THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE PHILIPPINES: SOME ASPECTS FOR A COMPARATIVE STUDY WITH THAT OF THE UNITED STATES

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The inquisitorial system of criminal justice prevailed in the Philippines while it was a crown colony of Spain.[1] Dissatisfaction arising from protracted proceedings, complexity and expense, together with opportunities for abuse inherent in the system, was keenly felt and gave rise to strong agitation for reforms.[2] Shortly after its acquisition of this nation at the conclusion of the Spanish-American War in 1898,[3] the United States extended with some modifications its own adversary system, thereby supplanting the Spanish system. The elimination of perceived defects and the affording of adequate protection to individual liberties motivated the reform[4] in the words of the Presidential Commission headed by Jacob G. Schurman, President of Cornell University:

> "A pure, speedy, and effective administration of justice will be established, whereby the evils of delay, corruption and exploitation will be effectually eradicated."[5]

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[1] See U.S. v. Samio (3 Phil. 691). General Order No. 58 issued by the American Military Commander on April 23, 1900 established the accusatorial system in the Philippines. International Law recognizes legislative functions of the military government of the army of occupation. People v. Santiago (43 Phil. 120). From 1900 to Feb. 24, 1920, criminal prosecutions in the Phil. were brought in the name of the U.S., the accused being charged for an offense "against the U.S. within the Phil. Islands". On that date, Act 2886 was passed whereby prosecution was thereafter undertaken in the name of the People of the Philippines. For a history of criminal procedure under Spain and subsequently under the U.S., see FRANCISCO, CRIMINAL PROCEDURE, (1964). Also, THE PENAL CODE AND PENAL ACTS, arr. & ann. Publisher's Staff, Lawyers Cooperative Publishing Co. (1930) 1077.

[2] See Harvey, *The Administration of Justice in the Philippine Islands*, 9 ILL. L. REV. 81 (1914).

[3] The Treaty of Paris by which the Phil. was ceded to the U.S. was signed on December 10, 1898. For an interesting and startling article citing numerous parallels between American military involvement in the Phil. and that in Vietnam, recalling an early "My Lai massacre" of Filipinos and suggesting that the Fil-American war was U.S.-initiated to ensure ratification of the Treaty of Paris, see Miller, "Making War in Asia — in 1900", *The New York Times*, March 20, 1971.

[4] *Op. cit.*, note 2.

[5] *Id.*, p. 75.

The introduction of the adversary system in the Philippines was hailed as "the greatest benefit conferred upon the (Filipino people)."[6] Thirty years later, an American legal scholar made this lavish appraisal:

> "The Philippine system of procedure, as an instrument for the enforcement of criminal law, is far superior, it is believed, to that employed in the United States. The procedure is swift but no essential right of the accused is sacrificed to celerity."[7]

Cultural Influence in the Administration of Justice.

No perceptive understanding of any legal system can be achieved without a reference to the past and an attempt to similarly understand the social characteristics and cultural values of the people, the governance of whose conduct and behavior is sought to be achieved. There are several of these that I perceive to have a distinct bearing, if not a significant influence on the administration of justice. These are by no means an exhaustive list, for a more profound understanding can come only from close collaboration with anthropologists and sociologists. There is a great need in the Philippines for such a collaboration to uncover, to analyze and explain hidden practices in the actual day to day operations of the criminal justice system which cannot be perceived from a mere casebook reading and on the basis of such study to propose reforms of practices which cannot be justified.

The most dominant single characteristic of Philippine society is the pervasive influence of close personal relations upon almost any conceivable human transaction. The success of politicians is strongly influenced by the extent of their kinship ties. One recalls a successful presidential candidate[8] from the south exploiting his dark complexion as proof of his familial origins from the darker and more politically cohesive people of the "solid north." Adherence to the principle of *jus sanguinis* as the basis for citizenship may be traceable to this trait. Big business corporations and enterprises are family based. These observations are not surprising when it is recalled that Philippine society itself originated from a clan and tribal organization called *barangay*.[9] A perceptive de-

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[6] A tribute paid by Arellano, C.J., see Le Roy, THE AMERICANS IN THE PHIL., (1914), quoted in Pugh, *Aspects of the Administration of Justice in the Phil.*, 40 PHIL. L. J., 526 (1965).

[7] Fischer, *Some Peculiarities of Philippine Law and Procedure,* 19 Va. L. Rev. 33, 49 (1932).

[8] Pres. C. P. Garcia, from Bohol province in the South, during one of the presidential campaigns.

[9] CONSTITUTIONAL REVISION PROJECT, U.P. LAW CENTER, SECTION ON "LOCAL GOVERNMENT", p. 703: The *barangay* was a settlement of some 30 to 100 families, resembling the Greek city states, and was the first political organization.

scription of this aspect of Philippine society is given in a Filipino-American co-authored book, thus:

> "Relationships many times removed are remembered carefully with the result that each child has many relatives and virtually doubles this number when he marries. He is responsible for helping all of his relatives and can in turn look to them for help when he needs it. In addition to relatives by blood and marriage each Filipino gains relatives through various ceremonies. For instance he assumes a responsibility toward the sponsors of his child at baptism or marriage. By giving and receiving favors he extends even further the extent of the group to whom he has obligations and to whom he can look for assistance. This bilateral, extended kinship means that each individual is part of an enormous network of persons, and we can understand him only as we see him in the matrix of relationships in which he makes almost every decision. One is tempted to draw an analogy to the tropical forest where a vast variety of biotic relationships exist with many plants drawing from or giving to other plants some of the conditions essential to life. There is a sort of relatedness which supports a complicated and beautiful growth, but a relatedness from which an individual plant cannot be separated. So it is in the human family here, each person living for and with the aid of many others."[10]

A study of early Filipinos[11] describes two modes of dispute resolution which, surviving with little modifications to the present day, are relevant to this paper. The first is mediation, an attempt to reconcile and compromise differences.

> "When complaint was made to the chief by one of his 'timaguas' (freeman or commoner), the former immediately summoned the defendant and attempted to compose the differences between the two men. If he failed, formal suit was opened."

The second mode was formal adjudication based on restitution.

> "The judgment for most cases involved the payment of a fine by the loser, the amount of which was usually within the discretion of the judge or judges. As a rule the judges and intermediators before whom the suit was tried received one-half of the fine. . . while the other half was paid to the winner of the suit or his relatives. Sometimes, it is said, the winner of the suit was left with a mere pittance as his share."

[10] Guthrie & Jacobs, *Child Rearing and Personality Development in the Philippines*, (1966) 24-43.

[11] Robertson, *The Social Structure of and Ideas of Law Among Early Philippine Peoples; and a Recently Discovered Pre Hispanic Criminal Code of the Philippine Islands*, Stephens and Bolton, THE PACIFIC OCEAN IN HISTORY, (1917).

Mediational procedures for dispute resolution is based on the fact that disputes and crimes occur in the context of the intricate network of relationships described above. It is also based on the cultural value of *pakikisama* or *pakiusap* which lays stress on social harmony and getting along well with one another. The breach in this harmony must be restored through *arreglo* — the reconciliation and compromise settlement by restitution. While positive values of such practices are explicitly recognized in civil disputes,[12] the serious hazards that such informal adjustments pose when applied to the criminal law context must likewise be perceived.[13] They add to the already formidable perils of what Fuller calls "intimate justice", unduly fostering habits of looking to the person, his status and relationship rather than to the objective act that he has committed. Fuller's observation that "though an aloof justice is bound at times to be harsh, an intimate justice, seeking to explore and grasp the boundaries of a private world, cannot in the nature of things be evenhanded."[14]

Another cultural value bearing on the administration of justice is that of *hiya,* literally meaning shame. Gorospe suggests that "it provides perhaps the strongest motivation of the Filipino."[15] Bulatao defines it "as a painful emotion arising from a relationship with an authority figure or with society, inhibiting self-assertion in a situation perceived as dangerous to one's ego."[16] Stated otherwise, it is the avoidance of situations involving loss of face, of prestige or causing social humiliation or embarrassment. Inferentially, this seems to be the basis for giving the victim of rape or other so called "private crimes" the absolute right to withhold prosecution therefor and under certain conditions to terminate proceedings and even to remit penalty by pardon or marriage of the victim with the offender.[17] This will be analyzed in greater detail subsequently.

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[12] R.A. (Republic Act) 386, CIVIL CODE OF THE PHILIPPINES, Article 2029 provides: "The court shall *endeavor to persuade* the litigants in a civil case to agree upon some fair compromise." (Emphasis supplied).

[13] In direct contrast to the view advocated in this paper, an official in the Department of Justice advocates the use of mediation to speed up the disposition of even criminal cases as a solution to clogged court dockets. See Pobre, *Courts of First Instance: Their Problems and Solutions*, 45 PHIL. L. J., 453 (1970).

[14] Fuller, THE MORALITY OF LAW, Rev. Ed., 72 (1969).

[15] Gorospe, CHRISTIAN RENEWAL OF FILIPINO VALUES, 54 (1966).

[16] Bulatao, *Hiya*, 12 PHILIPPINE STUDIES, 424 (1964).

[17] Act 3815, THE REVISED PENAL CODE OF THE PHILIPPINES as amended, hereafter cited as RPC, Art. 344. Also, THE REVISED RULES OF COURT (1964), hereafter cited as Rules, R. 110:4, par. 2-4.

Another relevant concept is that of *palakasan*, a prevailing belief that "a really powerful or influential person is able to circumvent the law."[18]

More related to crime causation theory than to the administration of justice is the concept of *machismo* which dictates that a man must act in the tradition of manliness and fearlessness. A society that places a premium on such masculine traits must also be prepared to assume a greater incidence of assaults and other crimes of violence.

Lastly, the economy of the country as being largely agricultural and consequentially having a very immobile population, in contrast to the high mobility of populations in industrial societies, is relevant and significant to much needed bail reform. The wide gap between the rich and the poor is an added consideration for this and other areas of law reform.

Professor Lon Fuller once remarked that the price paid for getting a total picture of a subject is a little obscurity. In presenting the following broad overview and general comparison, many details must of necessity be often blurred. The process described is that generally prevailing in the processing of defendants for the more serious offenses. This is not to depreciate the importance of what has been referred to as the "low-level criminal process" but as Professor Weinreb has aptly noted, "it is composed too little of our aspirations. . . and too much of failings. . . as to be useful as a model of our criminal process."[19] Also, the described process is that practiced in the "country" and may not be particularly true in the few large cities of Manila and environs. A *caveat* is therefore posted at this point.

THE AGENCIES OF THE CRIMINAL JUSTICE SYSTEM

1. *Law enforcement agencies.*

There are approximately 1,488 separate and independent local police forces in the country having an aggregate total of 10,329 policemen.[20] Each force pertains to the different forms of local government divided into 1,401 municipalities, 38 municipal districts and 59 chartered cities.[21] Their size and organizational structure vary considerably from the most

[18] Lim, Aldaba, TOWARD UNDERSTANDING THE FILIPINO JUVENILE DELINQUENT, 9 (1969).

[19] Weinreb, CRIMINAL PROCESS, CASES, COMMENT, QUESTIONS, Preface, xi (1969).

[20] Polcom (Police Commission) Statistical Compilation, Series of 1967, cited in Villaruz, *The Police Act of 1966* Notes and Comments, 42 PHIL. L. J., 400 (1967).

[21] *Op. cit.*, note 9, p. 209, Local Government.

simple force consisting of a mere handful of men to the quite modern police force of Manila numbering several thousands. In addition, there are about 31,024 barrios[22] whose head, the barrio captain, is likewise constituted a peace officer.[23] Except for the latter who is elected, all members of police forces are appointed by the mayor from a list of certified civil service eligibles.[24] Because of the dearth of eligibles, however, more than 60 per cent of the total police force hold temporary appointments. The length of their services is thus left to the discretion of a mayor whose actions are often dictated by political considerations. This was sharply criticized

> "as the much abused power which politics wields at every change of administration, without regard to the expense of training, the value of experience, the efforts of selection and screening and the good standing of the non-eligible peace officer, which cuts deeply into the continuity of efficient police service more than anything else."[25]

In addition to the local police forces, there is the Philippine Constabulary,[26] a national police organized strictly along military lines as to be in effect regarded as a separate service branch of the armed forces. Lastly, there is the National Bureau of Investigation which is likewise empowered to undertake investigation of crimes in any part of the country whenever public interest warrants such action.[27] Because there is no clear allocation of functions and jurisdiction among these separate law enforcement agencies, conflict not infrequently results. In one case, rivalry among these agencies threatened the solution of the murder of a city mayor. The widow had to appeal to the President to resolve the dispute in the interest of a speedy solution of the crime.[28] The desirability of resolving such overlapping functions is thus plain.

2. *Courts.*

The administration of justice is regarded as an "inherent national function."[29] Accordingly, courts[30] and government offices for the prose-

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[22] *Id.*, p. 713.

[23] *Id.*

[24] *Op. cit.*, note 20.

[25] Lazaro, *An Analytical Study of Local Police Problems*, 3 PHIL. ECO. BUL., 33 (1965).

[26] Act 2711 as amended, THE REVISED ADMINISTRATIVE CODE OF THE PHILIPPINES, hereafter cited Adm. Code, Chapter 35 relates to the structure, powers and functions of the Philippine Constabulary.

[27] *Op. cit.*, note 20.

[28] *Id.*, p. 404.

[29] *Op. cit.*, note 9, p. 726.

[30] The organization of courts, appointment of judges and their personnel, duties, functions and jurisdiction of the courts are governed by R.A. 296, THE JUDICIARY ACT OF 1948, as amended, hereafter cited as Jud. Act. See PHILIPPINE PERMANENT AND GENERAL STATUTES, Vol. II (1971), U.P. Law Center.

cution of crimes[31] are set up by the national government and all corresponding officials — judges, clerks of courts, prosecutors and others — are national officials appointed by the President with the approval of Congress acting through its Commission on Appointments.[32] This local-national dichotomy of prosecutorial functions creates problems which will be discussed subsequently.

The courts are organized on a four-level structure. The first two levels are the various trial courts — municipal and city courts, courts of first instance and circuit criminal courts — each of them presided over by a single jurist who performs both adjudicative and sentencing functions. The other two are the collegiate courts. The third or intermediate level is the Court of Appeals and at the top is the Supreme Court.

At the first level, each of the 1,401 municipalities and 59 chartered cities has at least one municipal or city court.[33] Their territorial jurisdiction is generally coincident with the political limits of the governmental unit where they sit. Municipal courts other than those sitting in the capital of the province have general jurisdiction over crimes punishable by up to 3 years and ₱3,000 fine; city courts and municipal courts of the provincial capital have jurisdiction over crimes punishable by up to 6 years and ₱6,000 fine.[34] A qualification for appointment, among others, is practice of law for at least 5 years.[35] In 1969, full-time service[36] was required of judges of these courts which were likewise made courts of record,[37] thereby abolishing trials *de novo* for appeals taken from offenses within their exclusive original jurisdiction.[38] In certain cases,[39] appeals may be taken directly to the Court of Appeals or the Supreme Court.

