

Criminal and Legal Analysis of Trafficking in Minors in the Republic of Kazakhstan

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Abstract: The purpose of this study consists in consideration of the criminal and legal characteristic of the crime, providing responsibility according to Art. 135 of the Criminal code of the Republic of Kazakhstan “Trafficking in minors”. During the conducted research there was undergone to generalization the criminal statistics of the analyzed crime, debatable positions of scientists-lawyers who are engaged in studying of the designated problem. The analysis of signs of the considered crime showed that in the penal statute of Kazakhstan there is no responsibility for trafficking in minors now. Such facts are existed in law-enforcement practice. It is reasonable to criminalize the called phenomenon. We believe that the designated question requires legislative settlement, by fixing regarding the 2nd Art. 135 of the Criminal code of Kazakhstan of the new qualifying sign “trafficking in minors”, entailing stricter criminal liability. For the Supreme Court of RK it is recommended to make explanations concerning qualification of trafficking in minors in connection with a new regulation of signs of the analyzed crime.

Key words: Trafficking in minors, slave trade, sexual exploitation, purchase and sale, other transactions concerning the minor

INTRODUCTION

Actuality of a problem: In the 21st century, reality for all states including for Kazakhstan is a human trafficking including trafficking in minors. Human trafficking is the global phenomenon which gaining momentum in the recent years. It is a modern equivalent of slavery. So, for example, according to the report in 2004 there was noted that from at least 600000-800000 women and children are transported through the international borders every year where the most part is transported for commercial sexual exploitation (Rafferty, 2008).

The special place among criminal encroachments against a family and minors is taken by the trafficking in minors provided by Art. 135 of the Criminal code of the Republic of Kazakhstan of July 3, 2014 (further-CC RK). At the same time, trafficking in minors is characterized by deep cynicism and special cruelty that demonstrates moral degradation of the persons, involved in criminal activities. According to data of Committee of legal statistics and Special Records of the General Prosecutor’s Office of the Republic of Kazakhstan, the criminal statistics in the country is reflected in Table 1 from 2008-2015.

The provided data demonstrate that trafficking in minors in Kazakhstan possesses the increased latency

degree because the victim of a crime (victims) timely does not give a petition to the law enforcement and other special bodies and here it is registered only insignificant part from actual offense.

In international law trafficking in minors means “the severe violation of human rights (juveniles), integrated to forced sexual or labor exploitation in the conditions close to slavery” (Pristanskaya, 2005). Gravity and the importance of a problem of human trafficking (minors) were emphasized in all accepted international documents. With adoption of the Criminal code of the Republic of Kazakhstan of July 16, 1997 in Art. 128 of the CC RK for the first time there were provided responsibility for recruitment of persons for exploitation. On the basis of adoption of Law of the Republic of Kazakhstan “about amendments and additions into some legal acts of RK concerning human trafficking counteraction” of March 2, 2006 No. 131-III, Art. 128 of the CC RK was renamed with new name “human trafficking”. Also on the basis of the above-named Law of March 2, 2006 responsibility for trafficking in minors was provided in Art. 133 of the CC RK. Consecutive continuation of this line was adoption of the new Criminal code of RK of July 3, 2014 which was entered into force from January 1, 2015 in which responsibility for trafficking in minors is regulated by Art. 135 of the CC RK.

Table 1: Criminal statics from 2008-2015

| Reporting period | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 |
|--|--------|--------|--------|--------|--------|--------|--------|--------|
| Total crimes | 127478 | 121667 | 131896 | 206801 | 287681 | 359844 | 341291 | 386718 |
| Crimes against a family and minors Chapter 2 of the CC RK | 199 | 176 | 182 | 143 | 146 | 251 | 243 | 1042 |
| Trafficking in minors (Art. 135 of the CC RK; March 7, 2014) | 5 | 16 | 17 | 21 | 2 | 25 | 15 | 49 |

In the Criminal code of RK of July 3, 2014 it is provided a number of studys where the person acts as a subject of a crime. They include: kidnapping (Art. 125 of CC), illegal imprisonment (Art. 126 of CC), human trafficking (Art. 128 of CC), trafficking in minors (Art. 135 of CC), substitution of a child (Art. 136 of CC), etc. Because the minor is become as goods at committing of purchase and sale or other transaction then degree of his public danger is considerable. The interrelation between parents (close relatives, tutors, custodians) and minors is lost under such circumstances and there are broken not only physical and their intellectual development but also health. According to P.1 Art. 80 of the CC RK of 2014, minors are persons who at the time of commission of the crime were fourteen but not the age of eighteen. Trafficking in minors is one of transnational criminal actions as the victim of a crime (generally females) is sold to the countries of the FSU and beyond, by their illegal export abroad.

Structure of trafficking in minors: Based on the modern doctrine of the criminal law in item 2 of the normative resolution “about practice of application of the legislation establishing responsibility for human trafficking” of December 29, 2012 No. 7, Supreme Court of RK gives definition of object of the crimes connected with human trafficking (Art. 128 of the CC RK) and according to Art. 135 of the CC RK-trafficking in minors. At the same time, the Supreme Court of RK explains that an object of these crimes is human freedom, his personal security, the rights and legitimate interests, honor and dignity, the right to the free choice of a residence, an occupation and a profession.

Direct object of the crime, fixed by Art. 135 of the CC RK is the personal liberty of the minor. The public relations, providing protection of interests of parents (close relatives, tutors, custodians) in education of the minor, act as facultative object. We will notice that minors have no complete freedom of will it is limited to psychophysiological capabilities of their age. At committing of trafficking in minors in addition to imprisonment, there is also an infringement of their health that is in general on the right protected interests of the victims which are specified by the Supreme Court of RK in the called normative resolution of December 29, 2012.

Objective aspect of trafficking in minors: The objective aspect of the considered crime consists in purchase and

sale or in committing of other transactions concerning the minor and is equal in his exploitation or recruitment, transportation, transfer, concealment, obtaining and as well as committing of other acts for the purpose of exploitation. In a disposition P.1 of Art. 135 of the CC RK the legislator provided the alternative actions, meaning that responsibility comes for committing of any from the listed acts in a disposition.

We will consider signs of the objective aspect of the analyzed crime taking into account their specific features. At the same time, the first and main sign of trafficking in minors the legislator provided “purchase and sale”, covering itself the concept of “trade”.

At the committing of act of purchase and sale, the guilty purchases the minor for a certain payment and other guilty person sells him. These actions are legislatively reflected in P.1 Art. 406 “Contract of purchase (of sale)” of the Civil code RK (Special part) of July 1, 1999 (with amendment and additional). Feature of the purchase and sale act is that a subject of the transaction is the living person the minor. Considering that purchase and sale is a bilateral transaction, both the seller and the buyer are subjected to responsibility.

Similar definition of purchase and sale, namely the illegal paid transaction was given in item 3 of the normative resolution of the Supreme Court of RK “about practice of application of the legislation, establishing responsibility for human trafficking” of December 29, 2012.

At the committing of act of purchase and sale as payment there can be acted not only money but also movable or immovable property or other material remuneration (capital issues, gold things, etc.). Because the guilty transfers money (or something replacing of money) for purchase of the minor and the second one gives alive goods respectively, punishment according to Art. 135 of the CC RK will be for both persons respectively. At the same time, the specified act is considered ended from the moment of transmission of the minor to the buyer and money reception by the seller (or something replacing of money), or their parts.

The second sign of the objective aspect of trafficking in minors are “other transactions”. To other transactions concerning the minor involving criminal liability according to P.1 Art. 135 of the CC RK of 2014 there are belonged the following actions: donation (the victim give gratuitously), interchange (an exchange of the victim as barter), an exchange (replacement of one victim by

another), lease (in such cases the victim is given for temporary use), leaving of the victim as ensuring accomplishment of the liability according to the bargain, concluded between guilty persons; use of the victim for the purpose of receipt of any benefits of property or non-property nature, etc.

Purchase and sale or committing of other transactions can be made both for the purpose of exploitation and without it and recruitment, transportation, transfer, concealment, obtaining or committing of other acts pursue the obligatory aim that is they are committed for the purpose of exploitation of the minor.

The third sign of the objective aspect of the considered crime provides “exploitation” of the minor. The concept and signs of “exploitation”, fixed in item 1 of Art. 3 of the CC RK in the theory of the criminal law and judicial and investigative practice of the Republic of Kazakhstan, do not cause any disputes and discrepancies so far.

Purchase and sale of the minor or committing for the purpose of exploitation of other transactions should be considered ended from the moment of his transferring or money reception (or something replacing of money). And time of receiving and even its part, doesn't matter for qualification as structure of the real crime is formal on a design.

Such concept as “recruitment” acts as the following sign of the objective aspect of the considered crime. At the committing of recruitment it is required achievement of consent of the minor (victim) to accomplishment of any activities (work) including illegal, directed to his exploitation. At the same time, methods of recruitment can be the most different: threat by intimidation, blackmail, deception including the promise of any remuneration for the done work, etc.

Recruitment is considered ended at the time of reception of consent of the recruited person regardless of that, the expected transaction was taken place or not.

Objective signs of trafficking in minors: One more sign of the analyzed crime the legislator calls “transportation”. As transportation of the person it is necessary to understand intentional actions for movement of the minor (victim) from one place in another for example, within one settlement and it is equal from the settlement to the city or on the contrary or within the Republic of Kazakhstan irrespective of a transport mode, committing for the purpose of his exploitation. The hours underway and a method (open, secret) of the victim transportations for qualification of the considered act does not matter. At transportations of the minor, he can be accompanied both thieves and the persons which are not guessing about

trade (for a certain payment) and equally there are also belonged circumstances of acquisition of travel documents to the destination where the victim goes by deception. Transportation should be considered ended from the moment of the beginning the transportation of the minor, by any kind of transport.

At the same time, the person which charged to others to transport the minor will bear responsibility for the organization of transportation and in case of implementation of transportation through persons who according to the penal statute are not subjected to criminal liability (for example, deranged, not reached age of criminal liability) as the contractor of trade.

It should be noted that in case of transportation of the person (in particular, the minor) abroad that is out of limits of the territory of the Republic of Kazakhstan, actions of the guilty person fall under signs of the crime, provided by the P. 3 of Art. 135 of the CC RK.

Further it is necessary to consider such concept as “transfer”. Transfer of the minor (victim) for certain remuneration to the buyer in temporary or permanent disposal is understood as the actions expressed in his alienation in order to use for sexual or other labor exploitation. Under such circumstances, actions of the persons, who transferred or received the minor are subjected to qualification according to p.1 Art. 135 of the CC RK and if other persons also take part in act then also according to the sign “a group of persons by previous concert” (item 1 of the P. 2 of Art. 135 of the CC RK).

At the committing of the trafficking in minors by transfer and obtaining, the crime is considered ended from the moment of the actual committing of these actions.

In addition to the above-stated signs of the objective aspect of this crime it is also subjected to consideration “concealment”. To concealment there are belonged the circumstances, connected with concealment of the minor (victim) from law enforcement officers, parents (close relatives, tutors, custodians). Methods of concealment of the victim can be the most various: by imprisonment in equipped for this purpose hidden (disguised) room; by suppression of physical or mental activity of the victim (for example, in the form of the use of various drugs or psychotropic substances); appearance is changed by plastic surgery of the person; by change of passport data as a result of their complete or partial counterfeit and it is equal committing of the actions, complicating his detection, etc.

In cases of concealment of the minor the crime is considered ended from the moment of committing of the actions stated above.

At the same time, in advance promised concealment of the minor shall be considered as accompliceship in a crime, in the form of complicity (the P. 5 of Art. 28 and P.1 Art. 135 of the CC RK).

We believe that the obtaining sign in trafficking in minors has the same sense and value as transfer of the minor. In the first case the guilty person receives for money (or something replacing of money) the minor and in the second, on the contrary, gives such remuneration. Transfer and receipt of the minor are universal concepts for all transactions which can be both paid and non-paid nature. It is belonged to paid transactions in addition to purchase and sale: interchange, lease, rent, etc. To non-paid-donation, non-paid use, etc.

