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EUROPEAN PENAL LAW - AN INSTRUMENT TO FIGHT AGAINST HUMAN TRAFFICKING

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Abstract

Human trafficking has become one of the most versatile and hard to combat social phenomenon. Coordination of national action plans and legislative harmonization are vital for preventing trafficking, punishing traffickers and protecting victims. Even though national legal rules concerning human trafficking are similar, regional circumstances have to be taken into account, adapting these rules accordingly. Uniform criminal rules could be one solution to prevent and successfully combat transnational human trafficking. Presently, European Union legislation concerning human trafficking is considered to be one of the most complex legal tools, showing clear objectives, precise language and good implementation procedures. However, in spite of its complexity, the positive results in fighting human trafficking are not satisfactory, leaving room for debate and concern.

Key words: European criminal law, human trafficking, law harmonisation
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Europe is currently confrunting with an over-active and highly organized criminality, human trafficking being included here. The European Union Law completed by that of the European Council in this field is considered by the practitioners and the theorists as one of the best, from the point of view of its objectives, complex juridical language and legal tools common to its member states. Nevertheless, the positive results are still being expected as a consequence of the fact that not all the member states are consistent with the European Union norms, with the provisions of the conventions in the field and, at the same time, as a consequence of the lack of punishments which might determine the states to undertake the necessary measures in order to support the common effort to control and eliminate the human trafficking in Europe.

Although the European Union legislative proceedings regarding the incrimination of human trafficking date back to the beginning of the 1990s, it was only after the Schengen Agreement that the European Union had been obliged to give maximum priority to this issue, as a consequence of the unprecedented increase in human trafficking in the area. The main objective was to persuade the member states to conceive their own national legal rules, in accordance with the European ones, so as to incriminate the deeds of human trafficking, to punish the traffickers and to offer proper assistance and protection to the victims.

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Coordinating individual acts, unifying the national law and applying it by means of specialized structures are all conditioning the success of the demanding attempt to stop, or at least to diminish human trafficking.

Regardless of the continent, the measures which have been undertaken for the prevention and combat of human trafficking are similar, at the same time being adapted to the regional characteristics.

Starting from these realities, the literature in the field brings to attention more and more often the idea of conceiving an international penal law which could answer to the present need of global, transnational action against organized crime.

In spite of all this, in practice, the creation of some unified legal rules requires continuous efforts, attempts and debates due to the nature of the penal law, in comparison to other legal branches and to its specific place within any national legal system.

The idea of harmonization in itself, frequently mentioned, generates numerous controversies. The literature in the field draws attention on the use of this term too easily, in many cases without even being aware of the real meaning and its implications in law. *Harmonization*, as a term in itself, supposes the lack of divergences, eliminating differences and reaching a state of equilibrium and welfare. But, in legal terms, harmonization could imply contrary, negative effects, in the lack of basic principles and rules of guidance.

The contrary effects might appear from the lack of theoretical and practical knowledge of the implications of this process of levelling from the point of view of legal specificity in general and penal code in particular. To start with, on European level, there is not available any definition of the term and consequently of the harmonization process of the penal law. The term is not mentioned in the European Community Treaty, in the chapter on the cooperation in the field of penal law, but it is used in Title VI, Chapter 3, referring to the attributions of the Council regarding the measures to be adopted by means of legal provisions.

In fact, in legislation, harmonization does not always imply eliminating the differences. There should be taken into consideration that law represents and functions as a system and the adjustment of the penal regulations by changes or omissions, due to the domino effect, could lead to a lack of consistency in the parts of the system and finally to non-functionality. We do not confirm that eliminating the differences would not be a beneficial act for the penal law, but this issue should be approached going through the stages below: identify the problem, analysis, find an adequate solution and practical evaluation [Tadić, 2002, 18]. Following this rationale there has been often reached the conclusion that, in fact, harmonization in law, including in the penal regulations supposes an *approximation* of the rules, without leaving aside all the differences existing in the system, dissimilarities which confer the unique and inexpungible character of any national legal system [Tadić, 2002, 9]. In other words, we could not graft rules in a system which would reject them, as a consequence of all the particularities in the genuine national space. In most cases, it is not the differences in the system which cause frictions, but the interrelationship between the system parts and the way it functions.

From the perspective of the penal law, harmonization is not the long desired panacea to prevent and combat criminality, it is only a legal reform mechanism and a form of intergovernmental cooperation [Boodman, 1991, 703].

Thus, the literature in the field, judging unfavourably the harmonization of the penal regulations on European level, brought into discussion the objective need to create and impose certain standards in this process. The harmonization of the material penal regulations

and the operative measures to be applied in the European Union territory, as well as outside, should be accomplished on the basis of the ”harmonization standards”. Still and all, things are very different in reality. The European penal law has been developing without a theoretical model, a thing which makes it difficult to highlight the final purpose of this endeavour and how adequate are the means used to accomplish it.

