EIGHTH INTERNATIONAL CONGRESS OF PENAL LAW
(Lisbon, 21 – 27 September 1961)[8]

Topics:

1. The problems posed by modern penal law via the development of non-intentional offences.
2. Methods and technical process employed in penal sentencing.
3. The problems caused by the publicity of criminal files and criminal procedures.
4. The application of foreign penal law by the national judge.

I Section: The problems posed by modern penal law via the development of non-intentional offences

The VIIIth Congress of International Penal law:

By interpreting the view expressed in the national reports and in the work of the section, the drafting committee did not find it impossible to establish a formula concerning the fundamental problem. Nevertheless, the Drafting Committee suggested to have as a point of departure for the scientific and practical evaluation of the problem a description of the real difficulties because such a formula tends to veil these difficulties.

These difficulties are as follows:

It is a generally accepted principle that incrimination presupposes reproach. Reproach is always understood as a material reproach, however, for the majority this material reproach is a moral one while for a minority it is rather a social one.

Concerning « non-intentional offences» and more specifically the cases of «negligence»[2] there is debate if such reproach can be made at all. Some scholars affirm the opinion according to which there is such reproach like in the German Penal Code. Others who deny the existence of such reproach are to be divided into two groups. One of these groups is of the opinion that such negligence[3] should not be assed within criminal law which is the case in principle in Anglo-American law. The other group accepts the incrimination of even negligence[4] indispensable and is of the opinion that punishable facts behave as elements of acts in a purely objective sense based on e.g. the disrespect of a legal provision.

Though there are further questions with exception of question no. 4, we are entirely bound to

[8] RIDP vol. 23 2, 1962 2, pp.362-363; 366-368; 369-373; 378-380. Translation in English: K.Ligeti.

[2] « *Faute inconsciente* » in the original French text.

[3] « *Faute inconsciente* » in the original French text.

[4] « *Faute inconsciente* » in the original French text.

the principle question. This is why the section decided to employ the same approach in respect of these questions as in respect of the first one.

As far as question no. 4 is concerned, in cases where punishment entailing the deprivation of liberty are pronounced it is desirable to maintain a specialized correction regime designated to host persons condemned for a non-intentional offence and imprisoned for the first time.

The Section is of the view that the discussions of the Congress provoked substantial progress in the evaluation of the problem enabling an exact description of the real difficulties which is the pre-condition to find efficiently a solution.

II Section: Methods and technical processes employed in penal sentencing

The VIIIth Congress of International Penal law:

I. - Within the legal provisions on the formal requirements of the penal sentence the law should stipulate general principles designated to guide the judge in elaborating the decision.

The penal sentence should be reasoned revealing the precise manner and the exact reasons of the decision.

The reasoning should reveal the deliberations of the judge and should respond to all evoked facts. The reasoning should avoid stereotype or ambiguous formulations with the exception when such formulations are indispensable, and should also avoid strictly legal formulations incomprehensible for the sentenced person; the interests should be explained as properly as possible by the judge in the judgment.

II. – Modern individualization places great margin of appreciation on the judge with a view both to the different elements of the process, the examination of evidences and guilt, and also the determination of the sanction. Nonetheless this great power should be exercised with due regard to the procedural legal framework designated to prevent arbitrary adjudication.

Though it is not desirable to return to a system of taxed evidence (*) the production and admissibility of evidences should be exactly regulated by the law; it is forbidden to have recourse to any investigation in violation of either the rights of the defense or personal integrity and human dignity. With a view to the above imperatives it is also required that the rules on expert witness are revised with a particular view to their functions and to modern technologies as well as the role of the technician, the judge and the attorney.

In determining the appropriate sanction for the accused the judge should - in order to usefully exercise his sovereign power of appreciation -:

* "*Preuves légales"* in the original French text.

- dispose, in most cases, of a scale of individualized sanctions which he may apply based on a clear choice;

- find even in criminal law precise and clear directives susceptible to adopt in the particular case to be adjudicated;

- be entitled if made necessary by the special circumstances of the case, the particularities of the accused or the choice of the sanction to initiate the examination of the personality of the accused.

Such examination of the personality should be based - in most of the cases - on criminal law provisions, the judicial authorities should be entitled to dispose of the necessary tools in order to provide for the assessment of the person, the law should stipulate in advance the object of such assessment and the condition how to conduct such an assessment as well as the guarantees to prevent any breach of individual rights and any humiliation of the person concerned.

