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*NOTES CRITIQUES * NOTES*

Igor Andrejew, *Rozpoznanie znamion przestępstwa* [Identification of the Features of Crime], Warszawa 1969, PWN, 160 pages.

The book under review is in a way a continuation of another work by professor Andrejew, *Legislative Features of Crime,* which discusses features of crime in general. The latter book was a dogmatic analysis of the features of crime, in which formal-logical moments played a dominant role, while the book under review is of a different type. In principle it does not revert to a formal-logical analysis, does not contemplates individual features of crime, but makes an attempt to consider them from the point of view of the role they play in social practice. Two questions are involved here: the job of a legislator who recognizes the criminal nature of an act and builds up an adequate type of crime, and of a jurist who having recognized the features of crime in a definite behaviour of man fits them under an appropriate article of the Law. Insofar as identification of the features of crime is concerned these two domains do not resemble one another. However, the author has succeded in combining them into one by bringing to the fore legal consciousness which in his opinion plays a crucial role both in building types of crimes (which is quite obvious) and in identifying features of crime. A bridge between the two domains is built also by an analysis of the effects this or another description of the features of crime may have on legal practice as far as identification of those features is concerned, and what are the consequences of codification errors.

The author is of the opinion that legal tradition plays fundamental part in legislative practice. Definition of new features is needed only when such tradition is lacking. A legislator reckons with the consciousness of the society because it has both to take it into consideration and to form it. He has also to consider how the defined features will fit into practice and whether it will be possible to prove them in a court trial. But all legal rules are written in a conventional (legal) language and a legislator assumes that the reader will know how to interprète them reasonably, a thing which also has an effect on the formulation of the features of crime.

A legislator defines features of crime on the basis of typical cases, a practice which by necessity of things leads to formulations which formally can be applied to actions not recognized as socially dangerous or punishable. In view of that it is necessary to make corrections with the aid of "typical circumstances ruling out the criminal nature of an act." The author questions the view that such circumstances should possess the nature of negative

criminal features. He argues this view can be correct only from a "static-logic point of view" but cannot be reconciled with the dynamic interpretation of the features of crime considered as a subject of identification in a legal proceeding, that is with a realistic interpretation of which the author is a strong supporter. He is also against a general definition of such features as countertypes for they do not carry equal social judgements: while some of them approve or encourage to behave in a similar way (necessary defence), others express justification (the state of higher necessity), and still others — tolerance. These judgements are spelled out by the legislator when he attaches to them various legal consequences (when somebody does not commit offences he is not pusnished or held responsible). So, an error concerning the aforesaid circumstances ought to be treated in various ways. The author holds the opinion that cases when the circumstances rule out crime should be considered as not typical because different circumstances do not apply to all types of crimes. Some of them are — so to say — inherent in the features themselves while others are like an addition to them. Therefore, the name countertype is not proper for non-typical cases. Obvious things must be institutionalized only in abstract considerations (p. 75).

The author treats identification of the features of crime as a complex process of a legal proceeding. The psychological motor of that recognition is the sense of legal responsibility of the people who participate in the identification, the sense which says that the criminal must be punished. Subsumption of a case under a legal article does not, as a matter of fact, take the form of a syllogism, for the text of a law (higher premise) usually requires an interpretation, an investigated case (lower premise) originally does not have clear-cut contours, it takes a definite shape in the process of collecting material evidence. But features of crime always show the direction along which the legal proceeding will go. Analysing the question of a change of legal qualification during the trial, the author criticises the trial criminal law now in force, which permits to make this change all too easily. He suggests that the judge should be hedged by stricter formal conditions to the pattern of the Soviet legislation, in order to make such changes more difficult.

