

Need for Alteration of Undercover Operations in The Frame of European Legislation for The Successful Suppression of Organized Illegal Immigrant Trafficking and The Associated Transportation of Individuals Enmeshed in Terrorism

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Submitted: 2024, May 09; Accepted: 2024, Aug 07; Published: 2024, Aug 19

Citation: Papanikolaou. A. (2024). Need for Alteration of Undercover Operations in The Frame of European Legislation for The Successful Suppression of Organized Illegal Immigrant Trafficking and The Associated Transportation of Individuals Enmeshed in Terrorism. *In J Fore Res*, 5(1), 01-05.

Abstract

The purpose of the present article is to make an effective proposal for combating terrorist attacks related to illegal migration. It is stated that terrorist attacks and illegal immigration are organized criminal phenomena that are occasionally interconnected. The peculiarity of these crimes is that they radically affect societies and that combating preparatory illegal acts for their perpetration does not restrain the entire criminal activity. Under these circumstances it results that undercover operations are an effective, penetrative means of preventing organized criminal activities. Finally, it is concluded that the confluence of two particularly serious crimes leads to the proposal for adopting a new (more penetrative) type of undercover operation through the prism of the principle of proportionality.

Keywords: Terrorism, Immigrant Flows, Undercover Operations, Directive, Principle of Proportionality

1. Introduction

The severity of terrorist attacks at the international level over the last several years and the fact that these attacks have ultimate semantics (Western lifestyle/ Western religions – Christian denominations), which are predominantly derived from Muslim extremist organizations with unclear motives and targets, creates a continuous and indiscriminate ambiance of insecurity for citizens [1-3]. This insecurity impinges not only upon states but also upon the Western – European lifestyle, resulting in human casualties and negative effects on the everyday lives of all citizens.

2. Basic Statements

It has been argued that the actions of such organizations are supported through the transfer of immigrant flows. Recently, an increase in refugees and immigrant flows- has been recorded at the global level, with the basic characteristic of the mixing up of these two elements with no overt distinction between them in praxis [Nemeth, 2016]. In this context, illegal migration has taken the form and effect of transnational organized criminal activity [4-9]. As has been pointed out, relationships that have developed between transnational organized crime and terrorism are not static but have evolved into a “continuum” in which the borders between terrorist and crime groups are not clear and clearly defined [10]. The effects of terrorism in society

are rapidly becoming significant and patently recognizable. Moreover, in the wider social context, immigrant flows cause an imbalance at multiple levels of a society because they alter the composition of the population in an extremely short time and in an unorthodox manner (Martin, 2019).

According to the abovementioned data, it is necessary to identify effective solutions and make proposals to solve a problem that not only has national dimensions and side effects but also has European dimensions, affecting most European countries [11]. Both migration and terrorism are global phenomena, but their almost synchronous outbreak in Europe in recent years has created concern and led to a search for solutions within the European framework, especially within the framework of European criminal policy and general politics, which tend to be integrated in the areas of freedom, safety and justice (Amsterdam Treaty, 1997).

3. The Role of Criminal Law and Criminal Policy in Migration and Terrorist Phenomena

Criminal law and criminal policy are basic means of exercising social control and rooting out criminality. In this manner, they tend to constitute a means of supporting and exercising policy, especially for the universal legally protected rights (Universalsrechtsgüter) in a risk society (Beck, 1992; Bowling

et al, 2012). Currently, criminal law has finalistic leanings (Volk, 2002; Beulke, 2008; Roxin et al, 2012; Wessels et al, 2012). Therefore, it focuses mainly on preventive action. In that frame of its activity, criminal law aims - not only at the protection of legally protected rights as a means of answering the demand for safety [12-18]. In this respect, the penal system is being transformed into a dynamic form, where criminal law applies before the assault of a legally protected right, which is called "Dynamisierung der Rechtsgüter;" thus, its aim is usually the protection of legally protected rights that have been denied [19]. That dynamic is the reaction of criminal law to a risk situation (Risikosituation), and, thus, to a risk society, as has been described [18]. Therefore, this tendency becomes more profound in the risk society into which modern globalized society has evolved, where prevention is enhanced [14,18,20,21]. The security of legally protected rights aims at the security or legal certainty of the law.

Additionally, as a reflection of criminal law's preventive action, the benefits of the empirical social reality become legally protected and are formed through the prism of a security state (Sicherheitsstaat) (Pile et al, 2018). The state of security (Sicherheitsstaat), which aims to ensure security, becomes the state of prevention, which suggests the political form of a risk society, where the danger is not just present, it is a threat.