At the second level are the courts of first instance or CFI and the circuit criminal courts or CCC. The entire country is divided into sixteen judicial districts, each comprising from one local government (Manila with forty judges) to scores of political subdivisions. Each district has from eleven to forty-five courts, each one designated by the province[40] in which they sit, eg., Court of First Instance of La Union, 1st.,

[31] Prosecutors, named fiscals, are governed by the provisions of Sec. 1673-87, Adm. Code.

[32] CONST., Art. VI, sec. 2.

[33] Jud. Act., sec. 68.

[34] *Id.*, sec. 87(c).

[35] *Id.*, sec. 71.

[36] *Id.*, sec. 77.

[37] *Id.*, par. 2; sec. 75, as amended by R.A. 6081, (1969).

[38] *Id.*, sec. 45, par. 2, as likewise amended.

[39] *Id.*, sec. 87, last paragraph.

[40] A province is the largest political subdivision comprising municipalities, municipal districts and cities.

2nd., 3rd., 4th., & 5th., Branches. The total number of branches or "salas" as they are more frequently called, is 355 but as of 1969, only 230 were in actual operation.[41] The territorial jurisdiction of each CFI is confined to the political geographical boundary of the province in which it sits. The assignment of cases for trial to the different salas is either done by raffle or by the allotment of specific territorial jurisdiction within the province to each branch. Either method is done usually by agreement[42] among the judges themselves since no provision of law or rule covers this subject. There seems to be no reason for the division of courts into judicial districts since no provision is made for the administrative organization of each district into an operating system. As it is, each CFI of every province operates independently of the CFIs of other provinces within the same district. And furthermore, the different branches of each CFI operate in the same manner. There is no administrative organization of the district or the province for the election or designation of a chief judge or for setting up uniform policies for sentencing, bail or other matters. The subject matter of the CFI's and CCC's jurisdiction is for offenses punishable by upwards of 6 months or ₱200 fine, including the imposition of the death penalty.[43] Because of the rather unsystematic manner in which the jurisdiction of the lower courts was enlarged, needless questions were raised as to concurrent jurisdiction between them. The CFI has final appellate jurisdiction over offenses decided by the lower courts in their exclusive original jurisdiction. The CFIs handle about 25,000 new criminal cases annually. This constitutes approximately 50% of their entire caseload.[44] Through the years, they have accumulated a formidable backlog of undisposed criminal cases amounting to 33,456 cases and a total of 82,825 for all cases. Primarily, this was due to the disposition of less than the number of cases filed annually, thereby adding to the backlog the number constituting the difference. A reversal of this trend was noted in 1969 when decisional output was 105% over case input.[45] This problem of delay and congestion is currently occupying center stage among various reforms.

At the third level is the twenty-four man Court of Appeals which usually sits in eight divisions of three justices each.[46] Unanimous vote of all three is required for a decision, otherwise two other justices of

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[41] *Op. cit.*, note 13.

[42] It is only in the Court of the 6th Judicial District for Manila that division of business among the different branches is explicitly provided to be by agreement, see sec. 60, Jud. Act.

[43] Jud. Act., sec. 44(f).

[44] *Op. cit.*, p. 428, note 13.

[45] Antonio, *Crime and the Administration of Justice*, 32 THE LAWYERS J., 259 (1970).

[46] Jud. Act., sec. 24.

another division must be designated by the presiding justice to sit temporarily with that division.[47] This court has appellate jurisdiction over cases decided by lower courts where the imposable penalty exceeds six months. As correctly pointed out by Professor Pugh, the ideal of bringing justice closer to the people would be promoted by having separate divisions sit in various parts of the country instead of at its permanent office in Manila.[48]

At the top level is the only constitutional court — the eleven man Supreme Court. The distinction is important for at one time the Court of Appeals was abolished. Where the death penalty is imposed, automatic view is mandatory and a vote of eight justices is required to affirm the death penalty.[49]

3. *Prosecutors.*

Each of the country's 66 provinces has a prosecutorial staff headed by a Provincial Fiscal[50] with several assistants given a hierarchical rank as Assistant Fiscal and so on downward. The size of the office is generally commensurate with population and caseload volume. As with judges, they are appointed by the President with the consent of the Commission on Appointments. A qualification for appointment is active law practice for at least four years. Fiscals are all under the administrative supervision of the Secretary of Justice, a member of the President's cabinet, and their department head. Each city has a city Fiscal with a staff dependent on its charter. Prosecution before the municipal courts is generally undertaken by police prosecutors or a police counsel designated by the Secretary of Justice. In addition, there is, in the Department of Justice, an Office of State Attorneys. These state attorneys, who exercise the same powers as Fiscals, may be designated to undertake the investigation of prosecution of any case.[51]

4. *Defense counsel.*

There is no system of public defenders and the accused must be defended by a retained counsel or by a lawyer, known as *de oficio* counsel, who is assigned by the court.[52] That the adversary quality of the system is impaired by a generally uncompensated defense counsel need not be stressed.

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[47] *Id.*, sec. 33.
[48] *Op. cit.*, note 6, Pugh, 522.
[49] Jud. Act., sec. 9, par. 4.
[50] Adm. Code, sec. 1673.
[51] Sec. 2, R.A. 1198.
[52] Rule 116:3-5.

5 *Penal Institutions.*

Convicts sentenced to not more than 30 days, defendants awaiting trial or preliminary hearing before municipal courts, as well as persons detained by the police prior to their production before said courts are all lumped together in the municipal jail,[53] which is effectively under the administrative supervision of the police rather than a correctional or other custodial official. Convicts sentenced to not more than one year and defendants awaiting trial before the courts of first instance are lodged in the provincial jail[54] under the custodial care of a warden appointed by the governor. All others are deemed national prisoners[55] under the jurisdiction of the Director of Prisons[56] who is appointed by the President. Such prisoners may be confined in the main prison at Muntinglupa or in various penal farms[57] where their wives and children may join them and live with them in said reservations.[58] Various forms of governmental assistance are given these "colonists", including transportation expenses for family members, clothing and subsistence allowance and so forth.

THE CRIMINAL PROCESS

For the sake of comparative clarity and uniformity, it is necessary to have a common frame of reference. I have accordingly made a rough approximation of equivalent functions and stages of the process, using for this paper, American legal terms and disregarding Philippine nomenclatures. Thus, I will now use "magistrate courts" to denote the investigatorial and commitment functions of municipal and city courts; "preliminary hearing" for preliminary investigation as contrasted with preliminary examination which takes place prior to arrest; "assaults" for physical injuries; "misdemeanors" for light felonies, and so forth.

In the main, Philippine criminal procedure reads much like that of the Federal model which greatly influenced the former's growth and development. Necessarily however, the different structure of Philippine society, different characteristics and culture of the people described briefly above, have modified the American model in its actual operation and practice.

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[53] Adm. Code, sec. 1739.

[54] *Id.*, sec. 1740.

[55] *Id.*, sec. 1741.

[56] *Id.*, sec. 1706.

[57] Iwahig Penal Colony in the Province of Palawan, sec. 1709 and the San Ramon Penal Farm in the Province of Zamboanga Mindanao, sec. 1720. The Iwahig Penal Colony is in the island where the so called lost stone age tribe was claimed to have been discovered.

[58] *Id.*, sec. 1714.

It will be on these departures and modifications, upon those rules and practices that have evolved and developed distinctly, or as Fisher terms it "peculiarly", that this paper will focus on.

There are four easily discernible general differences from the U.S. criminal process, namely, (1) private prosecution of crimes arising in part from a procedural joinder in one proceeding of both the criminal action and the civil claim for damages arising from the crime; (2) a narrowly circumscribed prosecutorial discretion; (3) absence of any jury system – grand or petite; and (4) absence of non-custodial forms of penalties such as probation, suspension of sentence or the disposition termed "continued without a finding". These and other differences will be noted and analyzed within the discussion covering three broad areas or stages of proceedings, to wit, (1) pre-trial; (2) trial; and (3) sentencing and service of penalties.

I. *Pre-Trial Proceedings*: *Invoking the criminal process.*

A sixteen year old girl coming home from school late one afternoon is waylaid along a lonely road and raped by an over-ardent suitor aided by a close friend. She staggers home bruised and bleeding, clothes torn and dirty. Hysterically she relates the horrid tale to her shocked parents. Immediately they decide to report the matter to the authorities – but which one? They hesitate to go to the police for the suspect is the son of the mayor who of course controls the police. They go to the prosecutor but are informed that no quick action can be obtained from him because the rules require that no information can be filed by the prosecutor without giving the suspect a chance to be heard in a preliminary hearing at which he will be entitled to cross-examine the victim and her witnesses and to adduce evidence in his favor.[59] In fact the prosecutor advises them to file their complaint directly with the magistrate where the summary proceedings there employed will ensure the satisfaction of their desire for quick action. Not knowing how to go about following this advice, they finally decide to seek the assistance of a lawyer-kin of theirs.[60] He takes down their statements in question and answer form and has the victim examined by a government physician. Armed with these papers, they all proceed to the office of the

[59] Rule 112:14.

[60] There is always a relative somewhere who is a lawyer. As correctly noted, "The ratio of law graduates to population is approximately the same in both countries" — the Philippines and the United States. See Peck, *Administrative Law and the Public Law Environment of the Philippines*, 40 WASH. L. REV. 406 (1965).

magistrate where they swear to their correct understanding[61] and the truth of their statements. The magistrate then further questions them on points he wants clarified. The whole process lasts no more than half an hour. Upon being satisfied of the existence of probable cause, he dictates an order stating such determination and then signs an arrest warrant.

The foregoing account illustrates two points: first, the summary magisterial determination of probable cause leading to the issuance of the arrest warrant; and second, a system of private prosecution of crimes where counsel for the victim-complainant actually initiates the start of the criminal process without being screened by either the police or the prosecutor.

A. *Pre-Arrest Proceedings.*

Magisterial determination of probable cause.

Unlike Federal Rule 4 (a) which allows a finding of probable cause to be made from a mere reading of the complaint or the affidavits filed with it, by explicit requirement of law[62] and the constitution,[63] an *ex parte* hearing must be conducted by the magistrate at which he must personally examine under oath the complainant and other prosecution witnesses. No distinction is made as to the gravity of the offense charged and therefore such examination must be made for all offenses. Further, affiants must testify upon personal knowledge and their testimonies, together with the finding or conclusion of the magistrate must be reduced to writing. A dual determination must be made: that the offense complained of has been committed and that there is reasonable

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[61] Interrogation, both questions and answers, is conducted in the local dialect of the region where it takes place but the written statement is generally prepared in English, which is currently the prevailing official language of the courts, thus requiring this part ascertaining affiant's understanding of his statement in English. The prevalence of English is due to the fact that it is the medium of instruction in education and also to the fact stenography is confined to English. Since literacy in the English language is estimated to be only 37 per cent, some 63 per cent of the population is disadvantaged, see Taylor, *Foreword*, 40 WASH. L. REV. 402 (1965).

[62] Sec. 87, par. 3, Jud. Act as amended provides: "No warrant of arrest shall be issued by any municipal judge in any criminal case filed with him unless he first examines the witness or witnesses personally, and the examination shall be under oath and reduced to writing in the form of searching questions and answers."

[63] Art. III:1(3), Phil. Const., in part provides: "... and no warrant shall issue but upon probable cause *to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce*, and particularly describing the place to be searched and the persons or things to be seized. (Underscoring refers to the modification made to the U.S. Fourth Amendment.)

ground to believe that the person charged committed it.[64] The first element in our hypothetical case was established by the medical certificate attesting to a ruptured hymen and semen traces in the vagina. The second, by the identification testimony of the victim. The written requirements are deemed necessary to put on record the facts on which the magistrate bases his conclusion as well as for purposes of an orderly review. Where the determination of probable cause is put to a test before a higher court, the record will obviate the necessity of putting the magistrate on the witness stand to explain and justify his determination.

Another difference to be noted at the pre-arrest stage is in whom the choice is given as to when summons instead of warrant shall issue. Such decision is entrusted to the U.S. Attorney[65] with no explicit standards to guide his choice. In the Philippines, the discretion is given to the magistrate whose choice cannot be exercised in favor of a dangerous defendant (as shown from his record of recidivism or from being a "fugitive from justice" or being charged with assault) or a defendant whose chances of voluntary appearance for trial are not likely, as when he has no known place of residence.[66]

Mayoral power of arrest.

The magisterial power to determine probable cause for the issuance of an arrest warrant is questionably extended to the mayor of a town in case of temporary absence of the magistrate.[67] What precisely constitutes "temporary absence" has not been clearly defined. Does it mean literally physical absence from the territorial jurisdiction of the court? If it is, then every time a magistrate, who does not reside in the same town where he is officially assigned, goes home after office hours, the door is opened for the mayor to become a magistrate. Further, the only standard set for the exercise of this dangerous power by a politician is that a delay will be prejudicial to "the interest of justice." Whatever protection against arbitrary exercise of this power was sought to be achieved by this standard has become illusory in practice. The standard is of the vaguest sort that gives no effective guidepost for the exercise of this power. It leaves its determination to the subjective sense of every individual mayor wanting to play magistrate and is thus clearly objectionable on this score. In addition, there are strong reasons to

[64] Rule 112:6.

[65] In Massachusetts, decision whether to issue summons or warrant is exercised by the clerk of court, Mass. Gen. Laws Ann. c. 276:22.

[66] Rule 112:9.

[67] Rule 112:3.

believe that the power of arrest in criminal proceedings is constitutionally entrusted only to the judiciary.[68] The Philippine constitutional provision expressly modified the U.S. Fourth Amendment by providing that probable cause "be determined by the judge". The conclusion cannot be escaped therefore that giving such power to a mayor is an unconstitutional delegation of a judicial power. An implied affirmance of this view seems to have been made in one case where the Supreme Court, in upholding the power of the Immigration Commissioner to order the arrest of an overstaying alien which was challenged on similar grounds, held that the cited constitutional provision "contemplates an order of arrest in the exercise of judicial power as a step preliminary or incidental to prosecutions . . . for a given offense. . . ."[69] The intention to assure the safeguards of an antecedent objective justification before a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"[70] is defeated by this provision. A mayor whose decisions may be dictated by considerations of political expedience, is certainly not such an official. Moreover, like Caesar's wife, the purity of the process must be placed above and beyond even a trace of suspicion.

