

|   |     |
|---|-----|
| O.G. 2499   | 102 |
| <i>Criminal Procedure</i> — Since Fruits Stolen from the Wife's Land Are Conjugal Property, the Husband, Being Co-owner of the Fruits, May File the Complaint as an Offended Party. <i>People v. Barao</i> , (CA) 61 O.G. 2392  | 103 |
| <i>Evidence</i> — A Document Prepared by the Officer or Agent of One Party and Presented in Evidence by the Other Party Favored by It, Is Removed from the Rule on Self-serving Evidence and Is Admissible Against the Former If Its Contents Are Relevant to the Issues Involved. <i>Lagman &amp; Co. v. Mercado</i> , (CA) 61 O.G. 2362                             | 103 |
| <i>Evidence</i> — Where the Victim Was in Good Health Before His Maltreatment Which Allegedly Cause His Death Afterwards and There Is No Proof Nor Ground for Reasonable Doubt That any Extraneous Cause Intervened, Said Maltreatment Is Deemed to Have Caused Such Death Applying the "Principle of Cause and Effect". <i>People v. Tammang</i> , (CA) 61 O.G. 1045 | 104 |
| <i>Evidence</i> — An Authentic Photostatic Copy of a Lost Check In Existence Prior to the Loss Is Admissible in Evidence in Lieu of the Original. <i>People v. Yu Pin Suy</i> , (CA) 61 O.G. 2218   | 105 |
| <i>Special Proceedings</i> — An Order Approving a Project of Partition of an Estate Which Conforms with the Judgment Fixing the Shares of the Heirs Entitled to the Estate Is No Longer Subject to Appeal. <i>Ortega v. Hon. Judge Flores</i> , (CA) 61 O.G. 709.   | 105 |
| <i>Special Proceedings</i> — A Pending Claim for Damages, Though Contingent, Makes the Claimant a Creditor of the Deceased's Estate and Entitles Him to Petition for Judicial Administration of the Estate upon Failure of the Heirs to Institute Said Proceeding. <i>Acosta v. Lumanlan</i> , (CA) 61 O.G. 2469.   | 106 |
| <b>RECENT DOCUMENTS</b>   |     |
| Revised U.S.-Philippines Base Agreements  | 107 |

Copyright 1965 under Act 3134, by the College of Law, Ateneo de Manila. Reproduction of the editorial matter in any manner, in whole or in part, without the permission of the publisher is prohibited.

The *Ateneo Law Journal* is published four times during the academic year by the student body of the Ateneo College of Law.

Unsigned and uninitialed writings are by members of the Editorial Board.  
Subscription rates: P4.00 per issue; P14.00 per year. Foreign rates: \$1.50 per issue; \$5.00 per year.

# ATENEO LAW JOURNAL

## SOCIETY, CRIME AND LAW

*Senderey Drapkin\**

"Nihil novo sub sole" said the old philosopher. To a certain extent it sounds like an undeniable truth, particularly if we recall for instance that the origin of the atomic theory and the search for other planets existed many centuries ago. But even if no subject is really new, the way in which we tackle it, the angle from which we focus upon it, the emphasis with which we discuss it, is different from those used by our predecessors. From this particular point of view we may assume that many subjects are new today. Precisely from this angle we would like to deal with the very old substance of our lecture: "Society, Crime and Law."

Few subjects awaken a greater interest in human beings than the one connected with crime and criminals. This may be due to the thirst for adventures — romantic, dramatic or tragic ones — that lies in the innermost nature of man. On the other hand, crime usually involves rather serious social consequences and it is utilized as the happy hunting grounds for all sorts of studies and scientific research. As a consequence, this perennial interest of mankind in all the problems connected with crime and delinquency is not at all strange. It was so in the past, it is still true today and there is no reason why it should not be so in the future. The successive causative theories upheld till now, served not only to provide

