

Criminal Law Remedies for Counteraction Human Trafficking and Trafficking of Children: Legislative Issues

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Abstract: The article discusses positive and negative aspects of the latest changes and additions made to the disposition of Art. 130¹ and Art. 167 of the Criminal Code of the Republic of Tajikistan. The purpose of the study is to identify positive and negative aspects of the changes and additions to the norms under consideration. The objectives of the study are to identify positive and negative aspects of the changes and additions to the norms under consideration; development of proposals for solving the problems of norms on human trafficking and trafficking of children. The methodological base consists of the dialectical method of cognition, which made it possible to study the problems of norms on human trafficking and trafficking of children. The authors analyzed the new acts of these norms, considered some points of delimiting human trafficking from related structures, taking into account the above changes and additions, and also analyzed the new purpose of human trafficking. As a result of the study, the positive and negative aspects of the changes and additions to Art. 130¹ and 167 of the Criminal Code of the Republic of Tajikistan were identified.


1 INTRODUCTION


The significance of counteraction to human trafficking in Tajik Republic is undoubted, since the addition of norms to CC of RT, there were included two more laws, Comprehensive programs, National plans, changes and additions were made to the CC of RT three times, there were held many conferences, round tables and seminars. But, indeed, the problems are still not solved. Analysis of scientific foreign and domestic literature shows that the scheme and mechanism of human trafficking in most countries are the same. In Japan, organized crime is engaged in human trafficking (Stoker Sully, 2008). The same situation is in India (Singh G., Singh H., 2013). The regulations for the investigation of this category of crimes are also similar. For example, in India, recruiters into the sex industry are women (Mikhel I.V., Kengurusi N. 2019), as well as in Tajikistan, in


Vietnam, human trafficking is mainly investigated at the victim or his family members' statement (Selezneva N.A.).

Moreover, due to the similarity of the Criminal Code of the Republic of Tajikistan and the Criminal Code of the Russian Federation, the problems of qualification and delimitation of human trafficking from related components of crime are the same. For example, in the law enforcement practice of Russia, as well as of Tajikistan, there is a problem of delimiting human trafficking from kidnapping (Taranenko V.V., Kharitonov S.S., Reshnyak M.G., Borisov S.V., 2020).

Another circumstance that actualizes the fight against human trafficking is labor migration, in particular international, which increases the efficiency of labor markets, facilitates the transfer of knowledge and competencies, facilitates the system of technology transfer, trade at the international level

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and removes obstacles to economic development (Melnik T.M., 2011), creates new jobs and supports the social security system (Potemkina O.Yu., 2019). However, Tajik citizens do not formalize their stay, in order to save money, and become illegal migrants, which leads to human trafficking. All above listed proves that criminal associations create transnational strategic alliances, so joint measures of states at different levels are required to counteract the alliances (Aliev N.T.O., Borbat A.V., 2020). All of the above factors determine the topicality of human trafficking in the Republic of Tajikistan.

The hypothesis of the study is the fact that, without taking into account the legislative technique, the changes and additions made will not be able to solve the problems in law enforcement practice.

The purpose of the study is to assess the effectiveness of the latest changes and additions made to Art. 130¹ and 167 of the Criminal Code of the Republic of Tajikistan.

The research objectives are:

- identification of positive and negative aspects of changes and additions to the norms under consideration.

- development of proposals for solving problems of norms on human trafficking and trafficking of children.

2 MATERIALS AND METHODS

Research was made with considering of dialectical method of cognition, which made it possible to study the problems of norms on human trafficking and trafficking of children.

With the help of synthesis, there was determined the validity of the existence of problems of legislative technique in the formation of Art.130¹ and 167 of the Criminal Code of the Republic of Tajikistan. The logical-legal method made it possible to give recommendations for solving the identified problems of the new edition of the norms.

