

# Comparative Study of the Sentencing Standards for the Crime of Bribing Abducted Women in Chinese and Foreign Criminal Laws

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**Abstract:** *With the disclosure of some typical cases, the crime of buying women has aroused the discussion in criminal law circles. Many scholars have examined situation of the legislation related crimes, and the call for the same crime of buying and selling women into the scope of legislation as well. In recent years, transnational and inter-regional crimes of human trafficking have been frequent, therefore, it is beneficial to promote international cooperation and provide reference for further legislation to combat the domestic buyer's market. In view of the differences in cultural customs and realities, it is obvious that the governance mechanisms about the crime of trafficking and buying women and children in different countries cannot be generalized. However, the successful experiences and lessons from them can be learned from each other with full respect for their national conditions and realities. By comparing Chinese and foreign criminal laws on the purchase of trafficked women, this paper provides a comparative analysis of the criminal legislative system of purchase in human trafficking crimes, discusses the current situation and shortcomings of China's purchase legislation, and at the same time proposes legislative and judicial recommendations to improve the purchase of trafficked women.*

**Keywords:** *Abducted women; Criminal law; Buyer's market*

## 1. Penalty Provisions on Buying Abducted Women in China

The Criminal Law of China adopts a legislative method of sub-provisions for the crime of trafficking and buying, and the object is limited to women and children, excluding men over 14 years old. Article 240 of the Criminal Law provides for the crime of trafficking in women and children, and sets three levels of statutory penalties, from five to ten years' imprisonment for the basic offender, and two levels for the aggravated offender, namely ten years' imprisonment or life imprisonment with a fine, and the death penalty with confiscation of property. From the eight situations of aggravated offenders, aggravating factors can be broadly classified into four categories [1].

At the same time, Article 241 of the Criminal Law provides for the crime of buying trafficked women and children with only one level of statutory penalty, i.e., fixed-term imprisonment of up to three years, detention or control. Correspondingly, from the provisions of paragraphs 2 to 4 of this article, the occurrence or occurrence of similar crimes, heterogeneous crimes or aggravated consequential offenses on the occasion of purchase is not treated as aggravated offenses, but should be dealt with in the form of combined punishment for several crimes. Generally speaking, the way of taking several crimes together is less severe than the way of aggravated offense in terms of the severity of punishment. It is worth noting that paragraph 5 of the article is the case of buying and then selling despite the successive acts of buying and trafficking, according to the provisions of this paragraph can only be punished as a crime of trafficking, the act of buying is absorbed and evaluated as one. Since it is not clear in the legislation that the previous buying behavior should exist as the circumstances of heavier punishment, therefore, according to the provisions of this paragraph, the lawlessness of buying behavior has not been independently evaluated in fact, and it has not been reflected in the conviction, nor has it had an impact on the sentencing. Instead, it is completely left to the discretion of the judge, and whether it should be taken into consideration or not is ambiguous. This means that, although it is not possible to simply compare the legal punishment of the two crimes, it is believed that the maximum legal punishment of trafficking crime is death, while the maximum legal punishment of buying crime is three years' imprisonment. Therefore, it is concluded that the two crimes have extremely different legal punishment allocation. However, it is certain that the lawlessness degree of buying crime is much lower than that of trafficking crime.

This can also be corroborated by the provisions of article 241, paragraph 6. Article 241 (6) of the original Criminal Law of 1997 stipulates that if a trafficked woman or child is bought, she may not be investigated for criminal responsibility if she wishes to do so and does not obstruct her return to her original place of residence. The regulation was amended by the 2015 Amendment to the Criminal Law (IX) to read: "Those who buy an abducted woman or child, do not abuse the bought child, and do not hinder the rescue of the child may be given a lighter punishment; If the purchased woman wishes to do so and does not prevent her from returning to her original place of residence, she may be given a lighter or mitigated punishment." Although this modification began to reflect the tendency to treat the crime of buying strictly to a certain extent, changing the original cause of preventing the crime to the cause of lenient punishment, it still inevitably revealed the basic position of the legislator hoping to treat the crime of buying leniently [2].

