

# ROLE OF CONSENT IN HUMAN TRAFFICKING

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## INTRODUCTION

Human trafficking has, since the turn of the century, consistently featured on the global political agenda, and recognition of the growing dimensions of this criminal activity has been the catalyst for a host of legal and policy responses aimed at the prevention of trafficking, the prosecution and punishment of traffickers and, more recently, for making provisions for identifying, assisting, supporting and protecting the victims of this phenomenon. The trade in human beings has flourished because of increased economic and social integration and has been facilitated by the ease of movement of workers, capital and goods, all of which are aided by increasingly sophisticated global networks of communication and transport. The body of persons engaging in transnational movement includes economic migrants – regular and irregular – students, visitors and asylum seekers. This body of persons involved in transnational movement also includes adult female victims of human trafficking for sexual exploitation, the latter being the chief concern of this body of work. As a system of bespoke rights for trafficked victims has been increasingly brought into the anti-trafficking regime, the role of consent – or lack thereof – in human trafficking has become increasingly important in traffic-related debate, and it has become apparent that this element has a significant role to play in terms of establishing who the victims are, and how they should be treated. In order to launch a coherent and cohesive multi-pronged attack on human trafficking, particularly one invoking the criminal law, there is need to reach consensus as to what human trafficking actually is in a legal sense, so that there is clarity as regards both the meaning of ‘trafficking in persons’, and the obligations placed on state parties to the various agreements and legislation which form the anti-trafficking regime. The most recent international legal definition of ‘trafficking in humans’ is provided within Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), and is replicated verbatim in Article 4 of the Council of Europe Convention on Action Against

Trafficking in Human Beings (CoE Trafficking Convention). Despite enough and well-examined scholarly literature regarding human trafficking, perhaps the most perplexing obstacle to prevention of human trafficking lies in the inability of governments and nongovernmental organizations to properly identify victims of human trafficking and quantify their numbers. Indeed, the wide body of scholarship relative to human trafficking reveals stark inconsistencies in representations of the number of human trafficking victims, which various sources claim, “range from the hundreds of thousands to millions per year.” The conundrum arises from an inability to isolate the jurisprudential, conceptual, and practical distinctions between victims of human trafficking (those forced to perform certain acts) and smuggled migrants (those who consent to being transported across international borders as means to engage in certain acts). Granted, the conceptual distinction between the human trafficking victim and the smuggled migrant appears well established in juridical constructions, as the divergent objectives of each crime determine the culpability and blameworthiness associated with offenders. Despite different objectives, though, the empirical line of demarcation between the crimes is not readily identifiable because the difference turns on consent.

## **WHAT IS HUMAN TRAFFICKING?**

The instruments which form the legal ‘anti-trafficking regime’ define human trafficking in the following way:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of 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.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition has taken significant and at times controversial steps in clarifying what human trafficking is in a legal sense. The definition is comprised of three elements – the ‘action’, the

‘means’ and the ‘purpose’ (of exploitation), all of which must be present for the activity in question to constitute human trafficking. The ‘action’ element is characterised by the ‘recruitment, transportation, transfer, harbouring or receipt of persons’. The ‘means’ is ‘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’, and the ‘purpose’ is ‘exploitation’.

The image popularized in Brazil is of the gullible individual who is duped by traffickers and is entirely lacking in agency and intentionality. In their communications with Brazilian law enforcement and NGO leaders, Blanchette and de Silva report that they have yet to be presented with a single case that fits this caricature in Brazil: "No one has yet found a sex worker who was forced into prostitution." Brazilian NGOs are able to sidestep this problem by defining trafficking expansively, insisting that a person's disadvantaged socioeconomic background (what the authors call "macro-social indicators" of trafficking) can be used to determine trafficking status and by defining "inducement" as persuasion by a person in a dominant position, thus creating "induced consent," which suggests an oxymoron of consent being demanded or coerced rather than freely given. This is a twist on the equally problematic claim, made by leading international anti-trafficking activists, that consent is irrelevant to both trafficking and sexual commerce generally.

## **ROLE OF CONSENT**

Potentially, a recasting of consent and victimhood in a trafficking and exploitative migration context is needed. As will be seen, lack of consent plays a pivotal role in the determination of who is and who is not a victim of human trafficking, and consequently what rights and protections they are or are not entitled to. Consent is an elastic concept, which can be perceived in a variety of ways. In stating that consent to exploitation is irrelevant where the ‘means’ have been employed, the wording of the definition clearly recognises the potential for consensual exploitation to take place. It is submitted at this point that this book recognises that an individual can consent to being exploited, and essentially argues that the ‘lack of consent’

requirement creates a false dichotomy between consent and coercion and that this, along with the effect of economic coercion, creates a 'grey area' category of persons who fall somewhere on the spectrum between trafficked and smuggled. Since people smuggling is frequently viewed as being of a voluntary nature, smuggled individuals will be liable to removal from the destination state owing to the voluntary commission of immigration offences, although they may not be liable simply for working there. Such people are often described as having been trafficked for exploitation – an example of criminal activity which is defined by reference to lack of consent, or at least the presence of 'coercion' in some form. If there is consent it is considered more of smuggling than trafficking. The approach is to recognise that the 'lack of consent' requirement introduced to the international legal definition of trafficking leads to a series of problems affecting the identification of victims, which need to be addressed. There will, therefore, be a focus in this work on the exploitation and its effects and an attempt to find a way to mitigate genuine 'hard' cases, as simply returning trafficked and/or exploited migrants home may serve to put them back into the same conditions, economic or otherwise, that led to them leaving in the first place.

## **RESEARCH FINDING**

Trafficking is contextual, and frequently takes place against a backdrop of poverty and lack of opportunity in the origin state. The role of 'push' factors – such as economic hardship – in the global trade in human beings clearly have a part to play in the continuance of trafficking and exploitative migration-related activity. The trafficking of women for sexual exploitation constitutes criminal activity which goes far beyond smuggling, to a point where victims are deprived of their autonomy and basic rights such as liberty and freedom of movement. However, the line between trafficking and smuggling is blurred, and the difference turns largely on consent. Piotrowicz and Redpath-Cross state that: '... smuggling involves the consent of the individual ...', whereas '[t]here is no real consent from the trafficked person'; further, that 'The individual may believe that he or she is being smuggled, when he or she is being trafficked'. This sums up many of the issues associated with defining and understanding trafficking and smuggling. In contrast to trafficking, smuggling of migrants across borders is seen as a violation of state sovereignty and essentially a crime against states. Notwithstanding

restrictions imposed by major human rights instruments, states' power to refuse entry and to expel aliens has been an integral part of their territorial sovereign power since the late nineteenth century. This statement itself begs the question as to who is the target for criminalisation where smuggled persons are concerned – is it the smuggler, or the smuggled? Establishing lack of consent is difficult. In basic terms consent may be defined as 'subsisting, free and genuine agreement in the question'. Specifying and determining the scope of the conditions for a valid consent is necessary for discussion of consent in a specific context to take place. It may not seem palatable to all to accept that exploitation can take place with consent, but it is on this issue that the determinants of a person as 'trafficked' or otherwise.

### **THE REQUIREMENTS OF A 'VALID' CONSENT**

The Sexual Offences Act (2003) defines consent as where 'a person consent if he or she agrees by choice'. Additionally according to the Law Commission we might explicitly also ask that the consent must be 'subsist', although this putative element received critique from many. Accordingly the conditions central to a valid consent must be freely given; it must be informed; the consenting agent must have the capacity and understanding as regards that to which she is consenting ; and the consent must subsist at the time of the act consented to.

In a trafficking context, Global Alliance against Trafficking in Women (GAATW) and the foundation against trafficking in women call for a shift away from focusing on prostitution as the work and instead focus on the force and coercion. The condition of work should be the issue, not the type of work. Sex work can be viewed as a legitimate form of labour. Any form of labour is capable of being exploited or exploitative. Arguably the law should provide additional protection to those who are potentially more vulnerable which includes children, it may also include women or sex workers in general.

## EFFECT OF CONSENT IN HUMAN TRAFFICKING

The discussion throughout has established the lack of consent or presence of coercion etc is a necessary condition to establish the existence of trafficking according to legal definition, whether an offence, as a condition for criminal cooperation or to identify victims of trafficking. The issue of consent is much debated concept of the requirements of the requirement imposed by the means element of trafficking – human trafficking is now defined explicitly with reference to lack of (free and genuine) consent, and the presence of factors invalidating consent. Correct determinations as to the presence or lack of consent are made more important where ‘social relationships are framed by a respect for human rights’, as is the case in a smuggling / trafficking / exploitation nexus. The relevant instruments preceding the Trafficking Protocol namely the 1949 Trafficking Convention deemed consent irrelevant through inclusion of the words ‘even with the consent of that person’. It stated that traffickers could not rely upon consent as a defence to the crime contained in the treaties. While it is evident through lack of inclusion of a ‘consent’ element in slave trade provisions that one may not contract oneself into bondage in the context of slavery, the potential to contract oneself into a form of bondage in the context of human trafficking means that consent has come to play a pivotal role in trafficking debate. In a trafficking context, the consent debate is frequently flawed owing to supposition that there are only two situations: consent or coercion. The reality is a spectrum with one of the two states at either end. Thus, trafficking is largely characterised by the lack of consent, whereas smuggled persons are considered to have ‘willingly engaged in a criminal enterprise’. Bhabha also points out the flawed distinctions made by the trafficking definition through its presupposition of only the two states of either consent or coercion. It is this distinction and the grey area in between that tempers the trafficking debate. As outlined, older traffic-specific instruments do not deem consent to be relevant or probative of human trafficking. Slavery related instruments make it clear that a person cannot contract himself or herself into bondage in a slavery context.



## RENDERING CONSENT IRRELEVANT

Abramson states that the Trafficking Protocol ‘offers the opportunity to urge state party compliance in a way that protects trafficked people without making a formal pronouncement on their ability or inability to consent’. However, deeming consent to be irrelevant in a trafficking context is not about denial of the capacity to make choices about one’s own life. Rather, it is about effectively combating a phenomenon that constitutes criminal activity coupled with serious exploitation.

## CONCLUSION

This research was set out to investigate the legal nature of human trafficking, and it rapidly recognised the centrality of consent in the trafficking of women for sexual exploitation. Coercion and lack of consent are the essential elements to distinguish the trafficking of people from people smuggling. Consent however turns out to be a far from simple notion. The problematic nature of the inclusion of a means or lack of consent element in the definition of human trafficking is analysed and criticised in this work first on the basis that consent is inherently mutable concept the absence of which is difficult to determine and secondly because of the inclusion of this element renders identification of trafficked victim difficult and creates loopholes in the protections offered to those who are transported and exploited. The central focus of anti -trafficking should be exploitation rather than on consent this work has argued that either consent should be deemed irrelevant or as is the preferred argument here the middle category of persons who can be referred to as ‘less than trafficked more than smuggled’ should be provided for by a system considered on a case by case basis so that victims are not left without access to necessary and appropriate rights and protections and so that traffickers cannot rely upon the consent as a defence to their criminality as a trafficker

The destination state must tread carefully. Showing proof of coercion determining the timing of consent or exactly what has been consented to may at times serve to make an arbitrary distinction between ‘consenting’ and non-consenting trafficked persons, when the reality is that the cases may be so alike that little purpose beyond immigration control (although an important concern on the part of the affected state) is served by treating these individuals differently. Now

the question is where next, the consent debate could potentially leave genuinely trafficked persons in a state of limbo, on the wrong side of the law and denied any victim status. There may be subject to legal sanctions or preemptory removal, with the destination state struggling to obtain prosecution against the trafficker. Inclusion of consent in the trafficking definition creates a hierarchy of severity of exploitative migration. Ultimately it should be the exploitation that should matter not the consent, is what I have inferred from this research.

## **BOOKS AND ARTICLES REFERRED**

1. THE ROLE OF CONSENT IN HUMAN TRAFFICKING BY JESSICA ELLIOT
2. Rethinking human trafficking. Author: Ronald Weitzer, Source: *Dialectical Anthropology*, Vol. 37, No. 2, Special Issue: Anti-Anti-Trafficking? Toward Critical Ethnographies of Human Trafficking (June 2013), pp. 309-312 Published by: Springer Stable URL: <https://www.jstor.org>
3. Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol. Author: Jo Doezema, Source: *Gender and Development*, Vol. 10, No. 1, Trafficking and Slavery (Mar., 2002), pp. 20-27 Published by: Taylor & Francis, Ltd. on behalf of Oxfam GB Stable URL: <https://www.jstor.org>