

Realities and Prospects of Regulating Human Trafficking for Labour Exploitation and Forced Labour in Republic of Moldova

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Abstract: The analytical survey on research and trial of cases on human trafficking and those related to trafficking (for the period 2006-2009) has ascertained that in 29% of all the cases on child trafficking (Article 206, Penal Code), children were subjected to labour exploitation or forced labour, and in 32% of all the cases on human trafficking, people were subjected to labour exploitation or forced labour. Notwithstanding this, of all the criminal cases on child trafficking submitted to court, prosecutors demanded that the actions of the perpetrators should be reclassified under Article 168 of the Penal Code in 6.5% of cases, whereas in 13% the court reclassified the actions after it examined the substance of the case. If we refer to the same indexes but in the context of human trafficking, prosecutors reclassified 4% of cases under Article 168 of the Penal Code, whereas courts reclassified the actions of the perpetrators based on other components of crime, including forced labour, in 30% of cases.

Keywords: labour; trafficking in human beings; exploitation; abuse; prohibition

All these cases took place in the same context (in terms of recruitment, transportation, exploitation outside the Republic of Moldova, maintenance conditions, cheating and threats, etc.), but they all fell under different articles. The difference between the penal sanctions stipulated by the articles 165 and 168 of the Penal Code is very big. In the first case the minimal sanction is 7 years in jail, whereas in the second case, one may get a fine. Delimiting the actions of these crimes is a difficult process, leaving much space for abuses by people empowered to classify the perpetrators' actions. The doctrine does not describe clearly and convincingly the classic delimitation of these two offences. Moreover, the legislation makes no reference to the delimitation of these offences either.

Although presently there are no differentiated governmental statistics on human trafficking in various sectors, including forced labour, concealing the traffickers' activities and presenting them as minor offences (including forced labour), as well as avoiding criminal responsibility continue to be the perpetrators' topical

aspirations. Undoubtedly, they also take advantage of the existing legislative confusion in the process of classifying these criminal actions.

In order to unequivocally classify the perpetrators' actions in accordance with Article 165, when trafficking was aimed at labour exploitation, or in accordance with Article 168, which refers to forced labour, it is necessary to establish and specify what actions by the perpetrator should be classified in accordance with Article 168 of the Penal Code, as presently there is a clear legal definition of human trafficking.

Thus, in order to justify the need to amend Article 168 of the Penal Code so that it extends to other criminal actions but human trafficking, a comparative analysis (delimitation) of the components of crime would be welcome.

So, we proceed from the theoretical aspects of every mandatory element of a crime:

1) *the legal object*, which is made up of social relations affected by a component of the crime;

2) *the objective side*, which comprises 3 mandatory components (for material components) and several optional ones. The mandatory ones are: a) harmful events that may take the form of action or inaction, b) harmful consequences and c) the casual link between the harmful event and consequences (characteristic of the components of material crimes).

At the same time, the same *objective side* also comprises several optional components, which *however may play a decisive role in classifying crimes (for instance, the method and means at human trafficking)*, such as the method, means, date, venue....

Another element of the 4 mandatory ones for the component of crime is

3) *the subjective side*, which resides in the perpetrator's attitude towards his/her deed (which may be committed deliberately or by imprudence), the goal and reason (are optional, but may also play a decisive role when classifying some crimes, such as human trafficking).

4) *subject*- that is, the perpetrator that may be a private person (responsible and aged...) or a legal entity...

It is known that there is no component of crime if one of the main elements of the crime is missing – it may be a deed that poses no social danger (misdemeanour) or in general, it may be an insignificant deed... At the same time, it is said (we repeat) that although in certain situations, the components of the main elements are insignificant, their presence for certain components of crime is highly important and plays a decisive role when classifying the crime (to such an extent that their absence may lead to classifying the actions in accordance with another component

of crime). Moreover, sometimes when the optional components are decisive for the classification, even the legislators outline them in the legal norm.

Thus, we get to human trafficking and will try to present the elements by respecting the above-mentioned sequence.

As it ensues from the chapter of which this component of crime is part, taking into account the system of crimes set by the legislator (starting with the gravest crime and ending with the crimes that pose reduced social danger), *the general juridical object* of this crime is made up of social relations as regards people's freedom that may be expressed in physical and psychic freedom, and adjacently the bodily integrity may be affected...

