

The Tendency of Criminalizing Preparatory Acts as Self-Standing Offences or Attempt to Commit an Offence

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Abstract

The present study aims to analyze the criminalization as self-standing offences of some preparatory acts which are, in fact, merely the material conditions for the execution of the offence itself. The criminalization of preparatory acts as self-standing offences has become a widely used legislative instrument, despite the adverse consequences on the inviolability of citizens' fundamental rights.

Keywords: preparatory act, criminal resolution, trafficking in human beings, trafficking in minors, trafficking in migrants.

Introduction

The Romanian criminal law only punishes preparatory acts in exceptional cases, when the legislator assimilates them to the attempt to commit an offence or when they are incriminated as self-standing offences¹.

The exclusion from criminal prosecution of the preparatory acts has constituted, at least at the doctrinal level, a general principle. Impunity is justified by the fact that "the preparatory act does not damage the protected social value and does not affect the legal order"². Besides, the doctrine is also the one which defines the preparatory acts, in the absence of an express intervention of the legislator - who, within Article 32 of the Criminal Code, limits himself to define the attempt to commit an offence as being "*the execution of the intention to commit the offence*".

The preparatory acts are the material acts which facilitate the commission of the offence and which do not fall within the constitutive content of the offence, being situated in the phase prior to the execution of the intention to commit the offence.

The legislator conditions the criminalization of the majority of offences by the production of a result or, at least, by the possibility of the production of a result.

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¹ C. Bulai, B. Bulai, *Manual de drept penal*, Ed. Universul Juridic, Bucharest, 2007, pp. 422-423.

In the doctrine, a third way to sanction preparatory acts is also laid down. If preparatory acts are committed by a person other than the author, preparatory acts shall be sanctioned as acts of prior complicity.

² F. Stretanu, *Tratat de drept penal*, vol. I, Ed. C.H.Beck, Bucharest, 2008, p. 607.

However, the preparatory acts do not reveal the offence that a person intends to commit, but are only directly related to the offence that the perpetrator has projected and represent the acts that unveil this projection.

By criminalizing them, the objective theory, according to which only the beginning of the execution is sanctionable, loses its supremacy in favour of the subjective theory, according to which criminal behaviour, i.e. the criminal resolution manifested externally in any way that allows its identification, can be sanctioned independently of the beginning of the execution. Consequently, what is being sanctioned through the criminalization of the preparatory acts is the offender's state of mind, which denotes a dangerous conduct and, theoretically, the irrevocability of the criminal plan, and not the materiality of the acts.

The current tendency is, however, to extend the area of the incriminated preparatory acts. If in the beginning, their incrimination was justified by the need to combat the phenomenon of organized crime, nowadays their sphere has been extended to cover many other categories of offences.

Their criminalization is justified not by the nature of the incriminated behaviour, but by the possibility it creates for the prevention of serious offences, being called, consequently, obstacle-offences. The obstacle-offences imply not only a concrete material act, but also the possibility of causing danger, namely the awareness of the projection of a future danger.

Hence, unlike basic offences, which are grouped according to the protected interest, the obstacle-offences are the result of the legislator's imagination. The legislator cannot conceive as many obstacle-offences as to cover all the means of committing a basic offence.

In the category of preparatory acts incriminated as self-standing offences or attempts to commit an offence, in the Romanian Criminal Code we find certain ways of committing the following offences: trafficking in human beings (Article 210 of the Criminal Code), trafficking in minors (Article 211 of the Criminal Code), smuggling of migrants (Article 263 of the Criminal Code), the possession of instruments for the purpose of counterfeiting valuables (Article 314 of the Criminal Code), illegal operations with IT devices or software (Article 365 para.(2) of the Criminal Code), treason (Article 394 of the Criminal Code), the constitution of an organized criminal group (Article 367 of the Criminal Code), the terrorist offences provided for in Law no. 535/2004 on the prevention and combating of terrorism, the provision of a home or a place for illicit drug use (Article 5 of Law no. 143/2000), the financing of trafficking and illicit drug use (Article 9 of Law no. 143/2000), etc.

In what follows, we will analyze the offences of **trafficking in human beings**, **trafficking in minors** and **smuggling of migrants**.

The offence of trafficking in human beings / The offence of trafficking in minors

With regard to the provisions of Articles 210 and 211 of the Criminal Code, which provide for the criminalization as offence of the trafficking in human beings/minors the act of *"recruiting, transporting, transferring, housing or receiving a person/minor for the purpose of their exploitation"*, it should be noted that the criminal law does not define the

notions of recruitment, transportation, transfer, shelter or reception, so that the incriminating rule is presently vague, unequivocal and unpredictable.

Thus, regarding the **concept of recruitment**, in the absence of a definition provided by the law, it is unknown whether the legislature has considered an action envisaged by the perpetrator (the grooming, inciting the victim to perform certain activities for the purpose of exploitation, regardless of whether these exhortations or proposals are accepted or not by the victim), or has considered an action which was actually performed (when, after the grooming activities undertaken by the perpetrator, the victim actually goes under their influence or control).

