

Legal framework for combating the crime of human trafficking in the European Union and Peru: common aspects and opportunities for improvement

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Abstract: This article develops how dignity, in addition to being the legal good protected by the crime of human trafficking, is a fundamental value/principle common between the European Union and the Peruvian State. It also reviews the legal frameworks for the fight against this criminal phenomenon and, following the steps of the European Union, proposes improvements regarding the criminal liability of legal entities for the commission of the crime under analysis.

Key words: European Union, Peru, Human Trafficking, Exploitation, Dignity, Legal Entity, Criminal Responsibility, Prevention Model, Human Rights.

1. INTRODUCTION; 2. DIGNITY AS A PROTECTED LEGAL GOOD AND COMMON VALUE BETWEEN THE EUROPEAN UNION AND PERU; 3. COMMON LEGAL FRAMEWORK TO COMBAT HUMAN TRAFFICKING: ESSENTIAL ELEMENTS; 4. OPPORTUNITIES FOR IMPROVEMENT: CRIMINAL LIABILITY OF LEGAL ENTITIES FOR THE CRIME OF TRAFFICKING IN PERSONS; 5. CONCLUSIONS; 6. REFERENCES.

1. Introduction

According to the National Institute of Statistics and Informatics of Peru (INEI), during 2022, the National Police of Peru registered 631 reports of the crime of human trafficking at the national level (17.9% more than the number registered in 2021). On another hand, the Public Prosecutor's Office recorded 897 complaints nationwide and the Judiciary recorded 66 people with convictions for the crime of human trafficking. Now, according to the National Observatory of Citizen Security of the Peruvian Ministry of Internal Affairs (MININTER), the number of victims of this criminal phenomenon during the period 2017-2023 amounts to 3 822.

In this context, this article seeks to briefly review the legal framework against human trafficking in Peru and proposes to expand the scope of Law N° 30424 - Law that regulates the administrative liability of legal entities for the crime of transnational active bribery (hereinafter, Law N° 30424). This, considering the provisions of the European Union in Directive 2011/36/EU of the European Parliament and of the Council, on preventing and combating human trafficking and the protection of victims.

2. Dignity as a protected legal good of the crime of human trafficking, and a common value between the European Union and Peru.

According to Roxin (2013), legal goods are all the necessary circumstances and purposes for the free development of a person, the realization of their fundamental rights and the functioning of a state system built on that purpose (p. 5). In Peru, although there was initially

a debate on what legal right the crime of human trafficking protects, peruvian doctrine and jurisprudence¹ have reached a consensus and understand that the crime of human trafficking in Peru seeks to protect dignity in its essential content: the prohibition of objectifying/instrumentalizing a person.

At this point, it should be noted that dignity in Peru is a fundamental right/principle that radiates throughout the Peruvian legal system. Hence, in Article 1 of the Political Constitution of Peru, dignity is recognized as the supreme purpose of society and the State². That is, dignity, in addition to a right, is a principle that should guide all actions of the Peruvian State (Landa, 2017, p. 17-18). The above goes hand in hand with Article 2 of the Treaty on European Union, which recognizes dignity as one of its fundamental values³ and, therefore, as a value that inspires and determines the general action of the Member States (Bar, 2014, p. 108).

Thus, identifying dignity as the legal good that is affected by the commission of the crime of human trafficking sheds light on the high level of harmfulness of this criminal phenomenon, and, in fact on the urgent need to provide and strengthen the legal framework to combat it.

3. Common legal framework for combating human trafficking: essential elements

Regarding the legal framework for combating human trafficking in Peru, in accordance with the Palermo Convention, the Peruvian Criminal Code typifies this crime in Article 129-A as follows:

Article 129-A.- Trafficking in persons

1. Whoever by means of violence, threat or other forms of coercion, deprivation of liberty, fraud, deceit, abuse of power or of a situation of vulnerability, granting or receiving payments or any benefit, recruits, transports, transfers, shelters, receives or retains another, in the territory of the Republic or for his exit or entry of the country for the purpose of exploitation, is punished with imprisonment of not less than eight nor more than fifteen years.
2. For the purposes of paragraph 1, the exploitative purposes of human trafficking include, among others, the sale of children or adolescents, prostitution and any form of sexual exploitation, slavery, or practices like slavery, any form of labor exploitation, begging, forced labor or services, servitude, extraction or trafficking of somatic organs or tissues or their human components, as well as any other similar form of exploitation.
3. The recruitment, transportation, transfer, harboring, receipt or retention of a child or adolescent for the purpose of exploitation is considered human trafficking even when none of the means provided for in paragraph 1 are used.

¹ Check Rodríguez and Montoya, 2020, p. 407, and Plenary Agreement No. 06-2019/CJ-116 on Concurrent Problems in the crimes of human trafficking and crimes of sexual exploitation.

² Article 1.- Defense of the human person

The defense of the human person and respect for his dignity are the supreme aim of society and the State.

³ Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

4. The consent given by the victim of legal age to any form of exploitation has no legal effect when the agent has resorted to any of the means set forth in subsection 1.
5. The agent who promotes, favors, finances or facilitates the commission of the crime of trafficking in persons is punished with the same penalty foreseen for the perpetrator.

Disaggregating the provisions contained in the aforementioned article, it can be noticed that the crime of human trafficking in Peru punishes the conducts of recruiting, transporting, transferring, harboring, receiving and retaining (in an independent manner, that is to say, one conduct is enough for the crime of human trafficking to be committed). Likewise, it is noted that such conducts pursue a particular purpose: sexual exploitation; labor exploitation; the sale of children or adolescents; the extraction or trafficking of somatic organs or tissues or their human components; and any other similar form of exploitation. Finally, in the case of people of legal age (18 years or older, according to the Palermo Convention), the aforementioned crime requires that such conduct be accompanied by means such as violence, coercion, deception and abuse of a situation of vulnerability. In the case of minors, such means do not form part of the criminal offense, since consent given by minors in a human trafficking context is considered invalid in any scenario.

In the European Union, Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting victims (hereinafter Directive 2011/36/EU) was adopted in 2011. By means of this directive, the following guidelines are provided:

Article 2
Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.

5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.

6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age.

As can be seen, the minimum elements of the crime of human trafficking listed in the aforementioned article 2 are not totally different from those provided for in article 129-A of the Peruvian Criminal Code. However, unlike the Peruvian criminal type, this directive expressly states that it is not necessary to prove the existence of a mean such as violence, coercion, deception and abuse of a situation of vulnerability, in the case of people under 18 years of age. In the Peruvian case, there is no fixed age framework, on the contrary, only the terms "child or adolescent" and "person of legal age" are used. However, doctrine and jurisprudence, following the provisions of the Palermo Convention, have chosen to understand that people of legal age in the crime of human trafficking are those who are 18 years of age or older.

4. Opportunities for improvement: criminal liability of legal entities for the crime of human trafficking

About opportunities for improvement, this article will address the one related to the criminal liability of legal entities for the crime of human trafficking. To do so, it is necessary to review the treatment of such liability in Peru. With Law N° 30424, the Peruvian State opened the possibility of attributing criminal liability (although nominally called "administrative liability") to those legal entities that, due to an organizational defect⁴, facilitate the commission of the crime of parallel accounting, archaeological crimes, collusion, transnational active bribery, generic active bribery, specific active bribery, influence peddling, money laundering, crimes of terrorism, customs and tax crimes.

For the commission of such crimes, legal entities may be punished with fines; disqualification; cancellation of licenses, concessions, rights and other administrative or municipal authorizations; closure of premises and dissolution. Likewise, Law N° 30424 provides for an exemption from criminal liability for the implementation of an effective prevention model⁵. This prevention model allows legal entities to identify the criminal risks to which they are exposed, and to implement prevention, control and sanction measures. According to the regulation under analysis, if such prevention model has the minimum elements provided in its article 17, legal entities may be exempted from the aforesaid sanctions.