The objective side of this crime manifests itself through two categories of distinct actions which are interconnected. These actions are regulated by the *Recommendation of the Parliamentary Assembly of the Council of Europe No. 1325 (1997)* on trafficking in women and forced prostitution in Council of Europe member states; Recommendation R(2000) 11 that the Council of Europe Committee of Ministers adopted on 19.05.2000 and *the Explanatory Report; Recommendation of the Parliamentary Assembly of the Council of Europe No. 1526 (2001) on trafficking in minors (the example of Moldova); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000 (Palermo); the UN Resolution of 18.01.2000; the UN Convention against cross-border organized crime.*

The first category of criminal actions can have the following varieties: a) recruitment; b) transportation; c) transfer; d) harbouring; e) reception of a person.

The criminal actions of *the second category* can be carried out through: a) threat to use physical or psychic violence that is not dangerous for the life and health of a person, including abduction, confiscation of documents and slavery in order to pay back debts whose amount is not reasonably set; b) deception; c) abuse of a position of vulnerability or abuse of power, giving or receiving some payments in order to achieve the consent of a person who has control over another person (the second category comprises methods applied by the trafficker while committing the actions of the first category – the victim is recruited through threats or deception; every time the perpetrator combines these actions in order to meet the expected goal).

The conclusion is that the methods of committing HT, albeit they are an optional component of the objective side, are relevant for the classification of the crime. In particular, these actions and methods differentiate the HT from other components of crime, the more so that now that the legislators have taken them over from relevant international documents, they are reiterated in the current version of the legal definition of HT.

So, in order to carry out the objective side of human trafficking, at least three varieties of the first category of criminal actions and at least one of the above-mentioned actions of the second category should exist. This means that the actions stipulated in Article 165 paragraph 1 are committed through the methods envisaged at letter a) through c) of Article 165 paragraph 1 of the Penal Code.

Human trafficking is a formal component and is considered to be over once the two mandatory actions described in the penal norms are completed; no matter whether harmful consequences supervene (the goal is achieved).

So, in the above-mentioned sequence, the *subjective side* manifests itself through direct exclusive intention because from the very beginning it entails the fulfilment of a *special goal* (exploitation in various sectors, including labour exploitation). The actions listed for the objective side should be carried out *with the purpose* of commercial or non-commercial sexual exploitation, through forced labour or services, in slavery or in slavery-like conditions, of using in armed conflicts or criminal activities, of drawing human organs and tissues for transplantation (it should be noticed that the goal is an optional component of the subjective side; the legislator describes it as relevant for human trafficking; if the actions are committed for another purpose but the set ones, the classification of actions shall take place based on another component of crime)

Subject – responsible private person, aged 16, legal entity.

If we return to the crime of forced labour (Article 168 of the Criminal Code) in the current version, we should note that in the Republic of Moldova it means *forcing people to work against their will, enslaving them to pay back debts, obtaining labour services through deception, constraint, violence or by threatening them with violence*.

Thus, the first criminal action is *to force people to provide labour services against their will* and according to DEX (Explanatory Dictionary of the Romanian language), *forcing* means to induce somebody by force, to compel, to constrain, to oblige.

In these circumstances, the legislator unclearly expounded the criminal actions taking place after the constraint - *enslaving a person to pay back debts, obtaining labour services through deception, constraint, violence or by threatening them with violence*. The unclearness resides in the fact that by their significant content, the subsequent actions double the meaning of the action of forcing. Forcing, by all efforts, can have no other meaning but the one suggested by DEX. Therefore, it is deemed opportune to change as follows the legal definition of forced labour so as to avoid a double meaning: Forced labour should represent *the constraint of a person to work against his/her will*.

Otherwise, at a first glance, one may draw the conclusion from the current version of Article 168 of the Penal Code that the conditions of providing such labour services are similar to HT, which implies labour exploitation. Nevertheless, another conclusion is that forced labour as presented in Article 168 may be regarded as HT with the purpose of labour exploitation provided that the main criminal actions of the objective side characteristic of HT and pointed out by the legislator – *recruitment, transportation, harbouring* - took place in combination with one of the methods characteristic of HT as well stipulated in *Article 165 paragraph 1 letters a-c) of the Penal Code*. Moreover, forced labour does not entail the presence of a special goal, which may be different (as example, profit, revenge, envy, jealousy, etc.), as it is not relevant for classification (it is taken into account only to individualize the punishment), whereas when it comes to HT, the goal as part of the optional component of the subjective side plays a decisive role in classification (as the perpetrator had a clear goal from the very moment of recruitment).

Taking into account the above-mentioned arguments, it is necessary to supplement the existing norm of Article 168 of the Penal Code with the words: *if these actions do not contain elements of human trafficking*.

Thus, forced labour (paragraph 1) shall be worded in the following version:

- *Constraining a person to provide labour services against his/her will through;*
- *Deception;*
- *Violence;*
- *Threats to use violence and other methods, if these actions do not contain elements of human trafficking.*

Argument: Forced labour was for the first time defined at international level in the ILO (International Labour Organization) Convention No 29 on forced labour, according to which, *forced labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered voluntarily*. In other words, this definition points out 2 key elements:

- 1) work should be carried out under the menace of penalty and
- 2) work should be carried out forcibly.

Making a sum-up after the adoption of the Convention in the context of existence of the forced labour phenomenon in the signatory states, ILO identified the following displays of threats:

- Physical abuse against the provider or his/her family's members
- Sexual abuse;

- Excessive revenge;
- Imprisonment sentence or any other restriction to the freedom of movement;
- Fines;
- Handing them over to the authorities (police, migration services...);
- Dismissal;
- Refusing to give them the promised job;
- Exclusion from community and social life;
- Depriving them of rights or privileges;
- Leaving them without food, shelter or other means of existence;
- Transfer to a more difficult job;
- Loss of social status, etc.

No matter what the threat is, we should not rule out that it may be carried out even in a situation when there are legal labour relations between the Employer and the Employee, which, after some time, have got traits of forced labour in any of its forms.

At the same time, people subjected to forced labour are often provided with shelter. In such cases, it is recommended that shelter that does not restrict the victim's right to movement after the working hours be classified as forced labour, whereas shelter that restricts the right to movement, to communicate with other people, and when the victims are dispossessed of their documents, etc., should be classified as HT.

In addition, taking into account the penal regulations of the states with which Moldova has historical connections (the Russian Federation, which in Article 127.2 of the Penal Code prohibits the use of *slave labour and includes the use of the labour of any person over whom power similar to the rights of ownership is exercised, if such person, for reasons beyond his control, is unable to refuse to perform such labour*), as well as the definitions offered by specialized dictionaries, forced labour should comprise elements of coercion through a range of factors used by the perpetrator and should be carried out without the consent of the provider (so, the key elements stipulated in the ILO Convention No 29 on forced labour should be reiterated).

Neither should it be ruled out that labour exploitation in conditions of HT may take place by respecting strictly the working hours stipulated by legislation and the conditions of labour security.

At the same time, we should take into account a situation when legal labour relations based on a signed labour contract subsequently get traits of forced labour, and hence criminal investigation bodies may stop the criminal investigation for reason that there are civil relations between the employer and the provider that are to be settled accordingly.

With reference to international documents on forced labour and human trafficking (Palermo Protocol), it is pointed out that criminal actions evolve as society develops. Therefore, we incline to admit that the definitions offered by the Palermo Protocol are more modern than the ones seen in the ILO Convention.

Looking for solutions (in finest details) and delimiting these two components (165 and 168) in international documents is deemed as incorrect, as they are reference points (standards) which exist in order to create and/or adjust the national legislation (by taking into account the social peculiarities of each of these crimes in a state, specific society).

In such circumstances, it is necessary that besides the prototype version, Article 168 also includes 2 aggravating versions providing for criminal responsibility for actions set in paragraph 1, but committed by 2 and more people against 2 and more people and by a decision-maker, public person or a person holding a public post, as well as for actions committed by an organized criminal ring or a criminal organization. At the same time, it is proposed to supplement it with the aggravating version which *caused by imprudence the death of the victim or great bodily harm or bodily integrity*.

Respectively, when Article 168 of the Penal Code is supplemented with 2 paragraphs, sanctions should be stepped up so that they include sanctions for legal entities.

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