Starting from the idea that the harmonization of the legislation is a process, the normal question which arises now is who holds the control over it? Therefore, it is necessary that the approximation and unification of the most important penal regulations should be completed by that of the penal procedures and norms, consequently compelling the authorities in charge to apply the common laws or to have the obligation to monitor the implementation. For example, the European Community Treaty stipulates attributions of monitoring of the implementation of the community legislation for the European Community. From the perspective of the penal procedures and norms, the harmonization is actually reduced to *uniformity*. The explanation starts from the premise that the community penal regulations, even though accepted by the member states and introduced in the national legal system, they will be interpreted by the national authorities according to their mentalities and local practices. This is also the explanation why theoretically, the penal regulations are considered adequate and efficient, but in practice, their legal value is not confirmed, their implementation being inefficient [Klip 2002, 24]. Putting into force the penal law in the same degree and with the same efficiency at the level of the member states of the Union requires imperatively certain standards and a mechanism of collaboration and control between the Union institutional structures and the national ones. This is the way the idea of uniformity is getting a concrete shape in the implementation of the European penal rules and of any other international legal rules for that matter. Still, the complex question comes back: harmonization of penal regulations at the level of the Union requires the existence of common legal, executive and judicial authorities ? If the answer is yes, then we could no longer speak about uniformity, but u*nification*, a matter which involves constitutional issues referring to a new definition of the concept of sovereignty and the fundamental human rights. As long as penal law implies limiting the right to freedom, there are two dangers which should be avoided. The first would be the destruction of the equilibrium between coercion and the guarantee of the fundamental rights, and the second, the lak of efficiency in putting into force the common penal regulations as a consequence of the lack of the common institutions with responsibilities in this field [Klip 2002, 27-28]. As regards this last aspect, the functional regulatory instrument and the widened attributions of the European prosecutor as well as of the European Court of Justice and related to human trafficking as well, could ensure part of the institutional infrastructure necessary for the enforcement of the common penal procedures and rules. But these dangers could be avoided, we believe, by planning rigorously the necessary steps to be taken in the process of creation of a new European penal law.

Today, the purpose of the penal regulations approximation at the national level of the Union member states is not to unify the legal regulations, but to decrease the number of differences, in order to persuade the members to acknowledge reciprocally the adjudgement in this legal field [Vermeulen, 2002, 73]. This is actually the reason behind the approximation of the legal rules at European level, in order to create ”a space of freedom, security and justice” [TEU, 1997, art. 29].

The main endeavours in this matter refer to the people’s access to justice, combat of organized crime, protection of the witnesses and compensations offered to the victims.

The combat of transnational infractionality brings along controversial debates related to the legal means to be used and their effects on the relationship between community, European law and the national systems of the Union members in order to reach positive effect in the fight against organized crime. More precisely, the effects of approximation aim mainly to the definition of the constitutive elements of all the crimes considered to be of maximum danger by the Union [TEU, 1997] (*EU core crimes*): terrorism, human trafficking and crimes against children, drug trafficking, weapon traficking, corruption and fiscal fraud. The communitary rules will obey the autonomy of the national penal law, making restrictions only where it is strictly necessary, in order to efficiently combat the transnational crimes.

As a consequence, the approximation of the penal instruments would determine a better international cooperation which had been previously restricted by the principle of double incrimination of the trafickers, which is present in the Union laws and the laws of the member states.

Also, the existence of common definitions for the crimes mentioned above, considered prioritary in the Union penal regulations, would facilitate the action of the community structures working in the field of penal deeds investigation[i] and it would ensure the incrimination and punishment of all these deeds in all member states. The definition of the crimes of terrorism, human, drugs and weapons trafficking are endeavours undertaken nowadays. Thus, the European Council adopted the *Decision frame regarding the combat of human trafficking* [EC, 2002], the first document relevant in the matter of the incrimination of this deed at the level of the Union, addressing exclusively to a decrease in the disparities in the penal law. The decision takes into consideration three essential problems : definition of the crime of human trafficking, decision of the minimum punishment for the deed and definition of the notion of victim. This last aspect was stipulated in regulations later, in another decision[ii] of the European Council which established the rights of the victim in relation to the procedure of settling the instruments for the penal cases, emphasizing the importance the two member states should give to the protection of human trafficking victims and their families.

The approximatin of the penal regulations implicitly takes into consideration the rules of the penal procedures, not only the material one. In fact, there are procedure rules regarding the reciprocal acknowledgment of the adjudgements given by the national courts of law, the use of the crime investigation techniques, the confiscation of the guilty person's goods, charged for crimes related to the activity of the organized criminal groups, even in his/her absence, the protection of the victims and of the persons who collaborate with the judicial services [EC, 2000]. A good example for this matter is the community regulations on the European arrest warrant [EC, 2002] which replaced the older community regulation on the issue of the arrested person's extradition. The European arrest warrant could be issued for the so-called *core crimes*, the main transnational crimes taken into consideration by the Union. The innovation brought by the European arrest warrant is the omission of the principle of double incrimination for these crimes. The warrant regards the arrest and the extradition of the persons within the Union borders, at the request of a member state, fulfilling a minimum number of formalities.

The controversial aspect related to the approximation of the penal law from the Union member states and eventually the gradual creation of some unique penal regulations is represented by the legal means and instruments used by the European Council for this purpose. The legal instruments of approximation are the conventions, the simple decisions

and the frame decisions. The critics arise from the lack of consistency, according to the Union Treaty (The Treaty of Amsterdam), between the legal means and the field under reglement. More precisely, the European Council and the Committee, the main initiator of the frame decisions regarding the approximation are suspected of ignoring deliberately the provisions of the Treaty, which imposes the uniformity obtained through minimal rules for the material regulations and penal procedures, only in certain sectors. The traditional instrument at the basis of the legal activity of the Council is the convention. Nevertheless, the Council imposes certain measures of appoximation of the penal rules, based exclusively on decisions and frame decisions in fields which, according to the Treaty, there should be regulated through Conventions, approved by the national Parliaments of the member states, in the European democratic spirit. Thus, the Europol structure was properly regulated through the convention, open to debates of the Union member Parliaments, but the creation of Eurojust was accomplished through a simple decision of the Council, and the European arrest warrant was enforced by a frame decision. The danger highlighted by the literature in the field is the sacrifice of the Union democracy for the sake of the importance and the emergency character of certain penal regulations which should be adopted or, even more seriously, for the sake of certain ideologies and not of the real need to approximate the penal rules [Vermeulen, 2002, 70-73].

The creation of a security area should not be accomplished by sacrifice of freedom and justice, desiderata reached only with sacrifices and privation within the European borders and which is a condition in itself for the existence of a security environment.

The legislation of the Union regarding the human trafficking is impressive in volume but at the same time offers disappointment by the lack, or sometimes only the inefficiency of the implementation mechanisms and enforcement at the level of the member states.

Even though, from the point of view of the strictness of the aspects under regulation, the Union legal rules regarding the human trafficking represent, at international level, one of the best legal models, in certain aspects they are yet far from putting together a specific regulation, having a general character or proving certain shortcomings. We mention here a few of them: protection of the minors and women as victims of trafficking, organ trafficking, adoptions within the European borders.

The aspects which should be presented into more detail, related to the changes in the legislation in force, are firstly the witnesses' protection and assistance in the penal court and giving the possibility to stay, for longer periods, under this context, on the territory of the hosting state, without any risk of expulsion and secondly, the limited protection in time, often insufficient for the social rehabilitation of the victim and avoidance of her/his reinclusion in the vicious circle of trafficking.

The establishment of certain efficient mechanisms for the prevention and combat of human trafficking remains the great challenge for the testing of the Union legal functionality. The new proposals, as well as the creation of the Institution of the European prosecutor must be closely and realistically analyzed, so as not to build a scaffold lacking in practical relevance, based only on theoretical terms of penal policy.

The problems related to legal conception, the lack or inefficiency of the mechanisms of enforcing the rules due to the differences in system and mentality of the 27 members of the Union, the complexity of the legal regulations, due to their great number and overlapping of the same issues, the reduced number of states which ratified the conventions and treaties in the field, are the major problems which make prevention and combat of crimes even more difficult, including human trafficking, within the European borders.

Although, as it could be easily noticed, the barriers in the way of crime prevention and combat at the level of the European Union, human trafficking being included here, are numerous and hard to pass over, it is also true that, under the stimulus of the judicial doctrine, there is made an attempt to build adequate mechanisms of response. The process remains long and toilsome, often due to the lack of the precise indication of the purpose, which has a bad influence on the construction of a well-rounded strategy, leaving the common initiatives of the Union member states in the stage of individual measures.

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Notes

[i] It is about Europol, a structure founded by the *Convention of the European Council regarding Europol*, J.O. no C 316/2 from 27th of November 1995 and Eurojust, a judicial organism adjacent to Europol, created by the Decision of the European Council from 28th of February 2002, J.O. no. L 63 from 6th of March 2002.

[ii] *Frame decision of the European Council regarding the penal court status of the victims,* J.O. no. L 82 from 22nd of March 2001, pages 1-4.