\* B.A., 1923, Bachelor of Medicine and Pharmacy, 1925, Lic. in Medicine and Pharmacy, 1928, and Dr. Med., 1929, Santiago; Medical Chief, Psychosomatic Outpatient Dept., St. Salvador Hospital, Santiago, 1947-59; Medical Chief, Institute of Criminology, Dept. of Prisons, Santiago, 1936-59; Lecturer in Criminology, School of Police, Santiago, 1942-59, and Superior Institute of Police, Santiago, 1948-59; Professor of Social Pathology, 1950-59, of Mental Hygiene, 1953-59, and of Criminology, 1958, University of Chile; Extraordinary Professor of Social Pathology, since 1950, and of Criminology, since 1956, University of Chile; Chilean Correspondent, U.N. Social Defense Section, since 1950; U.N. Technical Assistance Administration expert in Israel for criminological studies and services, 1957; Professor and Director of the Institute of Criminology, Faculty of Law, the Hebrew University of Jerusalem, since 1959.

us with a series of criminogenetic interpretations, but more important, they were the doctrinary backbone of the penal measures and the punitive norms employed in different times, places and cultures.

Crime is as old as human society. Such weakness in man's behavior can be traced all along his philogenetic evolution, as well as in every type and form of social structure and organization. There have always been men who trespassed the boundaries of the established behavioural pattern. Therefore, crime is, we repeat, a special type of deviant behaviour embodied in every system of social life.

From another point of view there are too many evidences that usually, when we come to discuss the different aspects of crime and delinquency — its detection, the operational judicial machinery and the ways and means for its prevention and treatment — most of us, if not all, are emotionally involved, we are full of beliefs and prejudices, and are inclined to make statements based more on personal or socio-political pre-conceptions, than on rational knowledge supported by research. In this respect we could mention an infinite variety of examples, but it might be enough just to pick out one, such as imprisonment, considered as a method to deal with law breakers. It is a well-known fact that during the XVIIIth and the XIXth centuries there were some critics of this system, but they remained as isolated bodies. Since the beginning of our century, particularly with the rapid developments in the field of sociology and psychology, this situation has been changing steadily, and evidence tends to show that imprisonment does more harm than good. Only in the last few years institutional treatment has started to be evaluated in a rational and scientific way. But till then both sides—those in favour or against it—were inclined to attack or to defend imprisonment more on the grounds of guesswork and of subjective personal feelings than on factual or objective grounds. Nowadays, with the scientific tools at our disposal, it is almost inconceivable that we should continue using such a poor approach in dealing with the different aspects connected with crime, its prevention and treatment. We believe that we have better methods and we will try to prove that such a belief is based more on rational than on emotional grounds.

We are often reminded that we live in a rapidly changing world. Because we are simultaneously witnesses of and actors in such an extraordinary drama as human life in perpetual movement, we are not always conscious of the many and unending changes in our lives. We only tend to believe that these changes constitute an exclusive experience of our generation, never lived before by our ancestors. The truth is that there have always been changes, fundamental changes, with such a decisive influence in

our life, that they have even changed the flow of mankind's history. We are inclined to forget that the pre-Socratic philosophers, centuries before Plato and Aristotle, had already expressed the concept of "flux," that is to say that the idea of continuous change, as a universal principle always present in every single aspect of life—movement or thought—be it in the physical world in which we live, in the life of everyone of us, or in human society. The greatest paradox seems to be the fact that the most stable and constant element of life, in this unstable and inconstant world in which we live, is the concept of change in itself. It is perhaps true that never before were these changes so mighty and so rapid as they are today. They are certainly the outcome of many factors, but special consideration has to be given to the impressive scientific and technical revolution, to the violent demographic explosion of the human population and the massive socio-political readjustment of our century. The astonishing technical developments of our time encourage, in many of us, the proud and blind conviction that very soon we will be the unique masters of the material world in which we live, that we will be able to solve all our problems, achieving in this way the eternal happiness of which mankind has always dreamed. We must be aware that all of our fantastic inventions would only become a dangerous fetish if they would be the unique reason of our life, to the exclusion of philosophy and religion, culture and art, love and emotion.