B. *Arrests without warrants.*

The grounds upon which arrests without warrant may be made are explicitly spelled out by rule.[71] They are similar to those prevailing in the U.S., to wit, offenses committed in the presence of the arresting officer and arrests on probable cause. Several differences, however, may be noted. Philippine rule in addition authorizes a warrantless arrest of one who "is about to commit an offense in his presence." If "probable cause" which is enshrined in the constitution has acquired a settled meaning as reasonable ground to believe that an offense has been committed by the suspect, how can a valid arrest consistent with such a meaning be made for an offense not yet committed? Where the suspect commits an overt act that would constitute an attempted crime, there may be

[68] In contrast to this view, the U.S. Supreme Court, in a case of Philippine origin, Ocampo v. U.S., 234 U.S. 91,100-01 (1914), held that the power of arrest is not strictly a judicial function — merely a quasi-judicial one which the legislature may confide to the discretion of other officials. This case was decided long before the adoption of the Phil. Const. in 1935, with the modified language noted in note 63. Divergent U.S. views holding otherwise are: State ex rel. Duhn v. Tahash, 275 Minn. 377, 147 N.W. 2d 382 (1966) holding that a deputy clerk of court could not issue a warrant based on a complaint charging a felony made before him. Also, State v. Uaulick, 277 Minn. 140, 151 N.W. 2d 591 (1967), extending the holding in *Duhn* to prosecutions for misdemeanors. Both cited in Weinreb, pp. 20-21.

[69] Morano v. Vivo, G.R. No. L-22196, June 30, 1967, 20 SCRA, 563.

[70] Johnson v. U.S. (333 U.S., 10, 14).

[71] Rule 113:6.

little problem. But the rules do not even require the performance of such an overt act. The determination of what legally constitutes an attempt may well be beyond the competence of an educationally deficient and untrained police officer. And precisely because of the total absence of adequate and useful standards to guide the discretion of the officer, this provision is clearly objectionable for its potential for abuse and the danger to civil liberties that it entails. The possibility of arrests for as yet no more than merely evil thoughts must be averted.

The second difference is that a warrantless arrest on probable cause may be made for all offenses — both felonies and misdemeanors alike. This is in constrast to the U.S. rule which denies the officer power to arrest without warrant in misdemeanor cases except only when committed in his presence. A similar restriction seems plainly desirable in view of the broad and bewildering variety of petty offenses that seems ever to be growing. Some violation or another may probably be unearthed even for seemingly innocent acts that generally pose no serious harm which would justify an immediate arrest. Reason dictates that such power should be strictly confined to serious offenses that society considers a grave threat to its security and safety. As Justice Douglas stated, "apart from those cases where the crime is committed in the presence of the officer, arrests without warrants, like searches without warrants, are the exception, not the rule in our society."[72]

It may be argued that the danger of abuse arising from this omission to differentiate between misdemeanors and felonies is curtailed by the additional requirement imposed by this rule, i.e., a determination that the offense must "in fact" have been committed. This incidentally is another difference from the U.S. rule. While this may be true, query is made as to the wisdom of adopting a procedural safeguard that may constitute an impediment to effective and efficient law enforcement when the same objective can just as easily be attained by the simple expedient of distinguishing felonies from misdemeanors. For it cannot be denied that requiring an officer to determine that an offense has in fact been committed before he can arrest without a warrant will often, in many situations, be requiring the impossible. Such constricting requirement on pain of personal liability will effectively nullify the prompt arrests necessary for the protection of public safety that is the basis for the grant of such power. A literal interpretation of this requirement will "put a premium on crime and will terrorize peace officers through

[72] Draper v. U.S. (358 U.S. 307).

a fear of themselves violating the law."[73] While there are older cases[74] holding that such requirement should not be literally interpreted, the re-enactment of the rules in the same explicit language gives rise to doubt and ambiguity. Making the misdemeanor-felony distinction then and modifying the rules to clarify this ambiguity will promote the attainment of the dual objective of protecting individual liberty and advancing the cause of effective law enforcement.

C. *Post-Arrest Proceedings.*

Reverting to our hypothetical rape case, news in the generally small communities that make up the Philippines travels amazingly fast. This means that news about the issuance of the arrest warrant by the magistrate as well as the amount that he has set for bail,[75] will have reached the accused even before the police will have a chance to execute the warrant. Frequently, under similar circumstances, the accused, accompanied by his lawyer and already carrying with him the required bail bond, will surrender himself[76] either to the police or more often to the magistrate. Some magistrates even accept bail from counsel without requiring the appearance of the accused at all. This is particularly true where the accused is himself a prominent and influential member of the community or is the son or close relative of one. This is where the concept of *palakasan* earlier explained will come in. Upon his acceptance of bail, the magistrate orders the release of the accused.[77] But where the accused does not go directly to the magistrate or does not even appear, to whom must the order of release be directed, and release from whose custody? The magistrate is not a law enforcement officer to whom a person wanted by the law may properly surrender himself. And certainly, it will be manifestly absurd for the magistrate to order himself to release the accused from his own improper "custody." And, if it is only the lawyer who appears to post bond for an absent accused, can it be said that there is any custody or lawful restraint from which the accused may be ordered released? But even if such questions are not raised, the discrimination against the poor or merely less influential accused certainly is odious. Cries of "split-level" standards and "compartmentalized justice" based in part on such practices, continue to grow louder and cannot be long left unanswered.

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[73] Suarez v. Platon (69 Phil. 556).

[74] U.S. v. Sanchez (27 Phil. 442); P. v. Ancheta (68 Phil. 415).

[75] *Infra*, see discussion on bail.

[76] Voluntary surrender and guilty plea are explicitly stated as mitigating circumstances by Art. 13(7) RPC.

[77] Rule 114:11.

After an arrest under or without warrant, the general practice is for the police officer to take the arrestee to the stationhouse for the usual "booking" and fingerprinting process. The booking is important as a written record of the precise moment when actual police custody began. This is significant for the purpose of determining criminal liability of the officer for arbitrary detention.[78] Prosecution of police officers for this offense is not unusual in view of the private prosecution of crimes and the narrow prosecutorial discretion of police officers, both of which will be discussed subsequently.

Prompt "presentment" to the magistrate.

The rules make a distinction between the duty of presentment imposed upon the arresting officer in cases where the arrests are made under warrant[79] and the duty of presentment in cases of arrests made without warrant.[80] In the former case, the duty is the same as that required by Federal Rule 5 (a) i.e., to take the person arrested before a committing magistrate "without unnecessary delay." In the warrantless arrest case, however, the rules require the performance of this duty "without unnecessary delay *and* within the time prescribed by law." (Emphasis supplied). The "time prescribed" referred to are specific limits of six, nine or eighteen hours depending on the gravity of the offense for which the arrest was made.[81] A loophole not infrequently resorted to is to charge the highest plausible offense to gain more time.

The foregoing distinction is made from the different circumstances obtaining in the two cases. An arrest under warrant assumes that the judicial process had already been commenced by the filing of a formal charge, either a complaint or an information. A judicial determination of probable cause had been made so that the person arrested is no longer a mere suspect but a defendant. The criminal action thus cannot be terminated on the sole decision of the prosecutor not to prosecute.[82] Judicial concurrence to such decision must be made. An arrest under warrant also assumes that the police is in possession of the necessary quantum of evidence to sustain further judicial proceedings and accordingly interrogation of the defendant properly should be no longer necessary. Therefore, nothing more remains to be done except to take the defendant without unreasonable delay.

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[78] RPC, Arts. 124-25.
[79] Rule 113:3.
[80] Rule 113:17.
[81] Art. 125 RPC sets these limits at 6 hours for offenses punishable by up to 30 days; 9 hours for those punishable by up to 6 years; and a maximum of 18 hours those penalized by more severe sentences.
[82] U.S. v. Barredo (32 Phil. 444).

In the warrantless arrest case, however, the situation is quite different. Judicial process has not yet started. No charging document has been filed in court that would give it jurisdiction over the case. The arrest has thus not conferred upon the suspect the formal status of a criminal defendant. Frequently, the police are in possession of no sufficient evidence to formally charge the arrestee with any crime so that up to this point, they can and often do simply decide to drop charges and release the suspect. This is usually done in the case of prostitutes and vagrants who are harassed out of town by a crusading mayor. The threat of an action for arbitrary detention by the arrestee against the arresting officer, however, serves to inhibit such arbitrary police tactics, including arrests for investigation of unsolved crimes.[83] Bearing these considerations in mind, there seem to be strong grounds to believe that the periods of six to eighteen hours within which the person arrested without warrant must be taken to a committing magistrate, were intended to provide the police with the limited opportunity to conduct an interrogation of the suspect. Originally, the law provided for only 1 hour but this was increased to six hours[84] and later to its present form of up to eighteen hours.[85] Senator Cuenco, author of the last amendment, explaining the need for lengthening the periods of allowable detention, stated that the "single period of six hours is inadequate for the study and investigation of grave offenses." The amendment was sought to be justified by the objective, "to obviate the hurried filing of unjust informations or complaints."[86] There is no decided case squarely touching upon this issue. In any event, it would be well to settle definitively the ambiguity now existing as to the legality of police interrogation within the periods provided by law and the admissibility of any evidence secured from the accused within those periods.

The arresting officer's duty to "take the person arrested (without warrant) to the proper court or judge for such action as they may deem proper to take"[87] was quite surprisingly construed to mean, not "a physical delivery but (consists) in making an accusation or charge or filing an information against the arrested person with the corresponding court whereby the latter acquires jurisdiction to issue an order of release or commitment of the prisoner."[88] Following this ruling, the practice is for the police to utilize the given periods to gather evidence against the

[83] People v. Orais (65 Phil. 744); Suarez v. Platon, *supra*.
[84] Act 3940.
[85] R.A. 1083.
[86] Aquino, THE REVISED PENAL CODE, 1961 ed. Vol. II, 818.
[87] Rule 113:17.
[88] Sayo v. Chief of Police (80 Phil. 859).

accused, including interrogation, put them in presentable form and drafting the complaint to be filed with the committing magistrate. The penal code provision penalizing detention *beyond* the prescribed limit serves to reinforce the view above suggested that interrogation *within* those limits was contemplated. If this impression is correct, procedural safeguards protecting the right of the accused during such custodial interrogation must be worked out in order to render the process immune from constitutional challenges.

The foregoing interpretation of the court seems vulnerable to challenge. First, the filing of the charging document does not, as the opinion states without qualification, confer upon the court "jurisdiction to issue an order of release or commitment of the prisoner." The charge gives jurisdiction over the case but not over the person of the accused as to whom personal jurisdiction is acquired by the service upon him of the coercive process of arrest. Further, it is based on the misconception that to construe the arresting officer's duty "to take" the arrestee before the magistrate as a "physical delivery" would in effect sanction a transfer of custody to the judge who is not a "custodian of the prisoner." This loses sight of the primary bases of procedural rules requiring prompt presentment which are to protect the constitutional right of the accused to be informed of the charges against him[89] and to be advised of his constitutional rights. The evident purpose of this procedural requirement is to check against the universally condemned police practice of "third degree" and to avoid violation of the accused's privilege against self-incrimination[90] by allowing the magistrate to order the commitment of the accused to the proper custodial officer.[91] There was no justification for the court to excuse this duty of presentment in warrantless arrest cases as to which this procedural safeguard is even more important than arrests made under warrant. The duty is plain. It only remained for the court to add that a complaint or information should be filed with the court when delivery of the accused had been made.

Summary judicial review of warrantless arrests.

Be that as it may, the foregoing ruling has given rise to a quite desirable practice. Within the time limits set by law, the police must do one of two things — file the requisite complaint and produce evidence sufficient to establish probable cause or drop charges and let the

[89] Art. III:1(17) of the Phil. Const., in part provides: "In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and the cause of the accusation against him...."

[90] Art. III:1(18) of the Const., in part provides: "No person shall be compelled to be a witness against himself."

[91] McNabb v. U.S., 318 U.S. 332, 63 S.Ct., 608 (1943).

suspect go. In order to be free from criminal liability for a detention in excess of those limits, an order of commitment in lieu of an arrest warrant must be secured from the committing magistrate.[92] This sets the stage for a practice which in effect constitutes a summary judicial review of the prior police determination of probable cause upon which the warrantless arrest was made. A plausible basis for this practice may be inferred from the requirement at preliminary hearing that the accused "shall be given access to the testimony and evidence presented against him at the preliminary examination." This clearly refers to arrests under warrant. Therefore, this duty cannot be complied with in warrantless arrest cases *unless* an equivalent summary hearing is conducted. "Sound judicial instinct" arising in part from a natural abhorrence against being made mere rubber stamps of prior police decisions is a tacit ground upon which this practice may have arisen. Solicitude for civil liberties and a desire to afford better protection from unwarranted police intrusions, furnish yet another basis. For if an accused waives his right to a preliminary hearing, the ensuing decision, following usual practice, to bind over to the district court will then be made on no stronger evidence than what the police originally had. That certainly is a slender thread on which to hang a man's liberty and possibly even his life. It was therefore a pleasure to discover that a proposal along this line of reform had been made to amend Federal Rule 5 (d) (l). Undoubtedly, recognition and formalization of this practice is desirable.

At this initial appearance before the magistrate, the accused is informed of the charge against him, advised of his rights and given copies of the complaint and written testimonies or affidavits filed with the court.[93] As previously stated, the purpose of prompt presentment is the protection of the accused's privilege against self-incrimination. Much of this protection, however, is diluted in practice. For after presentment, and upon inability or failure to post the required bond, the accused is ordered committed back to the municipal jail to await hearing. That place for his detention is under the administrative supervision of the police.[94] Free access to the accused for purposes of police interrogation is therefore virtually assured under this set-up. This being so, there is no reason for the police to delay presentment since any desired interrogation could just as easily be undertaken after presentment as before it. It is thus plain that the merger of two separate functions — custodial and law enforcement — in the same police agency, has effectively can-

[92] Lino v. Fugoso (77 Phil. 933).
[93] Rule 112:10.
[94] *Op. cit.*, Adm. Code, sec. 1739.

celled out the protection sought to be achieved by the procedural requirement of prompt presentment.