And at last, the last sign, provided in a disposition P.1 by Art. 135 of the CC RK, the legislator calls "committing of other acts for the purpose of exploitation". Most likely all other circumstances could not be provided in advance in this disposition, therefore, in our opinion and there was formed the formulation "committing of other acts".

At committing of a trade in the form of other acts, committing for the purpose of exploitation it is understood not only use of intellectual or manual labor of the minor (victim) but also other illegal actions directed to profit earning (Borchashvili, 2015).

In a disposition P.1 Art. 133 of the CC RK of 1997 instead of the "other acts" committed for the purpose of exploitation, earlier there were provided "other actions". We believe that noted phrases have identical value. At the same time, the Supreme Court of RK in the normative resolution, designated above of December 29, 2012, does not make an explanation what is understood as "other acts, committing for the purpose of exploitation" and it, in our opinion is a serious defect of the resolution of the Supreme Court of RK as judicial investigating bodies on the personal belief apply this concept and it, in turn, can lead or to expanded interpretation of the penal statute or to its various law enforcement.

Based on the stated above, the analysis of signs of the objective aspect shown that at committing the act of purchase and sale, act is considered ended from the moment of receipt of money (or something replacing of money) or the minor, even if the guilty person didn't manage to use it according to the destination as on the construction the structure of the analyzed crime is formal. Trafficking in minors is recognized ended as well from the moment of committing of one of the acts (transaction), fixed in a disposition P.1 by Art. 135 of the CC RK (for example, there was signed the agreement on hiring or the labor agreement, etc).

Subjective signs of trafficking in minors: From the subjective aspect the considered act is committed only with direct intention. The guilty person recognizes the act of purchase and sale or other transaction concerning the minor and equally recognizes that he makes his exploitation or recruitment, transportation, transfer, concealment, obtaining and also committing of other acts for the purpose of exploitation, he expects an opportunity or inevitability of occurrence of criminal consequences for parents (close relatives, tutors, custodians) and wishes their approach.

The Supreme Court of RK in the above-named normative resolution of December 29, 2012 in item 2 makes an explanation that the subjective party of purchase and sale of the person (minor) or at committing concerning him other transaction is characterized only by direct intention. Aim of committing of such transactions for qualification of a crime does not have a value on P.1 Art. 133 of the CC RK of 1997 (P.1 Art. 135 of the CC RK of 2014. At committing recruitment, transportation, transfer, concealment, obtaining or other acts concerning the person (minor) the subjective party of a crime is characterized by direct intention and the special purpose exploitation of the minor.

We will notice that absence of consciousness on purchase and sale or on committing of other transactions concerning the minor testifies about absence corpus delicti in actions of guilty.

The person, selling the minor always pursues mercenary motive (for example, he wishes to be enriched due to use of the victim for sexual or labor exploitation or for the purpose of use of organs or tissues of the victim for transplantation, etc). In certain cases at committing of the analyzed crime the motive can be and altruistic that is the buyer thus to aim to save the minor who is in an adverse family where parents (close relatives, tutors, custodians) are not engaged in education of the minor. It is enough of the committing of the actions of guilty person in order to bring him to criminal responsibility, described in a disposition P.1 by Art. 135 of the CC RK and it in turn, confirms availability of direct intention. Because the motive in this crime can be both illegal and altruistic then it does not influence on qualification of the considered crime, however in case of clarification of public danger of the identity of the guilty person and prescription of a penalty for deeds, ascertainment of motive is obligatory (Zheti Zhargy, 2007). And, if the altruistic motive will be established, then the court shall consider it as the circumstance extenuating fault.

The physical responsible person who reached 16 years age and both the seller and the minor's buyer can

be the subject of the crime, provided by Art. 135 of the CC RK. At the same time a seller of the minor are parents, tutors, custodians and other persons: for example, close relatives at whom the minor is legally, they can be adoptive parents as well (adoptive parents, adopters). Any persons can be the buyer except for the minor's parents.

None of scientific lawyers challenge opinion that responsibility for this crime comes from 16 years age (Borchashvili, 2007).

