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CRIMINAL AND LEGAL CHARACTERISTICS OF HUMAN TRAFFICKING

Abstract.

In the article the author gives a criminal law description of human trafficking, considers criminal liability for human trafficking. The issue of "trafficking in human beings" as a form of organized crime is also being studied separately.

Key words: *human trafficking, counteraction to human trafficking, criminal liability for human trafficking.*

Formulation of the problem. Trafficking in human beings is a global problem. Its use in the criminal business is one of the complex social problems of Ukrainian society. The UN Convention against Transnational Organized Crime states that trafficking in human beings is an act committed for the purpose of exploiting, recruiting, transporting, transferring, concealing or obtaining persons through the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or vulnerability of the condition or by bribery in the form of payments or benefits to obtain the consent of a person controlling another person. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or customs similar to slavery, enslavement or the removal of organs [1].

On February 22, 2021, the draft Law № 5134 "On Amendments to the Criminal Code of Ukraine to Strengthen Criminal Liability for Trafficking in Human Beings" was developed [2].

Analysis of recent research and publications. Various aspects of human trafficking have been repeatedly studied by the following authors: K. Dyadyura, G. Zharovska, O. Kraevska, K. Levchenko, B. Lyzogub, N. Lukach, A. Orleans, M. Fialka and others. At the same time, it should be recognized that the research does not cover all the issues in this area, as there are a number of controversial issues, in particular, on strengthening criminal liability for trafficking in human beings.

The purpose of this article: is to study the criminal-legal characteristics of human trafficking, identify ways to overcome and combat this negative phenomenon.

To achieve this goal it is necessary to solve the following **tasks:**

- analyze "trafficking in human beings" as a form of organized crime;
- investigate criminal liability for human trafficking.

Presenting main material. The definition of "trafficking in human beings" consists of three independent parts: 1) criminal acts; 2) the means used to perform these actions; 3) goals (operation).

The application of this definition requires the presence of at least one element in each of these three groups: the act of recruiting, transporting, transferring, concealing or receiving people; through the threat, force or other form of coercion, abduction, fraud, deception, abuse of power or use of a vulnerable condition, or offering payments or benefits to a person in control of the victim; for the purpose of exploitation, which includes the exploitation of prostitution and other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, as well as the removal of organs [3, p. 375].

If we turn to the national criminal law, this crime in accordance with Part 1 of Art. 149 of the Criminal Code of Ukraine is the recruitment, transfer, concealment, transfer or receipt of a person committed for the purpose of exploitation, using deception, blackmail or vulnerability of a person [4]. Human exploitation

should be understood as all forms of sexual exploitation, use in pornography, forced labor or forced service, slavery or practices similar to slavery, servitude, debt bondage, organ harvesting, human experiments without consent, adoption (adoption) for profit, forced pregnancy, involvement in criminal activities, use in armed conflicts, etc. [4].

We can agree with the opinion of Y. G. Lizogub that this article of the Criminal Code of Ukraine needs to be improved, because it does not provide a full understanding of the criminal phenomenon, which is human trafficking [5].

The question of how to distinguish the illegal exploitation of a person from the perfectly lawful exploitation of a person (which will necessarily take place if a person works or provides employment services) seems fundamental, when, for example, this transfer is carried out by commercial employment agencies. on a legal basis.

According to G. P. Zharovskaya, the grounds for such a distinction should be considered as follows:

1. Legal status of a person, organization carrying out legal movement, and lack of such status in the case of trafficking in human beings.
2. Legal agreement with the person who is the subject of the transfer and the absence of such an agreement in the case of trafficking in human beings.
3. Further legal status of the person in the country of relocation, lack of such status in the case of trafficking in human beings.
4. The purpose of relocation may be exclusively legal activities permitted by the laws of Ukraine, and participation in illegal criminal business, if it is about human trafficking [3, p. 375].

At the same time, the absence of any sign of legality seems to give grounds to claim that in this particular case it is trafficking in human beings.

In Art. 1 of the Law of Ukraine "On Combating Trafficking in Human Beings" trafficking in human beings is defined as the implementation of an illegal agreement, the object of which is a person, as well as recruitment, transfer, concealment, transfer or receipt of a person committed for exploitation, including sexual , fraud, blackmail, vulnerable human condition or with the use or threat of violence, using official position or material or other dependence on another person, which according to the Criminal Code of Ukraine is a crime [6].

