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THE CRIME OF HUMAN TRAFFICKING (ARTICLE 189A OF THE POLISH PENAL CODE)

In the Penal Code of 1932 (in order to fulfil Polish international obligations under ratified conventions), its Article 249 penalised putting another person into slavery and the practice of slave trade or participation in a "related business" (under the penalty of imprisonment for a term of not less than 5 years). The relevant regulations in the Penal Code of 1969 were included in Articles VIII and IX of the provisions introducing the Penal Code of 19.04.1969 (Journal of Laws No. 13, item 95). Article VIII provides for imprisonment for a period of not less than 3 years for anyone who causes another person to be put into slavery or engages in the slave trade. Article IX penalised the delivery, luring or abduction for the purpose of prostitution of another person, even with that person's consent (providing for that conduct a penalty of imprisonment for a period of not less than 3 years). According to § 2 of Article IX, the same penalty was to be imposed on anyone who trafficked women, even with their consent, or children.

The Penal Code of 1997 introduced a separate type of crime of human trafficking in Article 253 § 1 ("Whoever engages in trafficking in human beings even with their consent"), included in Chapter XXXII ("Crimes against public order"). A detailed definition of human trafficking is set out in Article 115 § 22 ("Human trafficking is the recruitment, transportation, delivery, transfer, accommodation or receipt of a person, by using: 1) violence or unlawful threat, 2) abduction, 3) deception, 4) misguidance or exploitation of a mistake or incapacity to understand the action in question, 5) abuse of a relationship of dependence, exploitation of a critical situation or a state of helplessness, 6) giving or accepting a pecuniary or personal benefit or the promise thereof to a person exercising the care or supervision of another person - for the purpose of exploitation, even with his/her consent, in particular in prostitution, pornography or other forms of sexual exploitation, forced labour or service, begging, slavery or other forms of exploitation degrading human dignity or in order to unlawfully obtain human cells, tissues or organs. If the perpetrator's conduct involves a minor, it shall constitute human trafficking even if the methods or means listed in paragraphs 1 to 6 have not been used"). In addition, Article VIII of the Penal Code Introductory Provisions includes a provision that

criminalises putting another person into slavery or practising slave trade under the penalty of imprisonment for a period of not less than 3 years. As a result of the amendment by the Act of 20.05. 2010, the provision of Article 253 § 1 (or rather its counterpart with the amended wording "Whoever commits trafficking in human beings even with their consent…") was placed in Chapter XXIII ("Crimes against freedom") in Article 189a of the Penal Code, where the criminalisation of the preparation of this offence is also set out (Article 189a § 2 PC).

Scholars in the field point out that the subject of protection here is human dignity and freedom [1]. It is, however, rightly argued that it is not right to reduce the subject matter of Article 189a solely to freedom of movement; it is also a question of respect for dignity of a human being as the subject of human rights, human dignity as the unacceptability of attempts to market a person as an object of commercial transaction [2].

The act of perpetrating the crime under analysis consists in the commission of trafficking in human beings. It is worth recalling that under the previous approach (in Article 253 PC) the expression "engages in trafficking" was used. In the linguistic sense of the word, engaging in something (in the Polish original: *uprawiać* [3]) is "doing something, carrying out some activity" and therefore it is not about a single operation, but rather an activity performed repeatedly [4]. When it comes to the common meaning of the term "to commit" (Polish: *dopuszczać się*), one would assume that it means "to do something wrong" [5]; one might therefore think that it is a case of a single act of the perpetrator [6]. As the Court of Appeal in Lublin rightly stated in the judgment of 7.05.2013, II AKa 42/13 (LEX no. 1316231), "All perpetrator's behaviour that involves recruiting, transporting, delivering, transferring, lodging or receiving a person using the methods specified in Article 115 §22 PC is human trafficking within the meaning of Article 189a §1 PC, regardless of the number of occurrences and people concerned. It is not necessary for the classification under the provision that such individual conduct by the offender be undertaken by him/her as part of any larger-scale business in that area."

Only acts of perpetration enumerated in Article 115 §22 PC may be considered as human trafficking but the perpetrator must act using at least one of the methods (means, ways) listed in Article 115 §22 items (1) to (6) PC, unless the object of the act is a minor (because in such a situation human trafficking takes place also if the perpetrator does not use any of the methods listed).

The victim's consent to exploitation cannot be effectively expressed, and therefore it is irrelevant to the existence of the crime. It should be noted that due to the location of the term "even with victim's consent" in the wording of Article 115 § 22 PC, it is clear that this consent can only refer to the fact and manner of exploitation (prostitution, pornography, work, etc.), and not to the means or method indicated in points 1to 6.

