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The Gray Area in the Concept of Human Trafficking: Between the Text of the Law and the Purpose of Criminalization

Human Trafficking as a Legal Concept

The modern concept of human trafficking as a criminal offense is the result of long-term international efforts to curb the enslavement and exploitation of vulnerable people (primarily for prostitution and forced labor). In this context, the White Slave conventions (1904, 1910), Slavery conventions (1926, 1956), Forced Labor conventions (1930, 1957), and Trafficking convention (1949) should be mentioned. However, the concept of human trafficking was finally formed in international and European Union law only at the beginning of the 21st century. Its content today is determined by the following three legal acts: the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children (2000, hereinafter – the Palermo Protocol); the Council of Europe Convention on Action against Trafficking in Human Beings (2005); and the European Union Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2011). These legal acts, based on international agreements, define trafficking in humans the same way, which leads to the uniform content of national criminal laws. As for the Republic of Lithuania, the concept of human trafficking was transposed into national criminal law identically and implemented in two norms: one criminalizes trafficking in adult victims (Article 147 of the Criminal Code), the other trafficking in children (Article 157 of the Criminal Code).

The unified concept of human trafficking undoubtedly represents a big step toward coherence in the fight against modern slavery around the world. The need for such a legal remedy was determined by the fact that the concepts of other known crimes against a person proved powerless against modern slavery, which is usually based not on capture and kidnapping, but on agreements between vulnerable victims and their exploiters. This led to the need for a more effective legal instrument that would cover the so-called "voluntary involvement" of victims in exploitation and allow countries to significantly intensify the fight against the phenomenon known as human trafficking.

Without repeating the rather long and complex definition presented in the relevant international and European Union legislation, the concept of human trafficking is usually explained by emphasizing three key elements that must be

present for a situation of trafficking in adult persons to exist: action, means, and purpose (Gallagher 2010, p.29; Stoyanova 2013, p.66; Chuang 2014, p.616; Office of the High Commissioner 2014, p.3).

The first element of human trafficking (action) refers to a certain transaction, the object of which is a human being. The following types of transaction are specified in this concept: recruitment, transportation, transfer, and the harboring or reception of persons, including the exchange or transfer of control over those persons. Note that the transactions can take place between the perpetrator and the exploited person (e.g., recruitment) or between the perpetrator and a third party (e.g., transfer). It is also important to note that human trafficking does not require the crossing of an international border:

> The definition covers internal as well as cross-border trafficking. That is, it is legally possible for trafficking to take place within a single country, including the victim's own. Trafficking does not always require movement. The definition of trafficking identifies movement as just one viable way that the "action" element can be satisfied (Office of the High Commissioner 2014, p.3).

The second necessary element of the concept (means) refers to a malicious effect on the victim, which can be coercive or non-coercive. Coercive means include the threat or use of force or other forms of coercion and abduction. Fraud, deception, and the abuse of power or of a position of vulnerability are indicated as non-coercive alternative ways of enslaving the victim. An important detail is that the consent of the victim to become an object of enslavement is not legally significant if this consent is obtained using the malicious influence (means). Moreover, an enslavement transaction involving a child is recognized as human trafficking even if there was no malevolent effect listed above.

Among the methods of operation of human traffickers, the concept mentions one that is not related to the impact on the victim – that is: "the giving or receiving of payments or benefits to achieve the consent of a person having control over another person." Adding this type of modus operandi to the structure of human trafficking does not seem logical, as it is more appropriate to name the element of the action than the means. For example, in the Lithuanian version of human trafficking, the buying and selling of the victim is directly indicated as an element of the action, so there is complete overlap with the element of giving or receiving payments or benefits to the person controlling the victim. This obviously undermines the clarity of the definition.

The third necessary element of human trafficking (purpose) indicates that said acts are intended to involve the exploitation of the victim. The concept directly names such commonly known areas of exploitation as: prostitution of others or

other forms of sexual exploitation; forced labor or services, including begging, slavery, or practices similar to slavery; servitude; the exploitation of criminal activities; and the removal of organs. Illegal adoption and forced marriage are also mentioned in the preamble of the EU directive on human trafficking as areas of exploitation. It should be noted that this list is not exhaustive, so countries can identify a wider list of exploitation areas. For example, in the definition of human trafficking established in Lithuanian criminal law, fictitious marriage is additionally specified as an area of exploitation. The Lithuanian version also provides for the possibility of recognizing any other exploitation, the content of which may be revealed in a specific case.

International and European Union legislation also imposes some additional requirements on the national law of states related to the need to establish the criminalization of incitement, complicity, and attempt, stipulating a certain severity of the punishment and its differentiation according to some criteria of dangerousness. According to Directive 2011/36/EU (para. 14 of the Preamble), European Union Member States must also establish the exception of persecution—namely, that victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities, such as the use of false documents or offenses under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimization, and to encourage them to act as witnesses in criminal proceedings against perpetrators. For example, in the articles of the Lithuanian Criminal Code on human trafficking, this exception is directly indicated.

In assessing the added value of the unified concept of human trafficking for criminal justice, it should first be noted that it covers a wide range of exploitation areas, including so-called "voluntary slavery," in which victims are recruited by non-violent methods primarily because of their vulnerability. These elements of the concept (there is an extensive list of areas involving exploitation and the abuse of vulnerability) undoubtedly served to intensify the fight against diverse types of human trafficking and opened the possibility to prove this crime in court in general (in this aspect, Lithuanian criminal justice is quite effective). On the other hand, the above-mentioned legal elements are too flexible and subject to various interpretations. This view is echoed by Stojanova (2014):

> The international law definition of human trafficking contains elements ("exploitation," "deception," "abuse of position of vulnerability") which are ambiguous and, therefore,

> it might be difficult for a criminal court to convict an alleged perpetrator for human trafficking without entering into serious interpretation problems (p.433).

A situation of insufficient specificity risks the over-criminalization of some social ills, such as illegal work, poor working conditions, the legal sex industry and the pornography businesses, corrupt adoption, etc. Such practices would certainly not meet the needs of the coherent and targeted application of the concept of human trafficking. On the other hand, too much room for interpretation can sometimes lead to the inaction of law enforcement in investigating serious cases of human trafficking, thus causing the state to fail to fulfill its positive duty under Article 4 of the European Convention on Human Rights (the prohibition of slavery and forced labor). Stojanova (2014) expresses the following apprehension in this aspect:

> Therefore, national legislation which has incorporated the concept of "exploitation" as an element of the crime of human trafficking without further defining it, might not be compatible with the standards established in the ECtHR case law (p.433).

As an example, the author refers to ECHR cases (*Siliadin v. France* 2005; *CN and V v. France* 2012) in which it was established that the unsuccessful prosecution of exploiters and the violation of Article 4 of the Convention were partly caused by the fact that the national criminal law provisions on modern slavery were open to very different interpretations from one court to the next.

This study is specifically dedicated to the aforementioned "grey zone" in the concept of human trafficking – more precisely, to the proper interpretation of its ambiguous elements, thus promoting coherence in the application of this unique legal instrument in practice.

The Problem of Defining the Content of Exploitation

It has been mentioned that the concept of human trafficking covers a wide range of exploitation areas. Moreover, this list is not exhaustive, so the national law and jurisprudence of states may recognize other forms of exploitation. This is both a strength and a weakness of the concept. On the one hand, the concept of human trafficking becomes a universal tool in the fight against all forms of exploitation; on the other hand, the list of areas of exploitation does not resolve the question of what the essence and content of this phenomenon are. This, in turn, brings uncertainty and ambiguity to the very concept of human trafficking.

Such a situation encourages practices where the purpose of exploitation is determined formally according to the field in which the person was intended

to be employed, regardless of how this person was treated, what interests and rights were violated, and whether they were violated at all. According to the formal point of view, even legal prostitution or participating in the filming of legal and well-paid pornography can be classified as exploitation, so in this sense the concept of human trafficking can even contradict economic legal regulation in one or another state where such activities are allowed. It is not surprising, therefore, that the drafters of the Palermo Protocol are often criticized in the legal literature for not having been able to properly define the content of exploitation. According to Noll (2007, pp.347–349), the meaning of exploitation is "painfully unclear" and "inoperable in a criminal law context with its demands on predictability flowing from the maxim of nullum crimen sine lege." A lot of criticism has been expressed regarding the failure to specify the content of sexual exploitation. Indeed, on this much-debated issue, the Interpretative notes to the Palermo Protocol permit a very flexible interpretation:

> The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws (§64).

Stoyanova (2013) expresses this reproach as follows:

> Ultimately, the phrase "sexual exploitation" may be interpreted for the convenience of either party to the dispute on prostitution. It could mean that any prostitution per se is exploitation and it could also mean that there should be force and coercion in the prostitution in order to be classified as "sexual exploitation." Thus, "sexual exploitation" is sufficiently elastic to cover different approaches to prostitution. However, this only enables further ambiguity in this field of law and flies in the face of the principle of legal certainty and specificity (p.69).

In this context, it is worth paying attention to the abolitionist approach to prostitution that has become established in Lithuanian law, where even legal work in this field in a foreign country is equated with exploitation. An excerpt from the ruling of the Supreme Court of Lithuania in criminal case no. 2K-487/2014 illustrates this:

> The fact that the victims were given to the owner of a legally operating brothel does not matter for the act's qualification. The composition of the crime of human trafficking does not require that engaging in prostitution or profiting from the prostitution of another person be prohibited in the state where it is intended to do so.

Such a strict interpretation is partly determined by the fact that prostitution is completely prohibited in Lithuania. Courts in countries where prostitution is

not prohibited and is a matter of legal regulation could hardly be guided by this point of view.

Legal researchers also fear that the unresolved question of the definition of exploitation allows space for conflicting interpretations as to what does and does not constitute trafficking, including other sectors of exploitation than the sex industry (Anderson and O'Connell Davidson 2004, p.18). Indeed, there is a risk that spouses who pay bribes to facilitate the adoption of a baby with the intention of raising and loving the child will be charged with human trafficking, as illegal adoption is included in the list of areas of exploitation. A person who simply persuades another person to join a gang operating abroad can also be charged with human trafficking. It is also possible that the mere fact of engaging in a fictitious marriage for money or not providing good working conditions to workers can become a basis for accusations of human trafficking. Considering that the fight against human trafficking has become a kind of brand in the criminal justice system of the modern democratic world, an overly elastic concept of this crime may lead to its excessive application.

In addition, there is a tendency for the laws of various countries to include more areas of exploitation (some of which are quite exotic) in the definition of human trafficking (Allain 2019, pp.3–6). Thus, national laws are slowly enshrining broader concepts of human trafficking than those agreed upon under the Palermo Protocol, although the idea was to unify the world's perception of this crime. In such a situation, the proposal to move "from a consideration of the various types of exploitative practices to a conceptualization of exploitation" sounds truly relevant, thereby establishing "an effective transnational regime which ensures the prosecution of organized crime groups across borders for human trafficking" (Allain 2019, p.9). Unfortunately, the exploitation formula proposed by the author of the idea – "where A takes unfair advantage of B" – would hardly bring more accuracy to the concept of human trafficking.

In a general sense (according to the Cambridge Dictionary, n.d.), human exploitation can be understood as the act of using someone unfairly for one's own advantage. Summarizing the views expressed in the legal literature on exploitation as a legal category (Wilkinson 2003; Munro 2008; Campana and Varese 2016), three essential identification criteria can be distinguished. The first criterion (wrongful use) denotes the moral aspect; in other words, exploitation means that a person is being used solely as a means. The second criterion (disparity of value or unfair advantage) represents the economic aspect; in Wilkinson's (2003, p.173) words, where the distribution of benefit and harm between the exploiter and the exploited is unjust. In simpler terms, when the exploited is underpaid. The third criterion (invalid consent) reflects the legal aspect of human exploitation; namely

that the deal is done under conditions that negate the individual's consent to be exploited. Of course, it is simply impossible to fit all of this into a universal legal definition of exploitation. In addition, the concept of human trafficking includes not only exploitation of an economic nature, but also, for example, illegal adoption, where the recognition of exploitation could not be based on said criteria. Marks' (2008, p.299) analysis of the content of the concept of exploitation in international law allowed her to conclude that this concept "relates to the exceptional contexts in which the word *exploitation* has been used." Considering that the concept of human trafficking is directed against all forms of human exploitation, creating a universal legal definition seems like an impossible task.