3 RESULTS AND DISCUSSION

Traditionally, for the realization of preventive measures, a substantive norm is needed, which is the basis of such a task. For effective preventive action, the norm should also be harmonized, since such norms of criminal law can reduce the risks that are caused by the principle of double criminality (Peers S., 2011), which, as a rule, acts as a serious obstacle

in the implementation of international cooperation in criminal cases (Entin M.L., Voinikov V.V., 2019).

In our case, the substantive norm is Art. 130¹ of the Criminal Code of the Republic of Tajikistan - human trafficking. As mentioned above, despite all the efforts of domestic legislation to bring the editing of the norm on human trafficking to an ideal formulation, from our point of view, the attempts were not entirely successful.

Disposition of Art. 130¹ of the Criminal Code of the Republic of Tajikistan makes provision of one of eight alternative actions: 1) purchase and sale, 2) other illegal transactions, 3) offer, 4) recruitment, 5) transportation, 6) transfer, 7) harboring and 8) receiving a person. The legislator took the path of formalizing the methods of committing trafficking, as evidenced by the indication of various methods of committing of human trafficking.

In the disposition of Art. 130¹ of the Criminal Code of the Republic of Tajikistan, due to the latest amendments and additions, such act as sale and purchase of a person was included and for the domestic scientific world this act has not been studied yet. In the Russian scientific world, this act has been sufficiently studied, so in this connection, the experience of Russian scientists on the term should be studied.

In the theory of criminal law, there are two approaches to the question of defining the concept of "buying and selling a person" among scientists. Supporters of the first approach (Vinokurov S.I., 2014, Kostrova M.B. 2002, Magomedov S.K. 2004, Skorlukov O.A., 2005), suggest not to use the terms of civil law, since a person cannot be a thing or be considered similar to that.

The second approach involves the use of these terms within the framework of Art. 1271 of the Criminal Code of the Russian Federation (Naumov A., 2002, Zhinkin A.A., 2005, Kislova E.A., 2005, Dolgolenko T.V., 2004, Zaydieva D.Ya. 2006).

Moreover, the blanket formulation of this norm is considered to be correct. The following example can be given: A contract of sale in civil law is similar to the sale and purchase of a person in criminal law, the only difference is the subject of the transaction, which is the person in the second case. In civil law, a sale and purchase is considered completed upon fulfillment of the obligations of the parties (transfer of goods in exchange for money), and in criminal law, the fact of exchange is not required for the recognition of an action to be completed. In this regard, the use of civil terms is acceptable in the context of human trafficking.

In the Republic of Tajikistan, the term "buying and selling a person" is disclosed by the Law of the Republic of Tajikistan "On Counteraction to Human Trafficking and Assistance to Victims of Human Trafficking" (hereinafter - the Law of the Republic of Tajikistan "On Counteraction to Human Trafficking"), the which meaning, from our point of view, is fully disclosed.

The next new action in Art.130¹ of the Criminal Code of the Republic of Tajikistan - making other illegal transactions in relation to a person. As well as the sale and purchase, the definition of other transactions in relation to a person is disclosed in the Law of the Republic of Tajikistan "On combating human trafficking." Due to the absence of a similar law in the Russian Federation, there is no definite approach to understanding the action among researchers.

The recognition of other illegal transactions to be socially dangerous act is determined from the practical experience, since a person is exchanged not only for monetary reward. A person, in addition, can be donated, rented out, mortgaged, etc. In domestic practice, there are several cases of such actions. For example, for non-payment of a debt, the culprit was forced to leave his spouse as a bail; another case shows that the child is given to relatives, etc. The term "other" allows the law enforcement officer to use it widely and understand the same transactions that are given in civil law (chapter 7, § 2, 3, 4, 7 chap. 22, chap. 30, 31, 33 paragraphs 1 and 2, 35 Of the Civil Code of the Republic of Tajikistan (hereinafter - the Civil Code of the Republic of Tajikistan)). All of the above stipulates the connection of these actions with human trafficking, respectively, in our opinion, the criminalization of "sale and purchase" and "other illegal transactions" is considered to be correct. A similar conclusion was drawn by the results of a survey of law enforcement officials in Tajikistan. 84% of respondents support the legislator's position.

