*CHRONIQUE DE LA VIE SCIENTIFIQUE * SCIENTIFIC CHRONICLE*

DROIT POLONAIS
CONTEMPORAIN
N^{O} 15, 1971

SCIENTIFIC SESSION DEALING WITH NEW CODIFICATIONS OF PENAL LAW, PENAL PROCEDURE AND PENAL EXECUTIVE LAW

A scientific session dealing with the new penal law codifications was held at the Staszic Palace in Warsaw from May 4 to 6, 1970. *The session was organized by the Praesidium of the Committee of Legal Sciences of the Polish Academy of Sciences. It was attended by Minister of Justice, Professor Stanisław Walczak, Minister of Internal Affairs, Kazimierz Świtała, First President of the Supreme Court, Professor Zbigniew Resich, chief of the Seym Chancellery, Professor Jerzy Bafia, Soviet scientists — Professor V. I. Kurlandsky and candidate of sciences, S. A. Shlikov of the Institute for Research on Criminality at the Prosecutor's Office of the U.S.S.R., as well as the most outstanding representatives of the Polish science and practice of penal law. The work of the session was based on 5 collectively prepared papers, 3 of which dealt with problems of the new penal code, while the other pertained to the code of penal procedure and the penal executive code. The session was opened by chairman of the Academy Committee of Legal Sciences, Professor Igor Andrejew.

The first to be presented was a paper entitled "The notion of offence and its consequences in penal law" prepared by a team composed of: W. Wolter (rapporteur), K. Buchała, K. Mioduski and F. Wróblewski. The starting point of the argumentation is the duality of the notion of offence, covering a material stratum and a formal established stratum. The former, as a social evaluation is a variable depending on the system of social relations, while the latter is a rigid structure capable of containing different contents in the same form. From the semantic point of view the material substance of an offence depends on the "social" factor (harmfulness, danger) in distinction from the formalism-burdened and internally contradictory "material illegality" — a notion of the bourgeois science. The social danger of an offence received its proper place in the new code, a place set by the principle of *nullum crimen sine periculo sociali.* The material notion of an offence became a common axis joining the circles of penal prohibitions and their exclusions, which could not be built by the formalized bourgeois science. The notion of social danger is defined as a "certain evaluated negative property of a human act," it being the evaluation of the act taken as a whole of objective and subjective properties. After argumentation pertaining to the mutual correlation of the material and formal side of an offence, greater attention was paid to the presentation of the problem of the graduality of the social danger, connected with the various formal divisions of offences.

Problems of the minimality of social danger of an act — understood as its quantitative sub-minimum are examined in connection with the circumstances affecting the severity of the penalty, and in the aspect of the connection of its objective and subjective side. On the basis of the principle that legislative measures are a "general and framework expression of the degree of the social

danger of an act" the thesis was put forward that while with a minimum measure (3 months) it is possible to assume minimality, it is impossible to assume it with the highest minimum measure.

With regard to problems connected with the severity of penalty, social danger constitutes a crystallizing axis for the concrete penalty which is subject to a purposeful modification, depending on the individual institutions. Personal circumstances of the offender, if they affect his guilt, determine the degree of the social danger of an act. The personality of the offender cannot be completely excluded from the subjective side of social danger. Other circumstances affecting the severity of the penalty (good reputation, no previous penalties, behaviour after the commission of an offence) cannot in principle influence the degree of the social danger of an act. The conclusion emphasizes the value of the notion of the social danger of an act as a category permitting us to solve and deepen a number of problems of penal law in a continuous manner on the road to better solutions. The second to be presented was a paper entitled "New means in the achievement of the aims of a penalty in jurisdiction," prepared by I. Andrejew (rapporteur part I -V), Z. Kubec, K. Jankowski and W. Świda (rapporteur part VI). The part reported by I. Andrejew dealt with problems of the selection of penal means, directives concerning the application of these means and court pronouncement of penalty.

