Code of other countries. But has the Code Commission studied why the present Penal Code is unsatisfactory? Has it bothered to ascertain why the incidence of robberies, estafas and killings has multiplied? Why is there much lawlessness in rural communities? Is it because there are no law-enforcing agencies in these areas, or the law enforcing agencies are lax or inadequate? Is it because there are many loose firearms? Is it because of unemployment or is it a concomitant of the rapidly increasing population? Is it because of the incompetence of the Parole Board, or the abuses in the exercise of the pardoning power? Is it due to the silly double jeopardy rule which prevents appeals in judgments of acquittal and gives corrupt judges a chance to perpetrate a miscarriage of justice?

Crime is a social phenomenon, as the positivists say. What is the nature and scope of crimes as social phenomena in this country? It seems logical and proper that the causes and incidence of crime in this country should first be studied before any revision of penal laws can be made. Why is it that right there in the New Bilibid Prison, gangs flourish and the inmates do not hesitate to kill each other? At least the Code Commission should know that fact and find out if such a situation can be prevented by the Code of Crimes.

The fundamental shortcoming of the proposed Code of Crimes is that the innovations introduced therein are not based on any relevant and concrete data regarding crimes in this country, as duly established in fact-finding surveys. Consequently, the proposed Code may be good on paper but may not work out well in practice. Henry Seagle has observed that "positivist criminology is an absurdity in the world of actuality."[3]

There is nothing inherently condemnable in drawing freely from the best modern penal codes in the world as the Code Commission has done in drafting the Code of Crimes. However, unqualified importation of legal provisions, without taking into consideration existing conditions in our country, is not always commendable. The example of the provisions of the American Uniform Sales Law and Uniform Partnership Law, incorporated in the new Civil Code, may

[3] HISTORY OF LAW, p. 249.

be cited. Many of those provisions may be all right in the United States. Whether they have any application in the Philippines is another question. It may turn out that many of those new provisions would become dead or inutile because conditions here furnish no occasion for their enforcement.

Some of the provisions of the Code of Crimes taken from the Penal Codes of Italy, Switzerland, Argentina, Mexico, Cuba, etc. may be all right in those countries because their experience has shown the necessity and expediency for those provisions. Whether our own experience justifies their enactment here remains to be seen.

If crime, according to positivist criminology, is a social phenomenon, then before taking measures against acts and omissions which are to be regarded as crimes we should first study the factors which produce crime in society.

While human nature is basically the same throughout the world and the wrongs done in other countries may be similar to those in the Philippines, it is undeniable that there are peculiar conditions here, which spawn crime but which do not exist abroad.

Therefore, before we adopt the penal rules enforced in Italy, Switzerland, etc., we must first study crime as a social phenomenon in this country. We should have the necessary data on crime in this country and enact penal legislation appropriate for conditions existing here which may not be the same as those in Italy and other countries whose civilization, history, and social conditions, not to mention the racial stock of their people, differ from ours.

Code of Crimes unduly restricts individual liberty.—While the Code of Crimes is supposed to be based on the penal philosophy that social defense is the cardinal objective of criminal law and that the criminal is more important than the crime, it is also true that another philosophy permeates its provisions. That other philosophy: strict regulation of the individual's conduct so that he would have a pure and immaculate moral character.

The framers of the Code disregarded the elementary tenets of liberalism in framing it. They were evidently preoccupied with petty notions of moral conduct in order to enforce what they call "a more strict morality." While they sought more effective guarantees for individual rights, they endeavored to shackle individual liberty by repressing certain acts whose toleration would not in any way endanger public welfare. The proposed Code consecrates the fallacy that jural law is synonymous with moral law.

In a free democratic society it is axiomatic that there should be the least possible interference with individual liberty by the Govern-

ment. Criminal law is an exercise of the police power of the State. Individual liberty can easily be curtailed by means of penal laws. Unless an act is strongly condemned by the community, it should not be penalized. In those cases where an act may not be morally correct but not to punish it would result in no serious detriment to society, then it would be better not to punish it. The doubt must be resolved in favor of individual liberty.

The proposed Code of Crimes has substantially increased the list of punishable offenses and to that extent it has thereby abridged individual liberty. This is one of the grave defects of the proposed Code. It is too moralistic, too Victorian, even puritanical and in some instances intolerably intolerant.

The proposed Code in its title on misdemeanors concerns itself with trifles and seeks to establish a society peopled with saints, ignores the fact that a man once in a while is entitled to lose his temper for the good of his health and to prevent him from committing a graver wrong, and unwittingly seeks to create a police state—a polity where the policeman can always book a citizen for any slight deviation from the straight and narrow path of righteous conduct.[4]

It should not be forgotten that the criminal law, as an instrument for regulating human conduct, is not a universal tool that can accomplish everything instantaneously but is a very limited one with capacities that will enable it to do so much and no more.[5]

Obstacles to individualization of punishment and the rehabilitation of criminals.—There can be no serious objection from the theoretical viewpoint to a Criminal Code anchored on social defense and intended to forestall social danger to rehabilitate, cure or educate the convict and to warn such other members of society and set an example to other possible transgressors. The proposed security measures are theoretically sound.

But does the Government have the resources, funds and facilities for implementing these benevolent and humanitarian purposes of the Code of Crimes? Are there many dangerous criminals in our midst, as may be the situation in the decadent and degenerate societies of Italy, Switzerland and other countries, which abound in idiots, homosexuals, communists, drug addicts and other socially dangerous persons, to warrant the view that the criminal law should be used primarily as a weapon of social defense? Do our judges have the time, training, incentive, interest and competence to determine whether a criminal, who has served out his sentence, is still dan-

[4] Take for example such proposed misdemeanors as disturbing the neighborhood (art. 748); toy guns (art. 745); gatherings between 2 and 5 a.m. (art. 756); allowing dancing or music between 2 and 5 a.m. (art. 757); drunkenness (arts. 763, 764); spitting in public places (art. 888); etc.

[5] PUTTKAMER, ADMINISTRATION OF CRIMINAL LAW, p. 5.

gerous or not? Do we have honest and competent prison administrators who can perform the task of rehabilitating the criminals?

The inherent and formidable difficulties in individualizing punishment and applying rehabilitative treatment have been explained by Paul W. Tappan, former head of the Federal Parole Board. He says:

> "In clinical theory it is highly desirable to retain the delinquent in custody until—and only until—the causes of his behavior are resolved so that he can return to the community rehabilitated and no longer dangerous. Our ability, however, to apply this theory to good effect must depend upon a combination of skills: to discover the causes of the delinquency, to apply effective treatment methods according to the requirements of the particular offender, to secure the necessary personnel and other resources for treatment, and—most of all, in the interest of justice—adequate criteria for release.
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> "Until now *we have lacked the knowledge, techniques and personnel to attempt this wholly clinical, positivistic approach to the criminal. With good reason we have feared that in actual practice we should err frequently in both directions* of releasing too soon individuals who are a serious danger to the community and in retaining too long others whose threat to security is small, whose rehabilitation is difficult or impossible to determine while they are confined in an abnormal institutional environment. The reality of these dangers has been attested often enough in our handling of these defective and insane. As a consequence we have preferred the compromise of partially indefinite sentences in which minimum and maximum terms are fixed, with the time of release determined by a paroling agency.
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> "This method is not wholly satisfactory for various reasons, and it is subject to unjust distinctions that come out of the fallibility of human decisions for treatment and release. It has represented, however, a rather ingenious compromise of our objectives in the treatment of the criminal: It provides, within limitations of our knowledge and skills, a useful method to protect the community against the threat of the offender over a time period that is proportional to his dangerousness, a period that is long enough, moreover, in the case of felonious crimes to offer some deterrent influence upon others who may be tempted to similar behavior. At the same time the indefinite term permits the duration of the confident to be guided to a considerable extent by the apparent effectiveness of the treatment. It appears safe to assume that where the individual is amenable to rehabilitation, the maximum sentence provides sufficient time to attain this goal in nearly every instance. In addition, the partially indefinite term offers considerable motivation to the offender to cooperate in the process of reformation in order to secure earlier release." [6]

Another writer notes that:

> "Life is much more complex to the practitioners of the reformation system. They must, perforce, interest themselves in all these questions of the background and personality of the individual offender. And they must be in a position to adopt an infinitely variable program of treatment

[6] 42 Am. Journal of Crim. Law, etc., pp. 332-333.

> for the various persons whom they are handling. Any program that calls for greater thought on the part of the administrators of that program than they have been applying in the past will be resisted bitterly by the people on whom these greater claims will be made. Thus to a very large extent it is unfortunately possible to say that the less able members of our law-enforcement setup (particularly those who have to do with prisons) are likely to take a very dim view of a reformation program. And their opposition is by no means to be lightly dismissed." [7]

Time in its issue of January April 4, 1960 reports that in Sweden, where prisons have most of the comforts of home and prisoners enjoy many liberties, "Sweden's penal reform has had no visible effect in reducing crime."

Imprisonment itself can be used for the "protection of society, by the prevention of crime, through the rehabilitation of offenders."[8]

However this matter requires long study, considerable investment of money in building decent penitentiaries, formulation of decent prison rules, appointment of efficient prison administrators, and adoption of modern penological techniques as practised in model prisons in other countries, such as the Borstal Institutions in England.

The machinery established by the Code of Crimes places too much work on the courts. This is impractical and will render the Code unworkable. At present the courts cannot even cope with their pending cases. Their dockets are scandalously clogged. The trials of cases have been unduly delayed. It would be unwise to give them additional work which they cannot perform efficiently.

Experiment on crimes against property.—The voice of prudence warns us that radical changes in the existing penal system may be fraught with danger. The practical efficacy and validity of the changes recommended by the Code Commission may be first tested with respect to crimes against property. The authorities could use crimes against property as the basis for experimenting with the theory that the criminal law should be employed for purposes of social defense and that security measures should be resorted to and the criminal should be reformed before releasing him.

In other words, try first on a small scale the system of security measures by applying them to crimes against property, instead of abruptly changing the present system, which has not been properly implemented. If the theory of social defense, the shortening of prison sentences and the enforcement of security measures, prove to be a sucessful experiment with respect to crimes against property, then we can expand its application to other crimes.

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[7] PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW, pp. 22-23.
[8] Mattick, 50 Am. Journal of Crim. Law, etc, p. 239.

But to effect radical changes in the present system, whose efficacy has not been fully tested because it has been incompetently administered, would be unwise, impractical and disastrous. There is no guarantee that the new system would be efficiently administered and would work effectively.

Our experience with the Probation Law enacted in 1935 should teach us to make haste slowly with respect to radical and abrupt innovations in the treatment of criminals. The Probation Law was enacted to permit individualization of punishment by adjusting the penalty to the character of the criminal and the circumstances of his particular case. It provided a period of grace for the rehabilitation of the pertinent offender. The assumption was that convicts could be reformed and that their transformation into hardened criminals should be avoided. The convict would be given an opportunity for reformation and his imprisonment would be suspended as long as he gave promise of reform. The welfare of society and the benefit to the individual convict are the ends of probation.

Yet, in 1937, after the law had just been in force for a brief period, President Quezon recommended its repeal, and it was later declared unconstitutional.[9] Probation was too advanced for us.

Individualization of punishment and reform of criminals under the present system.—Under the present system, it is required that "the regulations of the Bureau of Prisons shall contain such rules as will best promote discipline in all national and provincial prisons and penal settlements and best secure the *reformation* and safe custody of prisoners of all classes."[10] If this requirement is properly implemented, some of the objectives of the Code of Crimes can be attained thereby. The Prison Law also provides that "prisoner shall be treated with humanity" and that they may be compelled to work in public works projects.[11] Strict compliance with these legal requirements may be sufficient for the attainment of some of the objectives of the proposed Code of Crimes.

The security measure proposed in the Code of Crimes, consisting of compulsory residence in an agricultural settlement of labor establishment, is already provided in the existing Prison Law. Thus section 1709 of the Revised Administrative Code provides that the discipline of persons detained in the Iwahig Penal Colony "shall be of *reformatory and probationary character, and the surveillance over said colony and the colonists shall be less strict than is maintained in the main prison.*"

[9] People v. Vera, 65 Phil. 56.
[10] Sec. 1724, Revised Administrative Code.
[11] Secs. 1726 and 1727, Revised Administrative Code.

The Code Commission has not even bothered to find out if the present penal farm system is defective and has not achieved its objectives and, if it has failed, what causes were responsible for its failure.

Existing law provides that the Board of Indeterminate Sentence shall ascertain whether or not a prisoner should be paroled. The Board is supposed to have as members a trained sociologist, a clergyman or educator, a psychiatrist and a woman. The Board before paroling a prisoner looks into his physical, mental and moral record and is supposed to order his release only when it is convinced that the "prisoner is fitted by his training for release, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the law, and that such release will not be incompatible with the welfare of society." After the prisoner's release, he is under surveillance and required to report periodically to certain government officials or parole officers. The prisoner is ultimately discharged only after he has shown that he will " be a law-abiding citizen and shall not violate any of the laws of the Philippines." He may be rearrested if he violates the conditions of his parole.[12]

All these provisions of the Indeterminate Sentence Law are intended to protect society against dangerous criminals, the same objective which the Code of Crimes seeks to achieve through its security measures. The Code of Crimes wants to abolish the Indeterminate Sentence Board and vest its functions in the court that convicted the prisoner. This change is unwise. The courts are already burdened with much work. They do not perform their present functions efficiently. Their dockets are always congested. They will have no time to perform adequately the function of determining whether a prisoner should be eligible for release.

The present system is all right. If it has not worked out satisfactorily, the causes must first be ascertained. One likely cause is that there is only one parole board which, as disclosed in the case of the convicted Chinese plane hijacker, cannot cope with its work. The remedy is to establish more competent parole boards, not to abolish the old parole board.

The Supreme Court has held under the present penal system that "the State is concerned not only in the imperative necessity of protecting the social organization against the criminal acts of destructive individuals but also in redeeming the individual for economic usefulness and other social ends." If this can be done under

[12] Secs. 3 to 8, Act No. 4103.

the existing penal system, it would seem that its overhauling is not necessary.

Individualization of punishment is or should be achieved in the present penal system by means of the Indeterminate Sentence Law (Act 4103 as amended). Its purpose is "to uplift and redeem valuable human material, and prevent unnecessary and excessive deprivation of personal liberty and economic usefulness."

The Supreme Court (through Justice Butte) in a 1933 decision [13] indicate how the individualization of punishment should be applied. Said the Court:

> "It is necessary to consider the criminal, first, as an individual and, second, as a member of society. This opens up an almost limitless field of investigation and study which it is the duty of the court to explore in each case as far as is humanly possible, with the end in view that penalties shall not be standardized but fitted as far as is possible to the individual, with due regard to the imperative necessity of protecting the social order.
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> "Considering the criminal as an individual, some of the factors that should be considered are: (1) His age, especially with reference to extreme youth or old age; (2) his general health and physical condition; (3) his mentality, heredity and personal habits; (4) his previous conduct, environment and mode of life (and criminal record if any); (5) his previous education, both intellectual and moral; (6) his proclivities and aptitudes for usefulness or injury to society; (7) his demeanor during trial and his attitude with regard to the crime committed; (8) the manner and circumstances in which the crime was committed; (9) the gravity of the offense.
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> "In considering the criminal as a member of society, his relationship, first, toward his dependents, his family and associates and their relationship wit hhim, and second, his relationship towards society at large and the State are important factors."

