

Xth INTERNATIONAL CONGRESS OF PENAL LAW (Rome, 29 September -5 October 1969)¹⁰

Topics:

1. Endangering offences.
2. The division of the penal process into two phases.
3. The role of the judge in the determination and application of punishment.
4. Actual problems of extradition.

I Section: Endangering offences

The Section states:

that the number and importance of endangering offences is increasing in all penal legislations where the aim is to answer the actual claims of a social life transformed by technological progress and the internationalization of relationships;

that the risks generated by these transformations justify the legislator to develop the juridical structures to prevent all violations against human life and integrity or destroying material goods of public interests imposing on each of them the obligation to adapt their behavior;

that the feeling of solidarity among all the people developing everywhere, emphasizing a better recognition of equal value of each human being and the social aspirations created by the excessive individualism;

that this situation appears in the penal domain by the extension of legal regulations which tend to protect both individuals' existence and that of the collectives and by sanctioning the actions and omissions posing a general danger;

that the separate incrimination of endangering offences reinforces the guarantees which are already ensured by the former category of "choate offences of harm"⁵;

Assumes:

that legislation policy which incriminates endangering offences is not against the general principles of penal law, if this policy respects the principle of legality, i.e. avoiding the qualifications formulated in too generalized or too inexact terms;

¹⁰ RIDP, vol. 41, 1970 1-2, pp. 9-16. Translation in English: K.Ligeti.

⁵ "Délits de lésion consommée" in the original French text.

that the incrimination of endangering offences is the final recourse to remedy the insufficiency of the non-penal methods of prevention;

that the system of "presumed danger" has to be attentively measured and accompanied by the possibility of offering a proof *a contrario* to turn the presumption except for cases which are definitely (expressly) foreseen by the legislators;

Recommends:

that the anticipated penal protection be reserved as individual or fundamental social values, as the human values endangered by crimes against peace and humanity or instigation to war or racial hate;

that the desire for strict legality be manifested in a precise qualification of the facts qualifying as an offence (endangering offences) in an exact definition of the seen dangers or in the legal identification of the persons submitted to these particular professional obligations;

that the sanction of endangering offences be accompanied beyond the punishment by security measures and social pedagogy interventions, in a way to permit the judge to select the most efficient sanction.

II Section: The division of the penal process into two stages

Preamble

It seems impossible to recommend specific methods applicable to the numerous and different penal systems in force in the countries represented in the Congress. Consequently the following recommendations have to be considered as directives of general character.

The special adaptations to each penal system will be chosen in conformity with the entire "corpus iuris" and in the spirit of each individual legislation.

Resolutions

1. The judge ought to be authorized to limit, in case of at least serious offences, the examination of evidences and contestations to questions concerning the facts of the offences and culpability, i.e. the verification of the offence in their objective and subjective elements.

In this case the court at this stage ought not to examine the personality of the defendant in order to choose the appropriate sanction, only after having decided about the culpability with the exception of certain cases (when e.g. a mental disease gravely influences the culpability, it may be necessary to examine this case during the first stage).

2. The division of a proceeding into two stages can be done either by leaving the examination of the evidence and the contestations in one stage or by leaving the second stage to a future

date determined by the judge.

In case of reverting the duration ought to be the shortest possible. In a given system it ought to be desirable to obtain the consent of the suspect for the separate examination of the questions regarding the sanction.

3. If possible the information obtained to choose the sanction - which refer to the personnel and family circumstances of the suspect – must not be revealed, not even to the judge, prior to the first verification of the crime, neither must be known publicly, if this publicity can be harmful or detrimental to the suspect. The results of the investigation in regard of the personality of the accused must be secretly filed which later may be consulted only by the defense counsel and the prosecutor.

4. When the proceedings are divided into two separate stages, the second stage could take place either before the same judicial authority or before another judicial authority competent to choose the sanction. In case of the latter hypothesis the second stage ought to take place after experts of criminology having special competence to choose the sanction have examined the personality of the offender before a judicial authority

(The great majority of the section favored the first alternative.)

