

INCRIMINATION IN THE MIGRANT TRAFFICKING IN THE NEW PENAL CODE

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ABSTRACT:

THE PENAL LAW FROM OUR COUNTRY SANCTIONS THE ONES WHICH SUPPORT THE ILLEGAL MIGRANTS, BY RECRUITMENT, GUIDANCE, TRANSPORTATION, TRANSFERRING OR SHELTERING THEM, IN THE PURPOSE OF ILLEGALLY CROSSING THE STATE FRONTIER OF ROMANIA.

ANALYSING THE CONTENT OF THE INCRIMINATION REGARDING THE MIGRANT TRAFFIC, WE FIND THAT THERE ARE SOME INACCURACIES WHICH CAN IMPAIR ITS INTERPRETATION, THEREFORE IMPOSING THE IMPROVEMENT OF THIS REGULATION FOR A CORRECT APPLIANCE OF THE CONCRETE ACTIONS COMMITTED IN THIS FIELD.

KEY WORDS: MIGRANTS, HUMAN RIGHTS, ILLEGAL TRAFFIC, INCRIMINATION, REGULATION PERFECTING.

INTRODUCTION

The main responsibility of the respect, protection and insurance of human rights practice is in the duty of specialized state authorities, in article 2 (1) of The International Agreement regarding Civil and Political Rights¹ foreseeing that the signing states are committed to respect and guarantee *all individuals whom find themselves on their territory*, recognized civil and political rights, with no difference.

In the situation in which the citizen or resident is forced to leave the country, because the rights are violated, the main responsibility of protection comes to the receiving state, according to the assumed obligations under the U.N. Convention from 1951 regarding the status of refugees².

Throughout the history of mankind for certain categories of population, the departures outside the country of origin were linked by social or professional interests, or had represented the consequences of military conflicts, religious and political persecutions, economic problems and other necessities or dangers³.

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¹ Adopted by The General Meeting of The United Nations Organisations, at 16 December 1966.

² Dumitra Popescu, *Drept internațional public* (Bucharest, Titu Maiorescu University Press, 2005), 86

³ Horia Vintilă, *Dicționarul Papilor*, (Bucharest, Saeculum I.O. Press, 1999), 127-128.

In the last years the mobility of groups of people became extremely complex, and the movement of refugees who need international protection, intersects with the illegal migration in multiple ways⁴, in the search for a better life⁵.

The illegal migration is punished, generally, by the regulations adopted by the state, which punish the illegal crossing of the frontier.

In the new Romanian penal code, this offence is sanctioned according to the art. 262, and by art. 263 the activity of *migrant trafficking* is incriminated, committing different illicit acts, meant to help the ones in cause to realize their purpose of illegal crossing of the Romanian state frontier.

CRITICAL CONSIDERATIONS REGARDING THE LEGAL CONTENTS OF THE OFFENCE REGARDING MIGRANT TRAFFICKING

Analysing the text of art. 263 P.C.⁶, which sanctions the migrant trafficking, it is found that the way in which this incrimination was formulated, generates more interpretation and appliance problems in report to the committed actions in the objective reality.

1. Firstly, referring to the material element of the basic version of the offence, we appreciate that, besides the action consisting in: recruitment, guidance, transportation, transfer or sheltering "a person", other alternative modalities might have been included in the performance of the offence activity (which can be found in practice), as: paper procurement, facilitating links with other persons, who deal with the migrant trafficking etc. Moreover, maybe it was appropriate that illicit activities shouldn't have been shown in a limitative way, but enunciatively, adding the expression "either help or facilitate in any other way" so that different other activities meant to help the migrants, in the purpose of illegally crossing the Romanian state frontier will not stay outside the penal illicitness.

2. The use of the expression „a person” (regarding the „beneficiary” of the actions which form the material element of the offence) leads, interpreting the text *ad litteram*, to the conclusion that the offence is consumed each time when the offensive activity refers to a single person. *Per a contrario*, when more persons are „helped” to migrate, even in the same circumstance, it should have retain the competition of the offences, each migrant being a distinct individuality, well defined.

In this hypothesis, it still might lead to very high resulting punishments (in some situations over the ones applied for murder, or even equal to the general maximum), considering the new regulations regarding the mandatory growth in the case of offences competition, if, for example, the trafficker transports, with no right on a ship 50 illegal migrants.

In order resolve the dilemma regarding the retention of the competition or of the offensive unit, in the hypothesis of "helping" more persons who want to migrate (by the modalities foreseen in the incriminating normative), we consider that it should have been more appropriate the

⁴ Jeff Crisp, *Policy Challenges of the New Diasporas: Migrant Networks and Their Impact on Asylum Flows and Regimes*, in Neu Issues in Refugee Research, Working Paper no. 7 (Geneva, 1999), 3.

