

A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN, 1961. Guest Editor B. J. George, Jr. With an Introduction by Juhei Takeuchi. [South Hackensack, N.J.: Fred B. Rothman; London: Sweet and Maxwell. No. 8 in the American Series of Foreign Penal Codes. 1964. xiv + 104 pp. 2gns.]

This is the eighth in the American Series of Foreign Penal Codes under the Comparative Criminal Law Project, New York University. Gerhard O. W. Mueller is Director of the Project and Editor-in-Chief of the Series. The Series so far includes Criminal and Criminal Procedure Codes from Europe, Asia and South America. This is the first *draft* Code in the Series (although the German Draft Penal Code of 1960 is stated to be in preparation), and its inclusion is justified by the Editor-in-Chief on the ground that "all the official draft codes have in common that they reflect the most advanced thinking of the legal and criminological professions", and this apart from whether the draft codes ever become law. The Draft is Preparatory in the sense that it will prepare the way for the necessary Government Bill which in turn will be the subject of debate and judgment by the Diet.

The translation was done at the University of Michigan Law School during 1961-62 by a group of six — five Japanese legal experts then in residence and Guest Editor B. J. George, Jr., a Professor of Law at Michigan. The Translators' Preface by Professor George and Mr. Yoshio Suzuki, after noting the impossibility of a direct or literal translation as between Japanese and English, states that wherever possible the use of terms with a technical common law meaning has been avoided. This has generally been achieved, as also has precision and ready comprehensibility. There are just one or two figurative flights — the spy who "ferrets out" secrets (Art. 136), prescription that "ripens" but which may be "tolled" (Arts. 100-105).

There is a useful 18-page Introduction by Mr. Juhei Takeuchi, Director of the Japanese Criminal Affairs Bureau. This Introduction serves primarily to point out the main differences between the existing Penal Code of Japan, which dates from 1908, and the Preparatory Draft. These differences are, apparently, not great, the main one seeming to be in the increased scope for individualization of punishment and treatment given by the Preparatory Draft.

The Preparatory Draft is in two Parts, Part I, which consists of 17 chapters and 128 Articles, dealing with General Provisions, and Part II, which consists of 42 chapters and 247 Articles, dealing with Specific Crimes. Against, particularly, a Malaysian criminal law background, the following features of the Preparatory Draft are noteworthy. There is a general requirement of criminal intent for liability (Art. 18), although there are a few crimes for which negligence is sufficient (e.g., bodily injury under Part II, Chapter XXVI and destruction of property under Part II, Chapter XLII). Gross negligence, surprisingly, carries no higher punishment than mere negligence. There appears to be no scope for strict liability under the Preparatory Draft. On these questions of *mens rea* the influence of the American Law Institute's Draft Penal Code is apparent, as it is also on the question of mental disorder (Art. 15). The emphasis on *mens rea* appears also to have led to the inclusion of ignorance or mistake of law, for adequate reason, as a defence (Art. 20(2)). The insistence on *mens rea* for criminality leads naturally to the primacy

of culpability as the measuring gauge for punishment. In addition, punishment is to be for the purposes of "repressing offences and reforming and rehabilitating offenders" (Art. 47). Social security measures, by contrast, have been allowed little place — there is no provision for preventive detention and indeterminate sentences may only be imposed on habitual offenders (Art. 62).

Punishment and treatment may be individualised both by the courts and by administrative agencies. To start with, the punishment laid down for any offence specifies either an upper or a lower limit, or both, covering usually a wide range. Courts may then reduce fixed minimum punishments where there are extenuating circumstances (Art. 55) and for specific reasons such as mental disorder short of insanity (Art. 15(2) and, interestingly, self-surrender, both before or after the discovery of the offence, (Art. 50), while fixed maximum punishments may be increased by the courts in cases of recidivism (Art. 60) and accumulative crimes (Art. 65). Courts are also empowered to suspend the execution and, in what would be an innovation for Japan, the pronouncement of sentence in less serious cases. Administrative agencies may individualise through parole (Ch. XII), protective supervision (Ch. XIII), "curative measures" for the mentally disordered and "abstinence measures" for alcoholics and drug-addicts (Ch. XVI). Other features of the Preparatory Draft that may be noted include:— provision for confiscation of matter acquired by or received as remuneration for a criminal act, and of matter used in or the product of a crime, and for compensation to third parties in appropriate cases (Ch. IX); the punishment of mere preparation short of attempt in some cases (e.g., Arts. 187, 200, 272); the exception to the general purposes of the criminal law made apparently for the sake of the social interest in the family in a few cases, e.g., marriage precluding prosecutions for kidnapping or abduction (Art. 310), necessity for private complaint and provision for remission of punishment in cases of theft from relatives. The specific crimes require little comment here. They are generally simply but succinctly phrased, at least as translated. There is a comparative preponderance of crimes "concerning" national security and public peace and welfare. Public morals crimes are confined to public indecency, the distribution, etc., of obscene matter, seducing a woman into prostitution and bigamy. The only other crime relating to prostitution is kidnapping or abducting for that purpose. "Unnatural" sexual practices such as homosexuality, sodomy and bestiality are excluded from criminality, as is incest. Abortion, however, is proscribed, unless it is for the aversion of imminent danger to the woman (Arts. 289 and 14).

There were a few minor difficulties encountered by the reviewer with the Preliminary Draft. It is not quite clear what punishments attempts are to carry. Some key words could be made more precise, e.g., "crowd" (for riot under Art. 189), "gambles" (Art. 265), "intimidates" (Art. 319). The use of the word "statutes" in Art. 70 is perhaps questionable. The inclusion of the numbers and headings of articles with all else "deleted" must also be questionable in a published Draft.

This English version of the Draft of the likely new Japanese Penal Code is a further valuable contribution by the Comparative Criminal Law Project of New York University to the achievement of more satisfactory systems of criminal law. The particular relevance to Malaysia of a Code of a leading Asian nation needs no stressing.