However, many trial judges do not know the foregoing objectives of the Indeterminate Sentence Law and they have not bothered to individualize the punishment in the manner indicated by the Supreme Court in the *Ducosin* case. The result is that the Indeterminate Sentence Law has not been effective in redeeming the criminal for economic usefulness and other social ends.

The remedy is not to enact a new Code of Crimes but to require the judges to apply the principles of the Indeterminate Sentence Law.

Effective enforcement of the Revised Penal Code and the Prison Law.—The Code Commission says that the Code of Crimes opens and establishes a new orientation in Philippine criminal law. The observant student of criminal law may contend that what we need is

[13] People v. Ducosin, 59 Phil. 109.

not a new orientation but a strong, vigorous and relentless and at the same time judicious enforcement or implementation of existing penal laws, including the Prison Law, as the proper social defense against mounting lawlessness.

The implementation of the Prison Law has been inadequate. "The soundest paper system would be totally impoverished by an inadequate administration and sensible administration may get good results despite glaring defects in law.[14]

Criminal law is only one factor in repressing crime. Other factors and agencies have to be considered in an overall view of criminality. Criminal law itself is directly concerned with what conduct should be considered punishable or repressible. The other aspect of crime, which is what should be done with the convicted person, is largely a matter covered by our Prison Law.[15] To make the criminal law effective in attaining its purpose—whether retribution, prevention or deterrence, reformation or rehagilitation, social defense—its enforcement should be coordinated with the enforcement of the Prison Law.

The Code Commission admits on page 80 its report that there should be a more effective enforcement of the criminal law. "A country may have excellent laws defining crimes, but if there are formidable obstacles to the repression of criminal acts, the aims of the criminal law are neutralized to a large extent." This is probably the case with the Revised Penal Code. Not its old classical foundation nor its old orientation, nor its retributive objective explains its ineffectiveness, if it is ineffective. It is lack of more effective enforcement that has frustrated the Revised Penal Code. That may well become the fate of the Code of Crimes, with its considerable catalogue of new offenses together with the fact that it will take a long long time for the public and law-enforcement officers to familiarize themselves with its provisions.

A prolix and ponderous Code like the Code of Crimes, punishing the slightest impropriety as a misdemeanor, not only touches controversial questions of morality but, as Livingston Hall notes, makes everyone a criminal. Such indiscriminate use of the criminal law "weakens its hold as the arbiter of respectable conduct".[16]

Incompetence in prison administration is revealed in a news report that dead prisoners have been given good conduct allowances and later pardoned. One prisoner allegedly died because the toilet he was using collapsed.

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[14] WECHSLER, CHALLENGE OF A MODEL CODE, 65 Harvard Law Review, p. 1097-1101.
[15] Secs. 1705 to 1751, Rev. Adm. Code.
[16] 50 Harvard Law Review, pp. 616, 623.

Any practising lawyer, who has handled criminal cases, any law-enforcing officer who has apprehended and prosecuted criminals, any judge who has tried criminal cases and any officer who has acted as custodian of prisoners can easily see that the present Penal Code is effective to check crime and that it provides adequate social defense against criminals and socially dangerous persons and gives the prisoner opportunities for rehabilitation.

What is defective is the implementation of its provisions. Lack of peace officers, lack of zeal on the part of peace officers in apprehending criminals, and the inefficiency and incompetence of prosecuting officers and judges may explain the increase in criminality and lawlessness.

It may be also that the Prison Law is deficient and is the one which needs amendment so that the reformative or rehabilitative objective of criminal law may be attained. The rule on double jeopardy, which prohibits appeals from judgments of acquittal, the abusive exercise of the pardoning power and the congestion in prisons are the other factors which defeat the objectives of the Penal Code.