It is desirable that in the course of the criminal process the judge is empowered to decide on – if necessary in two separate decisions - the substantial facts, the responsibility of the accused and the sanction.

The judges have to clearly take full responsibility deriving from their social mission within an individualized criminal justice system. At the same time all reasonable efforts should be made in developing forensic techniques which contribute to solving debates on the elaboration of the sentence.

III. – The scientific methods of investigation should be promoted by the practical application of forensic techniques envisaged by the different penal jurisdiction within the same country and by the different criminal systems presently in force. The latter should reveal rational methods of elaborating the penal sentence and should give free way to forensic psychology.

The scientific training of penal judges should encompass all necessary knowledge of humanities to enable them to efficiently apply their power of individualization with the assistance of experts. The professional training should be promoted by all reasonable efforts comprising also practical experience.

Special attention has to be paid to the recruitment of criminal judges with a view to fundamental qualities indispensable for exercising the judicial profession; the spirit of human and social justice of modern criminal law should be promoted.

The essential dignity of criminal judges and of judicial functions should be promoted in the eyes of both the public, the legislator and even the magistrates themselves throughout the different jurisdictions; the procedural and organizational rules of the judiciary should in the given cases be modified in order to provide for at least of a certain specification of criminal judges based on the specific function of the judge.

III Section: The problems posed by the publicity of criminal files and proceedings

The VIIIth Congress of International Penal law:

I. - Considers:

the information of criminal facts and of the administration of the criminal justice system guarantees the public control of the latter within the limits imposed by the need of maintaining public order and safeguarding public morals, the respect for human persons, the safeguard of the dignity of justice and the utilization of such information for the sake of a humane criminal policy.

II. - State:

despite examples of fruitful collaboration between magistrates and the media, the misunderstanding of the needs are the source of numerous abuses; remedies to these abuses are to be provided by the adaptation of the legislation, the institutions and the morals.

III. - Assumes:

For the above reasons the following regulations should be applied:

1º) The statement of facts should essentially be justified by thoroughly affirming the disrespected social values and in the will to level public opinion against threats deriving from the acts of certain social groups and individuals directed against the community. The represented of the media fearing that his report may qualify as an offence in particular in respect of influenceable personalities consequently:

a) should refrain from making a false statement or delivering altered criminal facts;

b) should abstain from providing a sensational character to the statement of facts, a proportional place should be reserved for the statement of facts with respect to all other information and neither the form in which they are presented, nor the way they are illustrated in writing or by photographs should be excessive or complacent;

c) should refrain from depicting on the one hand violent scenes, cruelty or perversion in a way that entails the risk of being imitated, on the other hand the crime scene investigators' statement being also susceptible of imitation for possible criminals;

d) should refuse to either idolize the crime or to paint a romantic or novelist image of the offender or the criminal milieu.

2º) Except for the provisions on procedural secrets the media has the right to comment on or to criticize the result of the police investigation and the judicial proceedings, but the media should refrain from intervening with the administration of criminal justice and with the privacy of the person and his family.

Consequently:

- the media tries to follow on the police and the judicial investigation concerning the facts and perpetrators of the offence which may pose troubles and should, therefore, be prohibited or restricted;

- the media should do all reasonable efforts to avoid to reveal the identity of the suspect or the sentenced person or of the victim;

* the principle of the presumption of innocence should at all stages of the criminal case scrupulously respected and no speculations susceptible to violate the dignity, the intimacy, and the privacy of the accused , his right to free defense and right to integrity of his family are allowed;

* the media should remain unbiased regarding all persons of the criminal process;

* the media should refrain from any commentary which may lead the witness or influence his testimony or result in changing the opinion having repercussion for the opinion of judges;

- the magistrates in charge of the prosecution may have recourse to media to disseminate announcements facilitating the detection of offenders, to calm the public, to protect the public from certain forms of criminality and from false alarm;

- the above principles applying to investigation must be interpreted strictly in order to guarantee the greatest freedom to the media.