Such a heterogeneous and complex society like ours, changing at an always increasing speed, imposes serious demands of everyone of us. In fact, we must learn how to remain ourselves without becoming isolated from others. We must try to understand and to accept the norms and values of others, without rejecting our own. We must respect our fellowmen even if they are not necessarily our equals in all respects.

By its own nature every change requires readjustments and readaptations that are not always easy for the human being to achieve. Every change brings in its wake different types of reactions, some rapid other slow, some exhilarating other painful, that may be expressed in many different ways. Among them crime and delinquency, as well as other socio-pathological reactions are not precisely exceptions. The ultimate outcome will depend on the stability of our personality and on our capacity for adaptation to the social structure in which we happen to live. A weak personality in a sophisticated society will easily break down. On the contrary, a strong personality will easily be adapted to a simple type of social structure. But when there are no possibilities for the establishment of a certain equilibrium between the individual micro-cosmos and the macro-cosmos in which we live, the results

can only be projected in terms of psychopathology or sociopathology. For instance, when due to traumatic experiences during childhood, an individual gives to the world in which he lives a sense and a meaning that his fellowman will be unable to grasp or to understand, he will have to hide his personal and intimate drama and painfully experience his relations with other people, if he wants to carry on a certain degree of communication with them. Here we have the origin of the different types of *neurosis*, so intimately related to modern man. On the other hand if we recall that emotions are a vital element in our communication with other people, but at the same time emotions are able to create functional changes and reactions in the human body, it will be easily understood that, when the relationship with other members of our community becomes difficult, quite a number of these bodily reactions and functional changes may be translated into the so-called *psychosomatic diseases*, such as certain types of asthma, migraines, heart and digestive troubles, etc. But when the individual is unable to reach a minimal kind of compromise in his relationship with his fellowmen, there will be for him no other way but to cut his means of intercommunication with other members of his social group and remain isolated and secluded or even destroy himself. We have here a case of *psychosis* or *mental alienation*. Finally, when because of different factors and motives not only our relationship with others becomes difficult, confused and sometimes even contradictory, but we are also unable to conceive the society in which we live in the same way as do our fellowmen, when the basic norms and values, concepts and principles, have no longer for us the meaning that they have for others, then we may expect the development of some sort of *sociopathy* or social deviant behaviour, be it in the form of crime and delinquency, alcoholism or drug addiction, prostitution or sexual perversion, etc.

We do not believe that this is the most appropriate occasion to ventilate again the century-old discussion centered around the question of whether criminology today still lacks some of the attributes of many other older, traditional and more established disciplines. If 1876, the year in which Cesare Lombroso published the first edition of his famous "L' Uomo Delinquente" is considered as the starting point for a modern and scientific criminology, we have to agree that in 89 years too many achievements cannot be expected in such a complicated discipline as criminology. Its mere objects or field of competence have not yet been clearly defined or universally accepted. Its methodology has not yet developed the refinements and precision of those used by other sciences, and disagreement still prevails as to what should be its basic aim and purposes. Perhaps such fluidity stems from the fact that crimi-

nological studies can be focussed from several different angles, at least from the biological sociological and juridical points of view.

Whatever the definition of crime, in the last analysis crime is always an expression of an individual's behaviour, in a given moment of his existence, due to a given factorial constellation. In other words crime is always a human act or omission and, consequently, a bio-psychological reaction. It is also an old truism that man cannot live in a social vacuum. This indispensable social atmosphere does not obey biological laws. It follows the same patterns which determine the cultural characteristics of every human community in a given moment of its historical evolution. And to complicate such a picture even more, we have to bear in mind that human behaviour within the social group is also affected by a given juridical frame of reference, without which it would be more difficult to maintain the equilibrium and the stability necessary for its peaceful and progressive development. These are some of the factors why, in studying criminological subjects, we have to face such an overwhelming amount of difficulties.

As we have already mentioned, due to many and complex elements, there have always been and still are many people who will break the law, who will step beyond the limits of acceptable behaviour established by the social community to which they belong. In the most technically advanced and sophisticated societies, the legal and social norms are ignored more frequently and by a greater number of people, basically due to the greater difficulty experienced in their normal social adaptation. The proliferation of restrictions and punitive law and measures can only increase the evil instead of reducing it.

If in former and more primitive social structures, the behaviour of almost every member of the community could be pre-determined to a large extent, in modern societies, this cannot be done because they are lacking the consistency, the stability and the uniformity which were the basic characteristics of the previous ones. This is particularly true in communities belonging to the so-called western culture as well as in other societies in their process of westernization. In fact, from childhood on, besides our own family group, we belong to many different other groups within our community. Everyone of these groups—of a political, religious, social, economic, labour character — has its own principles, needs and interests which do not necessarily conform to the norms and values of other groups or those prevailing in our primary and basic family group. Moreover, not infrequently they are even opposed and antagonistic. This conflict of norms to which we are exposed from the moment we leave our paternal home, had been analyzed by Emil Durkheim

by the end of last century and had been named "anomie." This same concept was later enlarged and developed by Robert Merton, the American sociologist, giving it a broader meaning.

Besides the state of "anomie," another that we cannot avoid taking into consideration in modern societies, is the great mobility and rapidity of displacement of isolated individuals or of entire groups of people. One of the most serious consequences of such a phenomenon is the weakening of the family structure. Modern families have been increasingly losing their character as the "emotional backbones" and "protective shield" for everyone of their members; characteristics that were so fundamental for children of previous generations.

A third and last element that we would like to mention as proper to westernized communities is the spirit of competence so frequently present among its membership. Such a feature not only becomes an important factor in strengthening our egotism and aggressiveness, but also pushes us to achieve our personal aims without paying enough attention to whether the means for attaining such goals are legitimate or not.

One of the means traditionally applied by the human group to control individual behaviour, in order to protect the right of others, has always been punishment: tabu in primitive societies, penal law in modern ones. We cannot deny or ignore the importance of law in the development of human society. By law we understand the cultural pattern of a given society in a moment of its historical evolution, sanctioned by authority, that is to say, it takes the form of compulsory rules. The penal law is characterized by the attachment of sanctions to some of these compulsory rules, in order to make more effective their enforcement. To increase its effectiveness, the penal law has to comply with two basic requirements:

- (a) It must be adapted to the society to which it will be applied; and
- (b) It has to be based in a thoroughly established criminal policy.

There are many countries today, perhaps more than we are usually inclined to believe, whose operational criminal laws have been enacted some fifty or more years ago. Some criminal codes still in force are as such as a century old. It is true that once in a while, here and there, some minor modifications are introduced with the intention of keeping the law up-to-date, but the basic foundations, the conceptual elements, the values on which it was established at its origin, are the same, have not been changed, in spite of the undeniable fact of the many and rapid changes that have happened within the same society, since the date of the enact-

ment of its criminal code. Such laws have become old-fashioned and unable to satisfy the aims and needs, the norms and values, the principles and purposes of present-day societies. Therefore, there is an urgent need to create a new juridical framework, more adapted to present conditions, more effective and easily enforced. Without depreciating the sources of law it must be recognized that the characteristics of modern life are quite different of those that prevailed in the times of Hammurabi, Moses, Manu, Zarathustra, Emperor Justinianus, Napoleon and many other law-givers of the past. Today there is an urgent need for a profound revision of penal codes in general. Certainly it is not an easy and simple task, and we cannot expect miracles in this respect, but we have to face it and the sooner the better. On the other hand it is no more the task and the responsibility of the jurist alone. He cannot cope with all and every one of the intricacies of the present-day society. The best solution seems to be team-work, where the jurist unites his efforts with those of the sociologist and the psychologist, the teacher and the priest, the psychiatrist and the physician, and many other similar professional and laymen whose contributions may be appropriate and opportune. The quicker we awake to reality and start working, the better it will be for all of us.

