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*THE WORKS ON REFORM OF THE POLISH PENAL PROCEDURE**

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INTRODUCTORY REMARKS

The first drafts of reform of the 1969 code of penal procedure originated as early as 1981. One of them was drawn up in two versions on the initiative and under the auspices of "Solidarity," and the other one—by a Commission appointed by the Minister of Justice. Both drafts contained proposals of far-reaching changes aimed at democratization of penal proceedings, consolidation of the role of courts in those proceedings, and extension of the guaranties of both the defendant's and the injured person's rights. As regards the essence, both drafts were similar to each other in many points. Unfortunately, the works on reform were suspended on the imposition of martial law in December 1981, and this situation persisted for several years. At the same time, the provisional changes introduced in that period in the code of penal procedure tended towards rigorism and greatly broadened the applicability of special modes of procedure which limited the defendant's right to defence and enlarged the possibilities of imposition of detention awaiting trial.

With the advancing process of democratization of political relations in Poland, the idea of reform of the entire system of penal law, the code of penal procedure included, was revived. On May 14, 1987, the Prime Minister appointed a Commission for Penal Law Reform which started its works in October of that same year. In June 1988, the Commission completed its works on the draft of "Assumptions" for

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*For broader information on this subject and a list of references, see my article "The Works on Reform of the Polish Penal Procedure," *Państwo i Prawo,* 1989, No. 7.

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reform of the whole of penal law a part of which concerns the law of penal procedure ; the draft was then submitted to the Minister of Justice ; next, it was submitted to public discussion and is now to be adopted by the Government as the basis for the elaboration of a this time detailed draft of provisions reforming the penal legislation.

The fact should be stressed here that initial progressive changes of the code of penal procedure have already been introduced by the Act of May 29, 1989, on the change of some provisions of penal law, law of transgressions, and other statutes which precedes that law's radical reform. Those changes have been a direct consequence of the "Round Table" conference. The Act abolished the limitations in the detained persons' contacts with their councels ; it introduced the possibility of complaint to ' the court against all kinds of arrest or detention ; it authorized the Supreme Court only to extend the period of detention awaiting trial over one year ; it abolished the right of all courts of the second instance to sentence a person who has been acquitted or in whose case penal proceedings have been discontinued, and to sentence the defendant to death (which can only be done by the court of the first instance deciding in a remanded case) ; it introduced the institution of indemnity (which before applied only to unjust conviction and to obviously unjust detention awaiting trial) to concern also cases of obviously unjust arrest.

I. THE WORKS ON REFORM OF THE CODE OF PENAL PROCEDURE : GENERAL CHARACTERIZATION

The assumptions of reform of the code of penal procedure contain many pertinent and progressive ideas which are greatly to serve the emergence of democratic institutions of penal proceedings which would be better suited to the modern needs. Mention has been made in those assumptions of the need to extend the supervision and competence of courts at all stages of penal proceedings and the guaranties of the accused and injured persons' rights ; to limit the grounds for and time limits of detention awaiting trial ; and to extend the adversary system of proving during the first-instance hearing, etc. The draft's weak point, however, is an overtly general nature of many of its directives from which the reader can learn but little about the actual shape of the proposed changes.

These defects of the draft are not a chance occurrence, but result from a considerable dissent as to the range of the necessary changes within the Commission. Some of its members, most of them practicians, believe

the present code of penal procedure to be proper on the whole and would like to limit its reform to a small number of the most necessary changes only. Other members of the Commission, mainly scholars and representatives of the Bar, rightly share the opinion that the present code has a number of serious deformities introduced as long ago as the Stalinist period, and that the reform now planned should remove them conclusively. The latter point of view is now gaining the upper hand.

