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The concept of human trafficking: theoretical and legislative aspects

The article studies modern approaches to the definition of the concept of «human trafficking» and its generative features in scientific literature, international law and Kazakhstan's criminal legislation. The concept of «human trafficking», consolidated in p. 1 of the Art. 128 of the Criminal Code of the Republic of Kazakhstan, for compliance with its similar definition in the Palermo Protocol. On the basis of available scientific developments' comprehension, a further comprehensive study of the content of such conceptual features of human trafficking as other transactions in relation to a person, his/her purchase, sale, exploitation, recruitment, transportation, transfer, harboring and receipt was carried out. Based on the results of the study, the author came to the conclusion that the position of scientists, according to which the concept of trafficking covers a wider range of unlawful acts, is consistent with the norms of international and domestic legislation; current edition of the disposition of the Art. 128 of CC RK, having a number of unconditional advantages, requires adjustments and changes. The allocation of concealment as an independent act of human trafficking is questioned. The author makes suggestions on the improvement of the legislative definition of the concept of «human exploitation».

Keywords: Human trafficking, crime against the person, concept of human trafficking, object of human trafficking, elements of human trafficking, sale and purchase of human, human exploitation, recruitment faces, slavery, form of exploitation.

One of the greatest challenges to modern societies is human trafficking. The magnitude of this negative social and legal phenomenon reached alarming proportions, because today it is one of the most dangerous forms of transnational organized crime. Public danger of human trafficking is that the person being identified as a thing or product, acts as a «subject» of the transaction. Victims of crime are usually sold, purchased, transferred, transported and held against their will, and, consequently, deprived of freedom of movement, forced to physical or intellectual labor, undergo physical, mental or sexual abuse. That is why one of the most dangerous crimes encroaching on personal freedom is human trafficking, the objective side of which is connected with restriction of personal freedom, freedom of movement and freedom of the human will.

In p. «a» of the Art.3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15, 2000, the concept of human trafficking is determined as follows: «human trafficking» is the recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability or of the giving of payments or benefits to obtain the consent of a person having control over 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 practices similar to slavery, servitude or the removal of organs». The Protocol, known as the «Palermo Protocol» or «Protocol to Prevent, Suppress and Punish Trafficking in Persons» was ratified by Kazakhstan on June 5, 2008. It is appropriate to note that Kazakhstan has complied with international law's obligations on implementation of provisions of the Protocol in domestic criminal legislation. Thus, according to the Art.128 of the Criminal Code of the Republic of Kazakhstan human trafficking is the purchase and sale or other transactions in regard to a person, as well as his/her exploitation or recruitment, transportation, transfer, harboring, receipt, as well as committing other actions for the purpose of exploitation. As we can see, there are some differences in the above definitions, which consist in the fact that the domestic legislator, in contrast to the Protocol does not specify the methods that accompany the recruitment, transportation, transfer, harboring or receipt of persons, as a mandatory feature of human trafficking: threat of force, the use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, bribery. Along with this, it is worth paying attention to the fact that international legal norm which defines the concept of human trafficking, in contrast to similar rules of the Criminal Code of the Republic of Kazakhstan, there are no such forms of the category as a «sale and purchase» and other transactions. We believe that inclusion of the sale and purchase in the list of forms of human trafficking by domestic legislator does not contradict international legal statutes. It is only once again points to the fact that Kazakhstan is trying to honor and respect the traditions of the national law.

There is a difference in the establishment of the individual features of human trafficking in the Criminal Code of the Republic of Kazakhstan and in the above-mentioned Protocol, supplementing the United Nations Convention against Transnational Organized Crime. So, if the committing of human trafficking by force or threat of force, using his official position, by deception or abuse of trust are considered as aggravating (qualifying) elements of a crime according to the Art.128 of the Criminal Code of the Republic of Kazakhstan, then in the given international legal norm there is no direct references to the prohibition of their establishment as such.