MATERIALS AND METHODS

In this study the following general scientific methods are used: interviewing, expert poll, economical and statistical analysis, comparative and legal method, analogy, social experiment and studying of scientific literature.

System approach assumes consideration of the studied phenomenon as system as sets of the elements, interconnected among themselves, it assumes that it is reasonable to research trafficking in minors on actus reus elements with allocation of causes and effect relationships.

Interviewing: Interviewing is the talk which had to be according to a certain plan, assuming direct contact of the interviewer with the respondent and record of answers of the last was performed or by the interviewer or mechanically (on the digital carrier).

Expert poll: Expert poll is poll, most often by method of the standardized interview, the competent persons, having profound knowledge about a subject and object of this research.

Economical and statistical analysis: The economical and statistical analysis allowed to consider trafficking in minors on the basis of set of statistical data, their comparison and influence on these or those social processes and forecasting of their further development.

Comparative and legal method: The comparative and legal method determines similarity or distinction of the right systems and features of a regulation of separate processes and the phenomena. It is widely used in case of systematization and classification of concepts as allows to correlate unknown to known, to express new through the available concepts and categories. At the same time comparison prepares prerequisites for carrying out analogy.

Analogy: The analogy is the method of knowledge based on transfer of one or a number of properties from the known phenomenon on unknown.

Social experiment: Social experiment is an artificial reproduction of trafficking in minors for the purpose of its studying in optimum conditions and further practical counteraction.

Studying of scientific literature: Studying of scientific literature allowed to consider and analyse the existing situation in the field of theoretical developments of this problem.

RESULTS AND DISCUSSION

New edition of a disposition P.1 Art. 135 of the Criminal code of RK: Responsibility for trafficking in minors is determined by means of the separate description of the act, committed by each participant of this transaction, guilty of "purchase" or on "sale" of the minor. We believe that this aspect shall be solved at the legislative level and in this regard, we consider expedient that it is necessary to make changes and additions to a disposition P.1 of Art. 135 of the CC RK by replacement of a hyphen in the phrase "purchase and sale" on a disjunctive conjunction "or" and to state it in the following edition:

"The purchase or sale or committing of other transactions concerning the minor and equally in his exploitation or recruitment, transportation, transfer, concealment, obtaining and also committing of other acts for the purpose of exploitation are punished".

Establishment of criminal liability for trafficking in minors: In our opinion, we believe that now not resolved issue at the legislative level is lack of criminal liability for trafficking in minors. It should be noted that "in case of the conclusion of the contract with the expectant mother about transfer in subsequent the born child to other persons and reception of money remuneration by mother, act shall be qualified as encroachment at trade of the juvenile" (Volkov, 2007).

This provision is explained by the following. First, the rights and freedoms of children are under special protection as international law (we were provided the list of the international legal acts) and the domestic legislation of each state (for example, according to P.1 Art. 27 of the Constitution of the Republic of Kazakhstan of August 30, 1995, the childhood is under protection of the state).

Secondly, the increased danger of trafficking in minors is caused by their inability (especially it concerns the children who do not reach 14 years age) to protect themselves and to equally to show active resistance to the guilty person.

Thirdly, responsibility for depravity of minors is provided in Art. 124 of the CC RK. At the same time, the persons who do not reach 14 years age are recognized as minors. For depravity of minors a criminal liability comes but for their trade is absent that is in our opinion, a gap of the penal statute.

We have already noted that persons from 14-18 years are recognized as minors. Taking into account stated above, we believe that if the guilty person will be committed trafficking in minors, then in such cases of his action will fall under signs of already aggravating circumstance with more strict criminal liability.

As permission of this problem, we believe that to Art. 135 of the CC RK "trafficking in minors" it is reasonable to make changes and additions, presumably in new point 14 and among aggravating signs which are already fixed in part 2 to provide responsibility and for trafficking in minors.

It is recommended for the Supreme Court of RK to state the normative resolution "about practice of application of the legislation, establishing responsibility for human trafficking" in the new edition

Some aspects of the real subject as we assume will cause disputes in investigative and judicial practice. The last circumstance causes need of amendments and additions to the normative resolution "about practice of application of the legislation, establishing responsibility for human trafficking" of December 29, 2012 No. 7 based on the fact that it is stated within the Art. 128 and Art. 133 of the Criminal code of RK of 1997 (which was lost a legal force). In this regard, we consider expedient that for the Supreme Court of RK it is necessary to make amendments to the normative resolution "About practice of application of the legislation, establishing responsibility for human trafficking", taking into account explanations concerning qualification of human trafficking (Art. 128 of the CC RK of 2014) and trafficking in minors (Art. 135 of the Criminal code of Kazakhstan of 2014) which are reworded in the new edition for the purpose of uniform application of the penal statute by judicial investigating bodies of the Republic of Kazakhstan.

DISCUSSION

As a rule, women and minor girls become the victims of trade that quite often involves especially heavy consequences for their physical development and health. Men do not so often become a slave trade subject. As E.V. Tyurekanova noted, this figure can reach 4 million people of the annual victims of human trafficking, from which $\frac{1}{4}$ part is constituted from children. During the present period of time more than 200 million people in the world are the victims of modern forms of slavery.

Theoretical and applied aspects of human trafficking (minors) were repeatedly affected in publications of the

Kazakhstan scientists. In particular it is works (Boretsky, (2012) and other researchers (Khanov and Boretsky, 2012).

Considering this problem Crystal M. Fernandez notes that by hearing of cases in the court with participation of the children, who are commercially sexually exploited, falling under jurisdiction of the State of Arizona, children do not receive protection which would be received under federal jurisdiction. It creates the unequal handling with the same type of the victims (Fernandez, 2013).

The object of the analyzed crime was considered by such scientific lawyers as: Abramova S.V., B.N. Beysenaliyev, A.I. Milevskiy, N.G. Kulakova, Kulakova, L.Yu. Egorova, etc.

In legal literature by scientists lawyers provided various approach to definition of "recruitment". Recruitment means a incitement of one or several people (minors) to consent of their use for accomplishment of certain works or rendering services for example, for labor or sexual exploitation.

L.Yu. Egorova believes that "recruitment, transportation, concealment" are the actions accompanying to human trafficking. The author suggests that the transportation and concealment must be referred to the qualifying sign of the actus reus, provided by the P. 2 of Art. 127 of the Criminal code of Russian Federation "human trafficking"; recruitment of the person for the purpose of exploitation must be allocated in independent actus reus; recruitment of the minor for the purpose of exploitation must be referred to its qualifying sign, placed it in Chapter 17 of the Criminal code of Russian Federation of "A crime against freedom, honor and dignity of the personality".

It seems to us that the at committing of trafficking in minors there is no special need to allocate in the separate criminal precept of law only one sign "recruitment", fixed in a disposition P.1 Art. 135 of the CC RK "trafficking in minors" and respectively in P.1 Art. 128 of the CC RK "human trafficking". We will notice that the sign "recruitment" is reflected in two crimes, provided by Art. 170 of the CC RK "Mercenarism" and Art. 259 of the CC RK "recruitment or preparation or arming of persons for the purpose of the organization of terrorist or extremist activities".

CONCLUSION

Actuality of the subject "the criminal and legal analysis of trafficking in minors in the Republic of Kazakhstan", its theoretical importance for the theory of the criminal law and practical need for law-enforcement practice is shown in ensuring of effective fight against this negative social phenomenon, first of all law enforcement agencies, nongovernmental organizations and the state in general.

For the purpose of counteraction of trafficking in minors it is necessary to undertake a complex of measures of social and economic and legal (including criminal and legal and criminological) type as during this period of time the specified illegal act is one of the most profitable spheres of criminal business and it can lead to functioning in Kazakhstan and in other countries of the FSU and beyond of the market of "slave trade".

In this study the questions of qualification of trafficking in minors, designated by us, practically reflect essence of the studied phenomenon but at the same time, they are not exhaustive.

For the purpose of carrying out further research of the considered problem, concerning qualification problems of trafficking in minors it is supposed to study foreign experience of the countries of the FSU and beyond and taking into account its analysis and generalization it is necessary to consider the main positive aspects of the foreign legislation in the national penal legislation of the Republic of Kazakhstan.

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