As regards the **notions of transportation and transfer**, the legislature does not provide any criteria for demarcating the acts of transport from those of transfer, although the transfer of a minor also implies their transportation, and, vice versa, and therefore the exact definition of the two different terms used in the incrimination rule should have been done, in order to know the exact meaning and scope of the law, as a condition of clarity and predictability in its application.

Similarly, the legislature has not defined, with a view to a clear differentiation, the **notions of housing and receiving**, any act of harbouring/sheltering a person involving also their receipt within a home, leaving unclear what should be understood by the act of receiving a person with a view to their exploitation, in the absence of offering shelter.

Therefore, it is not clear whether a series of activities such as welcoming, facilitating food or clothing represent or not an act of receipt within the meaning of the criminal law, different from the activities of hosting or harbouring, distinctly incriminated by the criminal rule, so that the respect of the law cannot be secured without the possibility of knowing the exact explanation of the meaning and scope of the terms used by the legislator.

The offence of smuggling of migrants

Incriminated by the provisions of Article 263 of the Criminal Code, the offence in the matter regards the security of the state border, the act aiming at its fraudulent passage, without the fulfilment of the legal conditions by persons who neither have the nationality of the state of destination, nor legally reside on its territory. Therefore, this offence is different from the offences previously analyzed, which are directed against vulnerable people, because in the case of the smuggling of migrants, they are not the victims of the offence itself, at least not in its basic form.

In the case of this offence, the actions constituting the material element consist in the *“rallying, guidance, leading, transportation, transfer or housing of a person, in order to fraudulently cross the state border of Romania”*.

As we can see, a number of notions are identical to those underlying the other two offences, such as **transportation, transfer** and **housing**, so that the criticisms expressed hereabove are fully applicable also in this case.

It is noted that in the case of migrant trafficking, the legislator used the notion of **rallying**, instead of recruitment, as in the other two cases. The term “rallying” seems more appropriate to define the action prohibited by the law, although the two terms are synonyms, although not perfect synonyms. Thus, while the notion of rallying can also be used in connection to reprehensible activities, being appropriate in the context of defining an offence, the notion of recruitment may have, depending on context, both a positive and a negative meaning, in the latter case being a perfect synonym for rallying.

The **guidance** and **leading** actions are specific to this offence, but their joining seems redundant, the two notions being synonymous. Therefore, a clear distinction between the two actions is difficult to make, the rule thus becoming imprecise. The only difference may be at most of nuance, the legislator probably wanting to distinguish between the action of guiding, which would involve the orientation of the migrant in space, by accompanying them, and that of leading, which lacks the accompanying component, limiting itself to the verbal orientation, namely advice on the direction to follow.

Conclusions

This lack of clarity, precision and predictability of the notions of *recruitment, transportation, transfer, housing or receiving* from the provisions of Articles 210, 211 and 263 of the Criminal Code contravenes the principle of the legality of incrimination, stipulated by Article 1 of the Criminal Code and Article 7 of the Convention for the Protection of human rights and fundamental freedoms.

Easily accepting the incrimination of the preparatory acts signifies accepting the incrimination of a mere psychological attitude towards an event or thing and the shifting of criminal liability, in the sense of incriminating criminal resolution, which, obviously contradicts the basic principles of criminal law.

A preparatory act is inherently ambiguous, while the beginning of the execution represents a material act that leaves no doubt about the intention to commit an offence. The anticipated incrimination of some actions without having a constitutive element of the offence, and, respectively, a result, will prevent the perpetrator from reverting to their criminal intentions, thus excluding institutions such as discontinuance or obstruction of the outcome.

The drawbacks posed by the incrimination of preparatory acts arise, in our opinion, from the ineffectiveness in the discovery and fight against such offences in the absence of special investigative techniques that could identify ever since the earliest stages the possible criminal intention. Therefore, the widespread criminalization of preparatory acts will result in an expansion of special investigative methods, characteristic to serious offences, with adverse consequences on the inviolability of the fundamental rights of citizens.

The legitimacy of the fight against crime cannot serve as a basis for the legislature to extend the exceptional procedures at the expense of the common criminal law, having the obligation to avoid all authoritarian tendencies in the development of criminal law, "which must remain faithful to the democratic principles, especially the principle of legality, the principle of the criminal intervention as the *ultima ratio* and the respect for fundamental rights and freedoms"³.

Last but not least, we believe that the legislature must exercise caution regarding the incrimination as self-standing of the preparatory acts also in terms of the increased risk of judicial errors, because the more a preparatory act is situated further away in the

³ L'élargissement des formes préparatoires et de participation, Projet de Résolution, XVIII-è Congrès International de Droit Pénal, Istanbul 2009, Turk Ceza Hukuku Dernegi, p. 69.

causal chain of actions of the offence, the harder it is to identify its criminal or, conversely, lawful nature. An ambiguous act, inviting several meanings, can be labelled, with equal ease, either a preparatory act offence, or an act without criminal connotation, which allows that, in the lack of a clear regulation, there might be a higher risk of triggering the criminal liability of persons who had no intention whatsoever to commit an offence. The act of a simple transport of people could be subsequently described as an act in the causal chain of trafficking of persons, just as the sheltering with good intentions of a person found in difficulty could be performed as easily as an act of charity or as a consumed preparatory act offence of trafficking of human beings.