As always, this task that the legislature has failed to achieve is then left to the courts, which have their own tools to fill these gaps. In the current situation, there is no other way to solve the problem than to seek a certain standard of judicial interpretation according to which the goals of exploitation are determined not only according to the formal criteria of exploitation. Without forgetting the already mentioned criteria for identifying exploitation, in a specific case it is necessary to establish such facts that would indicate the dangerous and intolerable treatment of a person by, among other things, assessing it according to the generally known principles of criminalization of human behavior (harm principle, crime as a public wrong, *ultima ratio*, *Rechtsgüterschutz*, etc.). It should be remembered that the very concept of human trafficking is of international origin and serves as a uniform perception of this phenomenon in the world, so the interpretation of its elements in national law should not depart from the context of international agreements. For example, the Palermo Protocol directly links the need to criminalize human trafficking to the activities of international organized crime; while the preamble of the Council of Europe Convention declares that trafficking in human beings is a serious crime, often committed within the framework of organized crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union, and that special attention must be paid to the protection of victims who have already suffered the abuse and degrading treatment which trafficking commonly entails. This leads to the conclusion that, when admitting in a criminal case that the defendants acted with the aim of exploiting a person, it is simply necessary to consider the reasons for the adoption of the anti-trafficking acts. In this context, attention should also be paid to the description of the crime of human trafficking provided by the European Court of Human Rights in the case of *Rantsev v. Cyprus and Russia* (2010):

> The court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour,

> often for little or no payment, usually in the sex industry but also elsewhere […]. It implied close surveillance of the activities of victims, whose movements were often circumscribed […]. It involved the use of violence and threats against victims, who live and work under poor conditions […]. It is described by Interights and the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade […]. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention (Paras. 281–282).

In the Lithuanian legal literature, human trafficking is also treated primarily as a restriction of personal freedom (Fedosiuk 2007, pp.57–59) and a violation of basic constitutional human rights, including the right to security (Sirgedienė 2014, p.232), the humiliation of a person's dignity, the manifestation of modern slavery (Gutauskas 2016, pp.193–195), etc. Thus, legal logic dictates that the criminalization of human trafficking is intended for extremely serious cases of human rights violations of a criminal nature, and the content of this crime should not be trivialized. Despite this self-evident knowledge, in the absence of a universal definition of exploitation, cases sometimes occur in Lithuanian legal practice where the purposes of exploitation are incriminated without substantiating the real danger and compliance with the general concept of human trafficking.

For example, in one case, two persons (one of whom was not a Lithuanian national) were convicted of human trafficking because they recruited a vulnerable woman (a citizen of Lithuania) to enter a fictitious marriage with one of them, paying her €100 each month. Both in the decisions of the court of first instance and the Court of Appeal, several arguments were presented substantiating the facts of the woman's vulnerability (health problems, tough economic situation), but the element of exploitation was established formally – since in the Lithuanian version of human trafficking, fictitious marriage is indicated as an area of exploitation. However, the Supreme Court of Lithuania did not agree with such arguments and, without establishing all the necessary elements of human trafficking, acquitted the mentioned persons primarily due to the absence of the purpose of exploitation. It was concluded that the woman's goal was to receive a monetary reward and the defendants' goal was to attain permission to temporarily live in the Republic of Lithuania for one of them, but not to control and exploit the woman (Ruling of the Supreme Court of Lithuania in criminal case no. 2K-1-1073/2023). Thus, the conclusions of this case support the thesis that naming any field of exploitation in the human trafficking norm should not automatically lead to the conclusion that a person being recruited in this field

entailed the intention of exploitation under conditions that correspond to the general concept of human trafficking.

In this context, due to the risk of excessive criminalization, the preamble of EU Directive 2011/36/EU indicates how the forms of exploitation added to the concept of human trafficking, such as begging, illegal adoption, and forced marriage—are to be understood:

> Within the context of this Directive, forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour. Therefore, the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur. In the light of the relevant case law, the validity of any possible consent to perform such labour or services should be evaluated on a case-by-case basis. […] The definition also covers, […] for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings (Clause 11 of the Preamble).

The notion of the narrowing interpretation is even more relevant when assessing the scenario of entering a fictitious marriage. In such cases, the incrimination of the purpose of exploitation should be even more cautious. Of course, there may be cases where a marriage of convenience will involve real exploitation, such as taking out bank loans in the spouse's name, seizing assets, etc., but these aspects must be proven and substantiated, otherwise human trafficking through recruitment into a fictitious marriage can become a crime, the danger of which is no different from simple forgery.

In another criminal case, a person was charged with human trafficking for recruiting vulnerable and job-seeking people to Germany where they would be exploited. However, during the investigation, it was not possible to determine exactly what the recruited persons had to do in Germany and under what conditions. From some aspects of the case, it could be concluded that upon arrival in Germany, it is likely that fictitious transactions would be concluded in the names of these persons during online trading, etc. The persons were promised a reward for the trip and a quick, safe return to Lithuania. Lithuanian courts of all instances rejected the accusation of human trafficking because the purposes of exploitation were based only on assumptions. However, the Supreme Court of Lithuania also emphasized the need to link the goals of exploitation with the context of the criminalization of human trafficking:

> It should also be noted that human trafficking is treated as a form of slavery in both international and European Union law and is recognized as a violation of basic human rights. Common forms of human exploitation associated with human trafficking include

> slavery, prostitution, and other forms of sexual exploitation, production of pornography, forced labor and services, begging, enslavement for debt, criminal status, illegal adoption, involvement in criminal activities, marital slavery, illegal transplantation of human organs. The definition of human trafficking provided in Article 147 of the Criminal Code leaves the possibility to recognize other less known or previously unseen forms as exploitation, on the other hand, such a conclusion must be harmonized with the general legal concept of this serious crime. Thus, only those forms of using another person that are sufficiently dangerous, grossly violate human rights and dignity, and are incompatible with the rules of a civilized society can be recognized as other forms of exploitation (Ruling in criminal case no. 2K-551-788/ 2015).

This clarification is believed to have had a positive effect on court practice in human trafficking cases, reducing the risk of artificial incrimination.

In another case, the Supreme Court presented a vision of the difference between exploitation for criminal activities and mere complicity:

> The purpose of exploitation for criminal activity is to be interpreted as an attempt to use another person so that he performs one or other criminal acts for the benefit of persons organizing criminal activities (commits theft, distributes, or transports drugs, transports cash of criminal origin, collects money from defrauded people, etc.). Usually, the use of such people reduces the risks and costs of the organizers of criminal activities. On the other hand, the mere fact that a person has accepted an offer to engage in criminal activity does not in itself mean that such a person is intended to be exploited. The purpose of exploitation as a constituent element of the concept of human trafficking is associated with such forms of unfair use of another human being that are sufficiently dangerous, grossly violate human rights and dignity, and are incompatible with the rules of civilized society […]. Therefore, the conclusion about the purpose of exploitation for criminal activity can be made in cases where the context of the established circumstances makes it possible to state that the recruited persons, although they are at risk of being prosecuted, are not the main beneficiaries of the criminal activity, that is, they do not act on their own initiative, but according to the instructions of those who control them, as lawless executors of the will of other persons (Ruling in criminal case no. 2K-258-788/2022).

In conclusion, the incrimination of the goals of exploitation in cases of human trafficking must be based not only on the criteria of the field of exploitation, but also on arguments that justify that the determined treatment of a person grossly violates their rights and the norms of a civilized society, when there is a moral basis on which talk about modern slavery. For this, it is necessary to assess what damage or moral losses (such as discrimination, injustice, humiliation) the victim experienced or could experience as a result of the evaluated behavior, what part of their freedom or simply normal life they lost or would have lost, how much the criminals benefitted from it, whether such behavior correlates with

traffickers' usual methods of operation and victim control, etc. Only then can we expect the proper application of the human trafficking norm in judicial practice.

The Limitlessness of the Concept of Abuse of a Position of Vulnerability

Of all the methods of non-violent human enslavement enshrined in the concept of human trafficking, the most problematic is the abuse of a position of vulnerability. This problem arises from the fact that in this way traffickers achieve the victim's conscious consent to be exploited. Human vulnerability is indeed the single largest premise of modern slavery. In this context, a study prepared by the United Nations Office on Drugs and Crime (2013, p.71) stated: "All those surveyed agreed that vulnerability is central to any understanding of trafficking: that abuse of vulnerability is an inherent feature of most, if not all, trafficking cases." On the other hand, the concept of human vulnerability is limitless and lends itself to various interpretations which are highly undesirable in criminal law. It can be assumed that the inclusion of abuse of vulnerability in the structure of human trafficking was undertaken in the name of its more effective application but sacrificing the principle of *nullum crimen sine lege*.

All conventions related to human trafficking pay special attention to the concept of abuse of vulnerability. However, all attempts to legally define this method only prove the limitlessness of this concept. Abuse of vulnerability is officially defined as "a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved" (Interpretative notes 2000, § 63; Directive 2011/36/EU, Art. 2(2); Explanatory Report to the Council of Europe Convention 2005, para. 83). The preamble of EU Directive 2011/36/EU additionally states:

> In the context of this Directive, particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health, and disability (Clause 12).

The Explanatory Note to the Council of Europe Convention (2005) provides an even wider list of examples:

> The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social, or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence, or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited (Clause 83).

Recognizing the uniqueness and importance of the concept of abuse of a vulnerable position, the United Nations Office on Drugs and Crime issued Guidance

Notes (2012) specifically for this issue. This document separately explains what vulnerability and abuse of a position of vulnerability mean, as can be seen from the following explanations:

> Personal vulnerability for instance, may relate to a person's physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person's unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker. Pre-existing vulnerability may relate (but not be limited) to poverty; mental or physical disability; youth or old age; gender; pregnancy; culture; language; belief; family situation or irregular status. Created vulnerability may relate (but not be limited) to social, cultural or linguistic isolation; irregular status; or dependency cultivated through drug addiction or a romantic or emotional attachment or through the use of cultural or religious rituals or practices (Para. 2.3.).

Victims may not identify themselves as victims, particularly where they continue to remain dependent on or otherwise attached to those who have abused their vulnerability. (Para. 5.3)

Abuse of a position of vulnerability occurs when an individual's personal, situational, or circumstantial vulnerability is intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbor, or receive that person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim's situation. In determining whether the victim's belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account. (Para. 2.5)

Given the possibility of such a broad understanding of this essential element of human trafficking, the Guidance Notes also identified the resulting risks:

> The lack of a clear definition of APOV and resulting ambiguities create certain risks that should be identified and managed. Misapplication of the concept could potentially compromise the rights of victims to be recognized as such, as well as the rights of accused persons to a fair trial. There is also a risk that misapplication could lead to an expansion of the concept of trafficking that detracts from its essential nature as an extremely serious crime and violation of human rights (Para. 6.1).

Attention should be drawn to certain clarifications of the Guidance Notes that reduce these risks:

> The mere existence of proven vulnerability is not sufficient to support a prosecution that alleges APOV as the means by which a specific "act" was undertaken. In such cases both the existence of vulnerability and the abuse of that vulnerability must be established by credible evidence (Para. 2.2).

APOV should not be more or less easily found in relation to certain exploitative purposes than in relation to others (Para. 4.2).

The use of "means" must be of a sufficiently serious nature and extent as to vitiate the consent of the victim. (Para. 5.2)

Trafficking in persons is a serious crime that carries severe penalties. Safeguards should be put in place to ensure that a commonsense approach can be taken to understanding and applying APOV, to promote an effective criminal justice response to trafficking and protect against the risks outlined above (Para. 6.3).

The reference to common sense is perhaps the most productive recommendation for the legal practitioner.

In Lithuanian criminal practice, accusations of human trafficking are often based on abuse of vulnerability, and attempts have been made to clarify this element in several rulings of the Supreme Court of Lithuania as follows:

> […] The perpetrator must be aware of the victim's vulnerability; that is, it must be established that he, while carrying out certain criminal acts, realized or assumed the victim's tricky situation and took advantage of it. In addition, this element must be determined and individualized objectively according to the case data. Be it mental or psychological vulnerability, addiction to alcohol, drugs, material situation - these facts must lead to a limitation of the victim's ability to choose and provide the perpetrator with an obvious opportunity to manipulate the victim […]. Often, the vulnerability of the victim is determined not by one, but at least several combined circumstances that significantly complicate the possibility of refusing to accept the perpetrator's offer to be exploited (e.g. difficult financial situation, early age, lack of social skills, etc.). In particular, the situation of the victim can be complicated by the situation when he is brought to a foreign country and does not have a legal status, does not speak the language of that country, etc. (Ruling in criminal case no. 2K-7-73-511/2021).

The fact that a difficult financial, social, or other existing situation is not the only reason for which a person accepts such an offer does not in itself eliminate the fact of abuse of vulnerability. At the same time, it must be recognized that the courts, when determining the facts of abuse of the victim's vulnerability, assess not only the factual circumstances of the victim's situation, but also the nature of the exploitation in which they are included and its consequences for their fate, as well as all other reasons that led to the acceptance of the malicious offer (Ruling in criminal case no. 2K-172-788/2021).

The latter assessment was provided by the Supreme Court of Lithuania in a case in which human trafficking was carried out by recruiting persons to act as drug couriers by organizing their flights to foreign countries and back and providing detailed instructions on where to acquire and hide narcotics. The drug

couriers were paid enough money for such trips, so the defense denied the abuse of their vulnerability, saying that their consent was motivated by a desire to make good money, not a dire situation. One of the court's arguments in rejecting this position was that the recruiters purposefully sought out antisocial, low-income, and alcohol-dependent persons, and that the victims consented to be exploited in the extremely dangerous area of drug trafficking at a considerable risk of being arrested and imprisoned.

Such court reasoning leads to the conclusion that abuse of vulnerability is a highly contextual concept and its provability depends on various details, including the level of abnormality of the activity into which victims are recruited and the potential impact of this activity on their fate. It is because of this aspect that accusations based on abuse of the victim's vulnerability first emerged in cases of the recruitment of women for prostitution, because it is common knowledge that the sex service industry (especially when illegal) is very cruel to women and is hardly likely to be the result of their free choice. In other cases, accusations formulated in this way face a strong counterargument from the defense. Although the United Nations Office on Drugs and Crime (2012, para. 4.2) recommends the provision that abuse of vulnerability should not be easily found in relation to certain exploitative purposes than in relation to others, in practical human trafficking cases it is difficult follow this provision. In legal reality, a situation where an unemployed woman is recruited into prostitution is viewed by the judge as more favorable to the conclusion that the recruiters took advantage of her vulnerability than a situation in which such a woman is recruited to shoplift. In any case, when deciding whether a person's vulnerability has been abused, not only that person's life situation must be assessed. The recruiter's own behavior must also be evaluated according to the criteria of dangerousness, malice, treachery, indifference to the fate of the victim, etc. Only such an assessment allows us to answer the question of whether the victim's consent to engage in certain activities is in fact legally insignificant and is not the true will and choice of an adult but imposed on them in a malicious way.

Interim Findings

The lack of certainty regarding the essential elements of trafficking in humans, such as the purposes of exploitation and the abuse of a position of vulnerability, creates the risk of the incoherent and excessive application of this serious crime. Legal ambiguity in this area can lead to the over-criminalization of some social problems, such as illegal work, poor working conditions, legal prostitution and participation in pornography, corrupt adoptions, sham marriages, etc. Such

practices would certainly not meet the needs of a coherent fight against human trafficking and would compromise the very idea. To avoid this, the determination of the legal elements in specific cases cannot be based solely on the text of the law and must correspond to the essence of the concept of human trafficking and the goals of its criminalization as declared in international law and European Union legal acts. Therefore, when recognizing the existence of real exploitation or such a purpose, it is necessary to assess not only the formal list of areas of exploitation, but also what real damage (discrimination, injustice, humiliation, disease) the victim has experienced or could experience as a result of the evaluated behavior, how much the exploiters benefited from it, whether this behavior correlates with the usual methods of traffickers' activities and control of victims, etc. Abuse of vulnerability as a legal element of human trafficking is also a very contextual concept, and its application must consider not only the life situation of the victim, but also other aspects of the case that allow the legal significance of the victim's consent to the malicious offer of traffickers to be negated.

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Towards Coherence In Criminal Justice

Challenges, Discussions And/Or Solutions

PETER LANG

This book explores the pursuit of coherence in criminal justice, addressing how criminal laws and practices can become more rational and aligned with human rights principles. It examines key criminal justice principles like legality, proportionality, and presumption of innocence, aiming to adapt them to modern societal and technological challenges. The work highlights the growing influence of international conventions and European courts on national legal systems, emphasizing the need for thoughtful implementation of transnational precedents. While focused on Lithuanian criminal justice, topics like human trafficking, drug possession, and electronic evidence are relevant across Europe, offering insights for legal researchers globally.

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