

DELIMITATION OF THE TRAFFICKING OF MINORS OF OTHER INFRACTIONS

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Abstract: Associated often with the name of "modern slavery", the trafficking of minors, both in terms of its etiology and especially of the effects it presents at the level of society, has become more and more lately in a social phenomenon, in fact, a disease of society whose existence can not be denied, but rather conscious and fought.

Thus, it would be advisable that state authorities, non-governmental organizations and specialists from various areas of professional intervention work together to find the resources and means to combat this phenomenon that has devastating effects and major life-related harm to the minor victim of trafficking in human beings .

Being a serious offense affecting children, both girls and boys of all nationalities, it is necessary to create a working group at the level of the European Union to provide protection and assistance to victims of trafficking in minors as it is imperative to help them recover.

Preventing and combating trafficking in minors is a priority of the European Union and the Member States, recognizing the striking nature of this kind of crime. Placing the victim at the center of the discussion and recognizing the need for a special regime for children must be achieved through coordinated and multidisciplinary action.

It should be emphasized that European Union legislation sets minimum standards, but Member States may, where necessary, impose stricter provisions than these standards, taking into account the best interests of the child.

If the organized crime groups whose "juvenile trafficking" activity is in a continuous development of international relations, the same phenomenon of international relations development also characterizes international relations and the fight against this phenomenon.

Keywords: criminal law, juvenile delinquency, minor, criminal liability, criminal evidence

In investigating the phenomenon of trafficking in human beings, a multidisciplinary approach is required, requiring the involvement of all factors of power and responsibility in a state. The spread of trafficking in human beings and the trafficking of minors in particular, with devastating consequences on victims, but also on society, required the creation of legal instruments to prevent and combat this phenomenon.

Trafficking in minors, as a form of organized crime, must always be seen in connection with all the rules of incrimination of a state in order to be able to make a correct framing of an unlawful act.

The essential differences between the trafficking of persons in general and the trafficking of minors in particular, as compared to other offenses, are the highlighting of the legal content of the juvenile trafficking offenses of all illegal activities, capable of contributing to the trafficking of the juvenile, viewing all forms of exploitation (obedience to performing a job or performing services forcibly or in violation of legal norms, keeping in slavery or other similar procedures of deprivation of liberty or servitude, forced to practice prostitution, pornographic representations,

for the production and dissemination of pornographic materials or other forms of sexual exploitation, the obligation to practice begging, the removal of organs, tissues or cells of human origin forcibly or in breach of legal rules), while the content of the common offenses is revealed only certain criminal activities and certain distinct forms of exploitation of the human being.

As a consequence, *"the distinctions consist in the fact that in the case of human trafficking offenses, in their legal content, all those illegal activities that allow and even contribute to the trafficking of a person are listed, taking into account all forms of exploitation, while the content of other offenses contained in the Criminal Code are highlighted only some criminal activity"*¹ (eg, urging or facilitating prostitution or recruiting a person for prostitution, the crime of pimping or subjecting a person to the provision of work against his will in the case of the offense of forced or compulsory labor or the restriction of the liberty of a person, the deprivation of liberty unlawfully) as specific forms of exploitation of the human being (sexual, labor, rights and freedoms of the person).

I. TRAFFICKING IN MINORS AND LAUNCHING ILLEGAL FREEDOM

In any of the modalities of the material element of the trafficking offense, the victim may be deprived of his / her physical freedom, but this is not necessary.

Deprivation of liberty itself is a means of constraint, through which the recruitment, transportation, transfer, hosting, or receiving of the trafficked person can be achieved.

The kidnapping, as an activity - means of achieving the material element of the juvenile trafficking offense, is also a way of imprisonment.

According to Article 205 (1) of the Penal Code, which penalizes the deprivation of liberty illegally, "the deprivation of liberty of an unlawful person is punished by imprisonment from 3 to 10 years."

It also provides for an assimilated version, in paragraph 2 of the same article, which states that "it is considered a deprivation of liberty and the abduction of a person who is unable to express his will or defend himself", thus the regime the sanctioner is the same unlike the old Code, where deprivation of freedom by abduction was sanctioned as an aggravating variant.

Desiring to live up to the present requirements, the current code assimilates the deprivation of liberty and the abduction of a person unable to express their will or defend themselves (as is the case in practice of taking a newborn child from a maternity).

If the act is committed by an armed person on a minor, endangering the health or life of the victim, the punishment shall be imprisonment of between 3 and 10 years.

The main punishment of the 7 to 15 year prison and the complementary punishment of the prohibition of the exercise of certain rights are sanctioned if the deprivation of liberty of a person has resulted in the death of the victim.

The delineation of the trafficking offense of juveniles must be made in relation to the offense of deprivation of liberty in the simple version provided for by Article 205 (1) and (2) of the Penal Code.