It should be mentioned, that only other illegal transactions are considered criminal, in this connection there may be raised the question of legal transactions in relation to a person. From our point of view, legal transactions in relation to a person can be understood as those transactions when a person can express his will.

Addition of the disposition of Art. 130¹ of the Criminal Code of the Republic of Tajikistan by such acts as "purchase and sale" and "other illegal transactions" is a positive point, since they constitute the essence of human trafficking. On the other hand, the legislator of the republic has fulfilled the obligation to unify and harmonize the legislation of

the CIS member states in the field of combating human trafficking.

The next act as a part of the objective side of human trafficking is a proposal. This socially dangerous action was also criminalized with the introduction of the latest amendments and additions to Art. 130¹ of the Criminal Code of the Republic of Tajikistan. In the dictionary of the Russian language this term means "something that is proposed, offered ..." (Ozhegov S.I., 1990). A person's proposal is the introduction of an offer (service, giving an idea, incentives to commit human trafficking) to buy, sell a person or other actions in relation to him in order to exploit him or extract illegal benefits to another person (group of persons). This term is not a novelty in the Criminal Code of the Republic of Tajikistan. For the first time, it was recognized as socially dangerous in the form of an offer to imitate and support public justification of terrorist activities and extremism in 2016. The analyzed act is considered completed from the moment a person makes a proposal for the abovementioned purposes.

The proposal as an illegal act is found in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Thus, the legislator tried to criminalize all methods of human trafficking and comply with international standards. In fact, the list of acts is wider than those ones provided in this disposition, for example, forced labor, use of people in armed establishments (Shestakov D.A., 2010), etc. From our point of view, this approach is casuistic, which leads to unnecessary detailing: listing the specific circumstances of life situations, all kinds of cases (Ivanchin A.V., 2010). Evidence of the casuistic method in Art. 130¹ of the Criminal Code of the Republic of Tajikistan is presented by 62 words that make up this disposition. According to the rules of legislative technique for "the perception, the norm should consist of 7-8 words" (Tretyakova NS, 2008, Kuznetsova NF, 1973).

Description of such qualifying identifiers as pressure, abuse of an official position by a guilty person, or abuse of a vulnerable position of a victim of human trafficking, in the disposition of parts 1 and 2 of Art. 130¹ of the Criminal Code of the Republic of Tajikistan, from our point of view, may lead to competition between parts of this norm and to a corruption component. These aggravating circumstances should be criminalized in Part 2 of this norm. It should be noted that abuse of a vulnerable position, being an aggravating circumstance in other norms of the Special Part of the Criminal Code of the Republic of Tajikistan, is completely absent in Part 2

of Art. 130¹ of the Criminal Code of the Republic of Tajikistan as a qualifying component. Thus, in our opinion, the disposition of Part 1 of Art. 130¹ of the Criminal Code of the Republic of Tajikistan was not quite correctly constructed by the legislator.

All the above-stated leads to the following problems: the description of all methods and qualifying features in one part of the article, firstly, does not correspond to the legislative technique, secondly, it complicates the use of this norm by law enforcement agencies and courts, and thirdly, citizens will also not be able to understand the essence of such a norm. The issue of difficulty in understanding the aspects of the rules of human trafficking also exists in the law enforcement practice of the Russian Federation (Volkov K.A., 2014).

An obligatory identifier of the subjective side of human trafficking are the two goals - exploitation of a person or obtaining illegal profit in another way. Getting of illegal profit is a sign of exploitation, however, in this case, the position of the legislator is considered correct, since when committing the acts listed in the disposition of the article under study, the perpetrators may not pursue the purpose of exploitation (for example, in organized groups, a person can be recruited and sold without exploitation to another organized group in connection with which the first group commits human trafficking to gain profit). This goal is new in Art. 130¹ of the Criminal Code of the Republic of Tajikistan, since it was included in connection with the inclusion of the latest changes and additions. Thus, it is necessary to distinguish the analyzed goal from the attribute of the goal of human exploitation. In the latter case, getting of benefits occurs through exploitation.