The most careful and interesting, and at the same time the most important from the practical point of view, are the arguments concerning identification of the subject matter of crime. The author proceeds from the assumption that the objective outline of the crime is not formed in the mind of the offender in a shape which would correspond exactly to the semantic contents of the law. The author answers in the negative to the question whether an intellectual basis of intent exists only in cases when notions, which in the offender's opinion are synonims of the legislative description of an act, appear in his consciousness during the action. Andrejew concedes that according to formulations of the criminal code, an offender should be aware of definite features of the objective side of a crime but he agrees, like Rohracher and Platzgummer, that "co-awarness" itself of those features is sufficient (p. 122). This "co-awarness" means that a person receives sensual impressions in an ordered way, in the form of perceptions which engage his memory, mind and feelings. In this situation he is "co-aware of everything what he knows although he does not think he knows it" (Rohracher). As for Platzgummer, he contends that the perceived object appears in the consciousness of the

perceiver together with its social meaning in a more or less clear-cut way, depending on the predisposition of the perceiver, and this applies also to the features of crime. Andrejew, in turn, is of the opinion that the intent of immediate action (e.g. actions in which the moment of taking the decision "almost coincides with its implementation") can be accepted when the offender had recognized the meaning of his action much earlier and this does not have to mean that his consciousness produces images which correspond to the semantic contents of the features of the object matter. Coordinated impressions produce in the consciousness of the offender an image of the object matter sufficient to take up an act of will for he is co-aware of that which is essential. When the offender had made earlier a decision to commit an offence but put it into effect at a later time, his action need not be accompanied by thoughts about all features of the object matter. For it is enough to state that such action is an implementation of the aim set before it to make this action "organized from the point of view of that aim." To rule that the offender recognized the meaning of his act a confirmation is necessary that he reflects, at least a minimal part, of the social contents of the formulated law (p. 125). Thus, the offender should realize that he will cause, for instance, a damage to the body, or that he "will fit his enemy in, right and for ever" (Art. 235). This applies also to the features expressed with the help of numericals. It is not the number which matters but the contents which is the basis of a numerical definition — important is not the fact that a damage done to the body will disturb its normal functions for the period of 20 days or that a partner to prostitution was under 15. What is important is a statement that "the treatment will be long," that the "partner was sexually immature," etc. The basic error is made only then when the formalized contents does not find even this minimum reflection.

The author does not take into consideration one aspect, namely that application of the notion of "minimal reflection of social contents" in the process of the realization of guilt leaves a wide margin of free interpretation to the judges, especially when there is also a postulate to identify the meaning of the action and not the features of the legal description of the act. It seems that the postulate of minimal reflection may sometimes mislead the court. An offender, for instance, may escape punishment because he or she believed the partner was sexually mature even though he/she knew that this partner was under 15.

As for the volitional aspect of intentional guilt, the author emphasizes that qualification of a direct or "quasi" eventual attempt should be always based on exterior facts showing motivation of the action, which would allow to accept the effects as the aim of the action. On the other hand, an eventual attempt is established in practice with the maximum consideration being paid to the personality of the offender. We have to do in this case with a legal appraisal of an offensive act, the same as with carefulness or negligence. Expressions used by the law, pointing to the final effects of carelessness and negligence, are in fact a verbal equivalent of a "model of psychical attitude" appraised more or less critically. None of the forms of guilt can be put among exclusively psychological categories. But a question arises here whether this is not true also of a direct attempt (the role of personality,

The work concludes with reflections over the "dark number" and over legal and social causes underlying it. Adopting material definition of crime, the author comes to a conclusion that this definition should apply only to the cases falling within criminal jurisdiction and requiring penal sanctions.

The wide range of scientific problems covering the theory of law, criminal, material and trial law, and even criminology, makes the book under review a valuable lecture which no author dealing with problems of the features of crime should fail to read. But its very richness does not allow to present, even briefly, all the problems raised there, let alone to form an opinion about them. In the work the author presents many original views based on legislative and juridical practice. They are a successful attempt at a dialectical appraisal of the functions of the features of crime. The author broadely quotes foreign and Polish literature on that subject and often polemizes with the views which he does not accept. But he draws conclusions with great cautiousness and sometimes only vaguely outlines his own opinion. This makes any polemics virtually impossible, especially so, as in view of the small size of the book argumentation supporting these conclusions is often limited. This method is deliberate, for that matter, as the author is mostly interested in the real function of notions and institutions and not in theoretical constructions conceived as a finished mental building, in dialectical and not in formal-logical point of view. That is why some of the views he has presented are controversial but this, of course, does not diminish the value of his book.

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