Some sort of restriction has been placed on this generally free access of the police to the accused for interrogation by giving the accused, immediately upon his arrest, the right to have counsel "visit and confer privately with (him) in the jail or any other place of custody at any hour of the day or, in urgent cases, of the night."[95] Further, obstruction of this right by any officer is made punishable by prison sentences up to six months.[96] While possibly because of these safeguards the situations posed in the *Escobedo-Miranda* line of cases may have been forestalled, the protection afforded by these provisions is considerably weakened by two factors. First, there must be a specific request made by the arrestee or somebody else "acting in his behalf." The right thus ultimately turns upon knowledge or awareness of this right. In a recent poll conducted to assess this factor as a part of a constitutional revision project,[97] however, it was revealed that sadly only 5.19 per cent were aware of the constitutional rights of criminal defendants. Loss of right to counsel by default is a clear conclusion that can then be assumed in the face of such statistics. Second, this right is inferentially limited to the assistance of retained counsel. This conclusion is reached from the rather peculiar language of these provisions of law and rules that grant this right, not to the accused but to counsel. Since an attorney is not granted this right to confer with the accused except upon the latter's request, the clear implication is a prior contractual engagement. The right then hinges on the additional factor of financial ability to pay for legal assistance. Since the great majority of those drawn into the criminal process are both ignorant and needy, it is an easy conclusion to reach that this combination may well in fact make this right illusory for the vast majority of criminal defendants.

Bail.

As a matter of practice, the magistrate usually sets the amount of bail required in the arrest warrant that he issues. While the rules[98] explicitly authorize this procedure only in cases where the arrest occurs outside the territorial jurisdiction of the issuing magistrate, the practice is extended to cases not so covered. The net effect facilitates the early release of the accused. The right to bail has been elevated to constitu-

[95] Rule 113:18.
[96] R.A. 857:1.
[97] *Op. cit.*, note 11, Opinion Poll on the Constitution, p. 14.
[98] Rule 112:7.

tional status.[99] The language used, *"All persons* shall before conviction be bailable by sufficient sureties..." seems to extend this right not only to criminal defendants but to all persons otherwise deprived of their liberty.[100] Persons arrested without warrant may therefore apply for bail even before they are formally charged in court. "If there is a presumption of innocence in favor of one already formally charged with a criminal offense, (Article III, section 1 (17), *a fortiori,* this presumption should be indulged in favor of one not yet so charged, although already arrested or detained." The benefit of this rule, however, has not often been resorted to since *habeas corpus* proceedings are more generally used.

Three alternatives are open for an arrestee to obtain his provisional release. He may deposit cash in the amount set with the designated government finance officer.[101] In case of conviction resulting in fine, this amount is available for its satisfaction. While this alternative is limited to financially able defendants, it is quite popular with defense lawyers for it ensures to some extent the payment of their fees. Second, bail may be posted by a surety company upon payment by the accused of a premium fixed at 3 – 5% of the amount set. Or, third, the accused may present to the court two or more friends or relatives who will stand as his sureties upon a showing, through a description of the latter's properties, that they are worth the amount of their undertaking.[102] Clearly, the power to order the release of a defendant upon acceptance of bail in any of the three forms above is lodged with the court. In practice, however, some courts allow "stationhouse" bail whereby the police chief or desk sergeant is delegated the decision whether or not to release the arrestee upon a pre-determined schedule of bail amounts graduated according to gravity of the offense charged. There is nothing so sacrosanct about the acceptance and release on bail that it has to be confined as a judicial function. The express recognition and regularization of station house bail practices seem desirable in the interest of expeditious release of persons who after all are still constitutionally presumed innocent.

It is in this area of bail that the unequal economic and social circumstances of the accused put to a test professed adherence to the constitutional principle of equal protection. For while an indigent defendant languishes in jail awaiting the culmination of a seemingly interminable criminal process, the affluent accused is immediately bailed out. A weak

[99] Art. III:1(16).
[100] Teehankee v. Rovira (42 O.G., 717).
[101] Rule 114:14.
[102] Rule 114:9-10.

attempt to remedy this imbalance was made by a legislation[103] which provides for a release on personal recognizance in cases where the offense charged is a minor one punishable by not more than six months imprisonment. In addition, the law "is shot through with exceptions" so as to make the benefits intended for the indigent accused "more apparent than real."[104] More extensive reforms based on systematic study cry out in this area. Particularly to be considered is the impact of a relatively stable population in an agricultural society upon court appearance or its converse of bail jumping. This should be assessed with other factors bearing on this issue, such as length of employment, residence in the community, home ownership, strong family relations, and other relevant factors.

Preliminary Hearing.

Upon presentment, the magistrate sets the date for preliminary hearing.[105] Depending on how congested the court calendar is, this may take place immediately or may be set anywhere from the day following to several weeks thereafter. That reason for this is that there is no specific provision similar to 18 U.S.C. s3060 setting time limits within which preliminary hearings must be conducted. Also, unlike Federal Rule 5 (c) stating that the "defendant shall not be called upon to plead" at this stage, the rules are silent on this point. In practice, a "plea" is usually taken in what some authors term "arraignment on the warrant."[106] If the accused pleads guilty, he is required to subscribe to this in writing. This will be deemed a confession[107] which is not only admissible during trial but is considered a highly persuasive evidence of guilt. This makes plain that the practice at this stage is "critical" in the sense that danger of prejudice may be averted by the effective assistance of counsel. Unfortunately, however, there is no provision for the appointment of assigned counsel at this stage. Right to retained counsel is the only right assured the accused,[108] prompting the same critical observations on discrimination against the poor made earlier on a similar right to retained counsel after arrest.

Where the accused "pleads" not guilty, he may be permitted to cross-examine the complainant and other prosecution witnesses.[109] This is discretionary with the magistrate and where this is allowed, cross-

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[103] R.A. 6036.

[104] Agabin, "Congress and Legislation: The 1969 Record", 45 PHIL. L. J., 272 (1970).

[105] Rule 112:10.

[106] Hall, Kamisar, La Fave and Israel, BASIC CRIMINAL PROCEDURE 9 (1969).

[107] Rule 112:7.

[108] Rule 112:11.

[109] Dequito v. Arellano (81 Phil. 128).

examination will be made on the basis of the written affidavits which are taken down during the *ex parte* proceedings prior to arrest, or in the summary review after a warrantless arrest, and copies of which are furnished the accused at presentment. The accused himself may testify and present other evidence in his favor. If from all the evidence the magistrate finds probable cause, he will bind over the defendant to the district court for trial. The prosecutor, however, is not bound by this magisterial determination and I shall criticize this practice subsequently. On the other hand, if no sufficient evidence is found, dismissal of the case and discharge of the accused must be ordered. Whether the magistrate has the power to dismiss at this stage upon a lawful defense that may be interposed by the accused, will be discussed in the section on preliminary hearings before the prosecutor.

Private Prosecution of Crimes.

As was earlier noted, the victim of a crime is allowed to file her complaint directly with the court. In later stages of the process, she or her counsel is permitted to collaborate actively with the prosecutor in the prosecution of the accused for the crime charged. Not infrequently, after arraignment the prosecutor formally informs the court that he is turning over the active conduct of the trial to the "private prosecutor." The legality of this practice was unsuccessfully challenged in several cases. Said the Supreme Court:

> "The prosecution of offenses is a public function. But said public function can be performed not exclusively by fiscals (prosecutors) or other public officials, but by private attorneys in cases where they are allowed to intervene as private prosecutors. After all, in the performance of their professional duties, lawyers are officers of the court and assume public and official responsibilities:"[110]

This practice has arisen from two causes. First, it may have arisen and grown as a practical measure to supplement an inadequately manned public prosecution. In the Province of La Union, for instance, there are only ten prosecutors serving five district courts, one circuit criminal court and twenty municipal courts. By sheer necessity and for other reasons we will subsequently analyze, the prosecutors are confined to serving only the areas where the district courts sit. The magistrate courts must rely on police prosecutors aided by private prosecutors. Secondly, the practice has been on offshoot of a rather unique concept of crime which is viewed not only in the conventional sense as an offense

[110] Diel v. Martinez (76 Phil. 273).

against the State but also as a private offense against those injured thereby.[111] This concept finds formal expression in the codal provision declaring that "every person criminally liable for a felony is also civilly liable."[112]

Significant procedural consequences flow from this statutory declaration of dual liability for a criminal offense. Implementing the legal provision, the rules declare that "the civil action for the recovery of civil liability arising from the offense charged" is deemed "impliedly instituted with the criminal action."[113] This civil-criminal joinder is the basis for allowing the offended party to file his complaint directly with the court, by-passing any screening that may be done through a requirement of securing the approval of the police or the prosecutor, as illustrated in our rape case. It likewise provides the basis for the victim's authority "to intervene, personally or by attorney, in the prosecution of the offense."[114] By putting squarely the basis for this right of private prosecution upon the victim's interest in the civil aspect, the exceptions to this right may easily be understood. When the offense charged does not cause any particular harm or injury that may give rise to a civil claim for damages by the civilian complainant, as when the prosecution is for a violation of sumptuary legislation, it is plain that no right of private prosecution exists.[115] Likewise, if the offended party has expressly waived his civil claim or reserved his right to file a separate civil action or in fact has already filed such action,[116] he loses his right to intervene further in the prosecution of the accused.

An interesting situation arising from the foregoing sometimes occurs. There is a fight between two men in the local tavern. The waiter *A* claims that he was assaulted by customer *B* in a dispute arising from the correctness of the bill being charged. *B*, on the other hand, claims that it was *A* who assaulted him when he (*A*) became enraged at the imagined insult to his honesty inferred from questioning the accuracy of the bill. Both men sustain injuries. *A* complains to the police who conducts an investigation. In the meantime, *B* files his complaint directly with the magistrate who, finding probable cause, orders the arrest of *A*. Thereafter, the police persuaded as to the merits of *A's* version of the fight, goes to file with the same court, *A's* complaint against *B*. Plainly, the lack of a screening devise has ensnared the magistrate in an embarrassing situation.

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111 Padilla, CRIMINAL PROCEDURE ANNOTATED, 149 4th ed. (1965).
112 RPC, Art. 100.
113 Rule 111:1.
114 Rule 110:15.
115 People v. Orais, supra note.
116 Rule 110:15; People v. Olavides (80 Phil. 280).

A further procedural consequence is that the law gives to the victim or certain successively enumerated members of her immediate family, the right to withhold prosecution of so-called "private crimes."[117] Adultery, concubinage, seduction, abduction, rape and acts of lasciviousness[118] are the offenses falling under this classification. The tacit rationale for this rule is the increasingly criticized cultural value of *hiya* or shame. Since social humiliation and public ridicule are often inherent in crimes involving sex, under the *hiya* concept, the ultimate decision to prosecute and consequently to undergo the ordeal of a public trial is vested upon the offended party and her family who must bear this burden. Pardon by the offended spouse in adultery and concubinage cases, or by the victim of rape or her ascendants or guardian, is available as a defense to the accused. Further, when all efforts to secure pardon have proved unavailing, marriage by the victim to the offender will not only terminate further prosecution but will remit penalty already imposed upon the offender. Worse, such marriage benefits not only the rapist himself but also all his aiders and abettors, "co-principals, accomplices and accessories alike."[119] The wisdom of the foregoing procedure is certainly vulnerable to a valid attack.[120] While a plausible argument may be made for the exemption from criminal liability of adults who engage voluntarily in sexual crimes in strict privacy, no such justification can be invoked for abduction, forcible rape and deceitful seduction. Certainly the security of society demands the prosecution of these crimes and the punishment of their perpetrators irrespective of the wishes of the offended party. Further, there is no reason to exempt from punishment the accomplices of the offender upon the marriage of the latter to the victim. It is not improbable that the crime was committed upon the instigation of said accomplices, or upon their effective encouragement. The questionable cultural value of *hiya*, whatever good may be said for it as an instrument of social conformity, must be subordinated to the right of society to protection and security. It is likewise plain that investing private citizens with authority to initiate criminal actions without adequate screening and safeguards, opens wide the door to abuses. Vesting them further with power to terminate prose-

[117] Art. 344 RPC. The so-called "private crimes" are actually denominated Crimes against Chastity under Title eleven of the Penal Code.

[118] Homosexuality under the same conditions for rape is punishable under the provisions punishing acts of lasciviousness; but homosexuality between two consenting adults committed in private is not punishable.

[119] Art. 344 last par. RPC.

[120] For a strong attack on this power of the victim to pardon the offender under the old Spanish penal code, see Chester, *Criminal Procedure in the Philippines*, 42 AM. L. REV. 116 (1908).

cutions and even remit penalties for reasons that may have been procured through force or intimidation or through fraud or cajolery, is to undermine the very foundations of criminal law itself.

Further far-reaching consequences of great practical significance to the administration of criminal justice flowing from this procedural joinder in one proceeding of both the civil and criminal actions surface upon close analysis. A legislative policy of encouraging guilty pleas (as well as voluntary surrenders) is clearly inferable from the penal code provision explicitly authorizing the imposition of a mitigated penalty by reason of these circumstances.[121] It is certainly an observable fact, however, that the threat of incurring the additional burden of paying damages for the civil aspect of the crime, effectively thwarts such a policy. An accused may be perfectly willing to accept personal punishment for his misdeeds but when a guilty plea entails subjecting his family to additional hardship and even penury, it is understandable that he may in fact decide as he frequently does decide to contest the charge after all. Even where the accused has no property to protect, he may still be deterred from entering a guilty plea by his employer who by law [122] is made civilly liable in a subsidiary capacity for the offense committed by the accused-employee during the performance or in the discharge of his duties. Translated into actual practice, this means that any remaining resolve of the accused to plead guilty is effectively dissuaded by the employer who promises not only continued employment but payment of bail premiums and all defense incurred expenses. The significance of this will be better appreciated when considered with the observation that "Philippine substantive criminal law is much broader in scope than American law, embracing many harms which under American law would be civilly actionable only... and that what would be ordinary tort litigation in the United States, in the Philippines is subject to adjudication as an adjunct of criminal proceedings."[123] The net effect of all these practices is a greatly reduced incidence of guilty pleas that provides an unnecessary strain upon already burdened prosecutorial and judicial time. An obvious solution to this problem is the adoption of an alternative plea, such as *nolo contendere,* which is not now available to the accused. There seems to be no legal obstacle to this reform.

The procedural joinder of civil and criminal actions also contributes a great deal to the universally condemned problem of delay and court congestion. Confusion and prejudice often ensue from introducing evi-

[121] RPC, Art. 13.
[122] RPC, Art. 103.
[123] *Op. cit.,* Pugh note 6, 536.

dence of collateral matters which have no bearing on the ultimate issue of guilt. An American observer, unaware of this peculiarity, will undoubtedly and understandably be confused as to why, in a criminal trial, evidence properly pertaining to civil actions for damages, is being presented and controverted. The prejudicial effect of a mourning widow or a grief-stricken child testifying on hospital and funeral expenses incurred for the deceased victim, the support and care he gave to his family, the bright prospect for advancement in his profession, and all such evidence tugging at the emotions, certainly cannot be denied.

It may be claimed that certain social values are derived from this civil-criminal joinder. It encourages for instance more reports of crime. But while this leads to more prosecutions, more convictions do not necessarily follow. For the victim is in effect encouraged to use the criminal process to compel the settlement of their private civil claim under threat of criminal sanctions. The policy then appeals to the selfish interests of the victims of crimes instead of to their civic duty in the interest of maintaining order and the security of society. Prosecutions undertaken on the basis of such motives will not survive the satisfaction of the victim's civil claim. The satisfaction of a needed social service of providing free counsel to impoverished victims may also be argued as a justification for this joinder. This, however, has entailed a resulting confusion of the proper prosecutorial role arising from the performance of dual roles — as private counsel for the victim and as government counsel to see that justice is done. The two interests are not always harmonious. For it is easy to see that the victim may and does usually perceive it to be in his interest to desist from further prosecution upon the satisfaction of his civil claim but that public interest demands the prosecution and punishment of the criminal. Whose interests must the prosecutor serve? In major crimes that have aroused public condemnation, he may not have much difficulty in arriving at the correct answer. But in the ordinary run of cases, the answer may not be always so easy. Furthermore, unnecessary opportunities for corruption and official venalities are opened by this procedure. Quite often the victim feels obliged to remunerate the prosecutor for acting as her "private counsel" and this may occur without even a thought of existing undue influence or corruption. The victim is insistent and the prosecutor finally convinces himself that there is really nothing wrong in accepting an "honorarium" from the victim since she would have paid for counsel anyway had she been able to afford one. Besides, the damages awarded or the settlement reached was much more than she had expected and she would want him to share

in the unexpected bounty. From such small beginnings, a plethora of abuses, corruption and hypocrisies follows.

The net result of this civil-criminal joinder procedure is a compromising of the criminal law through the reduction of the prosecutor to a weak, vacillating and ineffective instrument of justice. By a gradual process, this deplorable practice has robbed the prosecutor of his initiative and power of effective decision to act in the public interest. It has transferred the prerogative of prosecution to the victim or his private counsel who, as pointed out, may be the prosecutor himself. And this could occur even without any taint of corrupt motives. This erroneous and distorted role concept is aptly illustrated by the remark of a prosecutor in justifying the dismissal of a criminal case upon the desistance of the victim, thus, "We cannot be more popish than the Pope." By this, I take it he meant that the prosecutor should not be more insistent on the prosecution of a crime than the victim himself. Such an attitude is indeed astounding when I recall that the prosecutor who made this remark was well-respected in the legal community.

Further, the dismissal of cases upon the victim's decision not to press charges has encouraged perjury. Since dismissal of cases upon prosecutorial policy unrelated to guilt is not available as it is in the United States, the victim is required to give a false narration of facts either exculpating the accused or showing insufficiency of evidence. The victim's affidavit is then attached to the prosecutor's motion to dismiss in support thereof. Such practices erode the integrity of the process and diminish the respect for law which is the foundation of social order. Such practices then cannot be too strongly condemned.

The role of the judge is likewise compromised. For the law enjoins the judge as his duty "to persuade the litigants in a civil case to agree upon some fair compromise."[124] Since the civil action is impliedly instituted with the criminal action, an *arreglo* is likewise resorted to in the criminal proceedings. And although the law goes on to add that "such compromise shall not extinguish the public action for the imposition of the legal penalty,"[125] the "impermissible leap" is often made which actually leads to the dismissal of the criminal case upon its successfully being *"arreglated."* Moreover, if dismissal does not follow, a resulting conviction may validly be criticized as having been unduly influenced by knowledge of guilt obtained during the mediational process.

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[124] Civil Code, Art. 2029, see note 14.
[125] Civil Code, Art. 2034.

Such compromising of the criminal law in favor of the rich and powerful who can afford to pay the victim's claim or cow him to silence has resulted in discrimination against the poor.

Public Prosecution of Crimes.

Prosecutorial work may in a general way be divided into two types of cases — those commenced before the magistrate and those filed directly with the prosecutor.

The original structure of the trial courts was based on the traditional dichotomy of misdemeanor-felony classification. Exclusive jurisdiction of the magistrate courts was confined to misdemeanors, penalty for which did not exceed six months.[126] The district courts had jurisdiction over offenses punishable by penalties in excess of that limit. It was mostly on this basis that the practice of confining the prosecutor to the prosecution of felony cases before the district courts arose. Also, the obligation to furnish the physical plant facilities for both the district courts and the prosecutors devolved upon the same governmental unit[127] so that these facilities (courts and prosecution offices) are generally located within the same building or government compound in the urban areas. The outlying areas constituting the vast majority of the country must rely for the prosecution of crimes, upon the police prosecutor who may be the arresting officer or a specially designated officer. In both cases, no special training is provided for this extra-police function.

Police prosecutors often pose vexing problems in the administration of justice particularly where the defendant is represented by counsel. The magistrate in such a situation will but naturally tend to assist the police prosecutor to balance somehow the tactical advantage of having a lawyer on the other side. Where conviction results, suspicion of judicial bias, no matter how unjustified, cannot be prevented. The taint of "prosecution mentality" upon the magistrate will accumulate and gain greater credence over time with the multiplication of these situations. A point will then be reached at which no defendant will ever feel that he can obtain justice from that magistrate. He will then be perceived not as impartial arbiter but an instrument of tyranny and oppression. How true indeed that both the appearance and the substance of justice must be satisfied for effective law administration.

The practice of limiting prosecutorial services to district courts alone has continued notwithstanding the fact that the basis for it is no longer

[126] *Op. cit.* note 2 Harvey.

[127] The provincial government provides the courthouse and prosecutorial offices, see 2102 (c), 2103, 1673, par. 2 Adm. Code.

obtaining. Over the years, the jurisdiction of the magistrate courts has been greatly enlarged.[128] Partly as a result, the volume of cases tried by these lower courts has also greatly increased. Following this trend, the prestige of the magistrate has commensurately risen. From its humble origins as a part-time official employment remunerated only from the fees collected,[129] the position has risen in prestige to its present level as a full-time, salaried regular court with proceedings fully recorded. In view of the fact that the penalties that may now be imposed may be even up to ten years of imprisonment, the practice of relying on police prosecutors in these lower courts can no longer be tolerated. Duly qualified lawyers must be appointed to prosecute in these courts. Budgetary restrictions make dim immediate prospects of an increase in the prosecutorial force. A temporary local solution to this problem was arrived at by having a lawyer of the municipality designated by the Secretary of Justice as special counsel[130] to assist in the prosecution of criminal cases. This local prosecutor is appointed by the mayor or governor and the arrangement is that such designation be "without further compensation" from the national government. A question that may well be asked in this connection is whether it is not desirable that the prosecutor should have a like power to make such designations as the Secretary of Justice. This issue gains importance in view of the generally difficult time of local governments to secure such designations by reason of bureaucratic red tape considered in relation to the desirability of having more lawyers, rather than the police, prosecuting criminal cases. If the prosecutor can and often does turn over the prosecution of crimes to the private counsel of a victim on a case by case basis, there seems to be no valid reason why a like power should not be given him to delegate the prosecution of offenses in general to a local government lawyer.

A. *Cases bound over by magistrates.*

Cases originating from the magistrate courts that reach the prosecutor are those bound over to the district courts upon a finding of probable cause. Following the U.S. model, the Philippine prosecutor is held likewise as not circumscribed by such magisterial determination.[131] He may accordingly still refuse to file the required information — the formal charging document necessary at this stage. There is one im-

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[128] For a statutory history of jurisdiction of the municipal courts, see, note 30.

[129] See Harvey, *op. cit.*. note 2.

[130] ADM. CODE, Sec. 1686-87.

[131] People v. Ovilla (65 Phil. 722).

portant distinction, however. For while the U.S. prosecutor may refuse to prosecute for reasons that may be totally unrelated to the question of guilt, the Philippine prosecutor can do so only upon the narrow ground of insufficiency of evidence to obtain a conviction.[132] This assessment of evidence sufficiency is the only area where proper prosecutorial discretion may validly be exercised. Some extreme cases even hold that such a duty to prosecute may be compelled by mandamus.[133]

This narrowly circumscribed prosecutorial discretion is a necessary consequence of a legislative policy of full enforcement of the criminal law which is clearly inferred from various statutory provisions. Thus, it is considered a punishable "dereliction of duty" for a prosecutor or law enforcement officer to "refrain from instituting prosecution for the punishment of violators of the law."[134] Even for cases where "a strict enforcement of the provisions of this (penal) Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice (of the defendant) and the injury caused by the offense," prosecution must be undertaken and the judge must impose the questionable penalty. The law[135] only allows the judge to submit a recommendation of clemency "to the Chief Executive through the Department of Justice." To implement this clear legislative policy, the rules direct that prosecution "*must* be commenced . . . against all persons who appear to be responsible" for an offense.[136]

It would seem that such a narrowly circumscribed prosecutorial discretion is demanded by the stage of economic development and cultural setting of the country. As described at the outset, Philippine society is permeated by an intricate network of kinship and personal relationship. The problem of administering evenhanded justice in such an intimate setting is certainly much more acute than in the impersonal relationship which characterizes industrial societies.[137] To provide a countervailing measure, it is thus made an explicit duty to prosecute all offenders. For it is only in pursuance of such an imposed explicit duty that a prosecution may be undertaken against even his own "friends, proteges or favorites."[138] This may provide a reason for an impression-

[132] *Id.*
[133] Guiao v. Figuerao, 50 O.G. 4828 (1954).
[134] RPC, Art. 208.
[135] RPC, Art. 5.
[136] Rule 110:1.
[137] The method of dispute settlement in an intimate society is developed by Gluckman, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY, 1965.
[138] *Op. cit.*, note 131.

istic conclusion that generally more attempts are made to exert undue influence on the private prosecutor than on the public prosecutor. The private prosecution is seen as a voluntary act while the latter is undertaken in pursuance of an imposed duty. It is likewise in recognition of this problem posed by "intimate justice" that an executive policy against the appointment of prosecutors and judges to their own respective birthplaces or places of residence is being implemented. The same considerations motivate the strict rotation of provincial commanders of the Philippine Constabulary at regular intervals.

For cases bound over by a magisstrate, the refusal of a prosecutor to file the information with the district court will not by itself result in the dismissal of the case nor in the release of a detained accused. Neither may the prosecutor merely file a dismissal as in Federal Rule 48(a). He must file with the district court a motion to dismiss based on the only ground presently available,[139] namely, insufficiency of evidence to secure a conviction. The motion must state the reasons justifying this decision and that the necessary quantum of evidence is not "forthcoming at the trial despite the exercise of due diligence to that end."[140] As noted earlier, this ground is not infrequently used as a mere subterfuge to cover up for the real reason, which is the settlement of the victim's civil claim. I had earlier denounced this practice of *arreglo* as encouraging perjury, eroding respect for the law, weakening the required vigorous prosecution of crimes, unnecessarily providing opportunities for corruption and in general as resulting in a compromise of the criminal law. Where in fact no such settlement has taken place, the victim is generally allowed to oppose the motion to dismiss and thereby challenge the prosecutorial decision not to prosecute. Though infrequent, the victim's opposition may be upheld and the motion is denied. In this event, another prosecutor must be secured. Any assistant prosecutor in the same office who is persuaded as to the merits of the victim's case may be designated by the chief prosecutor. Where the office sustains the decision not to prosecute, the judge or the chief prosecutor shall communicate with the Secretary of Justice for the latter to appoint or assign on temporary detail a prosecutor from another province[141] or a state attorney to undertake the prosecution. Where the court upholds the prosecutor's motion and dismisses the case, the victim still has other recourses available to him. He may contest the order of dismissal as

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[139] A technical ground for dismissal of a case bound over by the magistrate that the act imputed does not constitute the crime charged was alleged in Baes v. Judge (65 Phil. 251).

[140] U.S. Barredo, 32 Phil. 444, *supra*.

[141] Adm. Code, Rule 119:13. Sec. 1680-86.

an abuse of judicial discretion in certiorari proceedings. Or he may refile the case with additional evidence to convince the prosecutor of the necessary quantum of evidence to secure a conviction.

Binding effect of magistrate's decision to bind over.

There seems to be no sound reason why a rule could and should not be fashioned that would make the magisterial determination of probable cause and his decision to bind over, conclusive upon the prosecutor. The desirability of such a rule in the interest of shortening the gap between apprehension of the accused and his trial, cannot be denied. Further, such a rule will plug an unnecessary loophole for the escape of the guilty and thereby prevent the further erosion of the already weak deterrence credibility of the criminal law. The only basis for continuing with the present practice of allowing the prosecutor to make a second and separate assessment of evidence sufficiency is the fact that he is not usually represented in the proceedings before the magistrate at which the determination of probable cause is made. As was earlier noted this is due to the numerical inadequacy of the prosecutorial agency of the criminal justice system. But as likewise also noted, this situation is being remedied by a system of local prosecutors. Further, the magistrate often directs the attendance of a prosecutor in "important" or serious felony cases, or the prosecutor may do so on his own initiative. In these cases at least, a further investigation or re-assessment of evidence by the prosecutor is superfluous and unwarranted. Also, the bases for the U.S. rule after which the questioned Philippine practice was patterned, must be re-examined in the light of changed prevailing situation. The magisterial function in the Philippines is performed by a regular judge who must be not only a member of the Bar but must have practiced law for not less than 5 years prior to his appointment. In contrast, the U.S. Commissioner who performs the same function, until recently did not even have to be a lawyer and is certainly not a judge. In the U.S., facts arising or uncovered between the decision to bind over and the Grand Jury indictment, e.g., the participation by the accused in rehabilitative treatment and showing promise of successful reformation, although unrelated to the issue of guilt, may justifiably be the basis for a decision not to prosecute or to terminate prosecution. The Philippine prosecutor on the other hand, has no such power or discretion. As repeatedly said, he has only a circumscribed discretion related to the narrow issue of evidence sufficiency assessment. In fine then, a prosecutorial re-appraisal of evidence or a re-investigation of a case that has been bound over by a magis-

trate, as now permitted under present practice, seems to be unwarranted. It contributes to delay arising from duplication of labor. It makes undue imposition upon witnesses who are unnecessarily required to appear no less than five times — before the police, the magistrate prior to arrest, at preliminary hearing, before the prosecutor and finally during the trial. It provides an unnecessary avenue for the escape of the guilty and a further opportunity for corruption and the exercise of undue influence against the vigorous prosecution of crime. Lastly, such a procedure derogates from the judicial authority and dignity of the magistrate and even raises the constitutional question of separation of powers arising from what in practice amounts to a review of judicial findings by an officer of the executive branch whose qualifications as to legal practice are even lower than those of the magistrate. The prosecutorial time saved from dispensing with an unnecessary proceeding can be put to far better use to promote the more effective and fairer administration of justice.

B. *Cases filed directly with the prosecutor.*

The second general class of cases handled by prosecutors is directly filed with their office by the civilian complainant or the police. For such cases, a file is opened for each complaint made. A date is then set for preliminary hearing. The suspect has to be notified by subpoena[142] to appear if he wishes and to participate at said hearing. Prior to that date, the testimonies of the complainant and his witnesses are reduced to writing.[143] Said testimonies are subscribed and sworn to before the prosecutor who is by law authorized to administer oaths.[144] If the suspect fails to appear on the day of hearing, the proceedings will be conducted in his absence.[145] If he appears, he is given the right to cross-examine the complainant and other prosecution witnesses on the basis of their written testimonies. He may then testify and adduce evidence in his favor subject to cross examination by the complainant or his counsel and the right of the prosecutor to interrogate the suspect and other defense witnesses. It is this latter aspect of this hearing that has been characterized as being in a sense inquisitorial.[146] This is not entirely accurate, however, for the constitutional privilege against self-incrimination is available not only for the protection of the accused but also for other witnesses summoned to testify in said hearing.[147] The

142 Rule 112:4.
143 R.A. 5180.
144 Adm. Code, sec. 1665.
145 Rule 112:14.
146 People v. Badilla (48 Phil. 718).
147 Rep. Act 409:38.

phraseology of the Philippine constitutional provision, to wit, "No person shall be compelled to be a witness against himself" was expressly adopted from the U.S. Federal Constitution in a language that is a modification of the U.S. Fifth Amendment, in order to afford its protection not only to an accused in a criminal case but to all persons in all proceedings.[148] It thus forestalled many of the questions that raise doubts as to the proper applicability of the privilege in proceedings not criminal, or in pre-trial proceedings of criminal cases or in pre-indictment police interrogation cases.

The entire proceeding related to preliminary hearings conducted by the prosecutor is recorded. It is required that the hearing be terminated within sixty days[149] unless the case involves an indigent person as an accused or as the offended party,[150] in which case the hearing must be terminated within two weeks. After such termination, the case is submitted for resolution. By practice, the decision whether or not to prosecute is made in writing of which copies are furnished to both the suspect and the offended party. An affirmative decision is of course followed by the filing of the required information and the issuance by the district judge of the proper warrant for the arrest of the accused. Upon proper motion by the accused, the court may direct the prosecutor to conduct a re-investigation with a view to considering additional evidence that may change the decision to charge.[151] In extreme cases, "to prevent the use of the strong arm of the law in an oppressive or vindictive manner"[152] the accused may resort to injunction proceedings to restrain prosecution.[153] Where a negative decision on the other hand is reached, several alternatives are also available to the offended party for the purpose of challenging the prosecutor's decision not to prosecute. He may take his case directly with the magistrate who may order the arrest of the accused after finding probable cause. This is so because "there is nothing in the law which grants to a prosecutor the exclusive right to investigate a charge that is submitted to him for action."[154] He may contest the decision before the chief prosecutor where such decision

[148] Bermudez v. Castillo (64 Phil. 483); TAÑADA AND FERNANDO CONSTITUTION OF THE PHILIPPINES, vol. 1, 4th ed. (1952) 584.

[149] Rep. Act 5180.

[150] Rep. Act 6033:1.

[151] Suarez v. Platon, *supra*.

[152] Dimayuga v. Fernandez, (43 Phil. 304).

[153] In the only case which led to the conviction and the imposition of the death sentence of the highest legal officer of the government — Secretary of Justice Oscar Castello, two senators successfully obtained a restraining order enjoining the prosecution and arrest on alleged orders of the former, charging them of rebellion, see *Recto and Laurel v. Castello*, 18 THE LAWYERS J. 560.

[154] de la Cruz v. Sagales, G.R. No. L-14901, April 25, 1960.

was made by an assistant. Failing in that, he may raise the issue before the Secretary of Justice who in such cases will designate another prosecutor from a different province to re-assess the evidence or to hear additional evidence that may be presented.[155] In drastic cases where malice could be proved, a criminal case for dereliction of duty may be filed against the prosecutor.[156] All of these procedures available to the offended party are perceived as necessary to bolster a weak or vacillating prosecution, particularly against friends or relations of the prosecutors and against an accused who may occupy a position of power and influence in the community or whose patrons and protectors may be of such high status. Such persons may overawe the prosecutor into withholding or terminating prosecutions for crimes they may have committed. For as was correctly observed, "rank has always carried an undue influence in the Philippines."[157]

In both these classes of cases handled by the prosecutor, a question not yet squarely passed upon is whether he or the examining magistrate has legal authority to make a binding determination regarding the validity of a lawful defense that may be interposed by an accused during the preliminary hearings held before them so as to dismiss the case. The issue assumes some importance in view of the undoubted desirability of concluding at the earliest time possible, the question of guilt or innocence of the accused. If he is guilty, the prompt adjudication of this issue and the imposition upon him of the proper penalty will certainly add to the certainty and celerity of punishment — the two variables which together with severity constitute the foundation of the much sought after deterrent effect of criminal law.[158] If on the other hand the accused is innocent, justice demands his early release and the removal of the cloud of suspicion that has been cast upon his character.

Against a position upholding the power of the prosecutor or the examining magistrate to dismiss a case upon a valid defense, is the postulate that the adjudication of guilt or innocence is strictly a judicial function. But why must it be so? The imposition of punishment upon a finding of guilt — certainly yes; but exculpation is not strictly such. Does not the police officer exercise such power when he refuses to arrest upon his determination that the accused is probably not guilty? And so does the prosecutor when he refuses to charge upon a similar determination of absence of probable factual guilt. It is difficult to see any countervailing policy that will deny the exercise by these investigating offi-

[155] Adm. Code, sec. 1689; Rep. Act 1198:2.
[156] RPC, Art. 208.
[157] *Op. cit.* note 11 Robertson.
[158] See Jeremy Bentham, The spirit of the law.

cials of this authority to determine legal guilt, as opposed to factual guilt which they already possess. On the contrary, such power may be inferred from the screening function of a preliminary hearing which was designed "to secure the innocent against hasty, malicious and oppressive prosecutions, to protect him from the trouble, expenses and anxiety of a public trial, and also to protect the State from useless and expensive prosecutions."[159] Take the defense of infancy. A child under nine years of age is declared absolutely exempt from criminal liability.[160] In a case startling for its rarity, the police filed a case of aggravated assault against such a child for injuring a classmate with a penknife. Unaware of the age of the accused, the magistrate ordered his arrest and was, to give an understatement, taken aback by the youthfulness of the offender. The age was easily established and the case forthwith dismissed. The prosecutor conceived it to be his duty to charge and the judge's to dismiss. In another case, the accused, a boy under 15 years, was charged with petty larceny. The law provides that such a minor is exempt from criminal liability "unless he has acted with discernment."[161] Since the prosecution has the burden of showing such discernment[162] in addition to proving the essential elements of the crime charged, the prosecutor could properly have refused to charge or could have moved for the dismissal of the case. To my knowledge, this is the only case where the prosecutor is required to disprove the defense interposed by an accused. In all other cases, the defendant has the burden of proving "the presence of any circumstance which may relieve him from responsibility."[163] In this case involving a minor under 15 years who commits a crime without discernment, he is held criminally irresponsible but nevertheless, the law directs the court to "commit him to the care and custody of his family who shall be charged with his surveillance and education."

The specific language of the rules empowering the magistrate to determine "whether there is reasonable ground to believe that an offense has been committed and the accused is probably guilty thereof"[164] likewise lends support to the view here advocated. Further, the defendant is given the right to testify and present evidence in his favor. There are no limits imposed on what he or his witnesses may testify on or any explicit prohibition against presenting evidence that may establish

[159] Hashim v. Boncan, 71 Phil. 216.
[160] RPC, Art. 12(3).
[161] *Id.*
[162] *Op. cit.*, note 86, Aquino p. 206.
[163] *Id.* fn. 1-a, 121.
[164] Rule 112:1.

a valid defense. Bearing these facts in mind, the reasoning of the Supreme Court in a case [165] touching on a different issue, may well be applied to support this conclusion.

> "To hold that, after the preliminary investigation the justice of the peace has no authority to release the defendant even if the evidence is, in his opinion conclusive to support his action, would render the preliminary investigation a useless ceremony. Giving the accused a chance to introduce his evidence and declaring at the same time that such evidence cannot help him, for at any rate he would be held for trial, is to render the whole procedure a farce. Worse still, it would defeat the fundamental purpose of the Rules of Court which is 'to assist the parties in obtaining a just, speedy and inexpensive determination of every action and proceedings.' "

An obiter in an early case[166] declared that a prosecutor could file a motion to dismiss a criminal action grounded on the fact that his investigation had "satisfied him that the accused is innocent" of the offense charged. This again lends further support to our view. The court did not clarify the meaning of "innocent" but it would seem that the term was used in a broad enough sense as to include both "factual and legal guilt."

II *Trial.*

A. *Trial Calendar.*

On any working day, an examination of any court calendar of cases scheduled for arraignment and trial on that particular day, will show quite a number on the list, generally ten or many more than that depending on whether the court is sitting in the urban, suburban or rural areas. On the top of the list are the criminal cases which are required to be given preference over civil cases. In Manila, four branch courts are assigned full-time to try criminal cases alone.[167] Within the preferred class of criminal cases, further priority is given to cases where the accused is detained or indigent.[168] Upon a guilty plea at arraignment, the judge may and often does proceed to sentence the accused immediately thereafter, unless, on motion, evidence is taken to show mitigating circumstances. Upon a negative plea, rarely will the case proceed to trial on the same day. For the defendant is entitled to have a minimum of two days to prepare for his defense.[169] The case is then assigned

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165 Biron v. Cea, (73 Phil. 673).
166 U.S. v. Barredo, *supra*.
167 Jud. Act, sec. 60.
168 Rep. Act 6033:1.
169 Rule 118:7.

a trial date which plainly will be after the dates given to earlier criminal cases in the trial calendar of the court. There is no provision in the rules prescribing a uniform mode of trial date assignment. The practice accordingly varies with each court. In some courts, assignment is done by the clerk of court acting independently of the judge; in others, the presiding judge prefers to handle this matter himself. The latter mode seems to have more adherents partly from the fact that the personal convenience of the judge is thereby served and partly because the judge can more accurately predict how long the trial of a case will take. From experience, he gains insight into the working character of lawyers practicing before him. He knows for example that a certain prosecutor is always ready to go to trial or that a defense counsel has a predilection to postponements as a trial strategy. In addition, he has a sense as to how complex a case may turn out. All these the assigning clerk does not possess. But whichever mode is followed, the accuracy of prediction is nowhere as near as that desired so that judicial time may be utilized as efficiently as possible. The result is that the calendar is often unrealistically weighted toward the over-calendaring of more cases than can be heard in that day and consequentially, packing the court and hallways with expectant parties, relatives and witnesses. The frustration of their expectancies surely contributes toward the growing disenchantment with governmental institutions that is now a source of much concern for those in authority.[170] In addition, the practice of overloading the trial calendar "tends to make lawyers come unprepared for trial especially if they know that their case is far down the list. In the same way, parties and their witnesses get discouraged when their time is wasted after repeated postponements for trials."[171]

Where the second mode of assigning trial date is followed, the practice to be deplored is that the process is frequently done in open court. Upon entry of his client's plea of not guilty, defense counsel will, after consulting his appointments booklet, ask for a specific date which he finds convenient. The clerk looks up the date requested to find out the number and kind of cases scheduled to be heard on that date. If he believes that the trial of the case in question cannot be accommodated on the date asked for, he informs the judge and suggests another date. Counsel again looks up his own calendar to see if he is available on that date. And so on the process of haggling will go until a date is agreed upon that is not too far away from arraignment or from the

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[170] *Op. cit.*, note 45.

[171] Coquia, *Court Congestion, States, Causes and Remedies*, 33 THE LAWYERS J. (1968) 291.

last date of hearing as to be objectionable to standards of speedy justice. The extent to which defense counsel is permitted to influence the process is dependent on his professional standing and on whether he is an "out-of-town" counsel. Such a process of assignment is objectionable on at least two grounds. First, it cuts into the already short sitting time of the court and thereby deprives the consideration of the other cases waiting their turn to be heard by that much time. Secondly, a process that often degenerates into the "haggling of the market place" certainly derogates from the solemnity, dignity and prestige of the judicial process. It is in recognition of the seriousness of the problem that the U.P. Law Center is now conducting in-service training seminars for clerks of court to the end that modern managerial methods may be applied to court business functions.

B. *Absence of trial juries.*

As noted at the outset, trial courts in the Philippines are each presided over by a single trained jurist. Since there is a complete absence of the jury system, the fact-finding and adjudicative functions of the petite or trial jury in the Anglo-American system, as well as the sentencing function of the trial judge, are both merged in and entrusted to the good sense and skill of a single judge. As was likewise earlier observed, the American adversary system of criminal justice was introduced in the Philippines by American administrators at the turn of this century. A naturally logical question that arises therefore is why the jury system was not transplanted along with the entire accusatorial system. The Presidential Commission appointed by President Wm. McKinley, now generally referred to as the First Philippine Commission, whose task was to make recommendations for the improvement of the public order, actually did make a recommendation to adopt trial juries in the Philippines in "due time."[172] But as correctly noted by Prof. Pugh, this was never implemented. His speculation as to the reasons for this rejection is probably true. He surmises thus."

> "It must be remembered that from 1899 to 1902, Americans and Filipinos were engaged in the bloody encounter which Americans call the Philippine Insurrection and Filipino historians call the War for Philippine Independence, and this may well have been a factor in the rejection of the 1900 recommendation of the Schurman Commission.
>
> "Factors contributing to initial rejection of the jury system probably included the following: Filipinos had had no experience with juries; their traditions and cultural patterns were quite

[172] Report of the Philippine Commission, Vol. 1 (1900) 125 cited in Pugh, *op. cit.* note 6.

different from those of Britain and the United States; generally, educational level was low; and there was no single common language which could be understood by witnesses and jurors throughout the country."

Consequences of jury absence.