The deformities were introduced in the Polish model of penal proceedings at the moment of reform of the 1928 code, effected in 1949 and 1950. Above all, they consisted in a considerable limitation of the court's role in penal proceedings and exaggeration of the role and competence of the public prosecutor and State security agencies ; in a limitation of the defendant's right to defence and the possibility to be assisted by a counsel in preparatory proceedings ; in a considerable extension of the grounds of imposition of detention awaiting trial which thus acquired the features of a repressive measure. The role and competence of courts were limited with the abolition of the institution of the examining magistrate and the transfer of all of his functions and powers, the right to impose detention awaiting trial, to the public prosecutor. This limitation was also due to the exaggerated role of preparatory proceedings as compared with the first-instance hearing : the acts of taking evidence, performed in preparatory proceedings both by the public prosecutor and by the Civic Militia and Security Service, acquired the quality of standard acts in connection with legal proceedings, and the thus obtained records of hearings could with little restraint be disclosed at the trial and provided grounds for deciding. Those deformities, though mitigated to some extent by the new code of penal procedure of 1969, can still be felt today.

In my present discussion of the planned reform of the code of penal procedure which is to be an extensive one, I will confine myself out of necessity to present the main problems related to that reform only. The equally important problems of evidence have been left out as voluminous, controversial, and still little-discussed to date as compared with other issues : they should be dealt with in a separate study.

II. THE DEFENDANT'S AND INJURED PERSON'S RIGHT TO TRIAL

One of the very important rights which the penal procedure should secure to the defendant (suspect) and to the injured person is the possibility to demand that their case be examined at court. The present

code fails to secure that right to the full. The suspect is not allowed to demand that his case be examined by a court if the prosecutor discontinues preparatory proceedings stating that the suspect admittedly committed a punishable act but the degree of danger to society created by that act was minimal. The right to demand trial is also denied to a suspect in whose case preparatory proceedings have been discontinued by force of the amnesty acts passed in recent years (1983, 1984, and 1986). In cases of conditional discontinuance of penal proceedings by the prosecutor (which is always connected with the statement of commission of an offence, and may involve the imposition of specific probational duties on the offender), the suspect admittedly may provoke the necessity to continue proceedings, but is not protected by a ban on reformation *in peius* which largely limits his actual freedom of resorting to this remedy at law.

Also the injured person has no right to demand that a case concerning his rights be examined by court if the prosecutor has discontinued preparatory procedings or refuses to prosecute the offender. In cases of conditional discontinuance of preparatory proceedings, the injured person may only appeal to the court against the prosecutor's decision as regards the offender's probational duties.

For this reason, the doctrine rightly postulates the following changes of the code : the suspect should have the right to appeal to the court against all prosecutor's decisions on discontinuance of preparatory proceedings which involve a statement that he committed an act prohibited by penal law ; the injured person should have the right to appeal to the court against any decision on discontinuance of preparatory proceedings and refusal to prosecute ; conditional discontinuance of proceedings should be decided exclusively by the court. The latter two postulates have been included in the draft assumptions of reform ; the first one requires a further discussion before it can be fulfilled.

III. JUDICIAL REVIEW OF PREPARATORY PROCEEDINGS

For a number of years now, many representatives of the doctrine have been demanding a considerable extension of judicial review of the course of preparatory procedings : however, suggestions as to the desirable extent and forms of the courts' participation in that initial stage of penal proceedings vary. Some authors would like certain powers of the prosecutor, including particularly the right to impose coercive measures and to supervise the vital decisions taken in preparatory proceedings, to be transferred to the competence of courts whose jurisdiction includes

a given case. Others demand a réintroduction of the office of examining magistrate but vary as to his suggested role and competences. Some would like to charge the magistrate not only with some decisions in proceedings and with definite acts of taking evidence in preparatory proceedings but also with the entire investigation in cases of definite categories of serious offences. Others, instead, believe that the magistrate should supervise the course of preparatory proceedings conducted by the prosecutor and by the police supervised by the prosecutor, and that his actions at this stage should be limited to jurisdiction and the occasional taking of evidence. Personally, I share the third of the above opinions : were the examining magistrate charged with the whole of preparatory proceedings, he would thus be deprived of his status that is appropriate for a judicial agency : that of a jurisdictional agency which operates in the conditions of divisian of functions and adversary system. According to the latter conception, the examining magistrate's competences might include : deciding about most of the coercive measures, particularly about detention awaiting trial ; examining complaints against the major actions and decisions of the prosecutor and other agencies involved in preparatory proceedings (refusal to prosecute, discontinuance of proceedings, arrest, search, etc.) ; deciding about ending the proceedings : conditional discontinuance, penal order, committal for trial ; performance of occasional taking of evidence on motion of the parties : the records of such actions should have the force of evidence and be taken into consideration in the court's decision once they have been disclosed at the trial.