5. If new evidence emerges during the second stage, which raises the doubts in regard of the culpability of the suspect, the judgment will be reconsidered in the light of this evidence.

6. If the proceeding is divided into two stages, all the legal guarantees on the offender's side have to equally be respected during the second stage, and the choice of sanction will be contained in a reasoned judgment.

7. The two stage system does not involve appeal procedures.

III Section: The role of the judge in the determination and application of punishment.

1. The facts that the judge has to take into consideration when determining the punishment and the security measures must be provided for in the law at least in general terms (in a general way).

2. With total respect to the presumption of innocence and the human person as well as the Charter of Human Rights, the judge must be aware of the input of human science and technology to certify the fact qualifying as an offence and to reveal the personality of the offender.

3. The methods of enforcing the punishment and the security measure must be regulated by the law. In case conclusions 1 and 2 in regard of information of the judge are legally determined, the judge by reasoned decision, selects one of them.

4. The judge when enforcing the punishment and the security measure prior has to consult the public prosecutor and the defense counsel.
5. The modifications of the enforcement modalities of the punishment and the security measures which influence the decision of the judge must be pronounced or revised by him or by another judicial authority that is in charge of supervising the enforcement of sanctions. The responsibilities of penal justice require that the judicial organization gives the judge a proper education enabling him to assume such responsibility.

IV Section: Actual problems of extradition

With a view to the fact that extradition is a worldwide institution to fight criminality;

Regarding that the development of the extradition law has to consider not only the technical evolution of the institution of extradition designated to facilitate this way of international judicial cooperation, but also the modifications of the general principles of international law, the innovations in international penal law, the new concepts of criminal policy as well as the recognition of human rights;

The recommendations are the following:

I

The principles regulating extradition must not be interpreted and applied at a purely national level.

II

States desirable have recourse to extradition even in lack of international conventions.

III

The condition of reciprocity is not ruled by the claims of justice, it is desirable not to maintain it as a rigid rule within the extradition law.

IV

1. In general the requirement of "double criminality" will be sustained as a condition to the obligation to extradite.
2. Meanwhile the requested state may avoid the above condition if the particular circumstances of the requesting State demand the repression and the public order of the requested State is not opposed to it.
3. At the same time it is to understand that the acts susceptible to extradition must be punishable *in concreto* in the requested state.

4. a) It could be satisfactory to announce that the incriminated facts underlying the request are punishable *in abstracto* according to the law of the requested state.

It is possible to refuse extradition if there are evident causes of justification or that of non-imputability, unless in the case of extradition for enforcement of security or educational measures are concerned.

b) It will be indifferent for extradition that the offence underlying the request is punishable only by denunciation under the law of the requested State.

c) Amnesty granted by the requested State and prescription according to the law of the requested state will have no importance from the point of view of extradition, unless the offence gives rise to another title of jurisdiction of the requesting state.

V

1. It will be allowed to refuse extradition when under the law of the requested state the offence constitutes a political offence.

2. One cannot rely on this ground of refusal if the offence concerned constitutes a crime against humanity, a war crime or a serious violation of the Geneva Conventions of 1949.

3. The political offence exception will be regulated under the general rules which allow the requested state to refuse extradition, if there is undeniable facts justifying the fear that the procedure against the wanted individual does not offer the judicial guarantees of a penal procedure corresponding the minimum standards accepted at the international level, with a view to safeguarding human rights, or if the wanted individual will serve his penalty under inhuman conditions.

4. Extradition shall not be refused or excluded for prescription (limitation) of punishability in case of war crimes.

VI

1. Fiscal, economic and military offences will not be left out of the domain of extradition.

2. It is desirable that extradition in case of these types of offences is particularly arranged among the states which belong to military pacts or among the states whose economic systems are apparent.

VII

1. a) The requested state which wants to maintain the rule of non-extradition, ought to exercise its repressive power, or to enforce the judgment of the requesting state upon the request of the latter, i.e. it must adopt at an internal level the necessary legislative measures.

b) States should engage in criminal proceedings launched for the very crimes in respect of which extradition is excluded because of the lack of reciprocity.