⁵ Haines Rodger, *Gender-related persecution*, in *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection* (Cambridge, University Press, 2003), 319-350.

⁶ According to art. 263 P.C., migrant trafficking consist in: „(1) Recruitment, guidance, transportation, transfer or sheltering a person, in the purpose of crossing the Romanian state frontier, is punishable with prison from 2 to 7 years. (2) When the action was committed: a) in the purpose of achieving, directly or indirectly, a patrimonial use; b) by means which endanger life, integrity or health of the migrant; c) by submission of the migrant to inhuman or degrading treatments, the punishment is imprisonment from 3 to 10 years and the interdiction to practice some rights. (3) The attempt is punishable”.

introduction of a severe version, applicable to all cases in which the author facilitates the migration of more persons.

The regulation of this severe version would have the purpose to punish severely the ones who act for the facilitation of migrating more persons, which presents a social concrete danger which is higher than the case of helping one person. In the same time the extremely harsh resulting punishments would be avoided (by the appliance of the offences competition rules), which can exceed very far the specific social danger of such offences.

3. The offence regarding migrant trafficking is consumed not only by committing one (or more) of the alternative incriminating actions (in the purpose of crossing the Romanian state frontier) without this purpose ever being necessarily done.

If, however, the illegal crossing of the frontier is achieved, in the duty of the migrant trafficker, the participation to the offence foreseen by art. 262 P.C. will not be retained (committed by the migrants), because the previous activities – of helping or facilitating, by alternative methods foreseen by art. 263 P.C. – forms the contents of this previously specified offence.

We also appreciate that in the duty of the migrant trafficker, the complicity to illegal crossing of the frontier is also retained, if the crossing of the frontier is helped or facilitated by other actions (or inactions) than the ones expressly shown and limiting in the actual content of the incrimination from the art. 263 P.C.

4. Referring to the severe versions of the offence, we consider, mainly, that these might miss, because, due their certain specific characteristics, the severe circumstances are not of nature to increase in a relevant way the social danger of the acts.

Therefore, the severity element introduced by the new penal code⁷, which consists in the pursuance of a „*material use*” by the trafficker (directly or indirectly), is in reality present in almost all concrete acts, therefore if it is included in a severe version, the simple one would be achieved with an exception title.

It is obvious that in the *quasi-totality* of the cases the trafficker pursues a material use, with the hypothesis being almost excluded that the respective one would act careless, because it is not logically to risk a penal punishment, without being co-interested in a certain way.

If however does not quit this severing version, considering that it is also pertinent, then the expression ”or of any other use” should be added, because the uses which can motivate the commission of the offence might also have other nature, than the material one (sometimes more important for help).

Considering the ones shown, we appreciate that rationally it should be as severe as the one foreseen at p. 2 letter ”a” from the art. 263 P.C. to be removed, following that the social generic danger afferent to certain acts (almost all) to be reflected in the special limits of the punishment established for the simpler version.

5. Largely the same considerations are imposed in what regards to the aggravating one foreseen at art. 263 p. 2 letter ”b” P.C., considering that life, integrity and the health of the migrants are in danger in all cases (while they are involved in illegal activities), therefore the respective circumstance should have the place in the contents of the simple version, if the conclusion is reached to grant a certain penal relevance.

In reality however, there is no ration for the aggravating responsibility of the traffickers (dealers), on this consideration, whilst the migrants accept (in the purpose of achieving the illicit

⁷ Duvac Constantin, *Infrațiunile privind autoritatea și frontiera de stat din perspectiva noului Cod penal și a Codului penal în vigoare*, The penal right magazine no. 2 (2013), 31.

proposed objective) the migrating conditions, which in many cases are imposed by objective situations and not by the bad-faith of the ones who facilitate the illegal migration.

Moreover, the dealers might even have all the interest that the illegal activity (done together with the migrants) should be performed without affecting them, so that they could achieve their due advantages.

In conclusion, both dealers and the migrants act in common to achieve the same illicit purpose, imputably alike both persons (crossing illegally the frontier), the severing analysis would not have a support basis.

6. The text of the severity foreseen at art. 263 p. 2 letter "c" P.C. (regarding the submission of the migrant to inhuman or degrading treatment) refers to independent acts, which have no link to the constitutive content of the offence regarding the migrant trafficking, supposing a „*help*” from the author, within a „*cooperation*” with the migrant, in order to achieve the same illicit purpose.

