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The use of criminal employer sanctions in the European Union: from social policy to migration control

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Keywords: Employer sanctions, Directive 2009/52/EC, EU criminal law.

Abstract: Part of the development of ‘crimmigration’ in the United States is the criminalization of employers who are employing undocumented workers.¹ The European tendency towards ‘crimmigration’ recently resulted in the Employer Sanction Directive.² This directive, aiming to prevent the employment of undocumented workers, imposes sanctions and measures on employers who employ these undocumented workers. Under certain circumstances these employer sanctions must be of a criminal nature. The other sanctions and measures in the directive are all of administrative nature and include the obligation to check documents, financial sanctions, payment of the costs of return of illegally employed undocumented migrants, the withdrawal of licenses, exclusion of benefits, permanent or temporary closure of the company and back payments of any outstanding remuneration. This paper uses a transdisciplinary (legal, historical and socio-legal) approach to clarify the reasons for the prescription of effective, proportionate and dissuasive criminal penalties in this directive instead of the more common effective, proportionate and dissuasive penalties. While the directive itself is a logical result of the comprehensive migration policy of the European Union,³ the origin of the criminal sanctions in the directive is dubious. One might think the inclusion of criminal penalties could be due to the former Third Pillar status of migration policy or the connection to trafficking in human beings that has received a lot of attention since the 1990s. A proposal for a directive from 1976⁴ however, already demanded the ‘possibility of imprisonment’. Like the current directive the decision to include criminal penalties in the 1976 proposal was only justified by a reference to the alleged deterrent effect of criminal sanctions.⁵

Historical analysis of the 1976 directive shows that there is one major difference between the two text. While introduced as a social policy instrument in 1976, the use of employer

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  1 Stumpf 2006
  3 Which consists of regulation of both legal and illegal migration.
  5 COM/1976/331/FINAL
sanctions has evolved to a mere migration control instrument. Meanwhile, the substance of the provision did not change significantly. So, while criminal law is not new to the European employer sanctions, the use of criminal employer sanctions has changed. The main objective is no longer to deter unscrupulous employers from exploiting undocumented migrant workers, but to prevent undocumented workers from obtaining a job.6

This paper documents a recent development in the use of criminal law in migration policy in the European Union for the case of employer sanctions. It explores the social theory as developed by Loïc Wacquant (“Punishing the Poor”, 2009) in order to try to explain the change in the application of criminal employer sanction in the European Union.7 Wacquant describes how supporting ‘the poor’ has evolved into punishing ‘the poor’, and how the welfare state has transformed to a prisonfare state. This paper describes the similarities between the history of criminalization of ‘the poor’ as explained by Wacquant and the ongoing criminalization of migrants and their facilitators.

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Affiliation: I’m currently working at the Law Faculty of the University of Amsterdam (department of Constitutional and Administrative law). I’ve been working for three years on my Ph.D. dissertation on Directive 2009/52/EC and it’s influence on the member state level enforcement of illegally working third-country nationals.

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