The selection of one of the many means foreseen in the new code requires familiarity with the code, its idea and method of thinking which distinguishes it from the 1932 penal code. The direction of the selection of a penal means is determined by two elements: the intensity of the social danger of the act and data on previous penalties, because the code differentiates the means depending on the seriousness of the offence and the person of the perpetrator. Of particular significance here is the conditional dropping of proceedings, as a means which does not consist in the pronouncement of a penalty. Only in the absence of grounds for the dropping of proceedings or for abstention from the administration of a penalty, it becomes necessary to administer it. The pronouncement of a penalty is based on a system of sanctions reflecting, among other things, in the avoidance of short-term penalties of deprivation of freedom (3-6 months) in favour of broader possibilities of the pronouncement of a fine and of a new penalty — limitation of freedom. This last penalty is an original reference to the penalty of corrective work, with a stronger emphasis on elements of limitation of freedom which determine its substance and place in the penal code in between deprivation of freedom and a fine. It may be assumed that excluding offences of hooliganism and recidivism there exists the principle according to which courts do not impose the penalty of deprivation of freedom but a penalty of a different kind. Even if a sanction foresees deprivation of freedom only, the court is in duty bound to examine whether it is not indicated to pronounce a different principal penalty, or even to confine itself to the pronouncement of an additional penalty alone. The widely outlined institution of an extraordinary alleviation of a penalty offers the possibility — in distinction from the change of a penalty into a more lenient one — of its application to more serious offences with a higher minimum threshold of penalty. The universal institution of the conditional suspension of the execution of a penalty complements in a similar manner the conditional dropping of proceedings — being also aimed at more serious offences.

The system of the above means creates an alternative in relation to the

pronouncement of an unconditional penalty of the deprivation of freedom. The idea of the code is to subordinate a wide arsenal of means to the purposefulness of punishment to a much higher extent than heretofore.

The question might arise which of the three general directives of the application of penal measures (commensurability with the degree of the social danger of the act, aims of social influence, preventive and pedagogical aims as regards the offender) is the main and basic directive. One should not be influenced by the order in which the code lists them. It should be assumed that a commensurate (just) penalty fulfills the demands of general prevention, while particular prevention may more often modify the commensurate penalty in accordance with the traits and personal circumstances of the offender. "One may speak in this meaning of the sequence of otherwise equivalent directives of the application of penalty and the application of other sanctions in the following order: commensurability with the social danger of the act, preventive and pedagogical aims, social influence of the penalty."

W. Świda reported the new approach to recidivism introducing a stratification of the return to offence. Each form of recidivism causes different consequences in the field of penal responsibility. The code introduces new measures for the control of recidivism, which are not of a penal character but are aimed at resocialization after the execution of a penalty — protective surveillance and social adaptation centres. These are protective resocialization measures different to measures whose exclusive purpose is the isolation of a recidivist (for example, an "institution for incorrigibles" in the 1932 penal code).

The third report entitled "Problems of the particular part of the penal code" prepared by J. Bafia (rapporteur), K. Kukawka and L. Lernell presents selected problems of the detailed part of the penal code. The forefront place is held by the problem of a so-called horizontal depenalization consisting in a complete or partial abrogation of the offensiveness of an act as a consequence of the evaluation of the degree of its social danger. Of particular significance here is the transformation of an offence into a misdemeanour. Another form of depenalization is also the limitation of penal responsibility through the construction of offences requiring the production of an effect (for example, mismanagement — Art. 217 of the p.c., manco — Art. 218 of the p.c.). Apart from the depenalization the code creates new types of offences embracing situation not penalized before or punishable on the grounds of provisions which did not reflect properly the degree of social danger, or covering an act in an incomplete manner. As regards offences where the guilt was unintentional the new code uses this construction in a more adequate manner, particularly in case of offences against public safety and safety in land, water or air traffic. On the other hand, the code does not penalize unintentional mismanagement and manco. One may read in the new code a general tendency to restrict classified offences, even though it creates certain classified types of offences unknown before, but indispensable. Among privileged offences the code lays down a general criterion of a "case of small weight." The specificity of the construction of sanctions in the new code consists in the economy as regards the number of their types, division of the lowest sanctions into alternative ones, such as limitation of freedom and fine or providing for deprivation of freedom only, as well as liquidation of obligatory cumulation of the penalty of deprivation of freedom and fine as a type of sanction.