Sufficiency of the Revised Penal Code and the Prison Law.— The Revised Penal Code has acquired one singular merit which makes it superior to the Code of Crimes. The Penal Code is certain and is well known. The people, the bar, the prosecutors, the peace officers and the judges are familiar with its provisions which have been clarified in a luminous body of criminal jurisprudence.

By means of the 367 articles of the Revised Penal Code the lawmaking body simplified the 611 articles of the old Penal Code and other special penal laws. The Code Commission has drafted a Code of Crimes with nearly a thousand articles. The Code of Crimes is thus a veritable throw-back to the old Penal Code insofar as bulk is concerned.

A Criminal Code based on a sound philosophical foundation and containing provisions intended to protect society against criminals may be laudable, but if its provisions are not well known to the people and their meaning is not yet fixed by the courts, the Code may turn out to be unworkable, and become the instrument of persecution in the hands of unscrupulous peace officers.

The proposed Code of Crimes contains many new provisions which it would take time to master and make known to the people. Their enforcement would not only cause undue curtailment of personal liberty, but may generate injustices, harassments, annoyances and vexations reminiscent of happenings in a police state.

The unwarranted increase in the number of felonies and misdemeanors would render the Code of Crimes difficult to follow and result in much oppression to the citizen. A lawyer may encounter difficulty in mastering the Code. An ordinary layman, who never reads the Code, would never be able to know in his lifetime all the acts and omissions proscribed by the Code.

The Code of Crimes may be good for the year 2000. By that time the Government would possibly have sufficient funds to maintain good prisons and penal farms and to hire sociologists, psychiatrists and penologists to supervise the rehabilitation of criminals so that they would not become a menace to society after they leave the prison. By that time, the judges might have cleared the dockets of their courts and have more time to study the background of prisoners and their prospects for being reformed. Until that time comes, we have to be content with the present Penal Code and Prison Law and the Government should endeavor to improve prison administration so that penitentiaries would cease to be the breeding places of crimes.

Emphasis on the punitive aspect of criminal law.—The punitive or retributive purpose of criminal law should not be eliminated. The threat of punishment is the best deterrent against crime. Punishment prevents the convict from committing another crime at least while he is incarcerated and serves as an example and restraint upon others. Even the theology of universal religions is based on retribution. Their time-tested teaching is: Be good and you will get your reward in heaven; be bad and you will be punished in hell. If religion finds retribution as the most effective cause for inducing good conduct, there is no cogent reason why the State should repudiate it in criminal law. As Kant says, punishment is a categorical imperative.

The latest penal theory, the so-called "direction tecnico-cientifico" does not repudiate the retributive purpose of penal law.

> "La nueva direccion ya no pone como una de sus bases fundamentales la negacion del libre arbitrio, solo señala su inidoneidad para ser tomado como premisa y medida de la responsabilidad penal; se desliga de todo vinculo con la filosofia del positivismo.
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> "La defensa social como fin de la penal, que continua siendo uno de los cimientos de la nueva direccion, se realiza mediante la prevencion especial o individual y la prevencion general, y *no excluye la posibilided de concebir la pena como retribucion moral, siempre que se trate de retribucion moral objectiva.*" [17]

The retributive theory of punishment, which the Code of Crime seeks to abandon has been sanctioned by Congress time and again.

[17] 1 CUELLO CALON, DERECHO PENAL, 1956 Ed., p. 54.

Any deficiency in the Penal Code, as revealed by prevailing conditions, has been remedied by appropriate amendments adhering to the retributive theory. This is illustrated in the crime of kidnaping, or serious illegal detention. Originally, or in 1932, it was punished with *reclusion temporal* and it embraced (1) detention for more than 20 days (2) detention committed by means of simulating public authority and (3) detention with commission of serious physical injuries or threats to kill.

In 1946, to counteract the rampant kidnapings after the liberation, Congress amended the law on kidnaping by making it a capital offense (*reclusion temporal* to death). Congress also reduced the minimum detention period from 20 to 5 days and included in the crime of serious illegal detention the kidnaping of "a minor, female or public officer". This last amendment was obviously intended to check the frequent kidnapings of children, women and public officers, a practice which became very aggravated only after the war.

Congress also provided that the penalty for kidnaping would be *reclusion perpetua* to death where the detention was committed for the purpose of extorting ransom.

Inasmuch as the kidnapings continued unabated, Congress stiffened the penalty in 1954. It provided that the penalty for serious illegal detention would be *reclusion perpetua* to death (same as parricide) and that the penalty would be *death alone* if the kidnaping was for purposes of ransom.

The attitude of Congress towards kidnaping shows that it subscribes wholeheartedly to the retributive theory of punishment. It believes that crime, especially serious crimes, can only be repressed by severe penalties.

The Supreme Court also believes in the retributory theory of punishment. Thus in one case it is noted that, considering the depravity revealed by the defendant's act of engaging in the nefarious trade of killing for a price, "the only useful purpose which the life of such a public enemy could serve to society would be for the latter to make of it as a deterrent exemplarity through the application of the retributory justice as ordained by law." [18] In a case of robbery with homicide and attempted rape, the Supreme Court, in imposing the death penalty, said that society must protect itself against any enemy like the accused by taking his life in retribution for his offense and as an example and warning to others.[19] In another case, it was remarked that "the race of robbers, bandits, gangsters and other malefactors of the same brand should be ostracized perpe-

[18] People v. Young, 83 Phil. 72.
[19] People v. Garilla, 85 Phil. 611.

tually from human society until the same shall have disappeared completely from memory. They must be branded forever with the stigma of infamy. They are the shame of a race and the ignominy of a people, the disgrace of humankind." [20]

In 1864 Sir Henry Maine said that "all theories on the subject of punishment have more or less broken down. We are again at sea as to first principles." Dean Albert J. Harno notes that this observation is still true today.

It is not the proper penal philosophy that should concern the reformer in criminal law. What is important is thorough and solid knowledge of the facts regarding criminality and the pragmatic, remedial measures that may be employed to combat it.

It has been said that classical criminal law is absurd in its unscientific way of dealing with criminals. Unscientific because it concerns itself mainly with the crime but not with the criminal. On the other hand, it has also been remarked that positivist criminal law, insofar as it deals with the criminal and ascertains the multitudinous causes of crime and the complicated and individualized methods of treating criminals, is an absurdity in the world of actuality; it is impractical. It is ineffectual to check criminality. It requires a vast administrative machinery for attaining its objectives without in the meantime lessening lawlessness appreciably.

There is an observation that the guilty criminal has been *"the fond object of the Court's doting tenderness"* and that *"for the protection and welfare of the people x x x the public and the courts must stop coddling criminals, young as well as old, otherwise the terrible brutal crime wave which is sweeping our country will never be halted".*[21]

Suggestion.—Name a Crime Survey and Criminal Law Reform Commission to study criminality or crime as a social phenomenon in the Philippines, the conditions of prisons and correctional institutions, the manner in which offenders can best be reformed and rehabilitated, and the defects of the present Revised Penal Code, the manner it has been enforced and the latest reforms in criminal law and penology in force in other countries. The report of the Commission should be the basis for the revision of the Penal Code, the codification of special penal laws and the amendments to Prison Law. Needless to stress, the Commission should be composed of law-enforcing officers, prosecuting officers, judges, social workers, prison officials, teachers of criminal law, psychiatrists and sociologists.

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[20] People v. De la Cruz, 76 Phil. 169.
[21] 8 WIGMORE ON EVIDENCE, p. 317.
[22] Commonwealth v. Thomas, 117 Atl. 2d. 204.