Furthermore, the ambiguous and modified criminal theory concept of the legally protected right (equitable good) - (Rechtsgut) (Krey, 2001; Smith et al, 2015), which acts either as a purpose or as a mean for criminal law, is restructured in the direction of *international legally protected rights* [14,22,23]. For these reasons, *safety in the European legal arena and the preservation of social, economic and religious peace* is raised, in the opinion of the author of this article, as a *legally protected right*. As European society tends towards integration at all levels, European criminal law should protect and ensure these social values that enhance and support the European construction. Safety, in an integrated European society, also constitutes European values according to the Amsterdam Treaty (1997) (Article 1.10).

However, social, economic and religious peace is a precondition for the growth and prosperity of European society which has as an objective its economic and social progress (Article 1.2 and 1.5) This peace is strongly impinged by illegal immigrant flows, which, as has been indicated, change the above- mentioned conditions in an extremely short time and in an unorthodox manner. Therefore, safety and peace at the above-mentioned levels are very important for the progress and integration of a European society so, they should be especially protected.

At a practical level, within the framework of the *coherence of the elements of the crime* to the criminal aspects and targets, *criminal policy* leads to the adoption not only of repressive but also of *preventive measures*. As criminal law has finalistic leanings, it currently trends towards globalization, which subsequently causes a globalization of crime policy and vice versa. Apart from that, the criminal phenomenon influences positive criminal law, where the sense of legally protected rights (Rechtsgut) tends to be expanded (Meliá, 2008). Thus,

criminal theory is "synchronised" with criminal policy and criminal policy influences criminal theory as well, as the latter corresponds to its role in crime prevention (Kindhäuser, 2006). Accordingly, European criminal law should be synchronized with European crime policy.

In particular, concerning the violation of legally protected rights, the author believes that the peculiarity of the crimes of illegal migration and terrorism lies, inter alia, in that they are offences against the state or, in a broader sense, European dominion as well as human values. There are simultaneous effects on social, religious and political structures, the violation of state borders and state sovereignty, and offences against human life and values, – such as the dignity or personal freedom of innocent citizens and the transportation of people under sordid and dangerous conditions.

Another peculiarity of terrorism is that it is accompanied by preparatory acts that themselves constitute another crime. More specifically, the preparatory illegal acts of a terrorist attack (for example, forging documents, gun sales and purchases, and illegal migration) transpose the effect of criminal law to a theoretically "earlier and preposterous" stage with an extremely austere interventional method that responds not to the actual act (for example, the misdemeanour of forging documents or - illegally entering the country) but to the entire act (for example, the terrorist attack) at which they aim. In this manner, are supported the preventive criminal law actions. Therefore, punishing or trying to combat an attempted terrorist attack by also punishing or combating illegal migration has additional symbolism, another meaning and an additional side effect in criminal praxis and another impact at the social level.

Therefore, the main criterion for the adoption of preventive measures for combating such phenomena is *effectiveness*. In praxis, there is the need for effective preventive criminal policy based on police intervention related to globalized criminal law, which, as has been mentioned, has preventive action. As long as criminal law constitutes a part of the duty of the state with regard to security, since prevention is preferred, the effective use of advanced investigative techniques, such as interception and undercover agents, will be needed [25]. These measures fragment the impermeability of the illegal action, focusing on the intelligence-led policing (Winter, 2004; Coninx, 2004; Wandl, 2008; Sieber et al, 2011) that underlies the guaranties of criminal and criminal procedural law (PACE 1984; RIPA 2000; 110a, 101 StPO). Under these circumstances, *the borders* between criminal, criminal procedural and public security law are *cushioned*, reflecting, inter alia, the rule of the unity of law (Kelsen 1945; Kelsen 1967) [30,31].

Subsequent to the abovementioned discussion, criminal law, in the author's opinion, currently lies at a boundary point. Within the framework of the European accomplishment, – the compulsory harmonization of the legislation and boundary conditions that are required enables the protection of human rights, not by regurgitating them to an exclusive target but through the *security of the conditions- prerequisites* necessary for *human rights to exist*, which is even more important in our modern risk society. Within that framework, citizens are called

on to take a more energetic role in the security of their human rights, especially in the protection of their safety. In the context of the democratic state of justice (Rechtsstaat), the realization of the protection of legally protected rights (Rechtsgütern) is relied upon not only by the state that guarantees them but also by the citizens who accompany the state responsible for their realization (Glaessner, 2003). This implies involving them in any way in the actualization of criminal policy, for example, by giving information to police authorities and their agents or consenting to invasive measures such as undercover operations, which reflects the unity of fundamental human rights [14,32].

The subsequent key role of undercover operations and the practical implication and use of undercover operations in European legislation to fight against terrorism and cross-border crime. Specifically, undercover operations [article 20 United Nations Convention against Transnational Organized Crime (Palermo, 12 December 2000), article 12, 23 [Convention of Naples II (1997)], article 20 Directive EU/2017/541 of the European Parliament and of Council that substituted the Framework Decisions 2002/475/JHA and 2008/919/JHA) and Council Act 2000/C197/01] are a leading means of preventing and repressing the action of organized circuits as well as detecting organized activity that is expressed as a “lone wolf” attack [32,33]. That practice is preferred as the most appropriate way to handle such threats and is preferred -in general- as a preventive action.

In British law (PACE 1984, RIPA 2000), the preconditions of the implication of the measure are quite flexible as long as effectiveness takes precedence over formal legality. The legality of action has, in its interpretation, acted as the ultimate border, beyond which the consequences are the exclusion of evidence and the stay of proceedings (abuse of process). In contrast, German law (110a StPO, 101 StPO) is more normative and provides flexibility and competence of action. Undercover agents can have false identities, can act in cases of emergency without the permission of the prosecutor and can have an extension of the time limit of their action. However, the measure applies to offences that are of great importance, as these are described in the law, and the inferences of guilt need to be adequate.

A *common element* of the way the measure is judged in all the abovementioned legal orders and the concurrently implicit criterion of its legality is the *rule of proportionality/necessity*. The rule acts as a border and simultaneously as a criterion for the legality of these actions in all legal systems. That shows that, beyond the normativity of all legal systems, the sense of justice is reflected the same way within them. Furthermore, the nature of the measure of undercover operations as a proceeding action of double function (Doppelfunktionprozesshandlung) (Roxin, 2012; Kühne, 2010), in the opinion of the author's, is inextricably linked in regard to its implication and to constitutional and fundamental principles, as the rule of proportionality, which also acts in the fields of criminal procedure law and criminal law. These principles act as a compass for the legality of the measure. For that reason, the principles are expressed in the legislation that regulates undercover operations [34-36].

The rule helps in practice with the convergence of the distinct

legal orders especially in the European legal environment, and guarantees the *fractional character* of criminal law-, which reflects the rule of the *state of justice* (Rechtsstaat) (Roxin, 2006); this guarantee refutes those blaming governments for a state of surveillance [37,38]. Furthermore, within the framework of the improvement in the mutual collaboration and information exchange (Decision 2008/615/JHA of the Council and 2008/616/JHA of the Council, availability principle) (OJ, L 210/1, L 210/12) for the fighting of terrorism and cross-border crime, one of which is illegal migration, Europol has the ability to form common surveillance groups and collaborates with Eurojust, Interpol and FRONTEX, which use undercover operations to attain their targets [12]. Similarly, UNODC (the United Nations Office of Drugs and Crime) collaborates with Interpol and Europol on organized crime and illegal immigrant trafficking according to the abovementioned practices (www.unodc.org). Therefore, I – Map was founded (<http://www.imap-migration.org>); among others, it facilitates the exchange of information and analyses immigrant flows and destinations to support efforts to fight illegal immigrant trafficking.

Therefore, collaboration and operations through a common legal basis in criminal law is a prerequisite for combating criminal phenomena such as terrorism and organized illegal immigrant trafficking. Additionally, legality is a prerequisite and a requirement in each action and operation that has effects on society.

4. Conclusion

According to the abovementioned data, the confluence of two particularly serious crimes that radically effects the social, political and religious structures of societies makes it necessary to differentiate undercover operations that attempt to solve both crimes simultaneously. It is also concluded, that while undercover operations are necessary for both forms of criminality, these forms are either occasionally or frequently intentionally interconnected.

