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SEVERAL REFLECTIONS OVER UNIVERSAL JUSTICE

Abstract

The idea of universal justice suggests a justice that includes both the trial and complementary activity of tracking and enforcement of judgments exercised by a single state whose organs would make abstraction of where the crime was committed, of the nature of the crime but as well of the way in which the fact was incriminated and punished under national laws. Understood in this very broad way, universal justice is synonymous with justice globally performed, expression of global solidarity of community members and their interest to protect the essential values of the world community. Today this idea is not a distant prospect but a becoming reality even in our eyes.

1. In recent years the principle of universal justice is the subject of extensive discussions. This theme was also the subject of a preparatory meeting organized by the International Association of Criminal Law and will be subject of a section of the AIDP Congress in Istanbul, September 2009.

As shown in the overall work of the preparatory colloquium section IV of the 18 th Congress of International Criminal Law in Xian (China, 12-15 October 2007) universal justice is the most important way to combat the impunity of international crimes, became one of the illnesses from which our age suffers; failure to follow the most serious crimes that affect the whole community between nations, is often considered a greater evil than the crime itself[1]. Universal justice is regarded as an effective means to prevent international crimes and to punish the perpetrators thereof, shown in the resolution adopted by the Preparatory Colloquium participants above mentioned.

2. In its most extensive form, universal principle of justice suggests a justice that includes both the trial and complementary activity of tracking and enforcement of judgments exercised by a single state whose organs would

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[1] Isidro Blanco Cordero, *Raport general la tema „Competenţa universală"*, Criminal Law International Magazine no.1/2 quarters, 2008, p.13.

make abstraction from the place where the crime was committed, from the nature and way in which crime was incriminated and punished in national legislation.

Understood in this very broad way, universal justice would be synonymous with justice globally performed, expression of global solidarity of community members and their interest to protect the essential values of the world community.

Such a justice would exclude not to punish any crime: moreover the most serious violations of criminal law, as a result of differences in national laws. Evaluating unseemly acts by such a justice would be by reference to a system of uniform rules in the world, whose violation would trigger the application of the penalties provided by these rules. It also would operate uniform rules of procedure as well as the enforcement of sanctions in the world.

Acting under these conditions, the authority of sole state would only be entitled to pursue, to subject to court, prosecute and enforce the punishment of any person who would violate the universal rules of criminal law, regardless of the place where the crime was committed, of the individual offender, of the place where he has been found out, of the domicile of the crime victim, etc. ., being determining only the chronological order of referral, this being of office or from any natural or legal persons.

As such a perspective is very far, any discussion at this time over the basis of universal justice with this very broad content would seem a mere matter of speculation.

3. If, however, this theme is currently discussed not as a distant prospect but as a becoming reality even under our eyes and under the existing conditions of national states, this would be explained by the fact that to the concept of universal justice would assign the meanings further analysed but a more limited content. Assumption that currently foresee would be that when national states exist but they are grouped to safeguard their common interests. Since the fight against international organized crime have such an interest, it would also be justified for states to unify their criminal laws, even only in relation to a particular category of crimes, as well as procedural laws relating to prosecution, trial and execution of the decision for crimes belonging to the unified group; in these limits a universal justice can happen, because the authorities of each Member State could pursue crimes of the unified group, may provide prosecution and

enforcement of the sentence, excluding the requirement of double incrimination or the presence of the offender within a State or another .

4. This view, though closely does not coincide with that which has the **principle of universality** as a principle of application in the area of criminal law, currently known in national laws. In this case, national law applies, it is true, also to the offenses committed outside the national borders, but with certain limitations. Thus, the Romanian penal law limits this extension of the principle of territoriality to the facts committed by a foreigner or person without citizenship who is not domiciled in the country (thus the principle of universality does not operate in relation to Romanian citizens), claims to have double incrimination and that the offender to be voluntarily in the country or extradited for crimes directed against the Romanian state or against a Romanian citizen. Romanian law will also not apply if there is any legal impediment that would prevent the compliance with the principle of ne bis in idem. Therefore, the principle of universality would not apply, if there is an issue that prevents the movement of criminal action or criminal or the continuation of the criminal process or the execution of punishment. If punishment was not performed or was only partially executed, this will be considered at the application of new sanctions that will have to take into account what has been executed.

The principle of universality implies, therefore, the existence of different national laws (thus the requirement of double incrimination) while universal justice, at the level of a group of States, takes into consideration unified criminal laws and criminal procedure, double incrimination become unthinkable.

Even if in the conditions of the universality principle, the principle's action could be limited by a state only to a specific group of crimes (as do, for example, the Spanish penal law), it would still not create the premises of universal justice, if it would not get to similar formulations of the respective criminal content.

5. Contrary, the concept of universal justice even reduced to a small group of states implies, as seen, the existence of a unitary concept regarding the criminalization of incommodious facts, all or at least the most serious and will be described in the same way. Certainly, it is difficult to achieve this objective as compared to national traditions, the different level of development of each country, etc. being possible to accomplish only on the extent of performing of certain economic, political, social, legal homogenization of the entire community at a planetary level or at the level

of a group of states, a premise absolutely necessary for the identical formulation of all crimes or of the worst of them.

Currently, as revealed by some authors, such a goal is not easily achieved even only at the level of a group of countries (for example, at European level states).

6. It was correctly said that European integration process is performed with difficulties: evidence would be the ostracism of England by De Gaulle, the 2 negative Norwegian referenda, the rejection in the first instance by Denmark of the Maastricht Treaty, attitude subsequently amended, the difficulties for the approval of the Constitutional Treaty, negative responses to referenda in France, the Netherlands, Ireland, accesses of contrary attitudes against European Union among the new entrants states into the European Union[1].

Experts believe Europe would be currently established from several concentric circles: a group of 6 founding countries of the European Union in which it is not contested the privileged ties between France and Germany which have a decisive role; the Europe of the 15 that prepared the European Union in 2004, the Europe 12 which adopted the single currency euro, to them were later added in 2007, Slovakia, Cyprus and Malta in 2008. Another circle is formed by the countries which gathered the European Union in 2007 (Romania and Bulgaria). In these 4 circles there are also added the countries that exercise pressure in order to enter the European Union, some of them are candidates with great opportunities (Serbia, Croatia, Bosnia-Herzegovina, Albania, Macedonia) and others with more distant opportunities (Armenia, Georgia , Moldova and Ukraine)[2].

The above situations are evidence of major difficulties which prevents economic, political, social, legal homogenization, even at the level of a group of countries (the European ones). The greater will be difficulties in creating a homogeneous global community in which to apply a uniform system of criminal law and procedural.

7. To achieve this objective, the creation of a uniform criminal law, it would be necessary that the national components of the group to agree to waive a part of their sovereignty in order to enter their national criminal

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[1] Pietro Grilli di Cortona, *Crise de l'UE ou Crise dans l'Union* ,Bulletin Europèene no.705/2009, p.1

[2] Quoted texts., p.2

laws, common incrimination susceptible offences to be submitted to a unitary justice as well as the adoption of some common procedural rules regarding these incriminations. These common incriminations may, eventually, refer to, within a period to the most serious violations of the Community legal order. In these circumstances any state will be able to refer or be referred to procedural action susceptible to lead to prosecution, trial, punishment, execution of punishment of the guilty if the deed committed corresponds to the legal model of an incrimination of a community type.

Such common incriminations may relate in the first period, to the facts of genocide, terrorism, piracy, illegal diversion of aircraft, counterfeiting currency, prostitution, corruption of minors or unable, illegal trafficking of drugs and narcotics, illicit trafficking or clandestine migration of people, the mutilation of the genitals of women and any other crime that the international community would consider that it must be monitored and sanctioned by any community state.

8. Obviously, that to the extent in which such a justice would be limited only to serious offenses mentioned, this would constitute a first limitation of the sphere of action of the principle of universal justice. There is also a second limitation resulted from the principle of non bis in idem and the judged working authority and namely that the defendant was not acquitted, disgraced or lightly punished for these acts and should not have executed punishment. If he has executed punishment even in part, it will take account of the penalty executed in the sanction decided by a court who exercises justice community. This instance will follow in the same time that the national court should not adjudicate symbolic sanctions in order to circumvent the justice community.

9. Discussion on universal justice acquired new accents as a result of the relative frame decision on the application of mutual recognition principles of judicial decisions (framework decision no.2006/783/JAI of Council from 6th of October 2006 relative to the application of mutual recognition principles of judgments - Official Journal No. L.328 of 24th November 2006) principle considered as a structural principle of the whole community law[1].

[1] Adan Nieto Martin, *Fundamentos constitucionales del sistema europeo de derecho penal*, Criminal law magazine no.1/2008, p.37-38; 40-46

In its current form, this principle has been outlined for the first time within the European Council in Cardiff in 1988, was then resumed in the Action Plan Council and the European Commission in the same year. The principle was also developed in the conclusions of the Tampere European Council in 1999 and was thereafter dedicated in the Treaty of Amsterdam and in the Constitutional Treaty by becoming a "quoin" of criminal cooperation between Member States of the European community.

The principle of mutual recognition of judgments as well as of other types of legal court documents issued by a judicial authority, producing similar effects in all countries of the European Union, has completely revolutionized judicial authority[1]. Adopting this principle enables direct communication between judicial authorities which no longer need to send requests for judicial cooperation to political or administrative authorities; on the other hand it has completely or partially abolished the condition of double incrimination only regarding a limited group of crimes from a list approved of all member states of the community. In this case, the authority which requires cooperation has only to frame the facts into one of the categories of incrimination laid down in the positive list, without such employment to be reviewed by the requested authority. This solution was consecrated also by ECJ decision of 3rd May 2007, the list of incrimination being considered the functional equivalent of double incrimination.

The principle of mutual recognition of judicial acts do not work if the respective act would violate the fundamental rights (egg. the possibility prosecution would enshrine a person on grounds of race, religion, ethnic origin, political opinions, etc.. whenever they would violate the principle of non bis in idem or the penalty limits resulting from a state of infancy)[2].

10. The first and most important result of the principle to which we refer to, is the European arrest warrant which allows the arrest and surrender of persons without being necessary to resort to its extradition. Meanwhile the European arrest warrant foresees the nonextradition principle of its own citizens, principle already limited by the Schengen Convention and the Convention on Extradition of EU. One such principle was objectionable also for the fact that it was at odds with the mutual trust which mutual recognition of judicial documents is based on. On the other

[1] Luis Arroyo Zapatero, Adan Nieto Martin, *Codigo de Derecho Penal Europeo e internacional*, Edita Ministerio de Justicia, Madrid, 2008, p.35-36
[2] Luis Arroyo Zapatero, Adan Nieto Martin, quoted texts, p.35

hand, the exclusion of nonextradition principle of nationalities does not preclude that the person arrested to be subject to the execution of the sentence where there are big chances of social reintegration, such as the one in question by virtue of the above mentioned principle may return in its State to execute the punishment or the measure of safety.

11. Another effect was the direct application of judgments of a state on another state, implicitly renouncing to the principle of double incrimination, an expression of mutual trust between EU member countries of the belief that in all these countries is also ensured the compliance with the fundamental principles of criminal law[1].

12. Another important consequence of the principle was that of strengthening the authority principle of judged thing, if a national judge has given a final decision, is no longer possible a new trial in the same case throughout the European judicial space.

13. On the procedural level, the recognition of this principle has meant the accepting the probative evidence of documents in which the decision results, as well as the preservation of evidences in order to avoid the loss of already existing probative material.

14. An important consequence of the principle of mutual recognition of court decision is also the functional recognition of the principle *forum regit actum* which replaces the *locus of regis actum*. This means that the acts of tracking, which would perform on a foreign territory, are held by the enforcement of the requesting country, even if in exceptional circumstances they would be present reduced securities than if it would apply the law of the required country (egg the search could also be performed without the approval of a judge). In this way, the requesting country makes a real export of laws since the required state will have to comply with the procedural rules of the requesting State. The only allowed exception is in the case in which the applying law of the requesting state would lead to the adoption of measures contrary to fundamental rights (of public order).

Although law export solution seems contradictory, being interpreted as a sign of not complying with the law of the applied state, the experience shows that usually the forum principle ensures greater

[1] Mireille Delmas Marty, avant propos for the paper Geneviève Guidicelli Delage, Stefano Manocorda, *L'integration pénale indirecte*, Société de législation comparée, Paris, 2005, p.15

securities for the compliance with fundamental rights, is more effective, ensure a better administration of justice, usually the applicant state exporting more stringent dispositions in obtaining and evaluating the probative material, obliging the applying state to situate to this new maximum of securities.

Until the full recognition of the principle of *locus regit actum* in the current European judicial space continue to coexist the principle *forum regit actum* and the principle *locus of regit actum* as well as the principle of mutual recognition. So, for example the relative frame decision to the preventive seizure and to ensuring the evidences establishes the principle the forum. Contrary, the Convention of judicial assistance in 2000 enshrines the principle of *locus regit actum*.

Upon some authors, the forum principle would provide greater guarantees in terms of obtaining and evaluating of evidences, while in cases of serious crime when it is justified the formation of joint research teams, it is necessary to use the *locus regit actum* principle correlated with the principal of mutual recognition of judgments.

15. Mutual recognition principle has been enshrined by the European Constitution as a basic principle of judicial cooperation of bodies on criminal matters, this principle including also the principle of bringing closer the dispositions of criminal law between Member States in order to facilitate mutual recognition of judgments. According to the European Constitution by a European framework law, it would be possible to establish uniform rules of procedure to ensure the recognition throughout the European Union of all the other categories of judgments, thereby preventing conflicts of competence between Member States. Also through a European framework law, there shall be taken measures to facilitate the unification of the activity of prosecution and enforcement of criminal judgments. A European framework law would also provide minimum common rules in order to facilitate cooperation of police bodies and of justice bodies on criminal matters in connection with the mutual admission of evidences between Member states of EU or with respect to the rights of persons involved in criminal suit or with the victim's rights, etc..

In addition to these minimal rules to unify the procedural provisions between EU states, the Constitution also provides for the possibility that through a European framework law to provide minimum rules of unifying the definition of crimes as well as of the penalty matter, at first, of particularly serious crimes such as terrorism, trafficking, sexual

exploitation of women and children, illicit drug trafficking, arms trafficking, money laundering, corruption, counterfeiting of currency, informatics crime and organized crime (art.III-271 paragraph 1 al.2). Depending on the development of crime, the European Council may adopt through a European decision other areas of crime, likely to be countered by a uniform definition of the crimes.

All these measures and future plans for the unification at a European level of the substantial and formal criminal dispositions, represent in the same time determined steps towards the creation of a universal justice in terms of the scope of powers in the enforcing of criminal repression even if under territorial aspect, this universality is partial because it is not exercised by a single universal state, but by a community of European states that agree to unify their criminal legislation in order to ensure a uniform repression at European level, at the beginning of the penalties that present a maximum severity for the European Community and later of all criminal law violations unified within the unified European judicial space.

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