The suggested changes are no doubt far-reaching : today, the court's supervision of preparatory proceedings is limited to examination of complaints .against several types of the prosecutor's decisions only, particularly involving the imposition or extention of detention. Those suggestions met with a strong opposition on the part of practicians represented in the Commission for penal law reform : as a consequence, at the present stage of legislative works, the whole problem has been reduced to a general statement about the need to extend the court's role in preparatory proceedings. Therefore, the solution will have to be found in the course of further works on the draft of reform.

IV. THE ACCUSED PERSON'S RIGHT TO DEFENCE IN PREPARATORY PROCEEDINGS

In the works on reform of the code of penal procedure, a lot of attention is given to the need to extend the defendant's possibilities of

exercising his right to defence in preparatory proceedings, particularly to avail himself freely of the defence counsel's assistance. At present, the counsel's participation in nearly the whole of preparatory proceedings (the final actions excluded) depends largely on the prosecutor's assent. The prosecutor may refuse his consent to the counsel's participation in most acts of taking evidence in preparatory proceedings. He may refuse to permit the suspect to consult his counsel in the absence of third parties. The counsel has but a limited access to the files even if he intends to complain against detention awaiting trial. He is not admitted to court sittings where complaints against some of the prosecutor's decisions are examined. Also in the practice, the counsels' participation in preparatory proceedings is slight. Hence the opinion, propounded in scientific publications and in discussions on reform of the penal procedure, that this legal state requires radical changes.

Not going into this question in too great a detail, I would like to point here to the major postulates concerning the extention of the defendant's right to defence in preparatory proceedings, including particularly his right to be assisted by a counsel. Those postulates include : admission of the counsel to all hearings of the suspect ; creation of the opportunity for the counsel to communicate with a detained suspect ; admission of the counsel to inspection of the dossier, at least in cases if he intends to complain against detention ; admission of the counsel, and of the suspect himself, to those of the actions in the course of preparatory proceedings the records of which are to have the force of evidence disclosed at the trial ; admission of thé counsel, and of the suspect, to court sittings.

It should be stated that a part of the above postulates have been duly included in the draft assumptions of reform. Beside the general statements about the need to extend the suspect's rights in preparatory proceedings or the counsel's right to inspect the dossier at this stage, the draft also contains a number of concretes. They include : informing the suspect during the first hearing of his rights and duties, that is also of the right to refuse making a statement ; informing him immediately of the grounds of charges ; the need to create the possibility for the counsel to communicate with a detained suspect (which has already been introduced by now) ; creating the possibility for the counsel to participate in court sittings that concern the defendant's situation ; creating the possibility for the arrested person to get in touch with his attorney. The fact is worth stressing that the above formulations met with a strong support on the part of both representatives of the doctrine and many practicians—members of the Commission.

V. CONDITIONS OF IMPOSITION OF DETENTION AWAITING TRIAL AND ARREST

Three issues related to the conditions of imposition of detention and arrest are considered and argued about during the works on reform of the code. They are : grounds for detention, its duration, and the agencies authorized to impose it.

A solution which is now generally criticized is the way of defining grounds for detention, formulated both broadly and vaguely in the present code. The provision criticized most is Art. 217 para 1 point 4 of the code of penal procedure, most frequently adduced in practice, which permits a detention of the defendant (suspect) for the sole reason that he is charged with an act involving a high degree of danger to society the appraisal of which is in fact made by the prosecutor or court at discretion. It should be added that the duration of detention throughout penal proceedings is not limited in any way, and can be extended during preparatory proceedings without a definitive statutory limitation. Hence detention awaiting trial is repeatedly applied too broadly and often for too long a time in practice, though a considerable improvement of the situation in this respect has taken place lately due to a social criticism. Imposed often not because of a well-grounded apprehension of the defendant's evasion of justice but for the sole reason of the nature of his offence, detention awaiting trial sometimes actually performs the function of punishment inflicted on the defendant even before a valid decision has been taken finding him guilty.

The proposals of legislative changes in the discussed sphere centre around the following postulates : a) the grounds for detention should in principle be related to nothing but a well-motivated need to prevent the defendant from evading justice (his flight or obstruction of justice) ; the only exception should be a well-grounded fear that the defendant might commit a new serious offence against life, health, or public safety ; b) the principle should be adopted that it is enough to adduce the strict penalty the defendant is liable to as the grounds for his detention, and all cases of obligatory imposition of that coercive measure should be abolished ; c) the maximum duration of detention should be established at one year in the preparatory proceedings and two years till the decision of the first-instance court ; the above time-limits should be duly shortened in cases of less serious offences, and the power to extend them should be vested in the Supreme Court only and concern cases as exceptional as the need to extend detention during a stay in proceedings or a prolonged psychiatric observation in a serious criminal case. The above

three postulates have been reflected in the draft assumptions of reform, though their formulation is in part unduly general.

A solution that is strongly criticized is the present right of the prosecutor to impose detention awaiting trial. An opinion has been propounded in the Polish doctrine for a long time now that a deprivation of liberty for a period longer that forty-eight hours should be decided upon by an independent and fully impartial agency only ; that agency may only be the court and not the prosecutor who is amenable to the instructions and orders of his superiors, and who performs the function of a party to penal proceedings as prosecution. It is also stressed that the requirement that detention awaiting trial should only be imposed by judicial agencies follows from the International Covenant of Civic and Political Rights.

Sharp controversies arise within the Commission for penal law reform about the problem of the prosecutor's retention of his powers to impose detention in the course of preparatory proceedings. As a consequence, two variants of the solution of that problem have been worked out. The first of them provides for a transfer of imposition of detention to the court's exclusive competence, while the other one speaks of the prosecutor's retention of his powers to apply that preventive measure under the court's supervision.

It is also most important to formulate properly the provisions of the code which concern arrest for up to forty-eight hours according to the Polish law. A frequent and arbitrary imposition of that coercive measure by the police gives rise to demands in society that stronger legal guaranties should be created preventing its abuse. The draft contains pertinent and rather concrete formulations regarding this sphere, concerning in particular the duty of informing the arrested person in writing about the causes of arrest and of that person's right to complain to the court against an illicit or groundless arrest ; both these postulates have already been met (see above).

VI. THE COMPETENCE OF COURTS AND THE SETTING OF BENCHES

Two questions related to changes in the definition of criminal courts' competences are of the greatest importance in the works on reform of the law of penal procedure. The first one is a trend to relieve greatly the Supreme Court of the duty to examine numerous appeals against decisions passed by provincial courts in the first instance. This situation changed, the Supreme Court might concentrate to a larger degree on judicative review of decisions of all criminal courts by means of the

extraordinary appeal, applied more frequently than it is now, and on application of different forms of interpretation of legal provisions. For this right idea to be fulfilled, however, definite changes will be necessary in the present structure of courts. The draft assumptions of reform make but a most general mention of this issue. Discussions point to the need for establishment of an additional link in the system of common criminal courts : some believe that several courts of appeal of a level higher than provincial courts should be created, while others would like the new courts to be created at a level lower than the present district courts and to examine less serious cases in the first instance.

The other question is related to a proposed broader inclusion of cases of transgressions in the competence of criminal courts. The draft states that only the courts should be empowered to decide about all forms of the penalty of deprivation of liberty, that is also about the penalty of arrest (for up to three months) for transgressions, and the whole of activity of the so-called transgression boards should be submitted to judicial review. In the latter case, the point is to make it possible for the parties to appeal to the court against all decisions of the board ; at present, they have that right only if the board has inflicted the penalty of arrest or limitation of liberty. These are no doubt pertinent suggestions, though some of the postulates in this respect reach even farther, demanding that the whole of decisions in cases of transgressions should be transferred to the competence of courts, the transgression boards abolished.

