



Minor Trafficking in the Romanian Law

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Abstract: In the current paper we have examined the crime of trafficking in minors, given the recent changes and additions made by the legislator in the legal content of this crime with the adoption of the G.E.O. no. 18/2016. Within the examination we have identified elements of similarity and difference between the two measures (the previous law and the law in force at the moment), and the constitutive content, forms, penalties, complementary explanations, the previous legislation and the application of more favorable criminal law in this transitory situation. The innovations consist in the conducted examination with the new changes and additions to the text originally published in the new Criminal Code, presenting comparative elements and examining the constitutive contents and the variants of applying the more favorable criminal law in transitory situations. This paper continues the examination of the offenses provided in the new Romanian Criminal Code, publishing in the near future a new university course in this field. As it is organized, the paper may be useful to law students from Romania, practitioners in this field, as well as European citizens who wish to supplement their knowledge in this field.

Keywords: offense; constitutive content; more favorable criminal law

1. Introduction

There As provided in article 211 of the Criminal Code, the offense of trafficking in minors in its type consists in the recruitment, transportation, transfer, accommodation or receipt of a child for the purpose of his exploitation.

In par. (2) there are provided the aggravated normative ways that will retain as such when:

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- the offense was committed under art. 210, par. (1) of the Criminal law (trafficking in people), namely: through coercion, abduction, deception, abuse of power, taking advantage of the impossibility to defend or to express their will, or obvious state of vulnerability, offering, giving or accepting money or other benefits in exchange for the consent of a person having control over the victim;
- the act is committed by a public official in the performance of duties;
- the offense endangered the life of a minor;
- the offense was committed by a family member of a minor;
- the offense was committed by a person in whose care, protection, education, guard or treatment is the minor or a person having abused their position recognized as being of trust or authority over the minor.

As for the offense of human trafficking, the consent of the person victim of trafficking is not a justifiable cause.

We should highlight that paragraph (2) is shown as it was modified by the art. I, point 2 of G.E.O. no. 18/2016¹.

2. Similarities and Differences between the Current and the Previous Regulation

Although it has no counterpart in the 1969 Criminal Code, the crime of trafficking in minors was provided in article 13 of Law no. 678/2001 on preventing and combating trafficking in persons, as amended and supplemented.

The comparative examination of the two indictments reveals the existence of elements of similarity and difference.

Thus, in terms of the type modality, in the new indictment the legislator hosting discontinued its action, instead of sheltering, it replaced it with a broader term accommodate which includes sheltering.

As for the aggravated ways provided in par. (2) we can notice that in the new regulation, there will be retained the following circumstances: the offense is

¹ G.E.O. no. 18/2016 amending and supplementing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure and supplementing art. 31 par. (1) of Law no. 304/2004 on judicial organization, published in the Official Monitor of Romania, Part I, no. 389 of May 23, 2016.

committed under art. 210, par. (1) of the Criminal Code. The act is committed by a public official in the performance of their duties, the act endangered the life of the minor, the offense was committed by a family member of the minor, and the offense was committed by a person in whose care, protection, education, guard or treatment is the minor or a person having abused of his recognized position of trust or authority over the minor.

Another differentiation element between the two regulations aimed at renunciation of the legislator of the aggravated ways provided for in art. 13, par. (3) and (4) of the Law no. 678/2001.

No doubt that under the new law, if it was caused to the victim a serious injury to the bodily integrity or health, the offense of trafficking in minors will be accepted in competition with the offense of injury.

Also, if the result was suicide or death of the victim, the crime of trafficking in minors will be accepted in competition with the offense of causing or aiding suicide or crime of murder or manslaughter.

If the offense is committed by more than two persons together, it will be retained as aggravating circumstance provided for in art. 77, letter a) of the Criminal Code, and if the act is committed by two people together, the act will meet the constitutive elements of the offense of trafficking in minors in its type mode.

Between the two regulations there are some differences also in the case of regarding the sanctioning regime. Thus, in the case of the modality type the penalty limits are different in the new law being imprisonment from 3-10 years and deprivation of rights, while in the old law, the penalty is imprisonment from five to 15 years and interdiction of certain rights.

In case of aggravated way provided into the new law the penalty limits are between 5 and 12 years of imprisonment and deprivation of rights, while in the old law, they differ, namely: imprisonment from 7-18 years of imprisonment from 10 to 20 years of imprisonment for 15-25 years and interdiction of certain rights.

3. The Constitutive Content of the Offense

3.1. The Objective Side

The material element of the objective side is performed by the same alternative actions, as in the case of the offense of human trafficking or recruitment,

transportation, transfer, accommodation or receipt of a minor for the purpose of exploitation.

The fundamental distinction in the case of type manner in relation to the crime of human trafficking is that in the case of the examined offense the incriminated alternative actions are not achieved in the ways provided for in art. 210, par. (1) of the Criminal Code (i.e. coercion, abduction, deception, etc.), but by any other action which in their essence presuppose persuading minors to accept their exploitation.

In the case where the material element is achieved through a number of actions (from those provided in the text) it will retain committing a single offense.

