THE NEED FOR A EUROPEAN CRIMINAL LAW – AT THE CROSSROADS BETWEEN TRADITION AND FUTURE

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Abstract:
The new era of the European Union"s criminal law clearly indicates that a new perspective on the penal law issue is needed. That is why the European Union is the proper laboratory for this common law. The idea of legal harmonisation, which has been significantly acknowledged in the last twenty years by all criminal law scholars, is no longer a process, it is a result. Thus, it allows the assertion of European criminal law absolutely necessary to be able to impose its own normativity to the criminal law of the Member States. The many changes that have occured between the countries during the last decades, as technological achievements, the four liberties and so on, have very well facilitated the growth of transnational criminality and this is the point where we need to undertand that it is absolutely necessary to reconsider the role and the ways of Criminal law, in general and of European Criminal Law, especially.
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More and more, Criminal Law tends to get a more prestigious and important place in the European construction field and so it is now possible to talk about the existence of an EU Criminal Law which is supposed to be more than just the old Corpus Juris or other international attempts to influence the national law by indirect means.

If we even think about the fact that European Communities were born for economic and then political reasons, I think we can agree upon the fact that it is a good moment to think about other needs, such as freedom, security, justice. As Europeanists, we have reached a point

where the words of Andre Jean Arnaud really mean something: ”the reality of European Communities is a challenge to the traditional legal reason. It was built in an anarchic manner; its institutional organisation as well as its legal norms are not unitary. Only a flexible logic would allow understanding the theoretical way of elaborating a Law that escapes the classical categories.”[1] The many changes that have occurred between the countries during the last decades, as technological achievements, the four liberties and so on, have very well facilitated the growth of transnational criminality and this is the point where we need to understand that it is absolutely necessary to reconsider the role and the ways of Criminal law, in general and of European Criminal Law, especially.

European Criminal Law is concerned with a multi-dimensional overview of legislation and case law, which plays a role in both European and national courts, national parliaments and European and other authorities and structures. ”This is a hybrid system, even if they have some notions and values, which therefore justifies its classification as a separate branch of law. European criminal law also requires the establishment of a criminal justice system for the European Union, which should be considered an ongoing and progressive task.”[2] Since criminal phenomenon knows no borders, European Union appears to be both a cause and a remedy for the evolution of Criminal Law.

The first condition for the emergent need of a European Criminal Law is the development of a European mechanism able to edict a new corpus of rules with a real influence on the national legislations of the member states. Most of the European regulations have an indirect influence over the national criminal law system. The field of applying the EU penal law aims the sphere of the so-called “*Euro-offences*”,

[1] Arnaud, Andre Jean, *Pour une pensee juridique europeenne*, PUF, coll. Les voies du droit, 1991, p.203;
[2] Klip, Andre, *Dreptul penal european. O abordare integrativă,* Ed. Cartier Juridic Intersentia, ed. A 2-a, 2012, p. 469;

meaning those referring to terrorism, traffic of persons and sexual exploitation of women and children, illegal drugs traffic, illegal weapons traffic, money laundry, corruption, counterfeiting means of payment, informatic criminality and organized crime, as provided in the treaty. The majority of the infractionality fields already are the object of legislative acts adopted before the Lisbon Treaty which were updated or pending update. Additional "Euro-offences" may be defined only by the Council, deciding unanimously, after the approval of the European Parliament (here, the co-decision procedure is no longer incident).[3]The penal law, as field of study, is difficult to define, because a definition entails tackling of institutions, preserving the essential elements and of the significant correlation between them. "[4]

Also, the penal law as science and law branch is different from one state to another, depending on the specific penal legislation and the penal policy of each state. At present, despite the overall diversity of the European penal law there is also a community penal law based on international treaties and conventions based on the cooperation between the European states on the European Convention on Human Rights[5]. It is of course about the penal community law norms adopted by the European Union member states which created for themselves specific organisms on an institutional level, such as: The European Parliament, the Council, the

[3] Ligia-Valentina, Mirişan, *The Impact of the Community Law over the National Penal Law - Sovereignty vs. Integration. Cooperation or Unification? –,* in Agora International Journal of Juridical Sciences, pp. 94-101;

[4] V. Mirişan, *Drept Penal. Partea Generală – Prezentare comparativă a dispoziţiilor Codului penal în vigoare şi ale noului Cod penal./ Penal Law. General Part – Comparative Presentation of the Penal Code dispositions in force and of the New Penal Code, 3rd edition,* Universul Juridic Publishing, 2011, p. 9;

[5] J. Pradel, G. Corstens, *Droit penal europeen*, Edition Dalloz, 1999, Paris – reference paper refering to the diversity of the European penal law, the penal law generated by the European Convention of Human Rights, the penal alw and the community law, etc.

Commission, the Court of Justice and The Court of Auditors.[6]Article 83 paragraph (2) from the TFUE allows the European Parliament and Council to establish, based on a proposal of the Commission, "minimal norms refering to the definition of offences and sanctions in case the closeness of the acts with law powers and the administrative norms of the member states in penal matter proves indispendable for securing the efficient application of a policy of the Union in a field which has been the objective of some harmonization". [7] Should this art. 83 par. 2 TFUE constitute the true base for the establishment of a European Union penal law then the institutions must decide to turn or not turn to penal law measures (instead of other measures as administrative sanctions) as an instrument to insure enforcement and must establish what EU policies need to use the penal law as a supplementary instrument for insuring the enforcement. As an example, the field of financial markets and the way the main players play their roles here represents a case where the penal law should be a useful additional instrument for securing the efficient enforcement of the EU policies. In the current context of financial crisis, the norms regarding the financial market aren't always observed and sufficiently applied. "This fact may seriously undermine the trust in the financial sector. A better convergence between the juridical systems of the member states, including the penal law, may help prevent the risk of an improper functioning of the financial markets and may contribute to the creation of equitable competition on the internal market."[8]

European Crimnal Law is an evolving branch of law. It has definitiley changed its character from exclusively linked to rhe state

[6] G. Antoniu, *Dreptul penal şi integrarea europeană*, / *Penal Law and the European Integration* /in RDP/Penal Law Magazine no. 3/2001, p. 9-45.
[7]Art. 83 paragraph (2) from TFUE
[8] Communication „*Consolidarea regimurilor de sanctiuni în sectorul serviciilor financiare*", COM (2010) 716 of 8.12.2010;/ *Consolidating the sanctions regime in the sector of financial services/*

sovereignity, to the field of shared competence with the European Union in this matter. The privileged trade ban in the EU is just an example that member sttes have implemented a penal norm that has been established at a european level.[9]

The center of the aknowledgement of an emergent European Criminal Law is harmonization. This complex notion, with blurred edges, defined both by the approximation of national legislations to the general common principles and by allowing, at the same time, the member states to have a national margin of appreciation that will not break the link between criminal law and state sovereignty."Both seen as a process and as a result, harmonization is a dualistic notion based on intergovernmental and european foundation, the European institutional system allows this emergent european criminal law to be pragmatic, sectorial and having a great added value to the common definition of incrimination, legal sanctions or criminal procedure, this last one being mostly approximated by the mutual recognition mechanism."[10] Definitely, to succeed in this great process, we need to focus mainly on the harmonization and, secondly, on hybridization of the proprer national solutions.

Over the years, we have established two different ways to accomplish harmonization: the positive and the negative influence.

Positive integration refers to areas where the Union harmonizes substantive law in a particular area and, as a consequence, freedom of Member States to decide other measures in that particular area has become increasingly limited. The negative integration means that European Union does not oblige Member States to implement specific legislation to harmonize the rules that stand at its origin. Therefore, negative integration on national criminal law integration was much larger

[9] André Klip, *European Criminal Law* 2-nd edition, Intersentia, Cambridge–Antwerp–Portland, 2012, p. 31;
[10] E. Gindre, *L"emergence d un droit penal de l Union Europeenne*, L.G.D.J., Paris, 2009, p. 295;

than the positive integration measures, although framework decisions and directives of criminal law are an effect of positive integration.[11]

Harmonization, or approximation, as sometimes called, it is a tried and trusted method, which finds its origin in the old community law. Regarding domestic legal basis for harmonization, it can be found in Articles 114-118 TFEU. In a particular area, Member States must comply with the minimum requirements set. However, they are authorized to establish additional provisions. According to the scope of the instrument, its additional provisions may be more or less rigid. Minimum standards must be examined in the context of an alternative to full harmonization of EU law. In some cases, minimum standards is also a first step towards full harmonization of a range of politics. This can also be inferred from the case law dealing with discrepancies between national laws in case of partial harmonization. If they compromise the equal treatment or distort or affect the operation of the market, "the competent institutions will take the necessary measures to remedy these discrepancies".[12]

The validity of the harmonization process can be sometimes doubtfull if we look at it in the light of classical categories and we could be reluctant to see the embryo of this emergent europena criminal law that defies the traditional legal thinking. But the new institutional developments, as well as the legitimacy of the harmonization process are about to make teh europen criminal law to claim the place that it deserves, the place that we deserve. But the road to get there is a long one, and there are several reasons for me to say it. The harmonization process focuses on the implementation of the European standard within a national framework. However, it is relevant to examine the actual

[11] André Klip, *op. Cit.*, Intersentia, Cambridge–Antwerp–Portland, 2012, p. 31;
[12] 21 septembrie 1983, cazuri conexe 205 până la 215/82, *Deutsche Milchkontor GmbH and others v. Germany* [1983] ECR 2633, par. 24, pe www.intersentia.com, consultat în data de 03 03 2016;

outcome of the harmonized rules. This is the law implemented as evolving actions of the executive and judicial authorities. The question arises whether the harmonization of rules will lead to harmonize implementation, where implementing mechanisms have also been harmonized. This will depend to some degree on the content of the legal instruments that have been harmonized. Harmonization of legislation clearly described the effect will be greater than if the terminology that is used can have multiple interpretations. In addition, if legal acts provide oversight mechanisms, reporting on the implementation or any other form of feedback on the effects of the rules, the default was considered the question of implementation. An example of including aspects of implementation may be found in Union, where the Treaties and secondary legislation provide for supervision by the Commission and the Court.[13]

In view of the fact that we have little control of the European Commission on the third pillar harmonization process and if it really happens, then we have over 20 languages to interpret the EU norm in their own juridical manner, I think a big European legal project is needed concerning the relation between EU law and domestic law in the field of Criminal Law. Thinking and acting big is what we need to do. This is what European Union has always been and this is its future. It was a challenge from the very beginning, as it is right now for the emergence of a European Criminal Law. Going back to the words of Andre Jean Arnaud mentioned in the introduction of this paper: ”the reality of European Communities is a challenge to the traditional legal reason. It was built in an anarchic manner; its institutional organisation as well as its legal norms are not unitary. Only a flexible logic would allow understanding the theoretical way of elaborating a Law that escapes the classical categories.”

[13] André Klip, *op. Cit.*, Intersentia, Cambridge–Antwerp–Portland, 2012, p. 38;