The draft assumptions of reform rightly point to the need for a greater statutory stabilization of the composition of benches, the principles of collective decision-making and participation of lay judges in the examination of criminal cases observed. The present regulation makes a great number of deviations from those principles possible : they are decided upon by the president of court who may order the examination of a “complex” case by a bench of three professional judges. Cases examined by district courts according to the simplified and expedited procedure are examined by one judge as a rule.

The above observations deserve to be promoted ; it should be stated, however, that the draft lacks sufficiently definite proposals and fails to deal with this problem comprehensively. It is most important for the benches to be formed properly that the individual judges and lay judges should be appointed to them at random (e.g. according to the order in which the separate cases come in). The present system where the president of court forms benches at his own discretion allows for various personal manipulations in this respect and has been criticized by the doctrine for many years now.

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VII. STRENGTHENING OF THE ROLE OF THE TRIAL

Owing to the undue extention of preparatory proceedings which is to explain comprehensively the circumstances of the case and to amass evidence for the court, and to the broad use by the courts of the reports from the taking of evidence at that stage of proceedings, the role and rank of the first-instance hearing has been greatly reduced. In practice, that hearing is often turned into a specific repetition of the results of preparatory proceedings where the judge consults the dossier while listening to statements of the accused and depositions of witnesses and makes sure if they repeat exactly what has been recorded in the reports of their hearings during inquiry or investigation. If any differences are found, the court discloses the relevant fragments of reports, including them in the evidence. Thus the principles of direct examination of evidence by the judge, and of adversary system in court proceedings are limited, while all the time their observance during the trial is the essential condition of proper sentencing. Following this procedure, the court bases on secondary sources of evidence with which it has never dealt directly ; besides, that evidence is usually taken in the absence of parties and their assistants, that is in conditions that make it less reliable and objective than is the case during an adversary trial.

Obviously, some pieces of evidence have to be recorded promptly for the court to prevent their forfeiture or distortion. Their recording in preparatory proceedings should however be made in conditions approximating the trial, that is with admission of the parties and their assistants ; moreover, it had best be made by a court or at least a prosecutor. Only the records of a thus conducted taking of evidence should be disclosed at the trial and included in the grounds of the ensuing sentence. Reports from other actions involving the taking of evidence, such as a search or inspection of the *locus delicti,* performed in matters of utmost urgency in the absence of parties and their assistants, should be verified if the need arises by means of a hearing as witnesses of the persons who took part in or were present at those actions. The remaining actions performed by the agencies in charge of the investigation or inquiry or those to which the parties and their assistants have not been admitted should constitute material for the prosecutor’s information only, used in his assessment of the possible sufficient grounds for indictment and of the bulk of evidence to be submitted to the court for a direct proving during the trial.

Also the need to extend the adversary nature of the trial is rightly mentioned. At present, the main burden of proof is assumed by the court, or the president of the bench to be exact, who has extensive

records of the preparatory proceedings at his disposal and is the first one to interrogate the persons heard : he does it comprehensively and checks whether their statements and depositions tally with the contents of the records of investigation or inquiry. It is only afterwards that the parties interrogate those heard. The need for reversal of this order of interrogation is rightly pointed to in the doctrine. The first questions should be asked by parties and their assistants ; members of the bench should only ask supplementary questions afterwards, and engage in the hearing of evidence.

The problem of shaping an appropriate model of trial at court is among the paramount and at the same time most difficult and controversial problems that the reform of the code of penal procedure faces. The further legislative works can but to a slight extent base on the wording of the draft assumptions of reform, very brief and general in this respect. It mentions the need to develop the principles of adversary system and direct examination of the evidence, and to strengthen the rights of parties in proving which may be perceived by its readers as justification of a variety of scales and kinds of the introduced changes.