Of course, the effectiveness of legal norms is not only related to the norms themselves, but also related to judicial local, economic, cultural, policy and other factors outside the legal norms. Whether the legal punishment for the crime of buying is too light or not, and how effective Article 241 of the Criminal Law is, not only depends on whether the provisions of this article conform to the principle of the compatibility of crime and punishment. It also depends on whether it conforms to the changed concept of social civilization and value concept. It is necessary to consider the sentencing of this crime from the perspective of judicial practice. As the combination behavior of trafficking behavior, buying behavior provides a buyer's market for trafficking crime, which is an important reason for the repeated prohibition of trafficking in women. However, in a long period of time, the judicial practice rarely investigated the criminal responsibility of the buyer [3]. The Opinions on Punishing the Crime of Abducting and Trafficking Women and Children in accordance with the Law issued by The State Council of China and The State Council (the Opinions) require courts to distinguish between the crime of abducting and trafficking children and the act of giving them up for adoption according to whether the perpetrator has the purpose of making illegal profits. Although the Opinions explain how to judge whether the doer has the purpose of illegal profit, there is still a lot of room for "rational economic man" to avoid criminal sanctions, resulting in a very high rate of non-actual punishment and a low proportion of combined punishment for several crimes. The judicial personnel try to strike a balance between fighting crime and our customs and traditions. However, the difficulty in the identification constrains the punishment of the criminal law on the crime of abducting and selling children, and then restricts the function of the criminal law in the governance of abducting and buying women and children.

## 2. Judicial practice of buying trafficked women

The samples of judgments in this article are from the V6 website of North University of Law. As of February 17, 2022, 361 samples were obtained. As of February 17, 2022, a total of 361 samples were obtained, excluding 5 duplicate samples, and 356 valid samples were obtained. The analysis shows that whether the crime is punishable as a single crime or in combination with other crimes, the practical effect of Article 214 is not satisfactory.

### 2.1 Application of single penalty for one crime

First, the application of liberty penalty. The maximum basic sentence for this crime is three years' imprisonment, but the proportion of cases in which the actual sentence is less than one year's imprisonment, detention or control is high, reaching 58.38% (see Table 1). It can be seen that the overall sentencing term of this crime is low, and there is a mismatch between crime and punishment in the application of justice.

Table 1: Application of liberty penalty

Penalties	Number of cases	Percentage
Control	10	2.99%
Detention	56	16.77%
Imprisonment for a term of up to 1 year	129	38.62%
1 year to 2 years of fixed-term imprisonment	120	35.93%
2 to 3 years of fixed-term imprisonment	19	5.69%

Second, the application of probation. Among the 356 samples, 215 cases were sentenced to

probation, accounting for 60.39%, and there were no cases of concurrent punishment for several crimes. Among them, 39 defendants were sentenced to detention; 78 defendants were sentenced to less than one year in prison; 81 defendants were sentenced to one to two years in prison; and 17 defendants were sentenced to two to three years in prison. As for the application of probation, combining the conditions of application of probation and the actual situation of the cases, it can be found that the actual application rate of probation is high. As long as there are circumstances such as surrender, confession and punishment, no abuse of the victim, no restriction of personal freedom, the victim voluntarily continues to live together, no obstruction to return to the original place of residence, etc., and truthful confession, confession and repentance, the court will find that the applicable conditions are met and apply the probation.

Third, there are cases of exemption from criminal punishment. There are four cases of exemption from criminal punishment for bribery. However, the court's reasoning is not sufficient, and the exemptions from criminal punishment in these cases also show that there is a value bias in the court's understanding of the social harm of bribery.

## **2.2 Combination of several crimes**

In terms of the application of concurrent penalties, except in the case of prostitution, where the main purpose of the purchase is to marry and have children, the woman will often resist the purchase, which may be accompanied by beatings, forced sexual acts, or restrictions on personal freedom, and may be committed more than once or for a longer period of time. Article 241 of the Penal Code provides for concurrent punishment for the above acts after bribery. 18 of the 356 cases, or 5.06%, were concurrently punished. Among the 18 cases of concurrent punishment, the highest sentence was 11 years of imprisonment and the lowest was 5 months of detention.