The inhuman or degrading treatments do not present a more severe consequence (*praeter intentioned*) of the commission of activities performing the material element of the analysed offence, as it happens in the case of severing versions specific to certain offences and neither the modalities of person trafficking commission, as per complex offence, these activities could be performed only with intention, in real competition with the offence of migrant trafficking (if they achieve the content of some offences).

Likewise, the person who wishes to migrate illegally can quit the given "help" provided by the author, if that author has an improper conduct towards that (specifically special to the person trafficking, where the reports between parties are not of collaboration, but of dominance over the victim by the dealer), which can lead, not to the increase of social danger, but more specifically to the interruption of the "cooperation" and by default, to the offensive activity regarding migrant trafficking, considering as a result also the non-performance of the act regarding the illegal crossing of the frontier.

7. If, regarding to the three aggravating offences of migrant trafficking the entering into discussion of the opportunity of regulating them was tried, we appreciate that it also might exist another circumstance of nature to increase substantially the social danger of the respective offence, that of performing the act by a public official, through the use of his/her position.

In this way, we state that the offence foreseen by art. 264 P.C. (facilitating the illegal stay in Romania) – which is also referred to migrants, and which sanctions the facilitation of illegal "staying" in the country, not facilitating the "entrance" (as in the case of the offence foreseen by art. 263 P.C.) – is foreseen, as a severe circumstance, the performance of the act "by a public official in the practice of his/her work attributions" (letter b). The same aggravating act is also foreseen at the person trafficking (art. 210¹ p. 2 P.C.), and also in the case of certain offences, considering the fact that at the gravity of the performed actions is also added the resulting danger by violating the work attributions by the ones who are put to defend the rightful order.

That is why we consider that also in the case of the offence foreseen by art. 263 (the migrant trafficking) would be necessary to introduce the respective severity, therefore to prevent and in the same modality the performance of such acts (under certain alternative methods) by the ones who have attributions of applying the law in the field, and in the situation of performing that, they should be seriously sanctioned than the ones who do not have the quality of a public official.

CONCLUSIONS AND PROPOSALS OF *FERENDA LAW*

The problem of migrants is continuously of high interest, because, besides the ones which seek refuge in another state, due to prosecution which they were subjected by disrespecting the human rights, there are other numerous persons who migrate illegally to other states, from economic reasons (poverty, lack of employment, etc.), due to the triggering of certain armed conflicts in the countries of origin or from other causes.

Many of those persons, due to reduced knowledge, especially regarding the countries where they wish to migrate, call upon the help of „migrant traffickers” (or are recruited by them) in the purpose of achieving support in order to cross the frontier of another state.

In Romania the new penal code sanctions severely the migrant trafficking, but, as shown, the incriminating text (art. 263 P.C.) can generate some controversies regarding its interpretation and appliance in practice, therefore we appreciate as being necessary some proposals of *freneda law*.

- In the content of the simple version of the offence we consider that it might impose, *de lege ferenda*, the completion of the alternative modalities of performing actions (limitative shown) by the generic expression „*either help or facilitation in any other way*”, which would allow the sanctioning of authors for all the supporting activities of the migrants (no matter the way in which committed), in practice the dealers being able to find methods to help the migrants to achieve the purpose of crossing illegally the state frontier of Romania.
- *De lege ferenda* might also be the proposal referred to the introduction of the severity regarding the „*performance of offensive activity regarding two or more persons*”, because the author helping more persons to illegally migrate is more dangerous, and by this new regulations the dilemma of holding back the offensive units might be removed or the regulation concerning the competition of offences might apply, fact that should lead, as shown, to very high resulting punishments (even beyond the ones applied for the offence of murder), therefore exceeding the abstract degree of the offence regarding migrants trafficking.
- Having a reduced relevance in what regards to the increase of social danger and especially due to the fact that they are present in most overwhelming concrete actions (being almost indispensable, naturally, the basic version of the migrant trafficking), with the severity foreseen at p. 2 letter ”a” and ”b”, art. 263 P.C. can be removed from the incriminating text.
- Considering the imprecision of the expression ”inhuman or degrading treatments” which can cause controversies in what regards to the determination of their area (also considering the severity contents from letter b), and also the arguments previously presented, with regard to the severity from letter c) p. 2, art. 263 P.C., we also appreciate this text that might be removed, thus introducing, eventually, the mention of retaining the competition of offences, in the situation in which the author performs some penal actions over the migrant.

According to the abovementioned arguments, we propose *de lege ferenda* and the inclusion, as a severe version, the performance of the offence foreseen by art. 263 P.C. *by a public official in the practice of work attributions*.

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