The next report bore the title of "Principles and conceptions of the new codification of the Polish penal trial" and was prepared by M. Siewierski (rapporteur), M. Cieślak, J. Bednarzak and M. Mazur.

The new code of penal procedure performs two basic tasks: constitutes for courts and organs of prosecution and efficient instrument for the control of criminality and is at the same time a book of guarantees of citizens' rights. Supreme among all the trial principles according to the code is the principle of objective truth. It emphasizes also the preventive tasks of a penal trial. When it comes to principles of proof the code lays stress on the principle of impartiality and presumption of innocence. It adjusts to the latter the principle in *dubio pro reo* as being essential above all for factual questions. The participation of social assessor judges is increased by the new code, which introduces also the institution of social representative and auxiliary plaintiff. It intensifies also the contradictory character of a trial and the rights of the parties concerning the submission of proposals with regard to re-trials. Defence of the accused has been placed in a proper plane. It introduces also court control of those decisions of the prosecutor, which interfere deeply in the sphere of civic freedoms. The code contains provisions distinctly limiting the application of remand arrest. Thanks to its ideas of humanism, rule of law and democracy, the new Polish code of penal procedure is fully consistent with the Covenant on Civic and Political Rights adopted by the U.N. General Assembly, in whose creation Polish representatives have played an active part.

The last of the reports read at the session was entitled "Central problems of the penitentiary law and policy against the background of the genesis of the code of penal procedure", and was prepared by J. Śliwowski (rapporteur), S. Walczak and A. Ziembiński.

The idea to create a code of penal procedure goes back in Poland to the thirties of the present century. Many jurists dedicated themselves to the creation of such a code (Wróblewski, Rappaport, Sliwowski) and at the turn of 1931 - 1932 its draft was even prepared. It was not adopted, however, while the penal code gave only a fragmentary treatment to penitentiary problems. Of particular importance in People's Poland was the legislative regulation of the penalty of deprivation of freedom (provisions of 1945, 1956 and 1966). Taking the question generally, principles pertaining to the penalty of deprivation of freedom consitute the historical source of the contemporary executive law which was emancipated together with the evolution of penal law and the development of research on criminality. The Polish penitentiary doctrine has very fine traditions, and such writers of the first half of the 19th century as Niemcewicz, Potocki and Skarbek more than once overtook their epoch in their views. The first Polish executive code was based on the supreme idea of the pedagogical role of the penalty. The modernity of the code is determined by the new rules on the activity of the courts, particularly penitentiary courts, an penitentiary judges, development of means of resocialization and security of the guarantees of the rights of the convict who enjoys the rights of a party in the process of the execution of the penalty. The code emphasizes the principle of humanism and respect of the human dignity of the convict. The penal executive code is consistent with the most progressive world tendencies as regards the treament of the convict, and it consitutes a creative continuation of the institution and prin-

ciples of the penal material law contained in the new penal code. The link between these two acts is guaranteed in practice by their integration within the framework of the activity of the courts. The penal executive code contains the basic directives and aims of the penalty. The penal executive code attaches particular importance to the principle of individualization of the means of penal influence and the institution of post-penitentiary care. Considerable possibilities of individualization are connected with the penalty of deprivation of freedom in the form of different penitentiary establishments and rigours. All executive organs are bound by the general directive expressed in the penal executive code, namely that the restriction of the rights of the convict cannot exceed limits indispensable for the correct execution of the penalty imposed or the means applied.

The executive penal code guarantees for the convict the right of personal defence and the assistance of a counsel for defence whose powers have considerably grown in the executive procedure. The novel character of the e.p.c. depends largely on the fact that the codification introduces some completely new solutions, as well as solutions expanding the old institutions. These are: the new executive aspect of the conditional suspension of the execution of a penalty and conditional release, means for the limitation of freedom, that is also the penalty of limitation of freedom, surveillance of conditionally convicted and conditionally released within the framework of a trial period, protective surveillance of recidivists and the means of social adaptation. The executive penal code constitutes the normative base of the new Polish penitentiary system, of tremendous importance for its further development.

The problems submitted in the reports became the subject of a broad discussion concentrating above all on questions of material penal law. The main place in discussion was occupied by problems connected with the character and substance of the notion of the social danger of an act, and the understanding and application of the clause of the minimality of the social danger of an act from Art. 26 of the penal code. Participants in the discussion drew attention to the fact that an objective-subjective approach to the social danger of an act has won an is generally accepted in the Polish doctrine of penal law. Only a few representatives of the doctrine came out in favour of an objective approach to this notion, stressing the particular significance of objective elements in the graduation of the social danger, for example in the division of offences and misdemeanours, pointing out that elements of guilt are not included in the social danger by other socialist legislations. The justness of an objective-subjective treatment of the social danger was emphasized by a representative of the Soviet doctrine present at the session.

Two fundamental problems were outlined in connection with the notion of the social danger of an act. The first of them was connected with problems of the theory of guilt and pertained to the subjective aspect of social danger. The second problem connected with the notion of social danger pertained to the question of whether the personality (attitude) of the offender, his traits and personal circumstances affect the degree of the social danger of an act, and if so — to what extent. The thesis on the limited (by the subjective aspect) effect of these circumstances on the degree of social danger was in principle not questioned at the session. But the view was expressed that the degree of social danger might depend on all the circumstances which affect the severity of the penalty. If an offence is treated as a socio-

logical category, the degree of its social danger may be also influenced by the behaviour after the commission of the offence. The same influence may be thus exerted not only by the personality of the offender but also, for example, by the commonness of the offence.

Special interest was aroused by the problem of the minimality of the social danger of an act. The conception of minimality as the sum of sub-minimal elements (objective and subjective) was in principle not objected to. There appeared, however, an essential difference of views with regard to the practical application of Art. 26 of the penal code. The rapporteur said that this provision might be applied only to misdemeanours carrying a penalty of minimum three and maximum six months of deprivation of freedom. Other supporters of the "limited range" of Art. 26 of the penal code were unanimous in that it cannot be applied to crimes. Differences appeared in the positive definition of the limits of the operation of the provision. The above differentiated views were opposed with the opinion that Art. 26 of the penal code may be applied to all offences without exception, as one should not mix up the social danger of the type of an offence with the evaluation of this danger in case of a concrete act.

Among problems pertaining to the substance and application of penal measures in the new code the greatest interest was aroused by: problem of the preference of the directives of the court pronouncement of penalty, new treatment of recidivism, the penalty of limitation of freedom, protective surveillance and the means of social adaptation.

The participants accepted in principle the view on the comparative equality of all directives of the court pronouncement of penalty. Attempts were made at concretizing the significance of the directives of the pronouncement of penalties, emphasizing that commensurability with the social danger is the principal indicator for the judge, permitting him to evaluate whether the penalty will gravitate towards the upper or lower limit of the penalty, and that the guiding directive for petty offences is the directive of particular prevention, while for serious offences the guiding direction is general prevention. The new measures adopted by the penal code aroused a special interest of the Soviet jurists. They drew attention to the novel character of the penalty of limitation of freedom and measures for the control of recidivism in the form of protective surveillance and the measure of social adaptation, emphasizing the importance of the new solutions for other socialist countries and for the Soviet doctrine. The new penal measures were discussed by representatives of the doctrine of both material and executive penal law. Much attention was devoted to the penalty of limitation of freedom, and the participants discussed its essence and virtues an drawbacks. Certain doubts were aroused by the classification of the social adaptation centre.
It was asserted that it was not a sufficiently protective means, but only a way of modification of penalty based on the guilty act. It was pointed out that it was a new measure which does not fit the notional tradition of non-medicinal protective measures. In connection with the problems of penal measures the participants in discussion touched also on the problem of additional penalties and the specificity of punishing unintentional offences. Some interesting problems appeared also as a result of the report on the particular part of the penal code. The thesis put forth by the rapporteur that a "case of small weight" constitutes an evaluation based solely on objective

criteria was questioned. Attention was drawn to the doubt concerning the severity of the penalty which may be suspended in case of a coincidence of provisions (Art. 10) foreseeing responsibility for intentionally and unintentionally. A controversy arose regarding the interpretation and application of Art. 246 of the penal code. Participants in the discussion expressed also doubts concerning the definitions of "public functionary" and "employee," and emphasized the importance of the principle of the liquidation of double penalty for an offence and a misdemeanour, as well as the necessity of new criminalistic and criminological studies serving the newly introduced penal code.

Discussion of the report devoted to the new penal procedure code was less extensive. The report assumed that most important at the session will be problems of the material penal law, and was only an introductory signal for discussion. Predominating was a positive evaluation of the new code introducing new institutions and an integrated system of trial principles, enriching the quantity of those principles by the transformation of some of the old exceptions. The participants in the discussion stressed the modernity of the penal procedure code, manifested particularly in the model of preparatory proceedings. Attention was drawn to the correct solution permitting a limitation of the system of remand arrest and the replacement of the invalidity of the proceedings by the institution of resumption. The view was expressed that the principle of trial economy should be subordinated in practice to the praxeological criteria of "good work." The participants pointed to certain institutions which might be embarrassing for interpretation, for example the approach to the prohibition reformationis in peius and the resumption of proceedings, or the catalogue of absolute grounds for appeal. They submitted also a number of critical detailed remarks pointing to the lack of broader justification.

A more animated and broader discussion developed in connection with problems of the executive penal code. Attention was drawn first of all to the fact that the executive penal code was the greatest achievement of the new codification. It implements the principal demands of the modern penitentiary doctrine, by treating the convict as a party in the process of the execution of the penalty, emphasizing the pedagogical role of the penalty and expressing hope in the possibility of transforming the personality of a man. The modernity of the Polish executive penal law is expressed in the development of bold solutions, differentiation in the methods of the execution of penal measures — in accordance with the Leninist idea about the pedagogical role of law.

The executive penal law is an expression of departure from the penalty of deprivation of freedom as the most frequently applied penalty, it implements the role of humanization of penalty by using a broader range of penal measures, and it increases the role of the court by subordinating to it the whole of the execution of the penalty. A particular emphasis was laid in the discussion on the relationship between the executive penal code on the one hand and the penal code and the material penal law on the other, drawing attention to the necessity of the integration of all the three codes and stages of penal proceedings. It was pointed out, however, that this integration should not obscure the relative autonomy of each of the new codes. Among detailed problems, the participants touched on the question of the mutual relationship between the directives of the severity and execution of the

penalty. Attention was drawn to the complicated character of this problem which was even a subject of international debates (the 10th Penal Law Congress in Rome). Attention was also drawn to the fact that with regard to the penalty of limitation of freedom the executive penal code stresses the element of work, which is in accord with the conception of this penalty in the light of the penal code. The participants called also for a further intensification of research on the effectiveness of penal measures and the necessity of training a large cadre of penitentiary staff.

After the end of the discussion on the executive penal code, closing the three-day debates of the session, the participants were addressed by under-secretary of state in the Ministry of Justice, Dr Franciszek Rusek. He called for the concentration of efforts on the creation of proper scientific solutions indispensable for practice, with the acceptance of the principles of the new codification.

The debates of the session were summed up and closed by the chairman of the Academy Committee of Legal Sciences, Professor Igor Andrejew, who emphasized the great interest aroused by the session. It was attended by 150 participants, 50 speakers appeared in discussion, there were numerous representatives of the practice of the administration of justice and the ministries concerned. It was a sort of parliament devoted to codification, permitting a confrontation of theory with practice. Many essential problems were dealt with in the discussion. The session was a portent of an interesting dialogue of scientists and practitioners united by a common goal, that is a firm and strong setting of the new Polish system of penal law in the social life,

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