The above-mentioned judicial decisions give obvious signals that, except for a few examples of good-faith treatment of abducted women, the rest of the cases almost all contain acts of injury, unlawful detention or rape of abducted women, etc. The legislative design of Article 241 of the Criminal Law is obviously stretched in practice, and it is difficult to evaluate rape, unlawful detention and intentional injury after purchase. It is true that this situation is difficult to be separated from the injustice of law enforcement and laxity of justice, such as the protection of the government and the people, as Professor Che Hao said, but how can we not discuss the lighter penalties for purchase and treat trafficking and purchase differently? It is because of the lenient penalty for this crime, which affects the value judgment of the law enforcement and judicial parties, resulting in lax law enforcement, and cases are often treated leniently at the judicial level

As mentioned above, the overall application of liberal penalties for the crime of buying trafficked women is lenient, with only 5.69% of sentences over 2 years in prison and a high proportion of suspended sentences. At the same time, the system of concurrent punishment for several crimes designed by Article 241 of the Criminal Law is less effective, and in practice, the proportion of courts deciding to concurrently punish rape, detention, and intentional injury in subsequent prosecutions by the procuratorate is low. The overall penalties for the crime of buying trafficked women are light. This has led to poor prevention of the crime in general.

## **3. Penalties for buying abducted women in foreign countries**

### **3.1 Governance mechanisms of the United Nations**

International cooperation is an important way to effectively curb human trafficking. Punishing human trafficking has been a priority of the United Nations since its inception. On 2 December 1949, the United Nations adopted the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others to punish the sale and purchase of women for forced prostitution. However, making prostitution for profit a precondition for punishing human trafficking clearly limits the scope of human trafficking excessively. Moreover, the Convention does not prohibit prostitution itself, but penalizes those who use others' prostitution for profit. However, the obligation system of "punishment, cooperation, prevention and protection" proposed by the Convention has become the foundation for the subsequent fight against human trafficking in countries around the world. In November 2000, the United Nations adopted the Protocol to the United Nations Convention against Transnational Organized Crime on the Prevention, Suppression and Punishment of Trafficking in Persons, Women and Children in particular (hereinafter referred to as the "Supplementary Protocol"),

the most important and influential international legal document in the field of anti-trafficking by the international community to date. In terms of content, the Supplementary Protocol continues the governance framework of "punishment, cooperation, prevention and protection" (where "receiving" can be regarded as "buying"), requires States parties to criminalize trafficking in persons, including the sale of women and children, and to take an integrated approach to dealing with trafficking in persons. The incentives for human trafficking crimes should be resolved through education, poverty eradication and other means [4].

### ***3.2 Governance mechanism of the Japan***

Japan has a large buyer's market, focusing on the demand for pornography and the lack of labor due to the aging of the population. In 2005, Japan amended its criminal code to make human trafficking the same crime as kidnapping, and to refine the rules on buying. First, the crime of "buying a person's body" is added and punishable by imprisonment for not less than three months and not more than five years; second, Article 224 of the former Japanese Penal Code, which reads "abducting or slightly taking a minor" is replaced by "abducting"; third, Article 225 of the former Japanese Penal Code, which reads "abducting or slightly taking a minor for the purpose of indecent assault, marriage or profit" is punishable by imprisonment for not less than three months and not more than seven years. (2) Article 224 of the former Japanese Penal Code, which reads "abducts or abuses a minor", is replaced by "abducts", "abuses", or "buys or receives a minor", and is punishable by a term of imprisonment of not less than three months and not more than seven years. Third, Article 225 of the old Japanese Penal Code, "Abducting or abducting a person for the purpose of indecent assault, marriage or profit" was changed to "Abducting, abducting or trading a person for the purpose of indecent assault, marriage, profit or harming life or body", and the penalty was raised from 3 months to 7 years to 1 year to 10 years. This shows that Japan has increased the penalties for bribery by increasing the statutory penalties in addition to the criminalization of bribery. At the same time, it is required that the victims in the crime of trafficking in human beings, after being rescued by the police, are not immediately repatriated to their origin, but under the protection of the police, give the victims a certain time to stay, carry out psychological counseling and assistance, and let them establish the confidence to return to their families and better adapt to the society.

### ***3.3 Governance mechanism of the EU***

Social prevention is an effective experience in controlling human trafficking crimes. The main prevention measures of the EU are further improving laws and regulations, vigorously carrying out anti-trafficking propaganda, effectively raising public awareness of anti-trafficking, and carrying out in-depth social prevention and control work. Significant progress has been made in the fight against human trafficking crimes. In order to further strengthen the fight against human trafficking and to more effectively control and control the crime of human trafficking, in 2010, the European Council and the European Parliament reached an agreement to enact a new law against human trafficking and effectively prevent the crime of human trafficking. The new law enacted in 2010, in contrast to the law enacted in 2002, details and defines forced prostitution and other forms of sexual exploitation, coerced Labour or services, forced begging, slavery, coercion to engage in criminal activities, the harvesting of human organs for profit, and human trafficking for the purpose of illegal adoption and forced marriage. The new law effectively protects human rights by imposing for 5 to 10 years in prison for human trafficking crimes and focusing on organized crime, serious violent crimes, threats to victims' lives and child slavery. There are also detailed provisions on corporate crime and organized crime, including suspected criminal companies and groups will face criminal penalties and be temporarily or permanently closed.

### ***3.4 Governance mechanism of the United States***

In the 1980s, the US Congress passed and promulgated the Protection of the Rights and Interests of Trafficked Persons Act, which specifically enacted legislation on the crime of trafficking in human beings, effectively cracking down on and punishing human traffickers, making them a crime and effectively protecting the legitimate rights and interests of victims. In the United States, both the federal government and local governments impose heavy penalties on human trafficking offenders. Penalties for crimes vary at the federal and local levels, and more than half of state governments have established penalties for trafficking. Many state governments have taken action to ban trafficking within their borders, either through legislation or prevention activities. Washington state became the

first state to pass a law outlawing human trafficking in 2003. Ten Americans who trafficked 33 Haitian children to the Dominican Republic after the 2010 earthquake were convicted on charges including child abduction and criminal conspiracy and received harsh sentences. At the same time, to combat the buyer's market for trafficking and to combat human trafficking at its source, an increasing number of law enforcement agencies are holding buyers in the commercial sex trade accountable through arrests and criminal charges, and increasing penalties for buyers of the victim trade. In addition, victims of human trafficking have the right to hold traffickers accountable and receive independent financial and injury compensation without criminal prosecution by the government [5].

In the crime of buying and selling human beings, since the act of kidnapping and selling and the act of buying both exist as principal offenders, it is difficult to provide doctrinal basis for the current legislation to assign light punishment to the crime of buying and selling human beings. It is precisely because of the joint principal in the illegal structure of trafficking and buying behavior, foreign criminal legislation will carry out the same crime of selling and selling, and all in the same law stipulates the punishment for the buying and selling behavior, and assigns the same legal punishment. From the experience of international conventions and extraterritorial legislation, the phenomenon of applying different penalty ranges to acts of trafficking and buying is relatively rare.

#### **4. Inspiration from foreign experience and practice**

Each country and nation has a unique social foundation, laws and regulations and cultural traditions, directly copying the laws or experience of other countries is not desirable, in learning from foreign advanced control experience, should take full account of the current national and provincial conditions. However, there is no doubt that foreign countries have accumulated a lot of advanced experience in the protection of women and children, especially in the governance of the buyer's market, which also provides a good idea for improving the governance of "anti-trafficking".

##### ***4.1 The felony concept of the crime of buying***

In the extraterritorial legal system, the rationality of trafficking crime and buying crime as felonies has reached the same agreement in legislation. From the perspective of jurisprudence, based on the benefits and illegal nature of the protection law of human trafficking crime, buying crime and trafficking crime have no significant difference in the illegal nature and degree. Therefore, the statutory punishment set by the current legislation for buying crime is too wide compared with the crime of trafficking crime. At the same time, from the point of view of the general necessity of prevention, it is not appropriate to treat the crime of buying as a misdemeanor. The legal benefits of the crime of buying and selling human beings should be defined based on the individual's right not to be treated as a commodity. Therefore, the illegal nature of this kind of crime lies in buying and selling individuals as commodities, and the trafficking and buying behaviors belong to the relationship of joint principal criminals in the illegal structure. It is necessary to accelerate the perfection of the legislation of "trafficking and raising children with the same punishment", increase the punishment of the buyers in the crime of abducting and trafficking women and children, increase the cost of the illegal crimes of the buyers, and cut off the profit chain of the criminal market of trafficking and trafficking. Effectively curb the crime of trafficking.

##### ***4.2 Appropriately raising the upper limit of legal punishment***

The legal penalty of this crime is low, the maximum penalty of 3 years imprisonment is difficult to achieve the adaptation of crime and punishment. It is generally considered a misdemeanor for a crime with a mandatory sentence of less than three years in prison. Therefore, the legal limit of this crime should be appropriately raised. From the comparison outside the region, it can be seen that the maximum legal punishment of purchasing human population outside the region is higher than 3 years, and except for the Japanese criminal law is 5 years, the rest are 10 years or more. The basic punishment of the crime of human trafficking is more than 5 years, less than 10 years imprisonment. The danger of human trafficking is more serious than that of buying. The maximum legal punishment of buying should not be raised to the same as that of trafficking, otherwise it is also a violation of the crime and punishment, and the legislative design of Article 241 of the Criminal Law is inconsistent. The specific increase can be made by comparing the crime of buying an abducted woman, the crime of buying an abducted child, the crime of abducting a child (less than 5 years or criminal detention) with the crime of kidnapping and trafficking in women and children. And with the same will violate the dignity of

women group rape crime (more than 3 years but less than 10 years), forcible indecent insult crime (less than 5 years or detention) to design two analogy path. In the former path, compared with abducting women and children, abducting children lacks the purpose of selling and is less harmful than abducting children. Buying an abducted child is no less harmful than trafficking. It can remove the child from his or her family of origin and cause harm to the child and his or her family. There is nothing wrong with raising the legal punishment for buying an abducted child to the same level. The purchase of women is in the same law as the purchase of children, and the children are not subject to subsequent evil. Therefore, the legal penalty for buying an abducted woman could be raised to five years in prison. In the latter path, forced indecency, humiliation and rape will endanger the dignity of women, so it is of certain reference significance to refer to the legal punishment. Rape infringes on the personal safety of women, which is more harmful than buying abducted women. However, the legal punishment of forcibly molesting women is higher than that of buying and enslaving women as commodities, which is not in line with national sentiment. As a result, the legal limit for buying a trafficked woman could be raised to five years.

#### ***4.3 Strengthen the punishment for the crime of buying***

Here we need to mention the "bona fide buyers" mentioned by Professor Che Hao. Professor Che believes that the current penalty setting can leave room for the bona fide buyers to maneuver. In the first place, there is no such thing as a "Dr. Schultz" type of good-will buyer. The "good will" in the real world tends to be the desire for women to reproduce for themselves, rather than the desire to save them. Secondly, if there is such good faith, there are also reasons to prevent the violation of the law, which has nothing to do with the setting of the statutory penalty of this crime. The setting of legal punishment needs the double consideration of retribution and prevention. After buying women, the buyer often achieves the purpose of marrying a wife and having children. There is no possibility of reoffending, and the personal risk is low. In view of the problem of leniency in dealing with buying crimes in the current practice, from the judicial level, it is necessary to strengthen the punishment of buying crimes, make full use of the existing relevant provisions of criminal law, so that the guilty will be prosecuted, not allowing a large number of buying behaviors not into the criminal procedure, make full use of the provisions of combined punishment for several crimes, and pay attention to the reasonable classification of the relationship between related crimes

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