VIII. THE EXTENT OF POWERS OF THE COURTS OF APPEAL TO CHANGE THE JUDGEMENTS OF THE FIRST-INSTANCE COURTS

The major faults of the appeal proceedings which should be removed in the course of the planned reform include the unduly broad powers of the courts of appeal to change the judgement concerned instead of quashing it and remanding the case to the court of the first instance. Admittedly, those powers have been largely limited with the abolition of the provincial courts' right to sentence a defendant who has been found not guilty or in whose case proceedings have been discontinued by the court of the first instance, and with the ban on death penalty inflicted by the Supreme Court ; yet the discussed problem has not disappeared completely. What should also be made inadmissible is the introduction of such changes into the judgement that has been appealed against which would base on new establishment of facts made by the court of the second instance, and of any changes whatever (as regards guilt and the principal penalty) that would be disadvantageous for the accused. This postulate, propounded by many authors, has a number of essential motives : the need to observe constantly, when deciding about the merits, the directives that follow from the principle of direct examination of evidence by the judge which is today observed but to

a very small extent in the appeal proceedings ; the need to respect the defendant's right to defence : the defendant should have the possibility to appeal against a sentence that makes his situation essentially worse as compared with the sentence passed in the first instance ; the need to respect the first-instance court's decisions, passed with the participation of representatives of society (lay judges), which can be glaringly changed by the exclusively professional benches of courts of appeal in the present legal state.

The above problems have been expressed in the draft assumptions of reform. It mentions the already fulfilled need to eliminate the possibility of convicting a defendant who has before been acquitted or in whose case criminal proceedings have been discontinued, at a trial in the appelate instance. On the other hand, as far as other limitations of the powers of courts of appeal to change judgements are concerned, the draft speaks but generally of reducing the possibility of making new establishments by the court of appeal : this formulation requires further substantiation and supplementation.

IX. REVIEW OF VALID JUDICIAL DECISIONS

The formulations of the draft assumptions of reform concerning the means of review of valid sentences are extremely laconic and rather imprecise ; at the same time, however, they touch upon most important problems. Two of them are particularly worthy of attention : one speaks of the need to verify the class of subjects authorized to institute an extraordinary appeal but fails to specify the proposed directions of that verification (towards a broadening or reducing that class), while the other states rightly (though also generally only) the need to limit the possibilities of shaking valid decisions to the defendant's disadvantage.

At present, an extraordinary appeal against valid judicial decisions can be lodged to the Supreme Court by the Minister of Justice, the Prosecutor General, the First President of the Supreme Court, and the Spokesman of Civic Rights (Ombudsman). Such an appeal cannot be lodged directly by the parties who may only lodge a petition to the Minister of Justice or the Prosecutor General for filing an extraordinary appeal. The petition may be refused, and the party concerned has no means to appeal against this decision. For this reason, various proposals are submitted during discussions of creating definite possibilities for the parties to lodge directly their own motion for examination of an extraordinary appeal to the Supreme Court. The present author is for granting the parties the right to lodge a complaint to the Supreme Court

against a refusal to allow their petition for an extraordinary appeal. In order to reduce the number of cases of groundless complaints, it would be advisable to introduce the requirement that such complaints should be drawn up and signed by attorneys (the socalled obligatory assistance of a lawyer). An allowance of the complaint should authorize the parties to lodge and support their own extraordinary appeal.

On the other hand, it does not seem necessary to maintain the inclusion among the subjects authorized to lodge an extraordinary appeal of the First President of the Supreme Court who should not move for an appeal against a valid judicial decision before his own court (of which he is the administrative manager and also a judge). This function is appropriate for the parties, or at least for external (extrajudicial) subjects, and should be performed in the conditions of observance of the principles of accusatorial procedure (complaint against the judgement) and adversary system of proceedings.

It is rightly stated both in the doctrine and during the discussions within the Commission for penal law reform that the present code creates excessive possibilities of quashing and changing a valid judicial decision to the defendant's disadvantage. This is particularly true in the case of extraordinary appeal the grounds for which are extremely broad and include both offences to the regulations of substantive penal law and the law of penal proceedings, and errors as to facts found in the judgement. Moreover, those grounds are identical whether the appeal against a valid judgement is to the defendant's advantage or disadvantage, and the only (though admittedly important) protection of the defendant's rights is the fact that an extraordinary appeal to his disadvantage can only be allowed if it is lodged within six months after the decision became valid and final. In practice, with the above formulation of provisions, extraordinary appeal was generally used to the defendant's disadvantage, and sometimes for the sole reason of demanding a stricter penalty.