This leads to the proposal for the creation of “two-speed” undercover operations. One track that is already known and another, more severe, that is *proportional to the severity* of these crimes. Consequently, as the appearance of the criminal phenomenon is specific and severe (2 in 1), it is required pursuant to the necessity principle to strengthen the conditions of the application of the measure. That alteration will refer in that single case and only with the adoption of a directive (Richtlinie) that will describe the framework of action of undercover agents and integrate their action into domestic legislations. The National Regulatory Law Will Be Transformed Accordingly in Particular:

- regarding the *group of persons* against which it is arranged: it should be *expanded*
- regarding the *degree of suspicion*: it should be *less potent/intense*
- regarding the *procedural measure making the basis*: it should be *faster*
- regarding the *seriousness* of the crime: it should be permissible for *misdemeanours that appertain to the law against terrorism or smuggling* or proven *misdemeanours* that are *preparatory* for terrorism or smuggling (e.g., document forgery)
- regarding the *duration* of the undercover operation: it should

be longer

- regarding the *place* in which it is permitted: it should be permitted not only in public but also in private locations
- regarding the *use* of attained evidence: a *broader context* should be permissible.

Based on the remarks and the individual conclusions cited above, it is believed that an alteration of the European legislation, according to the proposal, will aid in the effective adoption of common criminal laws and provide police cooperation according to the European Union's policy for the successful suppression of organized illegal immigrant trafficking and the associated transportation of individuals guilty or suspected of terrorist attacks, which is a phenomenon with serious side effects in Europe [39-49].

References

1. Aubrey, S. M. (2004). *The new dimension of international terrorism*. vdf Hochschulverlag AG.
2. Zöllner, M. A. (2009). *Terrorismusstrafrecht: Ein Handbuch*. CF Müller GmbH.
3. Stierle, J., Wehe, D., & Siller, H. (2017). *Handbuch Polizeimanagement. Polizeipolitik–Polizeiwissenschaft–Polizeipraxis*. SpringerGabler, Wiesbaden
4. Koser K. D. and Koslowski R. (2001). The Smuggling of Refugees in *Global Human Smuggling* Kyle 2nd ed., Johns Hopkins University Press.
5. Gallagher, M. J. (2014). Terrorism and organised crime: Co-operative endeavours in Scotland?. *Terrorism and Political Violence*, 26(2), 320-336.
6. De Bie, J. L., de Poot, C. J., & van der Leun, J. P. (2014). Jihadi networks and the involvement of vulnerable immigrants: Reconsidering the ideological and pragmatic value. *Global Crime*, 15(3-4), 275-298.
7. Carrapico H., Irrera D., Tupman B. (2014): "Editorial – Transnational organised crime and terrorism: different peas, same pod?", *Global Crime*, Vol. 15, pp. 213-218.
8. Ludwig, A., & Johnson, D. (2016). Migration and crime: a spatial analysis in a borderless Europe. *European Journal of Policing Studies*, 4(1).
9. Knop, K. V. (2004). *Die Quellen der Macht von Al Qaida*. Frankfurt aM.
10. Makarenko, T. (2004). The crime-terror continuum: tracing the interplay between transnational organised crime and terrorism. *Global crime*, 6(1), 129-145.
11. Malm T. (2007). The impact of Immigration on Europe's Societies
12. Sieber U./ Satzger H./ v. Heintschel – Heinegg B. (Hrsg.) (2011): *Europäisches Strafrecht*, 2. Auflage, Nomos.
13. Norris, J. J., & Grol-Prokopczyk, H. (2015). Estimating the prevalence of entrapment in post-9/11 terrorism cases. *J. Crim. L. & Criminology*, 105, 609.
14. Asfal. (2014). *Der Beitrag des Europarats zur Terrorbekämpfung und sein Einfluss auf die EU*, Nomos Verlag.
15. Romano, M. (2011). Zur Legitimation der Strafgesetze–Zu Fähigkeit und Grenzen der Rechtsgutstheorie. In *Strafrecht als Scientia Universalis: Festschrift für Claus Roxin zum 80. Geburtstag* (pp. 155-169). Walter Mouton de Gruyter.
16. N. (1989). Hassemer, Winfried: *Symbolisches Strafrecht und Rechtsgüterschutz*.
17. Getoš, A. M. (2005). *Präventive Terrorismusbekämpfung in Übergangsgesellschaften: Eine Studie zu Entstehungsgründen, begünstigenden Faktoren und Entwicklungsmodalitäten des internationalen Terrorismus*. ibidem-Verlag/ibidem Press.
18. Landgrave M. and Nowrasteh A.: (March 2017) Criminal Immigrants in *Immigration* – CATO Institute, Number I, 1-7.
19. Roxin, C. (1973). *Criminal policy and the criminal justice system* (No. 39). Walter de Gruyter.
20. Barratta A. (1993). Jenseits der Strafe- Rechtsgüterschutz in der Risikogesellschaft in *FS für Arthur Kaufmann zum 70. Geburtstag*, C.F. Müller Verlag, 393 – 416.
21. Jescheck H. – H. , Weigend T. (1996): *Lehrbuch des Strafrechts, AT*, 5. Auflage, Duncker & Humbolt.
22. Williamson T. (editor) (2008): *The Handbook of Knowledge – Based Policing*, Wiley Verlag.
23. Walker, C. (2011). *Terrorism and the Law*. Oxford University Press.
24. Card, Cross and Jones. (2016). *Criminal Law*, 22th ed., Oxford University Press.
25. Segell, G. M. (2010). Is the UK stepping toward transnationalism? The Serious Organized Crime Agency. In *Emerging Transnational (In) security Governance* (pp. 100-117). Routledge.
26. Sharpe, S. (2002). Covert surveillance and the use of informants. *The handbook of the criminal justice process*, 60.
27. Ellermann J. U. (2005): *Europol und FBI*, Nomos.
28. Jacobs, G., & Kuntze, M. (2017). Internationale Polizeikooperation. *Handbuch Polizeimanagement: Polizeipolitik–Polizeiwissenschaft–Polizeipraxis*, 1113-1134.
29. Voß, T. (2003). *Europol: Polizei ohne Grenzen? Strafrechtliche Immunitätenregelungen und Kontrolle von Europol*. Edition Iuscrim, Max-Planck-Institut für Ausländisches und Internationales Strafrecht.
30. Kelsen H. (1945). *General Theory of Law and State*, Harvard University Press.
31. Kelsen. (1967). *Pure Theory of Law*, 2nd ed., University of California Press.
32. Alexy, R. (1994). *Theorie der Grundrechte A theory of basic rights*.
33. Benfer J. / Bialon J. (2010): *Rechtseingriffe von Polizei und Staatsanwaltschaft*, 4. Auflage, C.H. Beck.
34. Schröder, N. (2000). *Der Einsatz verdeckter Ermittler nach Landespolizeirecht*.
35. Ostendorf, H. (2011). Die Beschuldigtenrechte beim Einsatz eines Verdeckten Ermittlers–dargestellt am Fall eines abgenötigten Geständnisses. *Festschrift für Claus Roxin zum 80*, 1329-1340.
36. Bode, T. A. (2012). *Verdeckte strafprozessuale Ermittlungsmaßnahmen*. Springer-Verlag.
37. Maiwald, M. (1972). *Zum fragmentarischen Charakter des Strafrechts*.
38. Baker-Beall, C. (2016). The European Union's fight against terrorism: Discourse, policies, identity. In *The European Union's fight against terrorism*. Manchester University Press.

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39. Sheptycki, J. (2020). The politics of policing a pandemic panic. *Australian & New Zealand Journal of Criminology*, 53(2), 157-173.
40. Fijnaut, C. J., Wouters, J., & Naert, F. (Eds.). (2004). *Legal instruments in the fight against international terrorism: A transatlantic dialogue*. BRILL.
41. Glæßner, G. J. (2013). *Sicherheit in Freiheit: die Schutzfunktion des demokratischen Staates und die Freiheit der Bürger*. Springer-Verlag.
42. Kyle, D., & Koslowski, R. (Eds.). (2011). *Global human smuggling: Comparative perspectives*. JHU Press.
43. Sieber, U. (2008). Compliance-Programme im Unternehmensstrafrecht: ein neues Konzept zur Kontrolle von Wirtschaftskriminalität. In *Strafrecht und Wirtschaftsstrafrecht. Dogmatik, Rechtsvergleich, Rechtstatsachen. Festschrift für Klaus Tiedemann zum 70. Geburtstag* (pp. 461-496). Carl Heymanns Verlag.
44. Nemeth, C. P. (2021). *Homeland security: an introduction to principles and practice*. CRC Press.
45. Auflage, C.H. Beck. (2006). *Strafrecht, AT*, Band I, 4.
46. Auflage, C.H. Beck. (2006). *Strafrecht, AT*, Band I, 4.
47. Ormerod, D., Smith, J. C., & Laird, K. (2014). *Smith and Hogan Criminal Law: Text and Materials*. Oxford University Press, USA.
48. Stowell J. I. (2007). *Immigration and crime*, LFB Scholarly Publications.
49. Möller, R. (Ed.). (2004). *Islamismus und terroristische Gewalt*. Ergon-Verlag.

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