Regarding the issue of delimiting human trafficking from kidnapping, before making changes and additions to Art. 130¹ of the Criminal Code of the Republic of Tajikistan dated 02.01.2019, in distinguishing human trafficking from abduction, a difficulty appeared, which was associated with the fact that such a socially dangerous act as "abduction" was created in Art. 130 and in art.130¹ of the Criminal Code of the Republic of Tajikistan. The law enforcement officials faced difficulty of qualifying the act as aggregate or as a single crime in case of human trafficking by kidnapping. However, this problem was solved by excluding the term "abduction" from Art. 130¹ of the Criminal Code of the Republic of Tajikistan, which is also a positive point.

Regarding the issue of delimiting human trafficking from trafficking of children, in this issue, from our point of view, there are several difficulties.

The first one is in the objective aspect of child trafficking, which consists of two actions: any act or any transaction through which a child is illegally transferred to another person (group of persons). The meaning of the disposition in part 4 of Art. 4 of the Criminal Code of the Republic of Tajikistan "the principle of legality" indicates that a person who is receiving a child is not subjected to criminal liability for this act. Of course, the recipient who has committed the sale of children is prosecuted, but not under Art. 167 of the Criminal Code of the Republic of Tajikistan, and under Art.130¹ of the Criminal Code of the Republic of Tajikistan. The problem is that the penalties of both norms are proportionate, which is considered wrong from the point of view of fairness, i.e. a person who has committed a crime against a minor must bear greater responsibility. But if the punishment of Art. 130¹ of the Criminal Code of the Republic of Tajikistan would be stricter than of Art. 167 of the Criminal Code of the Republic of Tajikistan, then the question of the need for the existence of a rule on trafficking of children is raising. In other words, if there is a special norm, but it is not applied, then why is it needed?

There is another difficulty in the subject of child trafficking. In accordance with the disposition of Art. 167 of the Criminal Code of the Republic of Tajikistan, the subject in this crime is a parent, or another legal representative or another person (group of persons), who has a child to care for permanently or temporarily, i.e. the subject is special. In Art. 130¹ of the Criminal Code of the Republic of Tajikistan the subject is common. Thus, if a minor is sold by a neighbor, the latter one cannot be criminally responsible for this crime.

4 CONCLUSIONS

In conclusion, it should be noted about positive and negative aspects of the amendments and additions to Art. 130¹ and 167 of the Criminal Code of the Republic of Tajikistan.

The positive aspects include: a) addition of the disposition of Art. 130¹ of the Criminal Code of the Republic of Tajikistan by such acts as "purchase and sale" and "other illegal transactions"; b) the allocation of another goal in the subjective side of the analyzed crime - getting illegal benefits, which differs from the goal of exploitation; c) exclusion from the disposition of Art. 130¹ of the Criminal Code of the Republic of Tajikistan such actions as "kidnapping", which previously created problems for law enforcement

agencies and judges in qualifying and delimiting trafficking in persons from abduction.

The negative points are: a) addition of formation of the norm on human trafficking with such an action as “a person's proposal”. Thus, the legislator violated the legislative technique, which can lead to negative consequences; b) an attempt to describe all the methods and aggravating circumstances in the disposition of Part 1 of Art. 130¹ of the Criminal Code of the Republic of Tajikistan, may also lead to negative consequences; c) the absence of certain acts in the law on trafficking of minors forces law enforcement officers to qualify them under Art. 130¹ of the Criminal Code of the Republic of Tajikistan, which leads to violation of the principle of justice; d) narrowing the subject of trafficking of minors in the disposition of Art. 167 of the Criminal Code of the Republic of Tajikistan also forces law enforcement officers to qualify them under Art. 130¹ of the Criminal Code of the Republic of Tajikistan.

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