The regulation of revival of penal proceedings is more advantageous for the defendant, as the grounds for quashing a valid judgement by this means to the defendant's advantage are much broader than those leading to a disadvantageous decision. In the latter case, the proceedings can only be instituted *in novo* if the valid sentence is found to have been influenced by an offence which is seldom the case in practice. On the other hand, this regulation's main fault is a lack of any time-limit whatever for the possibility of quashing a valid sentence to the defendant's disadvantage (the only time-limit involved here is the limitation of offences) : thus the defendant can be kept in suspense for many years as to the permanence of the valid sentence once passed in his case.

It is generally thought that a limitation of the possibility of quashing a valid sentence to the defendant's disadvantage should be accomplished in two different Ways : a) through a considerable reduction of the grounds for extraordinary appeal in this direction, and particularly through an exclusion of demands for the aggravation of penalty only, without changing the establishments of facts concerning the offence or its legal qualification ; b) through a limitation of the period in which proceedings can be revived to the defendant's disadvantage, e.g. to three years in the case of misdemeanours and five years in the case of crimes from the moment when the sentence has become valid and final.

X. MODIFICATION OF PROVISIONS ABOUT SPECIAL MODES OF PROCEEDINGS

The draft assumptions of reform make a general mention of the need to verify the provisions concerning the following three special modes of proceedings : simplified, expedited, and proceedings by penal order. It is stated that although the possibility should be preserved of a simplified and less expensive mode of proceedings in less serious cases, the observance of the basic proceedings principles and securities should nevertheless be secured. Moreover, two variants of the simplified and expedited proceedings are mentioned. The first one suggests a single modified version of the simplified proceedings where all acts of directing a case to the court would be preceded by a simplified form of preparatory proceedings, and the court would examine cases collectively as a rule (one judge and two lay judges). The other variant provides for a preservation of both modes of proceedings with the necessary modifications only.

In their present shape, all three of the discussed modes meet with a lot of criticism on the part of representatives of the doctrine and of different social groups : criticized is the lack of appropriate guranties of protection of the parties' rights, particularly of the defendant's right to defence. The mode that is relatively least criticized is the simplified one which involves a small number of essential deviations from the ordinary mode of proceedings. They concern above all the possibility of examining criminal cases by one judge, and without the obligatory participation in the trial of both the prosecutor and the defendant, even if he fails to appear without an excuse. Instead, the expedited proceedings arouse fundamental reservations. In that mode, a perpetrator of many offences who has been caught *flagrante delicto* or immediately after the offence can be sentenced to a penalty of up to one year of deprivation

of liberty in an extremely prompt and simplified manner. Preparatory proceedings can be abandoned altogether, and the defendant brought before the court within forty-eight hours to be sentenced without delay. This procedure greatly limits the defendant's right to defence as he lacks the sufficient time to prepare himself for the trial and to choose a counsel freely ; in practice, he must depend on the lawyer who happens to be on duty in the court building at the moment. Moreover, as speedy a mode of proceedings largely limits the possibility of amassing information about the defendant which may after all be of great importance for decisions about his criminal responsibility and punishment.

Both members of the Commission for penal law reform and different representatives of the doctrine vary in their attitudes towards proceedings by penal order. A rather large group of scholars are wholly against this form of proceedings. Not so the present author who believes that properly shaped proceedings by penal order in which moderate fines could be imposed only is an admissible and for many reasons a useful form of proceedings. Its present form, however, arouses serious reservations. Namely the order can be issued by the court at a sitting to which the parties and their assistants (counsels) are not admitted ; the only party allowed to participate is the prosecutor. Also the guaranties of the defendant's right to demand an ordinary trial are insufficient here. He does have the right to object to the penal order in which case normal proceedings have to be instituted ; but he is not protected then by the ban on reformation *in peius* which largely restricts his freedom of using that means of appeal.

In the light of the above discussion, I declare for the variant which provides for the introduction of a single simplified mode of procedure with due modifications and the abolition of the expedited mode. I am also for the preservation of a modified version of proceedings by penal order where : the imposition of moderate fines only would be possible ; the parties and their assistants would be admitted to court sittings ; and in the case of objection lodged by the defendant or his counsel only, reformation *in peius* would be banned. This is the standpoint I support as member of the Commission for penal law reform.

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