2. It will be allowed for the requested state to agree to the extradition of its own national for

crimes mentioned in V.2.

3. The principle of non-extradition of its own nationals should be pressed back so that its own nationals be returned for adjudication in the state where the crime has been committed; however in such cases the enforcement of the sanction will be reserved to the state of nationality.

VIII

1. Request for extradition for the purpose of criminal proceedings shall be refused in case such request is based on a final decision of the requesting state resolving on the merits of the incriminated facts unless the revision of such proceedings is ordered.

2. Extradition shall be refused if the underlying offence has already been adjudicated in a final decision of either the requested state or a third state. In case of condemnation extradition will be refused only if the penal sanction has already been enforced, its enforcement is underway, its enforcement has been limited or annulled by either amnesty or grace.

IX

1. The suspect can consent to be reverted to the requesting state if this consent is voluntary and expressed before a judge in the presence of a freely chosen defense counsel.

2. Voluntary extradition shares the effects of coercive extradition from the point of view of the principle of specialty.

X

To facilitate the extradition the requested state has to verify the conditions of extradition on the basis of evidences delivered by the requesting state to sustain its request, it ought to restrain from examining in a particular trial procedure, if the charges are sufficient and the arrest is well founded under its own law. By all means the requested person must have the right to – without any limit – bring the evidence which permits the immediate statement of the wrongfulness of the alleged charge.

XI

1. In the extradition procedure the human rights must be respected, the requested person must be able to defend his rights against all the interested states.

2. The requested person must have the right –in the interested state– to turn to an independent court if he thinks that his human rights are not respected.

With a view to the guarantee of these rights it is desirable to envisage the establishment of an international court, which announces whether the human rights of the requested person were violated.

XII

1. The return of the accused or sentenced person must be carried out strictly according to the rules of the extradition procedure. All recourse to the use of force or cunning in order to take the requested person to the requesting state must be avoided. The same way it is not allowed to avoid extradition by using the procedure or expulsion if it is susceptible that the latter will lead directly or indirectly the requested person to the state which is seeking him with the aim of punishment. This last rule does not concern the right of expulsion of the state on the territory of which the crime was committed.
2. The suspect must have recourse to a judge of the state where he stays or of the state proceeding against him, to file a claim against the expulsion or the refoulement to elude extradition.
3. The state of procedure shall be hindered in exercising its jurisdiction in case extradition is eluded by means of a claim against expulsion or refoulement or by means of force or elusion
4. The tendencies to avoid extradition procedures have to be reduced by its sensible simplification, e.g. by admitting the direct correspondence among the judicial authorities of the states concerned and by allowing the requested person to consent to the conditions as stipulated in Art. IX.1.

XIII

1. When the forum state demands, in case the sentenced person stays on her territory, the enforcement of the judgment in the state of origin or the state of residence, this way of international cooperation should be subject to particular rules, susceptible even to derogate from rules of extradition.
2. If the sentenced person resides in a state different from the forum state, this latter state will demand the extradition in order to enforce the judgment if it esteems that this measure is appropriate for the given case.
3. In the opposite situation, one can demand the enforcement of the judgment by the state of residence.

XIV

It would be convenient to increase - by conclusions of international conventions or by adopting the adequate measures in internal law - the possibilities of the state of residence to conduct penal proceedings in cases where the requested person will not be extradited, particularly when the nationality or domicile of the requested person or the minimal importance of the offence does not allow for extradition.

Complementary resolutions.

With a view to establish international penal legislation in the domain of extradition, which will be part of general international penal law, which would be highly desirable for humanity; the

followings are desirable:

- that the groups of states of likeminded ideological and legislative tendencies take all reasonable efforts to conclude multilateral conventions of extradition,
- that the differences concerning the application of these conventions be obligatory, or at least facultative, brought before an international penal court.

The conclusion of a universal convention of extradition would be ideal to achieve in the future, the application of which would be confined to a universal international criminal court.