3°) The reportage of the trial audience should independently from the previous rules comply with the following:

- to adapt the freedom of information during the publicity of the debate to the needs of public order and to the evolution of penal justice in order to avoid bias to the accused;

- to prohibit the application of recording and disseminating equipment at judicial premises such as television, cinema cameras, photographic equipment and in general all sorts of information technology tools which may interfere with the dignity of justice or which influence the conduct of the accused, the witness and eventually the magistrates or the members of the jury;

- to avoid by all possible means to reveal the identity of the accused in the reportage and in judicial chronicles and simultaneously to enable the judiciary to order the publication of the sentence preserving the anonymity of the sentenced person;

- to pay attention that judicial chronicles and reportages do not hinder the offender's social reintegration, moreover do not reveal any results of the offender's psycho-medical or social examination which remains necessarily in secret so as to enable the justice system to attain the goals of penal sanctioning assigned by criminal policy.

4°) The media has the double obligation to objectively expose on the one hand the goals of criminal process and the actual experiences of the offender's social reintegration and on the other hand never to reveal the identity of the sentenced person or the case of early or full

release. Information concerning penitentiary institution should be fully discreet with a view to persons.

IV. - Proclaims:

the above principles may not be invoked in a way so as to create a direct or indirect form of censure.

V. - Wishes:

that in every country scientific research on the effects of reportage concerning criminal cases and criminal procedures are to be contacted by groups of researchers involving the representatives of the press.

VI. - Declares:

confidence towards the consciousness of the representatives of the media that they shall provide for professional control as regards publication of criminal processes and facts. In order to facilitate the exercise of such professional control on the one hand journalists shall receive sufficient juridical and criminological training and on the other hand the rules of deontology and professional discipline shall be developed

VII.- Invites:

The governments to take all necessary measure that enables the information on criminal cases, penal proceedings and on the identity of the sentenced person, of the imprisoned person or the released one respect the rules established in the present resolution.

IV Section: The application of foreign penal law by the national judge

The fourth Section in light of the problems encountered by the application of foreign penal law by the national judge proposes to discuss the issue from a technical point of view. It is unnecessary to say that the discussion was not in vain. It is at the same time regrettable and joyful. Joyful because the work progressed but also regrettable because it demonstrates that there is little interest of the Congress members towards jurisdiction issues in criminal law.

Resolution

The VIIIth Congress of the International Association of Penal Law acknowledges the need of closer cooperation between the states on issues of penal jurisdiction for facilitating both the effective fight against crime and the respect of the offenders' individual rights: in principle states sharing common interests should allow for the national judge to apply foreign criminal law.

I. – The domain of the application of foreign penal law

1. Application of foreign penal law should in principle be precluded if the punishable act was committed on the territory of the forum state.

Nonetheless, in case the seriousness of the violation depends on certain family relations between the offender and the victim or a third party, such relations shall be examined unless excluded by the public order clause as defined by the rules on international private law (see third resolution of the Bucharest Congress of 1929).

2. The public order clause does not exclude the application of foreign penal law in respect of any category of crime.

However, for practical reasons the application of foreign penal law may be excluded in respect of political offences.

Other categories of offences, such as crimes against morals, may be exempted from the application of foreign penal law because of the fundamental differences between national legislation.

States should conclude conventions for the application of foreign penal provisions relating to certain categories of offences such as the draft European Convention on Traffic Offences.

3. Foreign penal law applies to punishable acts committed abroad regardless to the offender's nationality.

II. – Modalities of the application of foreign penal law

1. It should be provided for the application of foreign penal law in cases when the national penal law (*lex fori*) is not applicable either due to lack of incrimination or because the applicable rules exclude the application of national penal law.

2. Foreign penal law should be –for the reasons of justice- applicable even to offences committed abroad even in case the national law (*lex fori*) does not foresee any incrimination.

In such a case application of foreign penal law should be limited to offences where it is favorable to the offender.

3. The application of foreign penal law may be excluded by the public order clause of the forum state.

Therefore the term of public order shall be interpreted narrowly.

III.- Solution for the practical difficulties deriving from the application of foreign penal law

1. The congress having examined the practical problems deriving from the application of foreign penal law (namely those resulting from the choice of the forum, the interpretation of foreign penal law and the adaptation of the sanction) considers that these difficulties may be overcome as has been the case with regard to similar difficulties in private international law.

The case by case solution should remain in the jurisdiction of the national legislator.

2. Considering the practical difficulties of the national judge to be informed on the actual state of the foreign penal legislation, the Congress expresses its wish that international organizations encourage and facilitate the activity of national scientific institutions active in the field of comparative law.

3. If the application of foreign penal law provokes a conflict of competence, the Congress expresses its wish to authorize an international penal tribunal – frequently proclaimed by the AIDP - to resolve such conflicts.