The crime under Art. 189a is of the formal type (not characterised by its result) and is considered committed upon completion of the act [7]. It is a generally-defined perpetrator offence committed intentionally. As follows from the definition of the concept of trafficking in human beings contained in Article 115 § 22, this crime may be committed only with a direct intention, having a certain specificity (*dolus coloratus*), because the term "for the purpose of exploitation" was used [8]. It is rightly pointed out by scholars in the field that narrowing the perpetrator's liability only to direct intention is inappropriate, because it should also be borne by the one who only agrees that certain persons, for example those transported or lodged, would be exploited (e.g. for prostitution or begging) [9].

Due to the fact that trafficking in human beings is considered one of the most socially harmful behaviours, often associated with organised crime, the legislature in Article 189a § 2 penalised preparation for this crime [10]. This constitutes a significant change, as the preparatory act had not been punishable before (neither in the Penal Code of 1932 and 1969, nor in the repealed Article 253 § 1 of the Penal Code of 1997).

The crime of human trafficking is punishable by imprisonment for a period of 3 to 15 years (from 14.03.2023 - to 20 years), and preparation for this crime is punishable by imprisonment from 3 months to 5 years. Pursuant to Article 72 of the Act of 12.03.2022 on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that state (Journal of Laws, item 583, as amended), when convicting a perpetrator who during the armed conflict on the territory of Ukraine committed a crime referred in Article 189a § 1 PC, the court shall impose a penalty of imprisonment of 10 to 25 years, and in the case of committing a crime under Article 189a § 2 – the court shall impose a penalty of imprisonment of not less than one year, up to the upper limit of the statutory threat provided for the offence attributed to the perpetrator increased by half.

Statistics of the number of offences under Article 189a are presented in the table below [11]:

Human trafficking – Article 189a PC				
Year	**Initiated proceedings**	**Closed proceedings**	**Offences found**	**Offences detected**
2020	14	22	11	11
2019	16	32	25	23
2018	33	42	67	64
2017	27	36	85	82
2016	31	38	9	7
2015	30	31	105	105
2014	28	36	64	61
2013	27	31	100	99
2012	26	31	61	60
2011	12	22	427	424
2010	16	18	39	39

As shown by the above data, the number of offences found under Article 189a PC varies from year to year and it is difficult to determine any trend (increase or decrease). Difficult to explain is year 2011, when as many as 427 offences were found, which is more than in the entire period 2014-2020. Worth noting is the very high detection rate of these crimes (e.g. 2018 – 95.5%, 2019 – 92.0%, in 2020 – 100%), although it should be still assumed that the so-called dark number is significant.

As regards the number of convictions under Article 189a, in 2010 there were 6 convictions, in 2011 – 16 (including one under § 2), in 2012 – 16, in 2013 – 12, in 2014 – 9, in 2015 – 24 (including one under § 2), in2016 – 20, in 2017 – 18, in 2018 – 9, in 2019 – 18, and in 2020 – 27 [12]. In 2019, when 18 people were sentenced, in all the cases the courts imposed a custodial sentence (in 4 cases suspended custodial sentence). In 2020, for a total of 27 convictions, in 26 cases a custodial sentence was imposed (including conditional custodial sentence in 5 cases) and one with a restriction of liberty [13]. Thus, as we can see, the custodial sentence prevails (in the form of immediate custodial sentence), which is understandable given the degree of social harmfulness of the offence in question.

The construction of the crime described in Article 189a PC does not cause fundamental interpretative doubts, although undoubtedly the too much detailed definition of human trafficking in Article115 § 22 PC is not the most accurate. As a proposal for the possible future amendments, it should be postulated to modify the provision in order to allow the perpetrator's liability in both forms of intent (*dolus directus* and *dolus eventualis*).

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MEMBERSHIP OFFENCES IN CRIMINAL CODE OF GEORGIA - DO THEY FIT WITH TRADITIONAL CONCEPT OF CRIMINAL CONDUCT?

Since 1999, criminal code of Georgia has introduced tripartite division of elements of the crime. Namely, according to art. 7, par. 1 of the criminal code of Georgia, the basis for the imposition of criminal liability is the commission of unlawful and guilty conduct envisaged by criminal code. Thus, three basic elements of the crime can be identified from this requirement: the corpus delicti (composition of the crime), the unlawfulness (absence of justification) and the guilt (absence of excuse).

According to traditional criminal law doctrine, the conduct element is a necessary prerequisite of the corpus delicti. In other words, there is no crime without conduct (actus reus). This element can be expressed in either act or omission.

Act is considered to be the voluntary bodily movement, which bring change in the physical world, while the omission is the failure to act, the performance of which is mandatory by the law. Criminal legal doctrine differentiates between two types of omissions: the pure omission and the impure omission. The pure omission is the mere failure to act (for example failure to testify, failure to pay taxes, etc), while so called impure omission is the omission which has caused a particular result envisaged by criminal law (for example failure of mother to feed child, which has caused death of the infant).

In the light of traditional definition of the criminal conduct, the question arises where do we place the so called “membership offences” which now appear in criminal code of Georgia. Lets bring some examples: