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Combating and sanctioning migration and related criminal phenomena

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Abstract:

Due to the fact that migration has grown, it is necessary to establish the correct constitutive elements of the criminalization of migrant trafficking in the Romanian legislation, as well as the elements whereby this act differs from others with similar content, such as trafficking in persons or procuring, and setting up an organized criminal group. The main element is the social value that the legislature intended to protect by criminalizing the act, namely the state border, a value which prevails over the freedom of the individual and which essentially distinguishes between the offence of migrant trafficking and the offence of human trafficking despite the similarities of the material element of the two offences.

Therefore, a correct assessment of the connection between the offence of migrant trafficking and human trafficking is required in order to hold or not the concurrence of the two acts in case the illegal crossing of the state border involves victims of human trafficking or child trafficking.

Keywords: *migrant trafficking, human trafficking, procuring, patrimonial benefit, inhuman or degrading treatment, freedom, criminal liability.*

General considerations on the need to criminalize the offence of migrant trafficking

Providing entry into the territory of a state under fraudulent conditions, by violating the law, of a person who is not a national of that state or who is not a resident in that state, may give rise to threat to state authority, state of threat that must be prevented by the criminalization of this kind of acts. This justifies the criminalization and sanctioning under criminal law of migrant trafficking, regardless of whether the person who assists illegal border crossing aims or not at obtaining a material benefit from his activity.

The regulations on the migrant trafficking offence as provided by the 2009 Criminal Code are similar to those on the same offence by Government Emergency Ordinance no. 105 of 2001. The criminalization was taken over by the 2009 Criminal Code which outlined distinctly the offences regarding state border, thus creating in Title III – Offences regarding the authority and the state border – Chapter II which reunites state border offences, regulating the acts consisting in illegally crossing the state border – art. 262 of the Criminal Code, migrant trafficking – art. 263 of the Criminal Code and facilitating illegal stay in Romania – art. 264 of the Criminal Code.

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The social value prejudiced by the commission of this act is the common element that determines the placement of the three acts in the same chapter. As for the offence of migrant trafficking, one should understand the legislature's option regarding the treatment of this crime as a state border offence, not as a crime against the person, the exploitation of a vulnerable person. Migrants are characterized by a state of vulnerability caused by their economic situation in particular, situation that makes them try to cross the state border fraudulently, illegally. This state of vulnerability is exploited by the perpetrator, therefore seemingly the freedom of the individual should have been first protected. However, the political and social movements taking place internationally justify the orientation of the legislature to consider this crime as a state border offence. State border security, the prevention of actions which aim at illegally crossing state border appears as a priority in the current conditions. It even exceeds in importance the protection of vulnerable persons due to the situation of migrants.

Legal framework and sanctioning of the offence in the Romanian legislation

The offence of migrant trafficking was first reflected in the provisions of GEO no. 105/2001, and the act was "the recruitment or guidance of one or more persons for the purpose of illegally crossing the state border, and the organization of these activities"¹. The Criminal Code took over this regulation, but it provided in detail the material element, including, in addition to recruitment or guidance, the acts of transportation, transfer of or accommodation provided to a person, and giving up the provision on the activities of organizing them in the material element of the offence.

Thus, in the current Code², the offence of migrant trafficking consists in the recruitment, guidance, transportation, transfer of or accommodation provided to a person for the purpose of illegally crossing the Romanian state border and is punishable by imprisonment from 2 to 7 years. In its aggravated forms³, the offence covers the act for the purpose of obtaining, directly or indirectly, a patrimonial benefit; by means which jeopardize the life, integrity or health of migrants; by subjecting migrants to inhuman or degrading treatment, and in these cases, the punishment is imprisonment from 3 to 10 years and deprivation of certain rights.

As for the aggravated forms of the offence, the current Code differs from the previous one, since it provides a new aggravated form – committing the crime in order to obtain, directly or indirectly, a patrimonial benefit – and renounces the criminalization in the aggravated variant of the situation where the act resulted in the death or suicide of the victim.

The legislative solution is justified in both cases. For the variant in which the perpetrator acts for the purpose of obtaining, directly or indirectly, a patrimonial benefit, it was necessary to establish a difference in the sanctioning treatment as compared with the situation when he commits the act without such a purpose. It is known – and judicial practice confirms this – that in most cases, migrant trafficking is committed while aiming to obtain a patrimonial benefit. The perpetrator is aware that he violates the law and puts in jeopardy the state border, but this behaviour is

¹ Pursuant to art. 71 of Government Emergency Ordinance no. 105/2001.

² Pursuant to art. 263(1) of the Criminal Code.

³ Pursuant to art. 263(1) of the Criminal Code.

determined, most often, by the perspective of material gains. However, there are situations where the perpetrator commits the same actions for the purpose of illegally crossing the state border, without seeking a material benefit, but, on the contrary, animated by feelings of mercy, compassion for the situation of the migrant, the wish to help him. It is obvious that, in terms of sanctions, a distinction must be made and a more severe punishment must be inflicted where the patrimonial benefit is the purpose of the perpetrator, and this distinction is illustrated by the distinct provision, as an aggravated form, of the situation where the act is committed in order to obtain, directly or indirectly, a patrimonial benefit.

Regarding the situation in which the act is likely to jeopardize the life or safety of migrants or to subject them to inhuman or degrading treatment, and it has resulted in the death or suicide of the victim, it is no longer provided for in the current Code as an aggravating circumstance of the offence. Therefore, if the perpetrator uses means that jeopardize the life, integrity or health of migrants or subject the migrant to inhuman or degrading treatment, and his act results in the death of the victim, he will also be charged with the offence of migrant trafficking and the offence of bodily injury or bodily injury causing death.

By criminalizing the offence of migrant trafficking, the aim is the protection of social relations concerning respect for the public authority whose activity consists of the supervision and control of state border, the protection of which depends on the interdiction of the acts of illegal migrant trafficking⁴.

The offence is an offence of jeopardy, the protection of the social value is required too where there is no illegal crossing of the state border, but this purpose is only pursued, a purpose that already leads to the creation of jeopardy necessary for the existence of the offence.

From this standpoint, the main passive subject of the offence is the state, which is the holder of the social value protected by law, and the secondary passive subject is the migrant with regard to whom, in the aggravated forms of the offence, there are means used which are likely to jeopardize the life, integrity or health or who is subjected to inhuman or degrading treatment.

The material element of the offence in the new criminalization can be achieved by committing, alternatively, one of the following actions, namely recruitment, guidance, transportation, transfer of or accommodation provided to a person for the purpose of illegally crossing the Romanian state border.

The actions consisting of recruitment, transportation, transfer, accommodation or receipt make the material element too in the offence of human trafficking or child trafficking, the difference being that it does not refer to a migrant, but to a person or a minor who has Romanian citizenship or is a resident in Romania, and the purpose for which the perpetrator acts is that of exploiting the trafficked person. By "exploiting a person, one understands:

- a) subjecting him to the performance of a work or performance of services forcibly;
- b) keeping him in a state of slavery or other similar procedures, i.e. deprivation of liberty or servitude;
- c) forcing the person into prostitution, pornographic manifestations in the production and dissemination of pornographic materials or other forms of sexual exploitation;

⁴ Dobrinioiu V., Neagu N., *Drept penal. Partea specială*, Ed. Universul Juridic, București, 2012, p. 319.

- d) forcing him into begging;
- e) retrieval of organs, tissues or cells of human origin, illegally.⁵

So, what distinguishes migrant trafficking from human trafficking or child trafficking and is essential for the existence of the offence of migrant trafficking is that all actions of the perpetrator are subordinated to a purpose – that of illegal crossing of the Romanian state border. The illegal crossing of the Romanian state border means both the entry and the exit from the Romanian territory through places other than those stipulated by law or places for this purpose, but fraudulently⁶.

In terms of guilt, the perpetrator must act with direct intent, which means that he foresees and pursues that his actions will have a purpose, that of illegally crossing the Romanian state border by migrant persons. If the existence of this purpose is not proved, although there are material activities specific to the material element, the perpetrator cannot be charged with the commission of the offence of migrant trafficking.

In the judicial practice⁷ it was established that although the defendant committed material acts that could be classified as the material element of migrant trafficking, they were not committed with the form of guilt required by law in order to entail criminal liability. Thus, although the defendant drove a van in which there were three migrants of Somali origin, it was not proved that he knew the purpose of carriage (of calls resulting that the defendant knew he had to load/unload a cargo from the van and the other defendant erroneously induced him to transport them, without communicating him the nationality of the persons transported, the fact that they were foreigners and they would cross the border illegally). Therefore, the court ordered the acquittal of the defendant, holding that the constitutive elements of the offence were not fulfilled.

Preparation acts in order to commit the offence are not punishable, but the attempt is sanctioned by the law⁸, the legislature considering that the action materializing the decision to commit the offence, either interrupted or completed, but without producing an effect, is serious enough and jeopardizes the social value protected by law, therefore the punishment is justified.

The offence is committed when any of the criminalized actions are carried out, when the jeopardy is presumed as for the social value protected by law which represents the socially jeopardizing consequence of the offence.

The offence may be in a continued form, and in this case, at various intervals and in order to put into practice the same criminal decision, the perpetrator commits actions/inactions, each having the content of the migrant trafficking offence, actions/inactions committed against the same passive subject. The requirement of the single passive subject is considered to be met in case the offence prejudices different secondary passive subjects, but the main passive subject is only one⁹. In the case of migrant trafficking, the social value protected by law makes the state be the main passive subject of the offence, the migrant being just the secondary passive subject, which means that, if the offence is committed in a continued form, the offence has,

⁵ Pursuant to art. 182 of the Criminal Code.

⁶ Griga I. in *Explicațiile Noului Cod Penal*, vol. IV, by Antoniu G., Toader T., Brutaru V., Daneş St., Duvac C., Griga I., Ifrim I., Ivan Gh., Paraschiv G., Pascu I., Rusu I., Safta M., Tănăsescu I., Vasiliu I., Ed. Universul Juridic, Bucureşti, 2016, p. 56.

⁷ The High Court of Cassation and Justice, criminal section, decision no. 1649/2014, www.scj.ro.

⁸ Pursuant to art. 263(1) of the Criminal Code.

⁹ Pursuant to art. 238 letter b) of Law no. 187/2012 for the enforcement of Law no. 286/2009 on the Criminal Code.

besides the moment of completion, a moment of exhaustion represented by the termination of the criminal activity.

Criminal phenomena related to migration and criminal law means to combat them

Although the existence of the migrant trafficking offence does not require the fulfilment of a requirement regarding the pursuit of a material benefit, most often actions typical of the material element are committed for the purpose of obtaining such a benefit. Getting a patrimonial benefit, either directly or indirectly, from committing migrant trafficking is an aggravated form of the offence, the aim of the perpetrator, even if it is not achieved, entailing a more serious punishment (imprisonment from 3 to 10 years and the interdiction to exercise certain rights).

In case of seeking to obtain a benefit from migrant trafficking, considering the complexity of the actions and the risks involved in such activities carried out systematically, in order to obtain gains, the perpetrator does not usually act alone, but together with more people for the same purpose. Therefore, there are frequently associations of persons who intend to commit such acts, in which case the offence of trafficking in migrants will be accepted in concurrence with the offence of setting up an organized criminal group.

Setting up an organized criminal group consists of “initiating or constituting an organized criminal group, joining or supporting in any way such a group”¹⁰, and an organized criminal group is “a structured group of three or more persons, constituted for a certain period the time to act in a coordinated manner for the purpose of committing one or more crimes”¹¹.

Moreover, the offence of setting up a criminal organized group jeopardizes public peace and order by simply initiating, setting up, joining or supporting in any form an organized criminal group, and it is not necessary for this group to fulfil the purpose for which it was set up. If the group organized for this purpose committed a crime, the law expressly provides that the rules of concurrent offences apply¹².

Judicial practice is constant to hold the concurrence between the offence of setting up an organized criminal group and the migrant trafficking offence¹³.

Migrant trafficking is subordinated to the pursuit of a specific purpose, that of illegal crossing of the Romanian state border, the existence of this purpose jeopardizing the social value protected by law which is the immediate consequence of the offence. It is not necessary for the existence of the crime that the offender succeeds in what he pursued, namely to succeed in helping the migrants to fraudulently cross the state border. In case this aim is attained, the offence of migrant trafficking is held in concurrence with complicity in illegally crossing the state border¹⁴ and, to the extent that for this purpose there were used means which themselves constitute offences (procuring fake IDs), the latter will also be concurrent with the former.

¹⁰ Pursuant to art. 367(1) of the Criminal Code.

¹¹ Pursuant to art. 367(6) of the Criminal Code.

¹² Pursuant to art. 367(3) of the Criminal Code.

¹³ The High Court of Cassation and Justice, criminal section, decision no. 1543/2010, www.scj.ro; The High Court of Cassation and Justice, criminal section, decision no. 657/2014, www.scj.ro;

¹⁴ Offence provided for and regulated under art. 262 of the Criminal Code.

Another issue that may arise in connection with trafficking refers to the situation where the illegal crossing of the state border is pursued in relation to persons who are victims of human trafficking or child trafficking. In such situations, the case law has found the solution of holding the concurrence of the migrant trafficking offence and human trafficking and/or trafficking of children¹⁵. In the legal literature¹⁶, the fairness of this solution was appreciated, since the social values protected by criminalizing these acts are different and require, individually, protection under criminal law.

Placing the migrant trafficking offence among offences relating to state border crossing is not accidental or without important consequences. The social value protected by the criminalization of the migrant trafficking offence – the protection of the Romanian state border – represents the justification for holding the act in concurrence with other offences if, by committing migrant trafficking, certain fundamental rights of the person are infringed.

Conclusions

Therefore, migrant trafficking is not an isolated phenomenon and it is not a phenomenon that must be perceived separately from the context of commission. Migrant trafficking involves the performance of certain activities that may predict the content of other offences. The commission of these acts also prejudices other social values whose protection implies the sanctioning of those acts as offences. Setting up an organized criminal group, human trafficking, child trafficking, illegal crossing of the border, forgery of official documents, fake identity (in the phase of attempt or terminated) may be held along with migrant trafficking concurrently.

The discovery of the acts of migrant trafficking are linked to the discovery of some criminal groups and a complex of activities undertaken by them requiring proper classification of the acts – by relating to the identification of the prejudiced social values – and a punishment proportionate to the gravity of the acts committed. Suppression of this complex phenomenon seems impossible, what is possible is to decrease it by quick and appropriate punishment of the acts of migrant trafficking discovered and the whole complex of criminal activities carried out for the purpose of migrant trafficking.

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¹⁵ The High Court of Cassation and Justice, criminal section, decision no. 1997/2014, www.scj.ro; The High Court of Cassation and Justice, criminal section, decision no. 1342/2014, www.scj.ro.

¹⁶ V. Dobrinoiu, N. Neagu, *op. cit.*, p. 321.