

Argument

Din punct de vedere evolutiv, dreptul penal și dreptul procesual penal au constituit întotdeauna redute aproape intangibile, fiind ultimele în care modificările în sfera relațiilor sociale determină modificări legislative. Cu toate acestea, în ultimii 10 ani, asistăm la o schimbare de paradigmă în ceea ce privește efectul de ricoșeu legislativ, cadrul legislativ penal și procesual penal național fiind bombardat de impulsuri modificatoare ale căror surse sunt diverse: presiunea cadrului legislativ european, reconfigurarea unor forme de criminalitate, dezvoltarea științei și tehnicii, biomedicină și bioetică, digitalizare, inteligență artificială, terorism, expansiunea în spațiul cosmic și multe altele.

Aceste impulsuri se suprapun peste o schimbare și mai dramatică, generată de obsesia generalizată pentru prevenție, pentru identificarea și minimalizarea riscurilor activităților umane, pentru intervenția etatizată în faza preinfrațională.

Am constatat o fuzionare insidioasă a celor două mari sisteme de drept continental și common-law, prin migrarea unor instituții de genul acordului de vinovăție, oportunitatea intervenției penale, compliance, due dilligence, whistleblower ș.a., din care pare să aibă câștig de cauză cel de-al doilea, mai orientat spre rezolvarea aspectelor practice, și mai puțin predispus spre analize teoretice aride.

La nivel național se constată o jurisprudențializare excesivă a dreptului penal și procesual penal prin inflația de interpretări obligatorii realizate de Înalta Curte de Casație și Justiție prin intermediul Deciziilor de dezlegare ale Completului pentru dezlegarea unor chestiuni de drept și a Deciziilor de soluționare a recursurilor în interesul legii ale Completului pentru soluționarea recursurilor în interesul legii. La acestea se adaugă intervențiile uneori discutabile ale Curții Constituționale a României care, prin ale sale decizii de constatare a neconstituționalității unor dispoziții legale, a devenit un fel de legiuitor incognito, obligându-ne nu doar să facem abstracție de o normă care nu întrunește standardele

constituționale, ci și la a o interpreta total sau parțial într-un anumit mod.

Un alt aspect care tinde să ia o turnură interesantă o reprezintă conceptul de proces echitabil cu toate drepturile persoanelor suspecte sau inculpate, care au o consacrare legislativă, o aplicare practică concretă, o divizare mai mult sau mai puțin evidentă în ceea ce privește persoanele juridice și o periclitare serioasă în contextul utilizării inteligenței artificiale în procesul penal.

Toate acestea și multe altele reprezintă tot atâtea motive de reflecție, poate de îngrijorare pe alocuri, declanșând un demers previzionar fără precedent: o anticipare a tendințelor evolutive ale dreptului penal și procesual penal din perspectiva celor șase școli de drept penal din România, dar nu numai, sub titlul „Dreptul penal al viitorului. Generații”.

E o (pre)viziune a „penaliștilor” contemporani, fie ei teoreticieni sau practicieni, structurată pe trei niveluri, sau mai bine zis pe trei generații: Generația 1.0 – „Profesorii”, Generația 2.0. – „Activiștii” și Generația 3.0 – „Învățăceii”. Cum văd aceste trei generații din Școli de drept penal diferite evoluția dreptului penal și procesual penal în România și nu numai, care le sunt temerile, certitudinile, curiozitățile și, mai ales, previziunile?

Nu în ultimul rând, se impune să subliniem faptul că la acest proiect și-a adus contribuția un invitat special, prof. John Vervaele, președintele Asociației Internaționale de Drept Penal, ale cărui gânduri le puteți regăsi în volum, atât în limba engleză, cât și în traducere.

Sperăm că rezultatul acestui demers va fi unul inedit, cu un impact semnificativ asupra cercetării în domeniul științelor penale la nivel național.

Cu speranța unui drept penal riguros, just și ancorat în realitate,

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Coordonator

Generația 1.0 „Profesorii”

Criminal Law of the Future. Generations

Prologue

*John A.E. VERVAELE**

I. Intro

Criminal law of the Future... Generations cannot only be understood in a broader societal and political context. For that reason, I propose to approach the topic in three “tempi”. In the intro I would like to sketch briefly this broader context. In the second part, I propose to look at the impact on the criminal justice system and finally, in the third part, I would like to highlight some important new features and challenges of this impact.

Societies are, of course, never static, but the speed and the impact with which substantive changes are taking place is rather unseen. The way in which our social-economic and governance models, but also private living patterns are shaped, has been fully transformed in the last three decades in what has been labeled as the *post-industrial society*. A lot of these changes are related to internationalization, digitalization and policy integration of our societies. They have in common the fact that the Nation-State is in loss of sovereignty, power and control and that new models of economic and political governance are imposed, in which private players (mostly important corporations) play an increasing role on a global scale and states shift from Nation-states sovereignty to forms of inter-state cooperation in an international setting.

Internationalization can be defined as a process of increasing cooperation between states and societies. This has become very visible in the last century, including with the setting up of international bodies as the UN, the World Bank, IMF, but also the G7-G20 etc. and of course also with strong models of regional

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governance, as the EU. The *globalization* of society is considerably more recent than the process of internationalization. Since the 1970s there has been a significant increase of standardization and unification of social processes (i.e. economic and cultural) by which they have become global. The idea of a global city¹ is the result of this process. The globalizing society is based upon a worldwide increasing mobility of persons, goods, services and capital, but also of labour flows, be it to regular or irregular migration. This globalization comes also with an increasing competition for leadership when it comes to access to mineral sources or dominance of new markets. Canadian-US firms are dominant in the field of global mining of gold and silver, US firms are dominant in the digital services, Chinese private and public firms are dominant in the last generation digital technology and are also very active in the field of mining rare earth elements. This comes, of course, with increasing disparities between the North and the South and further increase of migration flows from the South to the North. *Regional Policy Integration* is a post-World War II phenomenon, by which policies of Member States are combined to form a whole (in Latin, the term *integer* means „whole” or „entire”). In other words, regional integration aims at common policies in a common area. This integration process is regional and goes hand in hand with the creation of supranational regional bodies, producing integration law and, eventually, by providing for regional adjudication in integration matters by a supranational Court of Justice, as is the case in the European Union.

Digital Revolution & Artificial Intelligence. These processes of internationalization, globalization and integration have been combined in the past decades with the transformation of our societies into post-modern information societies, because of the widely spread availability and usage of Information and Communication Technology (ICT) and the way in which it has reshaped social

¹ S. Sassen, *The global city: New York, London, Tokyo*, Princeton, Princeton University Press, updated 2d ed., 2001.

behavior and social structure. The *information society*² is a post-industrial society³ in which information and knowledge are key-resources and are playing a pivotal role. However, information societies are not solely defined by the technological infrastructure in place, but rather as multidimensional phenomena. Any information society is a complex web, not only of technological infrastructure, but also as an economic structure, a pattern of social relations, organizational patterns, and other facets of social organization. Therefore, it is important to focus not only on the technological side, but also on the social attributes of the information society, which includes the social impact of the information revolution on social organizations, such as the criminal justice system. Moreover, the postmodern age of information technology transforms the content, accessibility and utilization of information and knowledge in the social organizations, including the criminal justice system. The emergence of a new technological paradigm based on ICT has resulted in a network society, in which the key social structures and activities are organized around electronically processed information networks. There is an even deeper transformation of political institutions in the network society: the rise of a new form of state (network state) that gradually replaces the nation-states of the industrial era. In this rapidly changing age, the structure of traditional authority is being undermined and replaced by an alternative method of societal control (surveillance society). The transition from the nation-state to the network state is an organizational and political process prompted by the transformation of political management, representation and domination in the conditions of the network society. All these transformations require the diffusion of interactive, multilayered networking as the organizational form of

² M. Castells, *The Rise of the Network Society. The Information Age: Economy, Society and Culture*, Volume 1, Malden, Blackwell, second edition, 2000.

³ D. Bell, *The Coming of Post-Industrial Society*, New York, Basic Books, 1976.

the public sector. Information and knowledge are key resources of the information society, affecting the social and political structure of society and state and affecting the function, structure and content of the criminal justice system. The increasing importance of the information society and meta-data result in models of private and public governance that are based on strengthening of information positions, information mining and use of information for all type of societal activity, going from direct marketing to bitcoin markets and even prediction of criminal risks.

The recent development of blockchain technology and the expansion of *artificial intelligence* (AI) is at least as important, as we see that AI systems have increased ability to collect and analyze data from a digital environment, to take actions to achieve certain goals that are designed, but even more important that they are self-learning, meaning that they can identify patterns in available data and apply them and thus improve their performance and to a certain extent their autonomy. Speaking examples are automated cars or automated war robots.

II. Impact on Criminal Justice of and for the Future?

The *internationalization* of criminal justice is not new at all. International public law conventions that prescribe binding substantive criminal law rules have been in existence for a century now, although their number and their impact have increased significantly. What is new is, I would say, twofold. Firstly, in the field of criminal justice, international organizations, such as the UN, the Council of Europe, the OECD and the FATF are monitoring the compliance process with international obligations, mostly through very detailed and politically binding evaluation mechanisms. We can find clear examples in the field of transnational organized crime (the UNTOC Convention), money laundering (FATF recommendations), corruption (the UNCAC Convention) and terrorism (the 19 UN Conventions). Secondly, international organizations as the UN Security Council is imposing international obligations upon Member States in criminal matters,

without any specific conventional source and, thus, bypassing the signature and ratification process. In the aftermath of 9/11, the Security Council made the conventional UN “acquis” in terrorism matters binding, independent from signature or ratification of Party States. Through resolutions, based on Chapter VII of the Charter, the Security Council has closely linked global security with the anti-terrorist criminal response and has called on states to criminalize conduct such as travel abroad, facilitate traveling or offer or receive training etc., provided that they are committed for terrorist purposes⁴. The content of the mandatory resolutions leads to proactive or preventive criminalization based on risk assessment, undermining substantive legality, procedural guarantees and fundamental rights⁵.

Globalization of criminal justice is much less developed than the internationalization dimension. Societal globalization does not automatically lead to globalization of criminal justice and not even to globalization of political authority with regard to criminal justice. We don't have prosecutors or courts that can investigate and respectively adjudicate suspects of crimes with a global reach or harm. Criminal Justice is – at a first sight – not part of the global city. There are, however, exceptions. The development of international criminal law and the establishment of international criminal courts, especially the ICC, can be considered as a very good example of dealing with globalized standards and institutions for the prosecution of the international core crimes (war crimes, crimes against humanity, genocide and aggression) and, in fact, also for dealing with justice and peace in situations of transnational

⁴ Resolution no. 2178 (UNSCR 2178) of 2014 is a good example. See A. De Guttry, F. Capone, C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, The Hague, Asser Press, 2016, p. 533.

⁵ J.A.E. Vervaele, *Foreign (Terrorist) Fighters: combatant and/or Terrorists or just Enemies?*, Engelhard, M. & Roskandic V. (eds), *Dealing with Terrorism: Empirical and Normative Challenges of Fighting the Islamic State*, Duncker & Humblot, pp. 35-60; J.A.E. Vervaele, *Terrorism and Anticipative Criminalization. Ius Poenalis sine limite?*, in M. Engelhard, V. Roskandic (eds), *op. cit.*, pp. 175-191.

justice, like f.i. in Colombia⁶. It remains, however, an open debate to which extent their competence should be extended to other crimes, be it transnational crimes to be upgraded to international core crimes or to a list of specific serious transnational crimes, as very serious terrorist acts or ecocide.

Regional Policy Integration. The elaboration of common policies in a regional integration institution has become an important model when it comes to regulation. Good examples are Mercosur in Latin America or ASEAN in Asia, but the most appealing one is of course the European Union (EU), as it has not only elaborated a supranational model, going beyond intergovernmental cooperation, and adopted an internal market with many common policies in the areas of agriculture, fisheries, customs, transport, environmental protection, financial services etc. Moreover, the EU has been able to integrate parts of criminal justice policy in the Area of Freedom, Security and Justice. Meanwhile, the EU has adopted a vast body of law related to harmonization of substantive criminal law, criminal procedure and procedural safeguards, proper instruments of judicial cooperation (as the European arrest warrant) and supranational judicial agencies (as Europol, Eurojust and the European Public Prosecutor's Office). So here we can identify a speaking example of the elaboration of an EU criminal policy approach. However, also in this setting we can identify that in the Area of Freedom, Security and Justice, security has become a dominant paradigm that justifies further criminalization in the field of serious transnational crimes.

Another aspect of the regional approach is related to the activity of regional human rights courts, mainly the Inter-American Commission and Court of Human Rights and the European Court of Human Rights. I mention them under the regional approach, as we don't have a proper human rights court at the UN level⁷. The

⁶ J.A.E. Vervaele, *The peace process and transitional criminal justice in Colombia: complementarity assessment under the Rome Statute*, in *International Review of Penal Law*, vol. 89, no. 2, 2019, pp. 21-54.

⁷ There is, however, the Human Rights Committee at Geneva, but it does not have a jurisdictional standard.

case-law of these Courts illustrate interesting developments in relation to criminal justice. First of all, the Courts are imposing far going positive duties (also called procedural human rights obligation) upon states to protect human rights, including mandatory duties to investigate, to prosecute and to punish crimes. This is certainly the case in relation to absolute human rights, as right to live and the prohibition of torture and inhuman treatment. This means that states have duties in relation to substantive criminal law, criminal procedure, judicial cooperation etc. when it comes to the effective protection of these human rights. The aim is to avoid impunity. When it comes to international core crimes and serious violations of human rights, the Inter-American Court of Human Rights and to a certain extent also the European Court of Human Rights have paved new ways to upheld criminal justice based on customary law and *ius cogens*, leading to acceptance of customary offences (not based on national substantive legality), abolishment of national amnesty laws (even if adopted by democratic parliaments) and setting aside of time bars for investigations and prosecutions in criminal matters.

Digital Revolution & Artificial Intelligence. Domestic criminal justice is faced with societal changes by which perpetrators are committing crimes and by which the crime, the perpetrators themselves and, *inter alia*, evidence are not always linked with the territory of the nation-state. As a consequence of the increasing digitalization, the domestic criminal justice systems have to protect new legal interests (*Rechtsgüter*), which usually have a strong transnational and digital background (for example, protection against hate speech and xenophobia, protection against child pornography or protection against securities fraud or against ID theft). The impact though is certainly not only related to specific offences. It has also a strong relationship with the general part (as criminal liability models for instance) and with criminal procedure. Enforcement authorities do need new powers and tools to investigate in a digital setting. The sword of criminal justice has changed substantially by the use of digital-led investigation (online criminal searches, the monitoring of data flow, data processing) and