In legal literature, there is no single approach to the understanding of the content of this phenomenon. «Human trafficking, — writes A. Repetskaya, — is the purchase and sale of a person or committing other illegal transactions in relation to him/her, as well as acquisition, use and dispose of him/her to receive any benefits from these actions, or with a purpose of his/her further exploitation in any form, if that person had no choice, as well as by means of deception» [1; 87]. This definition of human trafficking the author offered to consolidate in the criminal law. We suppose that the position of A. Repetskaya can be criticized, because inclusion in the regulatory definition of such wording as «acquisition and use of person to receive any benefits from these actions» leads to difficulties in distinguishing of compositions of person's kidnapping (p.2 part 3 of the Art.125 of the Criminal Code of the Republic of Kazakhstan) and human trafficking. Also, we do not consider it correct to indicate the lack of «another choice» by the victim. This feature, in our view, narrows the scope of the concept of human trafficking significantly and, therefore, the application borders of the Art.128 of the Criminal Code of the Republic of Kazakhstan.

Some scientists are trying to narrow general concept of human trafficking and limit the application of the norm. Thus, E.V. Evstifeeva wrote: «human trafficking» means the aggregate of socially dangerous actions which infringe on personal freedom, expressed in concluding transactions in regard to person, enslavement, forced labor, coupled with the application of physical or mental violence, deception, blackmail, use of material or other dependence of the victim and by other means, in order to use these people for mercenary or other motives» [2; 9]. Allocated category in the represented definition does not cover other activities, related in some extent to human trafficking, for example, carried out the recruitment, transportation, transfer, harboring or receipt of persons for the purpose of exploitation, which is not quite true.

There is a position in the modern doctrine of criminal law, according to which the concept of human trafficking covers a wider range of offenses. It covers, in their opinion, not only the purchase and sale and enslavement, but also other forms of behavior associated with the allocated category: recruitment, transportation, transfer, receipt or harboring of a person, carried out with a purpose of his/her subsequent exploitation [3; 8]. The position of these scholars regarding considered issue is consistent with international and domestic law.

On the instance of above definitions, we could see that there is no uniform understanding of «human trafficking» in the legal literature; consequently, there are different interpretations on this issue in the law enforcement practice.

The current Criminal legislator reveals only the concept of exploitation (p.1 of the Art.1 of the Criminal Code of the Republic of Kazakhstan), bypassing at the same time certain concepts of other forms of human trafficking. That is why the disclosure of the content of the other actions constituting the objective side of this crime compound, we will refer to their lexical meaning.

It should be noted that the objective side of human trafficking is characterized by active actions. According to the construction, the compound is formal, i.e. the action is recognized as completed since the moment of committing one of the actions mentioned in the Art.128 of the Criminal Code of the Republic of Kazakhstan.

Characteristically, the purchase and sale or other transactions of above-mentioned forms of human trafficking reflect the essence of considered issue to a greater extent. So, purchase and sale of human within the meaning of the Art.128 of the Criminal Code of the Republic of Kazakhstan is a criminal agreement between two persons, whereby one of them (the seller) undertakes to transfer the person as if in a «property» to another person, which, in its turn, is obliged to accept the person and pay him certain sum of money (price). It is important to note that only money (the price) may perform in payment form. For this reason, the position of I.D. Ismailova deserves support, who believes that «the purchase and sale of human beings in the criminal law sense is a deal (criminal agreement) between two parties whereby one of them is obliged to transfer the person as to the property of another person, who in its turn accepts man and provides a sum of money or other tangible assets for him» [4; 18]. Here, as we can see, the author designates money or other tangible assets as a mean of payment for the «live goods». Similar opinion was expressed by T.A. Voennaya: «... there is