Now in relation to criminal policy, we have usually been faced with two different approaches, the so-called "conservative" and the "liberal." By "conservative" we mean the trend to stiffen penal measures as much as possible, to increase their punitive value, so as to attain a better deterrence and a more positive social defense. Such elements as crime causation and treatment of offenders are taken into consideration only in a superficial and accidental way, on their surface value so to say. The "liberal" approach refers more to the humanitarian aspect of penal enforcement, based on the elementary need to respect the personality of the human being above any other consideration. The treatment of the offender, according to his personal needs and idiosyncrasies, is considered as the only way for his appropriate resocialization. By so doing the protection of society is reached by other means and in another way.

To a very large extent both sides, "conservative" and "liberals," have been opinionated and single-minded, rigid and dogmatic. Neither side has been or is prepared and willing to look objectively into the arguments and reasoning of its opponent. They are both blocking every possibility of a common understanding, for the benefit of the same society that they claim to serve.

For the "conservative" one of the fundamental pillars on which criminal law is based, to a greater or less extent, is the concept of deterrence, in its general or specific aspects. They have always

been convinced that the punishment of a convicted offender is inflicted not only to satisfy the public need for revenge but also to set an example so as to discourage other members of the community from behaving in the same way. Such a belief was widely accepted almost without any serious objection, during all the previous centuries. In stating this fact we have very little more to add. Our predecessors were entitled to stick to their beliefs without any need to prove their validity. They had no yard-sticks for such type of measurement. But it is quite a different thing to adhere today to the same beliefs, particularly when we do possess means and tools, methods and techniques, to demonstrate with a reliable degree of accuracy, whether such beliefs have some validity or whether they are mere symbols that we respect in a sentimental but not scientific way.

On the other hand, the humanitarian and therapeutic approach of the "liberals," must also be examined. It seems that there is an inverse relationship between the amount of talking about treatment and the amount of treatment really performed. Sometimes we have the impression even that for many people the miraculous resocialization of the offender might be achieved just by a mere process of talking, a new kind of "logo-therapy."

Happily enough we possess today quite a number of methods for evaluating objectively the effectiveness or lack of effectiveness of the different treatments that have been applied or are actually being enforced in many countries. It is no longer impossible to discriminate among different systems of treatment and choose for such a purpose the best possible ones according to the cultural pattern and the national idiosyncrasies, the budgetary possibilities, the number and skill of available personnel, etc. All this and even much more can and should be achieved through scientific research, the only way for substituting demonstrated and objective facts for speculative and subjective beliefs. It is a well-known fact that nowadays it is becoming customary, even fancy, "a la mode," to talk about scientific research, its importance, the urgent need for its greater development, etc. But let us be honest and candidly admit how little has been done in this respect in the criminological field. Someone has already said that we are only beginning to understand the real amount of our ignorance in this matter. With some exaggeration we might even say that the actual distance between our knowledge and our ignorance is very similar to the one existing between zero and the infinite. This tremendous gap is a real challenge to all of us, but at the same time provides the basis for an exciting interest in our studies.

The United Nations Organization recently took the leadership in stimulating further scientific research in criminology. In August of this year we were privileged to attend a special seminar on re-

search in criminology, held in Denmark under the auspices of the United Nations with the cooperation of the Danish Government. Representatives from more than twenty different developing countries in Asia, Africa and Latin America had the opportunity of discussing the different aspects of the main subject together with well-known international experts in the field. Among the many important conclusions, we would like to emphasize the following ones:

- (a) There is a general need everywhere for basic research in the field of crime and delinquency, particularly in relation to different methods of dealing with offenders;
- (b) Developing countries should do their utmost in order to avoid the repetition of so many mistakes already committed by the more developed ones. It may also be inappropriate or even dangerous for them to seek to transplant certain policies and methods prevailing in other areas. Original research is necessary for the establishment of systems most appropriate to their own situation;
- (c) Before proposing basic changes of criminal policy a wider and better use of already existing data seems indispensable. It is also important to collect reliable evaluative information of the best possible system; and
- (d) Instead of planning extremely ambitious research projects, for which many countries lack the necessary budgets and the indispensable team of trained personnel, it would be more profitable to design diversified and modest pilot schemes, providing information on some specific points, rather than on extremely general ones.

Immediately after the meeting in Denmark, the Third United Nations Congress for the Prevention of Crime and the Treatment of Offenders was held in Stockholm, Sweden. Also here the main accent was on the need and urgency to promote everywhere as much as possible scientific criminological research. It is true that some opinions were expressed asking the delegates to be extremely cautious in suggesting further research, due to the lack of value of very expensive projects already finished. For us, it is absolutely impossible to understand such a peculiar point of view. We personally believe that not everything that has been done under the label of scientific research is really such. In this respect of course we should be extremely cautious, taking good care that only specially trained people should design research projects and should carry them to their conclusion. If we do otherwise we risk arriving at the same absurd position as the one already mentioned in connection with the treatment of offenders: a maximum of noisy talk and a minimum of realization.

We should like to add another word of warning. Everywhere there is such a need for properly evaluating our methods of dealing with the prevention of crime and the treatment of offenders that we cannot afford the luxury of undertaking criminological research for pure speculative and abstract interest, particularly in the developing countries. On the contrary, we need more and more the so-called applied criminological research, with an immediate practical purpose, so as to realize the establishment of the best possible criminal policy in every country. Only in this way we may hope to diminish our present rates of crime, delinquency and recidivism and to keep them on a level more in accordance with our present state of cultural evolution.

We have already mentioned several times that proper criminological research needs trained personnel, time and budget. Only a few countries today can afford to invest enough money for such a purpose. But the vast majority of them do practically nothing in this particular field. It would be perhaps of interest if statesmen and law-makers should ask themselves how much of the national income is devoted to scientific research in general and criminological research in particular. The answer will vary from country to country, but most of them will be surprised to discover how little they do.

This can be due to the fact that in the scale of priorities the one connected with the prevention of crime and treatment of offenders is almost everywhere of less importance. There is always a greater urgency to solve such problems as housing, public health, urbanization, industrialization and many others. It is also understandable that governments should be more inclined to spend money on such types of enterprises that might increase the welfare of the entire community, and at the same time be profitable enough to permit the recuperation of the invested capital plus profits and dividends in the shortest possible period of time. Now, projects dealing with social problems such as crime and delinquency do not belong to this category. We are personally convinced that there is another reason for explaining the lack of governmental interest in criminological problems, particularly in democratic countries. These governments are elected by the people and because of that every voting citizen has a certain influence upon the parliamentary representative of his constituency. On the other hand, every member of parliament has a given influence in the process of law-making. As a result of this relationship, if the voting citizen is not well aware and informed about the consequences of crime and delinquency, he will not put any pressure on his congressman, who in turn will not be interested in the implementation of any change in the established penal system, and as a consequence the needed

penal reform will not be enacted. All those that in some way are dealing with or connected with crime and criminals — judges, law-enforcement and correctional officers; criminological teachers and researchers; etc. — in other words all of us, we are responsible to a very great extent for this situation. We have remained enclosed in a hermetic ivory tower, with practically no relationship to the public at large, whom we have considered to be unable to understand the sophisticated problems with which we deal. The sooner we stop considering ourselves so superior the better. And if we are really interested in attaining the solution of some of our main problems, if we are not paying just lip service to such aspirations, then we must start to build a bridge of intercommunication with the general public. We must make more use of the media of mass communication, as well as all other means to awaken the masses from the apathy in which they still remain, so as to promote an informed and enlightened public opinion. On a parallel move we must explore ways for a closer and more intimate collaboration among researchers, administrators, social action leaders and policy-making bodies. By our so doing, there may be better chances that the results of our research will be incorporated into a more rational criminal policy, which will, in turn, govern the administration of justice, the prevention of crime and the treatment of offenders. Nothing can be expected if we stubbornly perpetuate the present vicious circle. We must unite our efforts for the welfare of the society to which we belong and in which we live.