Far-reaching consequential effects may be observed from the absence of petite juries in Philippine criminal trials. The time-consuming process of empanelling jurors is naturally likewise absent. So are the often frequent interruptions of trial required by the necessity to give jury instructions on doubtful questions of law or of procedure. These could be placed on the plus side, a gain in the interest of speedier trials. On the minus side, however, I would place the absence of opening statements, the worthy objectives of which are "to inform the jury what the case is about and to outline the proof that will be used – on the one hand to establish the commission of the crime and on the other to outline the defense – so that jurors may more intelligently follow the testimony as it is related by the witnesses."[173] These are certainly desirable objectives as much with judge trials as they are with jury trials. The understanding of "what the case is about" will not only be immeasurably enhanced for the judge who sits on a case insufficiently prepared by not having done his "homework" beforehand, – but even for the conscientious judge. Further, imposing a requirement of making opening statements by both the prosecutor and defense counsel will promote more adequate and thorough preparation of their respective cases. Summarizations of any kind generally compel more "thinking through" of whatever kind of problem involved. Thought processes are clarified and clearer analysis is enhanced. The net result is a well-prepared case that indubitably contributes to a fairer and more expeditious trial.

A second important consequence is in the application of exclusionary rules of evidence. These evidentiary rules were fashioned and developed under the system of jury trials. A jury verdict is stark in its brevity – "We find the defendant GUILTY" or conversely, "NOT GUILTY". There are no elaborations as to how it had arrived at its verdict, no findings of fact upon which its decision is based and no statement of the reasoning processes that led it to its conclusion. In contrast, explicit requirement is imposed upon the Philippine trial judge to reduce his judgment in writing and to state "clearly and distinctly the facts proved or admitted by the defendant and upon which the judgment is based."[174]

[173] Foster v. U.S., 308 F. 2d 751, 753, 8th circ. (1962).
[174] Rule 120:2.

A major basis for a strict application of the exclusionary rules, it seems to me, is the virtual impossibility of ascertaining whether and how far excludible evidence, if improperly admitted, would prejudicially influence the jury in arriving at its verdict. The persuasive influence of this consideration is apparent in the development of the "rule of automatic reversal" or conviction in cases where coerced or involuntary confession was admitted. This rule "applies regardless of how much other evidence of guilt remains."[175] The application of the harmless error rule even more aptly illustrates the observation that the exclusionary rules are a consequential outgrowth of the jury system. For it requires a determination that there was no "reasonable possibility that the evidence complained of might have contributed to the conviction."[176] Fear of unascertainable prejudice is clearly a major basis for the rule. This is not present in the Philippine setting. Whether the judge improperly relied upon inadmissible evidence, such as an incriminating statement made by the accused or evidence secured from him through an impermissible search and seizure, would easily be ascertainable from a reading of his judgment. If he did consider such unconstitutional evidence, how much weight he put on it in relation to other "independently sufficient evidence" could be just as easily be determined from the written record. This situation makes the application by the appellate courts of the "harmless error" rule comparatively much easier for it involves no uncharted exploration and speculation into the mind of each juror. The result is that trial judges in the Philippines are quite liberal in the admission of evidence that would strictly be excluded under the jury system. It is common to hear a judge rule in the face of an objection that "all evidence are admitted for whatever they may be worth. Exceptions are duly noted."

The converse of the foregoing situation, i.e., where the judge erroneously excludes properly admissible evidence, presents a problem similar to that of the jury context. This may happen for instance where exculpating evidence is offered by a defendant and, upon objection by the prosecutor, the evidence is excluded. Conviction results. There is in this example no way for the appellate court to ascertain whether the judge would have reached a verdict of acquittal had he taken into consideration the excluded evidence. The record or the written judgment would not show that. A reversal on appeal would naturally result in a time-consuming new trial to consider the erroneously excluded evidence. The foregoing discussion then makes plain why judges are liberal

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[175] *Op. cit.* note 106 Hall, citing Malinsky v. N.Y., p. 530.
[176] Fahy v. Conn. 375 U.S. 85.

in admitting evidence and strict against its exclusion. Putting all the evidence on record would enable the appellate courts to correct any error that was committed and to decide as the facts and the law might warrant.[177]

No procedure to challenge unconstitutional evidence.

The foregoing observations on the leniency of trial courts in the admission of excludible evidence combined with the appellate court's power to make its own independent findings of fact, have reduced pre-trial proceedings to challenge the introduction of unconstitutional or otherwise impermissible evidence to nothing more than making and noting objections to their admission during the trial. The total absence of specific procedures to put this matter in issue before trial may be traceable to the foregoing practice of liberal admission of evidence which as shown above arose from the fact that the danger of prejudice is not as great nor as apparent in judge trials as it is in jury trials. Accordingly, there is no procedure similar to Federal rule 41 (e) explicitly authorizing a "person aggrieved by an unlawful search and seizure" to move for the return of property and the suppression of its use in evidence. As a consequence, the law in this area is largely underdeveloped. The relevant cases generally involve issues which could have been easily resolved on the narrow question of probable cause under the warrants clause rather than the unreasonable search clause of the constitutional provision. Another reason for this procedural absence is probably due to the fact that up to 1967, the rule followed in the Philippines was that the admissibility of evidence was not affected by the illegality of the means employed to obtain them.[178] In that year, however, a unanimous Supreme Court reversed that doctrine and applied for the first time the exclusionary rule to a search and seizure case.[179] Both cases had not yet been concluded when petitioners challenged the admissibility of the evidence against them. In the overruling *Stonehill* case, petitioners resorted to an original action in the Supreme Court for certiorari, prohibition, mandamus and injunction to prevent the use in evidence of materials they claimed to have been obtained by an unreasonable search and seizure. Almost five years have elapsed since that decision was rendered but so far the rules have not yet been amended to conform to the decision.

[177] Rule 124:11.
[178] Moncado v. People's Court, 80 Phil. 1.
[179] Stonehill v. Diokno, 20 S. Ct. Rep. Ann. 383. I criticize this as an improper case to apply the exclusionary rule ostensibly to deter unwarranted police intrusions since it involved search and seizure under warrant.

Likewise to be observed is the absence of explicit procedure for the separate determination of the voluntariness of confessions or incriminating statements similar to that provided in the Omnibus Crime Control and Safe Streets Act of 1968.[180] Considering how heavily the rules of court are relied upon in practice, the necessity for providing explicit procedures to cover these important areas of law, cannot be overstressed. It is of course entirely possible for a judge, upon defendant's motion, to dismiss the case after the prosecution has rested on the ground that constitutionally objectionable or otherwise impermissible evidence are the only proof of defendant's guilt. The rarity of such dismissals is testimony to the reliance upon rules. So that unless express power to dismiss and specific procedures are spelled out, lower courts will continue to feel that any corrections in practices that violate the constitution, properly should come from the appellate courts. This unjustifiable sense contributes to the lack of effective challenges against unconstitutional police practices that are made before the lower courts. Abdication of trial court functions will continue and the appellate courts will continue likewise to be burdened unnecessarily by cases that could and should otherwise have been better disposed of at the trial level, until reform shall have been effected in these areas.

Prejudicial evidence.

The introduction of clearly prejudicial evidence arising from the joinder of civil and criminal actions in one proceeding was earlier pointed out. Additionally, other evidence that may prejudice the accused also creeps in from the fact that no separate sentencing hearing is provided for. The determination of guilt, as well as the appropriateness of the sentence to be imposed upon those convicted, must both be made at a single proceeding. Circumstances that aggravate the penalty[181] and those that qualify an offense must be alleged and proved. These factors include the prior record of convictions of the defendant to show recidivism which authorizes the court to impose the maximum period of the penalty scale appropriate to the offense committed; and also to show "habitual delinquency"[182] which mandates the imposition of a penalty to be imposed *in addition* to the penalty for the latest crime which may be imposed upon the accused if found guilty. Clearly, the introduction of this class of evidence is prejudicial to the defendant but allowed under present practice. This is of course in contrast to the U.S. rule which generally forbids the introduction of such evidence

[180] 18 USC 3501(a).
[181] Art. 14 RPC.
[182] Art. 62:5 RPC.

unless it is for the purpose of impeaching the testimony of an accused who takes the witness stand or to show "predisposition" to commit the crime where the accused puts up the defense of entrapment.[183] On the other hand, the defense is placed in the very awkward position of claiming innocence while simultaneously proving extenuating circumstances that will justify a more lenient sentence in case he is found guilty. The reason for tolerating this confusing and often prejudicial trial is the supposed reliance placed on the skill and expertise of a trained jurist in contrast to the supposed absence of such qualifications of the lay juror. The judge is expected to be able to discriminate and discard prejudicial evidence. How justified is this trust and reliance cannot be or rather has not been assessed. It should be an interesting and illuminating subject of an empirical study by social scientists and legal scholars.

Non-continuous trial.

It is a peculiarity of Philippine trials that they are not, as they are in the United States, a continuous proceeding. After hearing one or two witnesses, trial is adjourned to another date at which time, one more or two other witnesses are heard. It is difficult to assign a reason or cause for the development of this practice of a "piecemeal or fragmented trial." Prof. Pugh explores some possible reasons, enumerating crowded dockets, the system whereby lawyers are paid by court appearances and the infrequency of contingent fee arrangement and even cultural factors such as the fact that Filipinos do not seem to be as pressed for time as Americans, as well as the judicial attitude of allowing the parties to cool off and settle their differences amicably.[184] I am inclined to agree with these observations. But whatever the reason or reasons, the protracted proceeding is a reversal of the objective of a speedy trial that the introduction of the adversary system was designed to achieve in the first place. A legislative recognition of this problem and a response to the setback posed by this clearly deplorable practice, was made in the law creating the circuit criminal courts where continuous hearings until termination are mandated. These courts became functional only in 1969, but early appraisal claims that they "have lived up fully to the hopes of Congress in their creation and to the trust of the public in seeking quicker dispensation of justice."[185]

Another consequence of jury absence which however need not also be mourned is the absence of a dramatic impact particularly of capital

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[183] Sherman v. U.S., 356 U.S. 369, 78 S.Ct 819 (1958).
[184] *Op. cit.* note 6, 539.
[185] *Op. cit.* note 45, 259.

offense trials which exists in abundance in American trials, if television shows and movies are any indication. Histrionics and questions, rhetorical or otherwise, designed to appeal to the supposed vulnerable emotional sensibilities of lay jurors, are rarely resorted to. Cases are submitted for decision often without any closing arguments[186] or summation. Not infrequently, the judge will require the submission of a memorandum or a brief in place of such closing argument. Essentially for the same reasons of compelling clearer thinking and better preparation of cases as grounds for advocating use of opening statements, I would also recommend compulsory use of summations or alternatively, the submission of a brief. This is especially advantageous particularly in cases where the trial has been fragmented and dragged out for a long period of time, as they frequently are in many cases.[187] Also to be considered is the advantage on appeal accruing from the rule providing that the written arguments "shall be preserved in the record of the case."[188]

Sentencing and service of penalties.

After termination of trial, the judge may in relatively uncomplicated cases, immediately adjudicate on the issue of guilt.[189] Since judgments are required to be in writing, he will in such cases dictate in open court his findings of fact and the elaboration of his reasons in support of his decision. Thereafter he may make the pronouncement of his verdict. Where it is one of conviction, he may likewise immediately impose what he deems to be the proper penalty. He is not required, however, to elaborate on what made him choose the actual penalty within the wide range of the authorized imposable penalty scale for the offense committed. Such a requirement seems to be desirable in order to compel the sentencing judge to see the connection between the penalty he is imposing and the penologic objective he seeks to attain for the particular convict. Often this is lost sight of in the mechanical and routinized imposition of penalties whereby the judge acquires a hardening of attitude from an "institutional bias." More often, particularly in the serious felonies, the judge will take time to deliberate on his verdict and sentence. The rules do not set any time limit for the judge to decide a criminal case, but a provision of law does set such a general limit of ninety days in a quite unusual manner.[190] Judges are

[186] Rule 119:3(d) permits oral arguments at close of trial.
[187] Some criminal cases have been known to drag out for as long as 6 years.
[188] *Op. cit.* note 186.
[189] People v. Ricarte, 49 O.G., No. 3, 974.
[190] Sec. 5 Jud. Act. For the CCC a 30 day limit is fixed.

required to certify monthly that they have resolved all motions, petitions, cases and other proceedings that have been pending for determination before them within the last three months. Absent this certification, which is considered made under the oaths of their office so as to subject them to the penalties of perjury in case of a false certification, judge's salaries are withheld from them. It certainly seems that this time limit is more than adequate for the most profound deliberation of even quite complicated cases. Surprisingly, there are still some judges who procrastinate their decisions well beyond this ample limit. Aside from sheer laziness which the law explicitly seeks to curb, several causes for this procrastination may be perceived — causes that may well be rooted in the cultural value of *pakikisama* and *pakiusap* earlier described as the cultural stress or pressure upon getting along well and preserving harmonious relationships. There is thus a tacit desire of the judge to postpone the inevitable unpleasantness of rendering a decision. In civil cases, it may be due to a desire to give the parties as much time as possible to effect an extra-judicial solution that would enable them to re-establish their former friendly relationship with each other.[191] This judicial attitude may imperceptibly and impermissibly be carried over to the criminal field. After all, the same judge tries both criminal and civil cases.

The structure of the penal code permits substantial judicial discretion as to the severity of penalty that may be imposed. Offenses punishable under the code are classified into three: light, less grave, and grave felonies.[192] The first class are punishable by up to 30 days; the second, by correctional penalties up to 6 years; and the third, by afflictive penalties up to death.[193] Note the frank classification of penalties that more than 6 years is no longer "corrective" under the reformative or rehabilitative theory of penology but avowedly "afflictive" under the retributive-deterrence theories. The Philippine penal code was frankly adopted under the latter theory.[194]

The entire range of imposable prison sentences, from one day to life, is divided into six graduated "degrees" each one given a technical penalty designation as follows: *arresto menor* — 1 day to 30; arresto

[191] An insight given by Gluckman, *op. cit.* note 137.
[192] Art. 9 RPC.
[193] Art. 25 RPC.
[194] The Revised Penal Code of the Philippines was approved on December 8, 1930 and took effect on Jan. 1, 1932. It is a revision of the penal code for the Philippines that took effect July 14, 1887. The latter was in turn a modified version of the Spanish Penal Code of 1848. This was based ultimately on the French Penal Code of 1810. A proposed Correctional Code completed in 1916 and based on the rehabilitative objective failed to be enacted. The Penal Code is undergoing a continuing revision. See, *op. cit.* Aquino.

mayor — 31 days to 6 months; *prision correccional* — 6 months and 1 day to 6 years; *prision mayor* — 6 years and 1 day to 12 years; *reclusion temporal* — 12 years, plus 1 day to 20 years; and *reclusion perpetua* — life imprisonment. Each degree is divided into three "periods" — a minimum, a medium and a maximum period — generally computed by dividing the time comprised within a degree by three, eg., *arresto menor* minimum period is 1 — 10 days; medium is 11 — 20 days; and maximum is 21 — 30 days.[195] The sentence of life imprisonment is quite misleading for it is not really incarceration for the duration of the convict's natural life, as one would suppose. The law mandates the pardon of the convict after serving 30 years of his sentence, unless the President considers him "unworthy of pardon."[196] Where the accused has to serve successive prison sentences imposed for different crimes in different proceedings,[197] the total duration shall not exceed three times the most severe of the penalties imposed on him or up to a maximum of 40 years, whichever comes first.[198] These limits in effect bar actual life imprisonment in the literal sense.

In general, it may be stated that, in the imposition of the proper penalty, there is no legal basis for considering the personal and social circumstances of the offender other than those attending the commission of the crime itself. Prior record of criminal convictions is explicitly stated to be considered in aggravating the penalty. The absence of such record, however, is not stated as an extenuating factor. Often, such legislative omission is taken as inferring a prohibition against its consideration. If the fact of being a marginal offender as shown by the absence of any record is to be considered in his favor at all, its consideration in mitigating the penalty will not appear in the written judgment. Its influence will make itself felt by some other means. Admittedly, it is important to consider such factors as viable marriage and family relationship, stable employment, absence of record of prior anti-social behavior, and others tending to show good prospects of rehabilitative success. In an intimate society, these data will usually reach the sentencing judge through a variety of informal sources of information. These factors will guide judicial discretion in imposing the proper penalty suitable to the convict's particular circumstances, within the limits of the generally wide penalty scale.

In the imposition of penalty, a somewhat mechanical formula is prescribed whereby mitigating circumstances are set-off against aggra-

[195] Art. 76 RPC.

[196] Art. 27 *id.*

[197] Charging more than one crime in one complaint is prohibited by Rule 110:12.

[198] Art. 70 RPC.

vating factors. Whichever is numerically superior over the other determines the gravity of the penalty.[199] The foregoing of course is an oversimplification of a complex area which was even more intricate and confusing under the Spanish penal code.[200] This, even without adding the further complex rules pertaining to the application of the Indeterminate Sentence Law.[201] Under this statute, the judge determines the minimum time that the convict must serve before he is eligible for parole. He must also determine the maximum limit of the sentence that the convict will serve if not earlier released on parole. Both the minimum and maximum terms are determined after arriving at the imposable penalty taking into consideration the aggravating and mitigating circumstances as noted above. This means that the actual sentence imposed need not be taken from within the limits of the sentence prescribed by the penal code[202] for the offense committed. To illustrate: A 19 year old man is convicted of homicide – manslaughter in the first degree – for killing a parolee who had taunted him for being a *bakla* (effeminate). The killing was done during a wedding celebration at which both the defendant and the deceased were intoxicated. The accused immediately gave himself up to the authorities and on arraignment pleaded guilty. Under these facts, four mitigating circumstances may be counted in favor of the accused – victim provocation, intoxication, voluntary surrender and guilty plea. The offense is punishable by *reclusion temporal* – 12 to 20 years.[203] Two or more mitigating factors reduce the penalty to the next lower in degree which is *prision mayor* – 6 to 12 years. The extra two remaining mitigating circumstances are considered to further reduce that to the minimum period of that degree, which is 6 to 8 years. The judge may select from within this range the maximum time that the accused will serve. To get the minimum, the law directs that choice be made from within the range of the next still lower degree which is *prision correccional* – 6 months to 6 years. An indeterminate sentence for manslaughter in the first degree may then be 6 months and 1 day to 6 years.

The scope and applicability of the Indeterminate Sentence Law are, it seems to me, restricted by standards or criteria that have but remote, if any, relevance to the rehabilitative function it seeks to achieve. This,

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[199] Art. 63 RPC.

[200] *Op. cit.* Aquino, note 86, 529-30.

[201] Act 4103 as amended by Act 4225.

[202] The rule is different for offenses punishable under special laws as contrasted to those punishable under the RPC. In the former case, the indeterminate sentence must be fixed from within the limits set by the special law imposing the penalty for the offense convicted.

[203] Art. 249, RPC.

as declared by the court is "to uplift and redeem valuable human material, and prevent unnecessary and excessive deprivation of liberty and economic usefulness."[204] If this be truly so, why then is the applicability of the law denied to "those whose maximum term of imprisonment does not exceed one year?"[205] Or those sentenced to life imprisonment? Is the need for rehabilitation or the prospect for reformation affected in any way by the length of a sentence over the imposition of which the accused had no control whatsoever? Further, why likewise deny its beneficial application to those convicted of treason, rebellion, sedition or espionage? Are they not "redeemable valuable human material" too? Is its denial an implied recognition of the effective limits of deterrence?

The provisions of the Indeterminate Sentence Law are administered by a Board of five members composed of one sociologist, a clergyman or educator, a psychiatrist and a woman qualified by training or experience and is chaired by the Secretary of Justice.[206] A question of basic fairness is raised as to the perceived impartiality of a body headed by the government's chief law enforcement officer. Can a convict perceive that a body chaired by one who he feels had a hand in his apprehension and prosecution be truly impartial? Would not the resentment aroused by a denial of his application for parole and rooted in his perceived bias of the Board, be an effective barrier to his successful rehabilitation? The removal from the composition of the board of the Secretary of Justice is certainly a small price to pay for advancing the accomplishment of the law's objective. "The administration of justice must be not only above reproach, it must also be beyond the suspicion of reproach."[207]

Absence of Probation.

The most noteworthy difference from American procedure in the sentencing stage is the unavailability of non-custodial forms of penalties such as probation, conditional or unconditional discharge or disposition such as "continued without a finding" that may be resorted to in appro-

[204] People v. Ducusin, 59 Phil. 109.

[205] A practical reason for denying parole to those whose sentence does not exceed one year is the fact that this class of convicts must serve their sentences in the provincial jail within the administrative supervision of the Provincial Government which has no Board of Parole for provincial prisoners.

[206] Women's lib should be interested to know that this requirement for a qualified woman to sit with the Board of Parole was made as early as 1933 when the Indeterminate Sentence Law was enacted.

[207] People v. Savides 1 NY 2d 554, 556 (1956).

priate cases. A probation law[208] was enacted in 1935 but it was declared unconstitutional for reasons other than the merits of the proposed probation system.[209] It is indeed quite surprising why there was no subsequent effort to renew the proposal. A guess can only be ventured that reforms involving financial expenditure for the criminal component of society do not seem to interest our legislature.

The most limited kind of suspension of sentence is available for minor delinquents under sixteen years of age.[210] Under the law, such a minor who is convicted of an offense punishable by a penalty of 1 month will only be publicly censured or fined.[211] Where said minor is convicted of a more serious offense, the imposition of the proper sentence of imprisonment is suspended and the judge has the choice of either institutionalization or some modified form of probation. It must be noted in this connection that there are no probation officers. Parolees are generally required to report periodically to the magistrates who needless to stress can exercise the barest, if any at all, kind of supervision. Since the institutions for the custody of juvenile delinquents are confined in the Manila area, the judge will tend to favor a local community facility if one is available. Otherwise, the minor may be committed to the care and custody of a responsible person in the community who is willing to assume the responsibility. This practice has been known to have degenerated in some remote areas to a system of providing involuntary personal servitude. Certainly, reforms cry out in this as in many other areas.

A practical consequence of this absence of sentencing alternatives is that any desire to mitigate the harshness of the criminal law in individual cases must be accomplished through *sub rosa* means, i.e., through outright exculpation or conviction of another offense with a penalty that is deemed more appropriate. Cases abound where judges bend over in strained interpretations of the law so that only a fine may be imposed as an alternative to an otherwise mandatory imprisonment. The full impact of this is most apparent in the field of regulatory crimes where, particularly because there is no insistent victim breathing down the neck of prosecutors, there is a marked reluctance to prosecute. The most notable illustrations of this conclusion can be found in the infrequent prosecutions for income tax evasions, smuggling of dutiable goods such

[208] Probation Law, Act 4221.
[209] People v. Vera, 65 Phil. 56.
[210] Art. 80 RPC.
[211] Such a penalty is arrived at by giving the minor the benefit of a privileged mitigating circumstance under Art. 68.

as cigarettes, textiles and other goods from Post Exchanges of American military bases, and illegal possession of firearms where no injury was inflicted. Although these types of cases dramatically symbolize the country's two most serious problems — economic problems and law and order problems — the deterrent credibility that can come only from a consistently vigorous prosecution and conviction of law violators in these areas, has been greatly detracted from and eroded by the significant diversion of the plainly guilty. Provision for more meaningful sentencing alternatives, as well as making the penalties more realistic in terms of appropriateness and suitability to the gravity of the acts prescribed, will do much to provide some solution to this problem.

Conclusion and recommendations.

We started this paper by recalling the objectives sought to be achieved in transplanting at the turn of this century, the American adversary system of criminal justice to the Philippines, i.e., to establish a "pure, speedy and effective administration of justice whereby the evils of delay, corruption and exploitation will be effectively eradicated." We recalled the lavish tribute paid to its operation some thirty years later as being even "far superior" to the U.S. model from which it was derived. We cited the need for a re-appraisal in view of changed conditions and rising criminality. We have posed the question whether the system of administering justice as it now actually operates, is in fact achieving effectively and fairly its primary objective of crime control. Understandably, our focus was narrowed by an occupational bias to the operation of the courts in the prosecution and sentencing of criminal defendants. This is not to minimize the equally and possibly even more important role of the police and the correctional agencies in this vitally important area of the law. Regretfully, they can only be given passing treatment at this time. Hopefully, this paper may be expanded at a later time to treat more exhaustively all three essential components of the criminal justice system.

While there seems to be no reason to doubt the accuracy of Mr. Justice Fisher's appraisal of the Philippine procedure as having attained the twin objectives of fairness and efficiency during the years prior to the last world war, there are strong grounds to doubt its present applicability. It is my distinct impression that the foremost problem facing the administration of criminal justice in the Philippines today is the repair and restoration of its badly eroded deterrent credibility. The erosion has almost imperceptibly crept through the years from the non-

uniform and inconsistent law enforcement. The remoteness and even uncertainty of punishment arising from long delay in adjudication, the *arreglo* and the *palakasan* where compromises are bought or coerced, have greatly detracted from and undermined the sought after deterrent effect. What is necessary then is to promote the deterrent variables of speed and certainty of punishment without sacrificing standards of fairness and decency. It is with this objective in mind that procedural reforms that are realizable in terms of present day financial realities have been suggested. To recapitulate, we will group our proposals into roughly three divisions that often shade into each other.*

I. Those designed to promote standards of fairness and enhance protection of civil liberties:

1. Remove the power of arrest in criminal proceedings now extended to the municipal mayor;

2. Remove the power to make warrantless arrests on probable cause for: (a) misdemeanors except where necessity demands immediate arrest because of likelihood that injury may be inflicted or damage to property caused[213] and, (b) crimes "about to be committed" except where an overt act has been committed which constitutes a punishable attempt;

3. Expand the use of summons procedure from its presently narrow confinement (to light felonies) to a wider scope restricted only by standards of dangerousness and likelihood of appearance for trial;

4. Expand the right to retained counsel given an accused after his arrest to include the right to assigned counsel but said right to be confined to arrests under warrant. For warrantless arrest cases, right to assigned counsel should accrue upon presentment;

5. Undertake systematic bail reform giving due consideration to stability of population in rural areas, length of employment, family relations, home ownership and similar factors showing likelihood of appearance for trial as bearing upon a policy favoring release on personal recognizance. Procedure for stationhouse bail should also be worked out;

6. Provide for a procedure of summary judicial review of warrantless arrest;

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212 ALI Model Code of Pre-Arraignment Procedure.

7. Remove from police their present custodial function over detention places for defendants awaiting preliminary hearing or trial.

II. Those designed to increase efficiency and effectivity of the criminal process:

1. Remove present requirement of prior determination that "an offense has in fact been committed" for warrantless arrests on probable cause;

2. Allow limited pre-presentment police interrogation of suspects arrested without warrant under proper procedural safeguards;[214]

3. Abolish requirement of victim-initiation of complaint for prosecution of so-called "private crimes" and likewise abolish victim-pardon as a defense;

4. Recognize power of the magistrate and the prosecutor to dismiss after preliminary hearing upon a finding of a valid defense;

5. Adopt the alternative plea of *nolo contendere;*

6. Require prosecutors to participate in preliminary hearings before magistrates and make the latter's decision to bind over for trial conclusive upon the prosecutor as is the present practice in England;

7. Set time limits for the commencement and termination of preliminary hearings before magistrates and shorten the 60 days presently set for similar hearings before the prosecutor. If a two week time limit can be set for cases involving indigents, a limit of twenty days should not be unreasonable;

8. Abolish system of police prosecutors and allow in their place prosecution by police counsel appointed by local governments;

9. Shorten the present 90-day time limit for decisions to thirty days similar to that imposed on Circuit Criminal Courts;

10. Mandate continuous trials until termination for all courts.

III. Those designed to achieve both fairness and efficiency:

1. Curtail present privilege of crime victims to file their complaints directly with the courts by requiring prior approval of the prosecutor. Such direct filing should be allowed only by reason of necessity as (a) where the police or other government officials are those sought to be charged, or (b) where the prosecutor unjustifiably refuses to issue a complaint in clearly meritorious cases;

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[213] *Ibid.*

2. Abolish present joinder of civil and criminal actions in one proceeding;

3. Provide pre-trial procedure for challenging constitutionality or propriety of prosecution evidence. eg., coerced or involuntary confessions or incriminating statements, evidence obtained by an unreasonable search and seizure, or where entrapment is put up as a defense;

4. Require the making of opening statements and summations;

5. Impose bifurcated trials or a separate sentencing hearing particularly where the additional penalty for habitual delinquency is sought to be imposed;

6. Require sentencing judges to elaborate their reasons for the particular sentence imposed in relation to the penologic objective sought to be attained;

7. Confine the benefits of marriage of the victim to the offender in cases of rape, seduction, abduction and acts of lasciviousness only to the offender himself and not extend them to his accomplices and other participants or aiders.

The foregoing proposals are by no means an exhaustive list for they are only confined to procedural rules that can be tried and experimented with. Other reforms such as the upgrading of the police, the establishment of more and better correctional facilities, the adoption of a probation system, and others of a similar nature, involve tremendous expenditures of vast sums of money that the government does not seem quite disposed to do at the present time. Also basic to any meaningful reform is the quality of the personnel manning any human institution. Therefore the method of selection must assure the competence, integrity and dedication of judges, prosecutors, police and correctional personnel and other officials of the criminal justice system. Lastly, the bearing that cultural factors may have upon the administration of justice must be uncovered so that questionable cultural values that impede the fair and effective administration of justice may be recognized, modified or eradicated. Only by a continuing process of critical evaluation and sincere attempt at meaningful reform can we attain the often elusive ideal of justice for all.