money or other property equivalent as a mean, in which property-related benefit can be expressed, movable and immovable property, free receipt of anything to be paid, the rejection of property or monetary debt» [5; 78]. On this occasion, I.V. Krylatyh points correctly: «Nothing can be recognized as the equivalent of sum of money, even the benefits of property nature» [6; 66]. This is clear from the Art.406 of the Civil Code of the Republic of Kazakhstan, according to which the means of payment in the purchase and sale is a sum of money. If the buyer exercises its payment by, as noted by the above authors, other material assets or other property equivalent, which can be a property-related benefit, movable and immovable property, receive free of anything to be paid, the rejection of a property or a monetary debt, then, from our point of view, these forms of payment should be regarded as «other transactions concerning a person», namely: human exchange for something or the other person, donation, giving person for rent (human transfer for payment for temporary possession and use), provision for debt repayment through the use of a victim as deposit etc. They may be carried out on a fee or free of charge basis. It is appropriate to note that in accordance with the Art.115 of the Civil Code of the Republic of Kazakhstan there can be all types of property with the exception of those removed from circulation by the legislative acts in civil relations. A priori, the transactions in which the object appears the man contradict to law and, therefore, do not create for buyer the right for ownership of it, and for seller - the right to receive funds in accordance with the agreement.

The issue on the moment of crime completion in the form of purchase and sale in the legal literature is controversial. Some authors believe that the act should be recognized as completed with the transfer of a person to another person and to obtain compensation, as the purchase and sale consist of two mentioned, related and resulting actions. According to authors' viewpoints, if two of these actions have not yet been fulfilled, these actions constitutes an attempt to commit a crime [4; 18]. Others believe that the completion of crime in this case is associated with the moment of reaching an agreement for the purchase and sale and transfer of the entire agreed amount of money or property or a part of the remuneration of such amount per person [7]. In our opinion, more credible is the view of those authors who consider the purchase and sale in relation to the person as the process of transferring the person to another person and receiving remuneration for it. Hence, the purchase and sale of a person would be recognized as completed crime at the time when the transmission and reception actions would have been implemented.

The next step in forming the objective side of human trafficking is the exploitation of person. The p.1 of the Art.3 of the Criminal Code of the Republic of Kazakhstan provides a legal definition of human exploitation, which means the use by culprit of forced labor, i.e. any work or service required of a person through the use of violence or threat of violence, for which the person has not offered his services voluntarily, except the cases provided by the laws of the Republic of Kazakhstan. As we can see, there are no certain forms of human exploitation in this article. It should be noted that the Criminal Code of Russian Federation has a similar norm (note 2 to the Article 127.1.), which includes following types of exploitation: 1) prostitution, 2) other forms of sexual exploitation, 3) slave labor (services); 4) servitude. Out of two presented legislative formulations there is one more correct viewpoint, which does not specify the form of exploitation, because in our view, it is impossible to foresee in the criminal law all of the variations of human exploitation. However, the definition of exploitation, established by domestic criminal legislator, can not be accepted in the other part. In our view, it is wrong that the existing variety of ways of criminal influence on the will of a person with a view to his/her exploitation only two of them - the use of violence or threat of violence - are legislated. This approach of the legislator cannot be regarded as correct, because it is appropriate to take into account that, biasing person to certain actions the offender may resort to the most gentle way to influence his will - persuasion, deception or abuse of trust, using the dependent position of the victim, etc. In this regard, we see the variant of improving of this provision in the criminal law. The first one is to leave open the list of ways of criminal influence on the human will with purpose of his/her exploitation, specifying in p.1 of the Art.3 of the Criminal Code of the Republic of Kazakhstan only the most common ones. Herewith, the latter, in our opinion, should be read as follows: «Human exploitation is the use by culprit of forced labor, i.e. any work or service required from a person by deception or abuse of trust, the use of dependent status of the victim, as well as the use of violence or threat of its application for which the person has not offered himself voluntarily, except the cases stipulated by the laws of the Republic of Kazakhstan». This norm (the second option), in our opinion, can also not to resort to indicating of criminal methods' exposure on human will for the purpose of his/her exploitation. In this case, from the meaning of the norm itself follows that the methods of influence on the victim can be very different.

Under the recruitment is to be understood reaching of agreement for the purpose of exploitation. The act is recognized completed from the date of the person consent's receipt who is being recruited to carry out the

act of trade in relation to him/her, regardless of whether the transaction took place or not. According to the Explanatory Dictionary of the Russian language «recruitment is taking, hiring, engaging in some kind of organization, recruitment of volunteers and the recruitment of labor» [8]. It should be noted that in the legal literature there are various definitions of general concept of recruitment. A.G. Kibalnik and I.G. Solomonenko argue that «the recruitment of a person is biasing of person to agree to conclude property-related transaction. Recruitment methods may be different: promises, persuasion, blackmail» [9]. A similar opinion was expressed by T.V. Dolgolenko. He believes that «the recruitment should be defined as an act aimed at the fact that the victim gave voluntary consent to take up employment, biasing for particular activity. Methods of recruitment can be persuasion, deception and other actions. If in the process of recruitment threats of violence are used or abuse is applied, the committed must be qualified under p.2 or p.3 of the Art.127.1 of Criminal Code of Russian Federation, depending on the severity of the consequence» [10]. M.Y. Buryak also believes that under recruitment should be understood the involvement of the victim in any way and under any pretext [11]. Despite the fact that the authors, considering the concepts use various verbal interpretations, they are similar in nature.

As T.A. Voennaya notices, methods of recruitment may be deception, persuasion etc., for example, ads in the media about the recruitment of girls to work abroad (the purpose of which is the recruitment) often involve activities relating to sexual exploitation [5; 79]. It can be expressed in the placement of advertisements in the media, the selection of candidates and interview with them, agitation, recording of willing people, sending them to the place of exploitation etc. [12]. Recruitment methods can be very diverse: persuasion, promises, deception, blackmail and others.

One of the actions and the objective aspect of crime's compound provided by the Art.128 of the Criminal Code of the Republic of Kazakhstan is the transportation of people. The literature indicates that it is a proper transportation of a person (the victim) from one place to another [9]. Some scientists believe that a carriage should also include arrangements for the implementation of human transportation (registration of necessary documents, exit and entry visas, etc.) [13]. It is appropriate to note that the person carrying out the transportation of the victim is neither the seller nor the buyer. A prerequisite for bringing the carrier to liability is its awareness of the purpose of transportation - the exploitation of people. If the carrier is not aware of the purpose of transportation, there is no crime's compound in his/her actions. However, there are judgments in the literature that it is not quite logical to highlight transportation as a separate action, forming human trafficking is, as mostly the transportation is an intermediary that provided by the Art.28 of the Criminal Code of the Republic of Kazakhstan and can be qualified as aiding in the purchase and sale [14; 52]. It is necessary to agree with positions of these authors, since in this case the qualification of seller's, buyer's and carrier's actions must reflect the group nature of the actions of above-mentioned persons.

In the literature, the question on the concepts of «transfer» and «receipt» is non-controversial. A. Kibalnik, I. Solomonenko argue that «transfer and receipt of a person constitute two separate acts. Human transfer, who is the object of the transaction, assumes direct «delivery» of such person to the purchaser or his representatives. Accordingly, the responding act from the part of «partner» of the transaction is the receipt of such a person» [9]. I.V. Krylatyh notes that the transfer is granting minors to another person for the purpose of his/her subsequent use, and the receipt is factual acquisition of minors for his/her subsequent purchase and sale, transportation, harboring for the purpose of exploitation [6; 68]. It should be noted that actions of transmission and reception of human can be performed both during the purchase and sales and performed independently. In the first situation, these actions do not require additional qualifications and are not considered as independent, out of purchase and sale.

Another action, which forms the objective aspect of «Human Trafficking», is harboring. By the latter is meant the action aimed at concealing the victim for the purpose of his/her use. This concealment of the victim, it should be noted, can take place both prior to his/her sale and after he/she is received by the buyer. As the law enforcement practice shows, harboring is inextricably linked with other forms of human trafficking and cannot be performed independently, apart from the purchase and sale of person, his/her exploitation, transmission and receipt. We, therefore, share the view of the authors, who call into question the allocation of harboring as an independent action in trafficking. If harboring is not accompanied by the purchase, sale, transfer, receipt, victim transport, such actions, in their opinion, are aiding and must qualify under the article of Special Part of the Criminal Code, providing liability for human trafficking, and the article providing criminal liability of accomplices [14; 55, 56].

In conclusion, it seems necessary to point out that the current wording of the disposition of Art.128 of the Criminal Code of the Republic of Kazakhstan, with a number of undoubted advantages, requires introduction of above-mentioned adjustments and changes.

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Б.Ж. Қыздарбекова

Адам саудасының түсінігі және нысандары: теориялық және заңнамалық аспектілері

Мақалада «адам саудасы» түсінігіне қатысты заманауи көзқарастар және оның ғылыми әдебиеттердегі, халықаралық құқықтағы және қазақстандық қылмыстық құқықтағы белгілері қарастырылған. ҚР ҚК 128-б. 1-б. бекітілген «адам саудасы» түсінігі, оның Палермо хаттамасында берілген түсінікке сәйкестігі талданған. Қолда бар ғылыми зерттеулердің зерделеудің негізінде адам саудасының келесідей негізгі белгілердің, тұлғаға қатысты өзге де мәмілелер, оны сатып алу-сату, қанау, азғырып көндіру, тасымалдау, беру, жасыру, алу мазмұны қарастырылған. Зерттеуден алынған нәтижелеріне сүйене отырып, автор келесідей қорытындыға келді: ғалымдардың адам саудасы түсінігі құқыққа қарсы іс-әрекеттердің үлкен шеңберін құрайтындығы туралы ұстанымы халықаралық және отандық заңнаманың нормаларымен сәйкес келеді, ҚР ҚК 128-б. диспозициясының қазіргі редакциясы біркатар құндылыққа ие бола отырып, түзетулер мен өзгерістерді талап етеді. Адам саудасы кезінде дербес әрекет ретіндегі жасыруды ерекшелуге қатысты күмән келтірілді. Автор «адамды қанау» түсінігінің заңнамалық дефинициясын жетілдіру туралы ұсыныс жасайды.

Кілт сөздер: адам саудасы, жеке адамға қарсы қылмыс, адам саудасы тұжырымдамасы, адам саудасының объекті, адам саудасы белгілері, адамды сату-сатып алу, адамды пайдалану, адамды азғырып көндіру, құлдық, пайдалану нысандары.

Б.Ж. Кыздарбекова

Понятие и формы торговли людьми: теоретический и законодательный аспекты

В статье исследованы современные подходы к определению понятия «торговля людьми» и его образующих признаков в научной литературе, международном праве и казахстанском уголовном законодательстве. Проанализировано понятие «торговля людьми», закрепленное в ч. 1 ст. 128 УК РК, на предмет соответствия его аналогичному определению в Палермском протоколе. На основе осмысления имеющихся научных разработок осуществлено дальнейшее комплексное исследование содержания таких понятиеобразующих признаков торговли людьми, как иные сделки в отношении лица, его купля-продажа, эксплуатация, вербовка, перевозка, передача, укрывательство и получение. Опораясь на полученные результаты исследования, автор пришел к выводам о том, что позиция ученых, в соответствии с которой понятием торговли людьми охватывается более широкий круг противоправных деяний, согласуется с нормами международного и отечественного законодательства; нынешняя редакция диспозиции ст. 128 УК РК имея ряд безусловных достоинств, требует корректив и изменений. Ставится под сомнение выделение укрывательства в качестве самостоятельного действия при торговле людьми. Автор вносит предложения по совершенствованию законодательной дефиниции понятия «эксплуатация человека».

Ключевые слова: торговля людьми, преступления против личности, понятие торговли людьми, объект торговли людьми, признаки торговли людьми, купля-продажа человека, эксплуатация человека, вербовка лица, обращение в рабство, формы эксплуатации.

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