The Minor victim's consent is not a justifying cause.

The immediate result is to create a state of danger for the freedom of the minor being the victim, who is trafficked for exploitation.

Between the action or actions of prosecution and the produced result it should be established the existence of a causation link.

3.2. The Subjective Side

The form of guilt with which it is committed the offense is direct intent, classified by the purpose provided in the incrimination norm, which consists in exploiting a minor.

4. Forms, Ways, Sanctions

4.1. Forms

Although they are possible, the preparatory acts are not punishable, and according to art. 217 the attempt is punishable.

The offense is consumed when they it is achieved the typical act.

The most often, as it results from the case law, this offense is committed through repeated form, in which case we will have a moment of exhaustion that will be identified when the perpetrator carried out the last act of execution, and the victim will regain their freedom of will and movement.

Specifically at this moment it will coincide every time the intervention of judicial authorities, the waiver of the perpetrator or the intervention of other persons or as a result of a specific action of the victim.

4.2. Ways

The offense of trafficking in minors presents a type way in the content of article 211, par. (1) even more aggravated ways in par. (2) of the same article.

The aggravated ways consist in the act of the natural or legal person who recruits, transports, accommodates or receives a minor in order to exploit him, committed by:

- coercion, abduction, deception or abuse of authority;
- taking advantage of the impossibility to defend or to express their will or their vulnerable obvious status of vulnerability of that person;
- by offering, giving or receiving money or other benefits in exchange for the consent of a person having control over that person.

It will also retain the commission of the act in aggravated normative ways also in the case where:

- the act is committed by a public function in the performance of their duties;
- the offense endangered the life of a minor;
- the offense was committed by a family member of the minor;
- the offense was committed by a person in whose care, protection, education, guard or treatment is the minor or a person having abused of their recognized position of trust or authority over the minor.

In the judicial practice it was decided that the recruitment, transportation and accommodation of a person by threat, violence and deception, by two or more persons together, in order to exploit the victim minor being forced to beg, wash windshields of cars in traffic and committing offenses of shoplifting, meet the elements of the offense of trafficking in minors as established in art. 13, par. (1), (2) and (3) based on the art. 12 par. (1) and (2) a) of Law no. 678/2001 regarding conducting activities that violate human rights and fundamental freedoms (Rusu, Chirilă, Goga, & Ionescu-Dumitrache, 2014)¹.

¹ Î.C.C.J., Criminal Division, Decision no. 2248 of June 26, 2012, available on www.scj.ro.

The recruitment and hosting a minor by fraud and violence, exploitation victims forced into prostitution if the act was committed by two or more persons together, comply with the article 13, par. (1), (2) and (3) of the Law no. 678/2001 (Rusu, Chirilă, Goga, & Ionescu-Dumitrache, 2014, p. 137)¹.

Also recruiting a minor by using false promises that he will be put in decent jobs, misleading him by the promise to help them obtain faster the passport represent fraudulent means that can attract the incidence of provisions of art. 13, par. (1) of Law no. no. 678/2001. (Rusu, Chirilă, Goga, & Ionescu-Dumitrache, 2014, p. 138)²

4.3. Penalties

For the type manner provided for in article 211, par. (1) of the Criminal Code the sanction provided for imprisonment from 3-10 years and the deprivation of rights, and in the case of aggravated way provided in par. (2) of the same article, the penalty is imprisonment from 5-12 years and interdiction of certain rights.

5. Additional Explanations

5.1. The Connection to other Crimes

The offense of trafficking in minors has direct links with the crime of human trafficking examined in the previous section, as well as other offenses covered by this chapter.

5.2. Some Procedural Aspects

The jurisdiction of the court is in the district in which the act was committed.

In relation to the competence of the person's quality, the jurisdiction of the court of first instance may reside also to higher courts.

Criminal proceedings shall be initiated *ex officio*, and the jurisdiction to conduct criminal investigations belongs to the criminal investigation bodies of police, under the supervision of the prosecutor.

Regarding some elements of resemblance to the crime of pimping, we should mention that the comments made when examining the crime of human trafficking are applied here as well, in terms of the examined crime.

¹ Î.C.C.J., Criminal Division, Decision no. 3091 of October 2, 2012, available on www.scj.ro.

² Î.C.C.J., Criminal Division, Decision no. 5692 of November 3, 2004, available on www.scj.ro.

So in the judicial practice it was decided that in the case where the recruited person does not know that after being taken abroad, will not get a job, as the person has been assured by deception by the defendant, but the person will have to practice prostitution, sharing the earned money, the act constitutes the crime of trafficking in persons referred to in art. 12 of Law no. 678/2001 and not the pandering offense.

The offense committed against a minor, whom it was promised a job by fraud abroad and their parents have received benefits in order to achieve the consent for the departure of the minor represent the traffic of minors offense as established in art. 13 of Law no. 678/2001 (Rusu, Chirilă, Goga, & Ionescu-Dumitrache, 2014, p. 138)¹.