At the same time, it should be understood that the use of "forceful" methods of coercion, as well as deception, fraud, etc., cannot be considered the main sign of human trafficking.

There are well-known cases where individuals have agreed to participate in these crimes voluntarily, when there has been no question of any form of coercion. Therefore, G. P. Zharovskaya amended the definition given in the law, noting that human trafficking should be considered any movement of a person for the purpose of its further exploitation, including sexual, in order to make a profit by the organizers of such movement, which is carried out both on a voluntary basis and using fraud, blackmail, vulnerable human condition, etc. [3, p. 376].

This definition makes it possible to distinguish the following features of a crime recognized as trafficking in human beings: compulsory relocation of a person, the presence of further exploitation, profit of persons who organized such relocation, and the feature of means of influencing a person is secondary to the above.

Analyzing the chosen form of transnational criminal activity, its "manufacturability" and orderliness should be recognized, which gives grounds to consider this crime clearly structured and organized.

G. P. Zharovskaya's research shows that the mechanism of human trafficking involves the movement of victims after the conclusion of illegal agreements or arrangements (or for the purpose of concluding such agreements) to other countries, where they are exploited. On the way to the place of exploitation, victims of trafficking may move through one or more transit regions, where they may be resold, temporarily exploited or hidden in transit or transshipment facilities.

The channel of human trafficking, in which certain stages are realized by one criminal group, we will call a "monochannel", if there are different criminal organizations in the channel, it should be considered a "polychannel".

A typical scheme of organized crime in a single channel is quite simple:

- the first stage - involvement of victims in the sphere of human trafficking (recruitment, abduction, etc.);
- the second stage - the movement (legal or illegal) of victims to the place of exploitation;
- the third stage is the direct exploitation of victims of human trafficking [3, p. 376].

The activities of the criminal organizations that created the channel are more complex and sophisticated. In the structure of the "channel" of human trafficking should be distinguished a number of stages that successively replace each other:

- the first stage - involvement (recruitment, kidnapping, etc.) of victims, their transportation and sale to the criminal organizations specializing in the second and third stages;
- the second stage - mediation in human trafficking. It provides for the purchase of victims from criminal groups that specialize in the first stage, and their resale at a higher price to criminal organizations that specialize in the third stage. This phase is optional and depends on the organization of the specific channel;
- the third stage - the purchase of victims of trafficking in human beings from criminal organizations specializing in the first and second stages, and the direct exploitation of victims.

Depending on the degree of openness of criminal organizations, a distinction should be made between the recruitment of persons for trafficking in human beings in open and secret forms. When trafficking in human beings in open form in order to find victims, as well as consumers of their services, various methods of publicity advertising are used, when criminal organizations through the media make appropriate proposals to an indefinite number of people.

In order to conceal the criminal nature of activities in such cases, criminal organizations are forced to use various methods of covering up criminal activities, using offices, various interviews, legal selection technologies, castings, and so on. Public means of finding victims are typical of such illegal activities as prostitution and illegal employment.

The covert search for potential victims is carried out without any advertising, usually in an environment where information about potential victims can be found or collected, for example, in databases or files of medical institutions, boarding schools, maternity hospitals, employment agencies among persons who engaged in prostitution, vagrancy, job search, etc.

Unspoken means of finding victims are characteristic of such violent forms of human exploitation as video production with scenes of real violence and torture, sexual exploitation in the form of sadomasochism, removal of organs and tissues, and medical and other human experiments. In this case, the capture of potential victims is often carried out in the form of kidnapping, in some cases, the search for victims is carried out by prior order of criminal organizations-contractors (intermediaries or exploiters). Due to the fact that traffickers "involve" in it only pre-selected persons and, as a rule, avoid contact with casual acquaintances, the conduct of operational and investigative measures is problematic, which makes the fight against this type of transnational crime difficult and unpredictable in terms of obtaining real results, which puts this type of crime in a number of particularly dangerous transnational crimes [3, p. 376].