This promotes the self-regulation of the companies through the implementation of prevention models, in order to avoid being involved in the commission of the crimes provided for in Law N° 30424 and, in case they fail to do so, to benefit from the exemption from criminal liability. Although the above does not constitute a definitive solution to the criminal phenomenon included in the Law N° 30424, this good practice motivated by the aforementioned purposes creates a new front in the fight against such phenomenon.

As can be inferred from the preceding paragraphs, legal entities in Peru are not criminally liable if, due to a defect in their organization, they are involved in the commission of the

⁴ The organizational defect consists of the absence of effective measures of supervision, monitoring and control over corporate activities (Caro and Reaño, 2022, p. 16).

⁵ The crime prevention model is the set of policies, actions, procedures and strategies aimed at preventing criminal risks (Article 4.1. of Supreme Decree N° 002-2019-JUS - Regulation of Law N° 30424).

crime of human trafficking. This without prejudice to the individual criminal liability of each natural person involved. However, leaving the crime of human trafficking out of the scope of Law N° 30424 reduces the strength of the Peruvian society's fight against this specific criminal phenomenon.

In this regard, it would be advisable to follow the provisions of the European Union in Article 5 of Directive 2011/36/EU and include in the group of crimes attributable to legal entities the crime of human trafficking when it is committed "for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person". This would go hand in hand with the general obligation of the Peruvian State to guarantee human rights⁶, since, by broadening the scope of Law N° 30424, the State would be taking measures to duly punish the commission of the crime of human trafficking, which, as mentioned in the first section, affects the principle/right to dignity. In the same way, this incorporation is also in accordance with the Guiding Principles on Business and Human Rights of the United Nations, which seek that companies align themselves with laws and other norms oriented to the protection of human rights. To this end, these principles foresee that companies implement policies and processes to (2012, p. 17):

- Prevent their activities from causing or contributing to adverse human rights impacts and address such impacts when they occur.
- Prevent or mitigate adverse human rights impacts directly related to their activities.

In Peru, these policies and processes can be implemented through a prevention model: 1) with the identification and mitigation of risks, companies will be able to identify and evaluate the activities, relationships and areas that potentially expose them to be involved in the commission of the crime of human trafficking and its forms of exploitation; and implement controls to prevent this from happening; 2) with the implementation of reporting procedures, they will be able to identify situations in which they have been or may be involved in the commission of the referred crimes, and address them; 3) with periodic dissemination and training, they can raise awareness among their personnel, clients and suppliers about the seriousness of human trafficking and its forms of exploitation, and the importance of joining the fight against this criminal phenomenon; 4) with continuous evaluations and monitoring, they can identify and evaluate new risks, as well as reinforce or implement new controls; and 5) with the designation of a prevention officer and the commitment of their senior management, they can ensure that their crime prevention model (including the crime of human trafficking and its forms of exploitation) is working properly.

5. Conclusions

- The crime of human trafficking protects dignity as a legal good, which both in the European Union and in the Peruvian legal system constitutes a fundamental value/principle that guides all state actions.
- Directive 2011/36/EU and the Peruvian Criminal Code agree on the typical elements of the crime of human trafficking. However, the European Union, through the referred

⁶ Article 1 of the American Convention on Human Rights establishes that States have a general obligation to respect and ensure the free and full exercise of rights and freedoms.

directive and unlike the Peruvian legal system, provides for the criminal liability of legal entities for the commission of the crime of human trafficking.

- In order to strengthen the legal tools available to the Peruvian State to face the criminal phenomenon of human trafficking, it is necessary to follow the steps of the European Union in this matter and modify Law N° 30424 in order to incorporate the crime of human trafficking into the group of crimes attributable to legal entities and, going a little further, the rest of the crimes that punish its forms of exploitation.

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