6. Previous Legislation and Transitory Situations

6.1. Previous Legislation

As in the case of the previously examined offense, the offense of child trafficking was not incriminated in the previous legislation in Romania, the reason being that the phenomenon itself, appeared and was developed from the second half of last century.

6.2. Transitory Situations. Application of the More Favorable Criminal Law

The comparative examination of the two indictments, some differences between them, and the changes in the general part of the Criminal Code allow us to formulate the following hypotheses of applying the more favorable criminal law:

a) In the case of the type offense set out in the art. 211, par. (1) Criminal Code and art. 13, par. (1) of Law no. 678/2001, we are facing the following hypotheses:

The contents of incriminating texts is almost identical in the two laws (the only difference consisting in the use of the term accommodate, replacing the term sheltering, used in the old law) and the penalty limits differ (imprisonment from 3-10 years and limiting some rights in the new law, compared to imprisonment from 5-15 years in the old law), depending on the specific circumstances of committing every act, the more favorable criminal law may be either one of them.

Thus, under the conditions where the court did not retain the existence of aggravating or mitigating circumstances, the more favorable criminal law will be

¹ Î.C.C.J., Criminal Division, Decision no. 4968 of September 7, 2006, available on www.scj.ro.

the new law, and in the case where the court is inclined to the imposition of a sentence oriented towards the special minimum, and also in the case where the court will apply a particular maximum penalty, as both limits are reduced.

If it is accepted as a mitigating circumstance, the more favorable criminal law will be the old law, and if it is accepted an aggravating circumstance (i.e., three or more people together), the more favorable criminal law will be the new law.

In the case of finding a real contest of crime, the more favorable criminal law will be the old law.

b) In the case of aggravated circumstances provided for in art. 211, par. (2) of the Criminal Code and art. 13, par. (2) of Law no. 678/2001, we are facing the following hypotheses:

In the case where the offense is committed by two people together, it shall apply as a rule, the provisions of the new law, as it is no longer an aggravated way and the limits of punishment are imprisonment from 3-10 years and deprivation of rights compared to the previous law which provides for imprisonment from 5-15 years and interdiction of certain rights; however, it is not included the old law enforcement in case of retaining mitigating or aggravating circumstances.

In the case of causing to the victim a serious bodily injury or health, according to the old law, we notice that in the new law this aggravated way is no longer provided, being applied the rule of offenses contest.

In that case of identifying and application of more favorable criminal law it is difficult as the court, taking into account all the circumstances of the offense, it will have to make a comparison of possible penalties under the old law (imprisonment from 5-15 years and deprivation of rights) and according to the new law, it will take into account the offenses contest (trafficking and injury), taking into account the limits of punishment or imprisonment from 3-10 years, deprivation of rights and imprisonment from 2 to 7 or 3 to 10 years old, respectively).

In this situation, the more favorable criminal law can be both the old and the new law.

If the active subject of the crime is qualified (a public official in the exercise of his duties), given the limits of minimum sentence that is identical (in prison - five years) and maximum different (12 years imprisonment in the new law and 15 years in prison in the old law), the more favorable criminal law can be any of them.

Thus, in the case where the court decides to apply a minimum or special maximum penalty, the new law will be applied, and if there are mitigating circumstances, the more favorable criminal law will be the old law; if it is retained as one aggravating circumstance, the more favorable criminal law will be the new law.

In the situation where the facts provided in the aggravated way are committed by a family member, two or more persons together, by a public servant during performance of their duties or if he caused to the victim serious injury to bodily integrity or health under the old law the act qualifies in article 13 par. (3), sentence I or II, where appropriate, of Law no. 678/2001, and the provisions of art. 211, par. (2) Criminal Code based on art. 38, par. (1) or (2) Criminal Code, as appropriate.

In this circumstance, the court should take into account the views expressed above (regarding the sentencing under the old law), then, by punishment resulting from the competition of offenses to apply the more favorable criminal law, which may be as any of them.

In case the act resulted in the death or suicide of the victim, the penalty limits are between 15 and 25 years and interdiction of certain rights, while according to the law we will retain the contest between the offense of trafficking in minors and the offense of causing or aiding suicide, homicide or murder, as appropriate. In that case the law may be more favorable for either of them.

7. Conclusions

In Romania, as all Member States of the European Union, the protection of minors from abuses, including the trafficking represents a legislative objective major was done to some extent by incriminating such acts and their provisions in the New Criminal Code.

The new modes of action of organized crime groups, the more obvious implications of special categories of persons in committing such offenses and the need to harmonize the Romanian domestic law with the European Union, prompted the Romanian legislator to operate some changes in the legal content of this crime, so that now we can say that the incrimination corresponds to the protection needs against this type of crime.

The conducted examination has revealed some specific situations where the criminal law should apply more favorably, given the transitory situation in which we are.

As one general conclusion we consider that the examination of the crime with the new changes made by the Romanian legislator, focusing on the identification of similarity and differences between the two measures (the previous law and applicable law), the constitutive contents and application of the more favorable law in transitional situations was imposed due to the increase of crime in this area and the need to prevent and combat more effectively this kind of crime.

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