One of the important features of the investigation of criminal cases of trafficking in human beings is that the subjects of counteraction can be not only the perpetrators, but also the victims themselves. Such opposition can take the form of various forms of obstruction of the investigation: from active actions to conceal or destroy traces of the crime to passive forms such as refusing to file a statement, evading testimony exposing traffickers, or participating in other investigative actions-search activities.

The analysis of the preconditions for counteraction by the victim allows us to identify the following typical reasons that motivate victims of trafficking to such behavior:

- 1) unwillingness to disclose information that degrades the honor and dignity of the victim, including the type of activity that he had to engage in the operation. This is especially true for prostitutes;
- 2) fear of revenge on the part of traffickers;
- 3) submission to one's destiny, apathy to the surrounding reality;
- 4) life attitudes that are not compatible with the idea of cooperation with law enforcement agencies;
- 5) loyalty to traffickers;
- 6) the influence of certain psychological factors, including unwillingness to initiate negative memories of the experience;
- 7) the desire to hide from law enforcement agencies committed offenses, including crimes, to the commission of which they were pushed by traffickers. Such

offenses may include illegal crossing of the state border, use of knowingly forged documents, prostitution, storage (use) of drugs, violation of migration legislation of the host country or the established regime of residence in it [8, p. 104].

Thus, human trafficking and exploitation in the 21st century are in fact a form of slavery, a phenomenon that our ancestors overcame centuries ago. This anti-social phenomenon has finally been transformed into a separate type of highly organized criminal business, which today poses a threat to the national security of all countries of the civilized world.

Currently, the only article that provides for punishment for criminal offenses - human trafficking - or other illegal agreement on a person is Article 149 of the Criminal Code of Ukraine. For the first time, criminal liability for trafficking in human beings was established by the Law of Ukraine of March 24, 1998 № 210/98 of the Verkhovna Rada, according to which the Criminal Code of Ukraine was supplemented by Article 124-1 "Trafficking in Human Beings". During the years of this norm, its wording has changed four times, which in itself creates difficulties in its application in practice [9, p. 266].

The current anti-trafficking framework in Ukraine, which consists of national and international legislation, needs to be supplemented and clarified, although it is generally suitable for creating an effective anti-trafficking mechanism.

According to the national criminal legislation, this crime, according to h. 1 Art. 149 of the Criminal Code of Ukraine, is the recruitment, transfer, concealment, transfer or receipt of a person committed for the purpose of exploitation, using deception, blackmail or vulnerability of a person [4].

The qualifying circumstances in the investigated corpus delicti are trafficking in minors, in relation to several persons, either repeatedly, or by prior conspiracy by a group of persons, or by an official using official position, or by a person from whom the victim was materially or otherwise dependent, or combined with violence, which is not dangerous to the life or health of the victim or his relatives, or with the threat of such violence. Particularly qualifying circumstances are actions committed against a minor, either by an organized group, or combined with violence that endangers the life or health of the victim or his relatives, or with the threat of such violence, or if they have caused serious consequences [4].

The legislator in the disposition of Art. 149 of the Criminal Code of Ukraine, the term "trafficking in human beings" is used, but the current rules of criminal law do not contain a clear definition of the term. In judicial practice and criminal law characterization of human trafficking, which is carried out by scientists, the concept of human trafficking is identified with the purchase and sale of man as a commodity.

It is not uncommon for courts to interpret trafficking in human beings as a sale in a civil law context and in fact apply a civil law analysis of the sale transaction to these legal relationships, indicating the existence of essential conditions and obligations that are decisive in civil law relations. In practice, during the commission

of a crime, under Art. 149 of the Criminal Code of Ukraine, purchase and sale in the classical civil sense may not take place, but decisive for resolving cases of trafficking in human beings is the fact of transfer of a person (or human management), regardless of other obligations inherent in the transaction of sale, such as price, availability and form of payment for the transfer of a person (debt bondage involves payment by working off).

The legislator considers freedom (will), honor or dignity of a person to be an object of human trafficking. Mandatory feature of the crime under Art. 149 of the Criminal Code of Ukraine, is the subject of a crime.

Mandatory feature of the crime under Art. 149 of the Criminal Code of Ukraine, is the subject of a crime. The subject of this crime is a man. Neither a human corpse nor its organs (tissues) are the subject of this crime. Therefore, attempts to commit acts under Art. 149 of the Criminal Code of Ukraine, in relation to a dead person can be qualified only as an attempt to trafficking in human beings (in case the perpetrators are not aware that the person who is the subject of the agreement has died). The commission by a woman of any illegal agreements regarding her unborn child during pregnancy does not constitute a completed crime and can be qualified only as an attempt to trafficking in human beings [10, p. 20]. The objective side of the crime is perhaps the most important element of the crime. By examining the objective side, a conclusion is made about the content of other elements of the crime, and any conclusion in a criminal case can be made only on the material traces that the crime leaves behind in reality. In law enforcement practice, law enforcement officers primarily establish the objective side of the crime [11, p. 116]. This crime can take the following forms:

- 1) human trafficking;
- 2) implementation of another illegal agreement, the object of which is a person;
- 3) recruitment;
- 4) relocation;
- 5) concealment;
- 6) transfer;
- 7) obtaining a person.

Given the public danger of such a crime as human trafficking (buying and selling), it is sufficient to establish the fact of an agreement to sell a person under certain conditions and the fact of transfer of a person (or management of a person). The current legislation does not require a mandatory condition for the qualification of a crime under Art. 149 of the Criminal Code of Ukraine - the establishment of a one-time transfer (payment) of funds for human goods, as the sale may be delayed payment or criminals may agree to pay for the sale of a person within a certain time for which the victim can work part of the money [4].

Trafficking in human beings, regardless of its form, can only be committed with direct intent. The consent of the victim indicates the absence of direct intent to commit trafficking in human beings, and hence the absence of *corpus delicti* in general.

Certain difficulties arise when resolving the issue of participants - the subjects of the crime under Art. 149

of the Criminal Code of Ukraine. The point is that buying and selling a person is possible only between the recruiter and the person who will exploit, or there can be trafficking in human beings and between other entities, because in many cases the courts are faced with the fact that there was no buyer in criminal offenses [4].

In this case, when the recruiter in the future carries out the exploitation of the victim, criminal liability is not excluded and must occur under Art. 149 of the Criminal Code of Ukraine for recruitment, transfer, transfer, concealment, receipt of a person, committed for the purpose of exploitation, using one of the methods of influence [4].

The main problems in preventing and detecting this type of crime are that not all victims can or want to seek protection of their rights. Many victims simply do not know where to turn for help. Very often the obstacle is the fact that law enforcement agencies of foreign countries refuse to cooperate with law enforcement agencies of Ukraine.

The real numbers of victims of the slave trade are an order of magnitude higher than those provided by international organizations. The fight against human trafficking in Ukraine, as well as around the world, requires the cooperation of states in this area, improving the legal framework, developing the capacity of the criminal justice system in Ukraine, including the police, investigators, prosecutors and the judiciary. It is also necessary for the state to fight against such social phenomena as poverty and ignorance. The state should provide social protection, psychological and financial assistance to victims, as well as provide jobs for the country's population.

The most effective way to prevent human trafficking is for governments to create broad streams of legal and legal migration. Involving most migrants in the use of official channels will help governments to more accurately identify, isolate and stop the use of illegal methods. In addition, legal migration flows can have positive consequences for society as a whole.

Thus, the norm of Art. 149 of the Criminal Code of Ukraine needs to be improved, as it does not provide a full understanding of the criminal phenomenon - human trafficking. The draft Law № 5134 "On Amendments to the Criminal Code of Ukraine to Strengthen Criminal Liability for Trafficking in Human Beings" was developed [2]. Draft Law № 5134 provides:

- strengthening of criminal liability for trafficking in human beings in Article 149 of the Criminal Code of Ukraine: increase of the minimum term of imprisonment in Part 2 of Art. 149 to six years;

- liability for recruiting, transferring, concealing, transferring or receiving a person, regardless of the person's consent to exploitation, if coercion, abduction, deception, blackmail, material or other dependence of the victim, his vulnerable condition or bribery of a third party controls the victim to obtain consent for its operation;

- inclusion in Art. 149 of the Criminal code of Ukraine of such form of criminal act, as "implementation of other illegal agreement which object is the person". These are actions aimed at the transfer or receipt

of a person without the purpose of its exploitation: donation, lease, free use, transfer of a person to repay the debt, in particular - the sale of a newborn child.

Adoption of the relevant law will strengthen criminal liability for human trafficking and bring the Criminal Code of Ukraine in line with international law.

Thus, human trafficking is an unacceptable social phenomenon that must be resolutely opposed. Countering this phenomenon requires the development of effective methods at both national and international levels. Therefore, it is necessary to carry out a more thorough implementation of the norms of international law into the legislation of Ukraine, including the implementation of the norms of international conventions on this issue. This will allow more rational application of current legislation to combat people. In view of the above, it becomes clear that Ukraine has a wide range of problems related to combating and preventing trafficking in human beings or other illegal agreements on human beings, starting with the detection of such an illegal act. The legal framework formed in Ukraine to combat this type of transnational crime needs to be further improved in accordance with international requirements and standards for ensuring the rights of every person and monitoring the implementation of legislation on their protection.

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ПРАВОВА ПРЕЗУМПЦІЯ ЯК СПЕЦИФІЧНА ПРАВОВА ФОРМА: ТЕОРЕТИКО-ПРАВОВИЙ АСПЕКТ

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LEGAL PRESUMPTION AS A SPECIFIC LEGAL FORM: THEORETICAL AND LEGAL ASPECT

Аннотація

В статті автор акцентує увагу на основних аспектах, що стосуються правової презумпції як специфічної правової форми. Автор розкриває актуальний питання і доводить, що правові презумпції вважаються специфічними правовими формами як в Україні, так і в інших країнах. Це проявляється в тому, що в законодавстві чітко не врегульовано місце правової презумпції в процесі регулювання суспільних відносин.

Abstract

In the article, the author focuses on the main aspects of the legal presumption as a specific legal form. The author reveals a topical issue and proves that legal presumptions are considered specific legal forms both in Ukraine and in other countries. This is manifested in the fact that the legislation does not clearly regulate the place of legal presumption in the process of regulating public relations.

Ключевые слова: презумпция, юрист, Римское право, правовая презумпция, закон, преступление, обычай, вина, ущерб.

Keywords: presumption, lawyer, Roman law, legal presumption, law, crime, custom, guilt, damage.

Етапи формування та побудови правової держави і громадянського суспільства ґрунтуються на реформуванні та удосконаленні законодавства. Цей процес потребує наукового дослідження змісту тих правових категорій, які є одним із найважливіших елементів у системі правового регулювання. Саме до цих критеріїв можна віднести правові презумпції.

Саме походження терміна «презумпція» вказує на стародавність цього вислову юридичної техніки. Багато вчених називають презумпцію «розробкою» римських юристів. Однак такий підхід є помилковим: римські юристи не давали ні визначення, ні класифікації презумпції [4, с. 74]. Проте, поняття презумпції зустрічається в Дигестах Юстиніана, причому приблизно в 30 контекстах, а також в інституціях Гая, що говорить про існування презумпції як такої в давньоримському праві.

Значного розвитку понятійного сприйняття презумпції доводиться на Середньовіччя. Середньовічні юристи, на підставі вищезазначених пам'яток римського права, створюють класифікацію

правової презумпції, розбиваючи їх на 3 категорії: спростована на законних підставах презумпція, законна незаперечна презумпція, фактична презумпція. Класифікацію цю не можна визнати правильною, бо вона змішує ознаки, за якими презумпції класифікуються: спрощені та законодавче закріплені.

Незважаючи на різні недосконалості законодавчої техніки різних часів і зміни в правових концепціях, існують і в наш час презумпції, пронесена людством крізь століття. Така, наприклад, відома будь-кому, навіть самому юридично недосвідченій, людині презумпція невинуватості. Вона, до речі, викликає чимало дискусій в юридичному світі: більшість обвинувачених в кримінальних злочинах є винними, тому невинуватість є в цьому значенні скоріше винятком, ніж правилом, а це вже порушує один із ключових ознак презумпції - високу ймовірність.

Особливо слід відзначити представлення законності тривалих відносин або станів. Так, в рим-