Analyzing the content of Article 211 of the current Penal Code, it is found that trafficking in minors is a complex crime, which absorbs in its constitutive content the simple variant of the offense of deprivation of liberty illegally. In this case, the conditions of Article 35 (2) of the Penal Code are met, according to which "the offense is complex when, in its content, an act or an inaction which itself constitutes an act provided for by the criminal law".

¹Mateuș și colectivul (2004), p. 116

Of course, this happens in situations where deprivation of liberty is necessary, being an intrinsic condition for achieving the material element of the juvenile trafficking offense.

The assessment of the required length of time during which the trafficked person is deprived of his liberty, in order for the perpetrator to commit the juvenile trafficking offense, will be made on a case-by-case basis, depending on the circumstances in which the act is committed, in all cases the victim having to be effectively prevented from moving according to their own will.

The deprivation of liberty that exceeds this necessity, however, achieves the constitutive content of the offense of deprivation of liberty illegally, which is in concert with the trafficking offense of juveniles.

Since deprivation of liberty has exhausted its purpose and ceases to be a condition attached to the material element of trafficking, the deprivation of liberty after that moment is autonomous and dissociates from the previous activity of the perpetrator.

The offense of deprivation of liberty is absorbed in the trafficking offense of juveniles and when trafficking is carried out by abduction.

The kidnapping appears as an element of the crime of trafficking in minors, and the provisions of Article 35 (1) of the Penal Code are also incidents.

If the deprivation of liberty has exhausted its purpose and ceases to be a condition of the material element, the deprivation of liberty continues to be autonomized, dissociating from the previous activity of the perpetrator and realizing the content of an independent offense, in this case the offense trafficking of minors is in competition with the crime of deprivation of liberty illegally.

In order to strengthen the above, we can imagine the hypothetical situation in which the victim is recruited, transported to another location and accommodated against his will.

As long as the victim is held there to prostitute, the juvenile trafficking offense is continuous.

If she is still deprived of liberty, not being used as a prostitute, but for example, not to go to claim the facts, we are in the presence of the deprivation offense in the real competition with the traffic offense minors.

II. TRAFFICKING IN MINORS AND TRAFFICKING IN MIGRANTS

Knowing the distinction between juvenile trafficking and migrant trafficking is of particular importance, especially as regards the correct application of the law.

Trafficking in migrants mainly means the organized movement of some people in order to make a profit.

Sometimes, the specific elements that distinguish human trafficking from the illegal introduction of migrants are obvious, but sometimes they are hard to prove without thorough investigation.

The need for differentiation is necessary in order to avoid that trafficked victims, who were most likely subjected to abusive abuses and whose rights were seriously violated, would be confused with migrants who for economic reasons were illegally entered into the country destination or crossed the border on their own and will be deported as such.

Migration trafficking and child trafficking, both being forms of illegal migration, are internationally distinct crimes agreed internationally and defined by the international community through the United Nations as part of the effort to combat them.

We could highlight in this sense some elements of differentiation of these phenomena:

1. Trafficked migrants always travel voluntarily, while trafficked persons can start their journey voluntarily, or are abducted and constrained;

2. Trafficked persons are used and exploited for a long time - this is the end of trafficking in human beings, while in the case of migrant trafficking, as a general rule, violence and exploitation are missing;

3. Trafficking in migrants can only take place internationally, and trafficking in human beings can be both international, ie it goes beyond national and domestic borders;

4. both crimes are criminalized in the Penal Code in Article 211 and 263 respectively, but trafficking in minors is a crime against the person while the trafficking of migrants is a crime against the state border;

5. The exploitative relationship between the trafficker and the victim of the two offenses is distinct: in the case of migrant traffic, it disappears with the illegal entry into the country of destination, whereas in the case of juvenile traffic the relationship is maintained even after the illegal crossing of the border.

Although in most cases the trafficking of minors is of a transnational character, the recruitment of the victims is done on the territory of Romania, while the exploitation abroad has also encountered situations in which the victims are recruited abroad and exploited in Romania.

Crossing the borders of the countries of origin, transit or destination can be done legally or illegally.

In such situations involving the transport of victims across the border, it is necessary to establish delimitations between offenses related to trafficking in minors and trafficking in migrants.

The juvenile trafficking offense is committed in order to oblige the victim to practice prostitution, while offenses related to the trafficking of migrants are committed, as appropriate, for the purpose of fraudulently crossing the border of Romania or a foreign state, the migrants being free after they reach their destination .

What is characteristic of trafficking in human beings is exploitation as a goal, not just migration from one country to another, as is the case with migrant trafficking.

The defining element in determining the difference between trafficking in human beings and migrant trafficking is to determine whether the migrant has used violence, threats or other forms of coercion, in which the investigator has to take a position to protect and support the victim win collaboration and define the deed of the trafficker. It is therefore essential to establish the person's status: an immigrant or a trafficked person².

As a consequence, trafficking in persons with specific regulation in national law is all the more necessary as the trafficking itself involves, in its content, the facilitation of the illegal crossing of the border, where the trafficked person should not be deported , but guided to a care center and treated as a victim of trafficking.

III. TRAFFICKING IN MINOR AND SCLAVIA, SUPPORT TO FORCE OR MANDATORY

According to Article 209 of the Penal Code, "putting or holding a slave person as well as slave trafficking is punishable by imprisonment from 3 to 10 years and the banning of rights."

This offense is "the deed of a person who slaughters another person, that is, the perpetrator who brings the victim into total dependence on him, becoming the owner of the injured person, a person who was previously free, being now assimilated to a simple object

² Mateuț și colectivul (2004), p. 124

animated. By being in the state of slavery is meant exercising on one person one or all of the powers deriving from the right of property"³.

The purpose of trafficking in human beings and trafficking in minors is the exploitation of victims.

Article 182 (a) of the Criminal Code provides that the exploitation of a person is also meant to be subjected to the execution of a work or to the performance of services, and in paragraph (b) of the same article it is foreseen that exploitation also means and "keeping in slavery or other similar procedures of deprivation of liberty or servitude".

Such incriminations would seem unnecessary for the separate crimes of slavery referred to in Article 209 and forced or compulsory labor under Article 212 of the Criminal Code, since at first sight there might be an interpretation of an overlap between these crimes, namely trafficking minors (trafficking being done for the purpose of exploiting the victim, the meaning of exploitation being limited and incriminated by the Romanian legislator in a separate article) and slavery on the one hand and forced or forced labor on the other.

But "there can be no overlap between these crimes, they actually enter the contest, because there is an etiological connection, because one crime is committed in order to commit another."

Everyone has the freedom to freely choose the work they want to do, in terms of their acquired skills and training. Any contrary act of forcing a person to forced labor is a serious violation of human freedom.

According to Article 182 (a) of the Criminal Code, the execution of a job or the forced service is the exploitation of that person. The problem to be put into practice is to differentiate situations where the subjection of a person to forced or compulsory labor constitutes the crime provided by Article 212 of the Criminal Code or one of the crimes of human trafficking.

If a person is forced to perform a task, a job he would not normally have done or is in a position to perform a job he was not obliged to, as if he had had the duty to do so and the execution of the respective work is forced, by the means and means incriminated by Articles 210 and 211 of the Criminal Code, the perpetrator will be responsible for the crime of trafficking in human beings and of trafficking in minors.

IV. TRAFFICKING IN MINORS AND EXPLOITATION OF THE CEREMONY

As regards the link between trafficking in minors and the crimes covered by the Criminal Code in Articles 214 and 215, the same legal logic applies as in the case of the previous link, the link between juvenile trafficking and slavery on the one hand and the trafficking of minors and the submission to forced or compulsory labor, on the other.

On begging, it ceased to be criminalized in the Criminal Code, the person who obtains the primary means of financial support to repeatedly appealing to the mercy of not being punished, the punishment applying to the person who exploits the former.

Taking into account that in Romania grew phenomenon of exploitation of begging practiced by children as well as those of people with physical or mental legislator was forced to govern such situations, criminalizing the Criminal Code offense exploitation of begging.

Traffickers are the ones behind these people, and in most cases they are the ones who appropriate the money or property received from the passers-by, the exploited persons reverting to them in the happiest cases an insignificant percentage.

³ Curtea Internațională de Drept Penal, Statutul de la Roma, art. 72 lit. c).

The legal content of the crime of exploitation of begging is contained in Article 214 of the Criminal Code. According to him, "(1) Any person who causes a minor or a person with physical or mental to appeal repeatedly to the mercy of asking for material aid or benefit from property from this activity is punished with imprisonment 6 months to 3 years or fine. (2) If the deed is committed in the following circumstances:

- a) parent, guardian, curator, or caregiver;
- b) By coercion, the punishment is imprisonment from one to five years "

It is very common for people to appeal to the public, using children for this purpose.

The situation was notified to the legislator prior to the adoption of the Criminal Code, sanctioning it by means of Article 133 of the Law no. 272/2004 on the protection and promotion of children's rights, the action of the parent or the legal representative of a child to use it to repeatedly appeal to the public, asking for financial or material assistance.

However, there was a legislative vacuum, but the act of the major who was not the parent or legal representative of the child but who used it to appeal to the public was not incriminated. Thus, Article 215 of the Criminal Code comes to remedy this shortcoming by penalizing the deed of any major person who uses a minor for begging.

The legal content of the offense of using a minor for begging is set out in Article 215 of the Criminal Code. According to him, "the deed of the major who, having the capacity to work, repeatedly appeals to the public, asking for material help, using for this purpose the presence of a minor, is punished by imprisonment from 3 months to 2 years or with fine".

V. TRAFFICKING IN MINORS AND PROXENITISM

The Criterion underlying the distinction between trafficking in minors (Article 211 of the Criminal Code) and pimping (Article 213 of the Criminal Code) is, as claimed by the High Court of Cassation and Justice, in the social interest protected by the said provisions.

In the case of juvenile trafficking, the protected social interest is the freedom of will and action of minors, while in the case of pimping, the protected social interest consists in the morality of the society and in the provision of licit means of existence.

These issues are reflected in the Supreme Court decision set out below.

High Court of Cassation and Justice, United Sections, Decision no. XVI, 19 March 2007

4 .

By this decision, the Court established the distinction between the trafficking offense incriminated (at that time) in Articles 12 and 13 of the Trafficking Law and the offense of punitive criminality (at that time) in Article 329 of the Criminal Code. According to the court, the distinction is given by the generic difference of the legal object of the two offenses, namely the different social value protected by the legislator. In the case of an offense under the anti-trafficking law, the protected value is the right to freedom of will and action, while in the case of punitive offense, the value protected is the moral value of social life.

That is why the offense of pimping exists in situations where the acts of hosting, transporting, transferring are carried out without the coercion of the injured party.

Under Article 211 of the Penal Code, recruitment involves attracting the human raw material to be exploited in order to obtain profit.

The ways of recruiting can take different forms, identifying various recruitment techniques, from kidnapping and fictitious marriage to the victim's total or partial deception, misleading the nature of the work he will perform, or financial or work conditions.

⁴ www.scj.ro

I note that the previously exemplified modalities imply a violation of consent and sometimes even the lack of consent of the trafficked person.

In the case of a punitive offense committed by the recruitment of persons for the prostitution, the recruited person gives his / her consent, freely and always agrees with the recruiter to practice prostitution in order to obtain mutual benefits.

Consequently, "the significant, essential element of differentiating between the offense of pimping and the recruitment of persons and the trafficking offenses under Article 211 of the Criminal Code, carried out in the same manner of committing, consists in the unlawful character of the consent, in the case (which does not meet the conditions of a validly expressed consent of the recruited person) in the case of trafficking offenses ⁵".

This is also the reason for which the criminal responsibility of the trafficker and, moreover, the trafficking of minors is not removed by the consent of the trafficked person, in Article 211 (3) of the Criminal Code expressly stating: "the consent of the victim of trafficking is not a justifiable cause. "

The legislator understood to criminalize the deed despite the consent of the injured person, since he felt that this consent was always vitiated, the modalities enumerated by the aforementioned law having the inherent capacity to defeat the consent of the trafficked person.

From the comparative analysis of the offense of trafficking in juveniles provided by Article 211 Penal Code and the punitive act, in the version provided by Article 213 of the Criminal Code, we note the following:

- in the case of punitive offenses, criminal prosecution is supervised by the prosecution bodies supervised by the prosecutors and the jurisdiction in the first instance is given to the judiciary. As regards the trafficking of minors, the prosecution is obligatorily carried out by the prosecutor and is tried in the first instance by the tribunal;

- other than the offense of trafficking in minors (and trafficking in persons in general), in the case of punitive offense, recruitment and trafficking in human beings are not made for the purpose of prostitution, the person recruited or trafficked voluntarily practicing prostitution; with regard to pimping in the form of constraint to prostitution, it does not imply implicitly the recruitment or trafficking of persons for that purpose, being regulated in this form as an aggravating variant in the constitutive content of the offense of pimping provided for by Article 213 of the Penal Code ;

- the offense of pimping restricts the exploitation of the person only to the specific form of sexual exploitation, while the juvenile trafficking offense also focuses on forced labor, enslavement, slavery, and other similar imprisonment.

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⁵ Mateuț și colectivul (2004), p. 124

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- O.U.G. No.143 of 24 October 2002 amending and completing certain provisions of the Criminal Code and some special laws in order to protect minors against sexual abuse;
- Law no. 301 of 29 June 2004 on the adoption of the New Criminal Code;
- Law 508/2004 on the establishment, organization and functioning within the Public Ministry of the Directorate for the Investigation of Organized Crime and Terrorism Offenses (DCI);
- O.U.G. No.79 of 14 July 2005 amending and supplementing Law No.678 / 2001 on preventing and combating trafficking in human beings;
- Order of the Minister of Justice no. 1226 / C / 2009 for the approval of the Regulation on the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism.