

The Problem of Consent in Distinguishing between Victims of Sex Trafficking and Sex Workers

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Introduction

This paper will analyse the problems understanding the concept of consent and its use in the United Nations' (U.N.) anti-Trafficking Protocol (Palermo Protocol (2000)) which considers consent irrelevant, both from a Western and Thai perspective. It will then assess whether a constructive way for this to be achieved is for consent to be legally recognized and how this could positively affect the rights of migrant women, who are consistently oppressed and marginalized by current legislation. While not promoting or encouraging sex work, this paper will use it as a conceptual tool to explore alternative methods that may assist in reducing the generalisations of migrant women by authorities, by distinguishing victims of sex trafficking from consenting sex workers; providing a safe environment for female sex workers; and raising the status of all migrant women globally to ensure their human rights and to assess their human needs. To date it is clear that in the process of conflating and critiquing prostitution and sex trafficking, women's legal and basic human rights are consistently ignored.

The paper will first consider the meaning of consent and how it is understood on a fluctuating spectrum ranging from implied to coerced and forced considering philosophical, and socio-economic factors. Due to the complexities of consent as a concept, it will then analyse how consent has been adopted and interpreted in the U.N.'s and Thai legal framework, and the negative consequences to migrant women's rights. Finally, it will make recommendations to ushering in a new era of legislation and policies putting women's rights at the forefront by addressing the issue of their participation in the process.

What is the Meaning of Consent?

Consent is a very complex concept involving many emotive and conflicting ideas that affect a multitude of issues. Consent involves the governance of women, sex, gender, society, legislation and politics. The paper is particularly interested in the importance of the concept of consent and a comparison of the concept through an analysis of how it is applied in the West and its application in Thailand.

Consent means to give "permission for something to happen or agreement to do something,"¹ Autonomy, self-determination, and consent are inextricably linked and considered in philosophy and law to be essentially and uniquely humanistic.² So as long as the person is consenting to something that they benefit from, there should be no restriction on the ability to consent or the act consented to.³

Yet Benedet (2013) and Barry (1979; 1995) argue that if something consented to is detrimental to women's morality, then that should over-ride that person's consent. Consequently a woman cannot consent to prostitution as it equates to a violation of

¹ Oxford English Dictionary - <https://en.oxforddictionaries.com/definition/consent>

² Perske (1972)

³ Faden, Beauchamp and King, 1986

her dignity. The concept of consent should therefore be restricted and the act restrained by law. The question of whether to usurp the autonomous right to consent based on allegations of immorality necessitating authoritative intervention, smacks of paternalistic interference and oppression. Bergelson (2008) states that in a situation of state versus an individual, the short-term or long-term harm or damage should be considered, but that in “cases of a conflict between autonomy and dignity, the former ought to yield.”⁴ Arguably dignity is so inherently associated with humanity that consent cannot defend its violation.

However there are neither agreed rules on the hierarchy of the various duties or principles nor who should ultimately decide them, and so the debate continues as to what has the higher standard and what should take precedence. Weyheymer, et al (2003) argue that even if external socio-economic factors may consequently restrict the level of a person’s autonomy, they conclude that everyone should still retain that autonomy without reduction or removal, and laws and societal structure should protect that right. A representative of a U.N agency agrees in that “you can consent to exploitative working conditions...if there is transparent disclosure... as many migrant workers and other communities do in this region and beyond on a day to day basis”⁵ Sunee Chaiyarose agrees that “if they choose to [be a prostitute] then they should have their rights respected.”⁶ So potentially for an international convention such as the Palermo Protocol to simply state that “consent is irrelevant”, could arguably be excessive and detrimental rather than protective. Although its intention maybe genuine, it must be subject to realistic concerns for the security of the women involved, and often, excessive protective measures suppresses those very people it is supposed to protect.⁷

An example of this debate is whether prostitution should be decriminalised. It has become a polarized dichotomy where supporters place it within an economic context that recognizes consent as a human right of those women to self-determination and economic development. Opponents place prostitution squarely within a morality framework and argue that any consent cannot be valid considering its immorality and the negative impact on society; because “given another decent choice, they would never consent to prostitution.”⁸ So should prostitution be respected or restricted by law? The issue of consent and its validity is at the core of this disparity and will be discussed for further clarity below by considering the spectrum of consent, notably informed, coerced and forced consent, within a socio-economic and moral context.

Informed Consent

There are four elements necessary to elicit informed consent: capacity; full disclosure; adequate comprehension; and be voluntary.⁹ Consent should be “subject to

⁴ Bergelson, 2008, p. 122

⁵ Interview 11th March 2016

⁶ Interview Sunee Chaiyarose 15th January 2015

⁷ Doezema (2001); Califia (2000)

⁸ Interview Annie Dieselberg 19th November 2015

⁹ Schroeder 2009

renegotiation over time” and not a presumption of continuance in perpetuity.¹⁰ It is about making a decision with freewill but with the ability to recognize the impact of numerous determinants including external factors ie economic forces / circumstances.¹¹ Informed consent is a moral principle associated with the importance of individual freedom of choice.¹² Empower stated that “if you have the ability and freedom to refuse, then you have the ability to consent or refuse consent.”¹³

Yet placing consent in a sexual context seems to obscure its true meaning and validity. In light of a growing number of reported sexual abuse cases between victims and known assailants, awareness of “affirmative consent” is growing in support. This encourages a joint conscious, current and voluntary agreement of all parties to engage in sexual activity and one that is ongoing but can be revoked at any time. The existence of any external, pre-existing factors such as a relationship, past sexual relations, whether someone is a prostitute/drunk/unconscious/sexually active/clothing/previous consent etc; are irrelevant and should never be assumed to be an indicator of consent.”¹⁴ This is relevant because it raises the awareness of the need of actual consent for both men and women and an understanding that consent can be revoked at any time in an ongoing situation, reinforcing the principles of informed consent. It also places a furtherance of liability on the male that questions the previously accepted behaviour that allows men to act with impunity as to the consequences.¹⁵

Perhaps placing consent in a non-sexual context may clarify things. You ask someone if they would like a cup of tea and they agree, so you make them a cup. However, upon your return they have fallen asleep, but you do not proceed to pour the tea down their throat thinking and presuming they still want it. Similarly, if they change their minds when you present the tea to them, you don’t force them to drink it regardless. Or, if you then make them coffee instead which they didn’t agree to, you don’t insist they consume it.¹⁶ To present it in this form, it seems absurd to presume consent exists in these circumstances, so why is this the case in any situation involving a woman and sex? A change in circumstances requires an automatic reassessment of the existence of consent and under no circumstances should it be ignored or regarded as irrelevant.

Furthermore, in situations of potential sex trafficking, circumstances contributing to a contractual understanding of what is to take place could prove crucial evidence as to whether the woman can be correctly identified as a victim. Evidence to support active, positive and continuous consent is therefore vital for a woman to be able to provide and confirm her status and intention. To be unable to do so, or for this to be ignored or deemed irrelevant, undermines her legal and human rights. Contractual consent is

¹⁰ The British Sociological Association Guidelines (2002) para.25. Available at: http://www.psi.uba.ar/academica/carrerasdegrado/psicologia/sitios_catedras/obligatorias/723_etica2/material/normativas/british.pdf

¹¹ Weyheymer, et al (2003) and Jones (2012)

¹² Faden, Beauchamp and King (1986)

¹³ Interview Empower 22nd October 2015

¹⁴ (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967)

¹⁵ <http://journalistsresource.org/studies/society/public-health/sexual-assault-rape-us-college-campusesresearch-roundup>

¹⁶ The tea comparison (<https://www.youtube.com/watch?v=pZwvrxVavnQ>)

therefore fundamental to political and economic relations in a liberal society and allows control over that relationship to continue or sever connections accordingly.¹⁷

By determining that consent is irrelevant perpetuates this disenfranchisement leaving women vulnerable and reliant on male-dominated state authorities to represent their best interests. Women do not need authoritative representation to determine their life choices. Questioning and ignoring consent constantly undermines their credibility. It is therefore imperative for the concept of consent to be restored and to “respect the right of the women to choose.”¹⁸

Forced &/or Coerced Consent

Forced consent, including threats, fraud and the endorsement of lies and misrepresentation to induce consent, has no legal basis and is deemed nonconsensual.¹⁹ But what if external forces collude to manipulate consent to the extent that it is deemed coerced and therefore invalid; or that the act the woman is consenting to, is so nefarious and exploitative as to be considered forced?

Stinchcombe and Nielson (2009) and Jeffries (2012) suggest that considering prostitution in an ethnographic context, there is a spectrum of consent on a scale that takes into consideration socio-economic and cultural factors that could be tantamount to coercion. Jeffries argues that in Thai society, there is significant cultural pressure on daughters to provide for their families and improve their social status. The sex industry is an attractive lure to earn a significant amount of money and more so than in other sectors.²⁰ Consent in this context may therefore be sufficient to be regarded as coerced and therefore negated. Indeed some²¹ hold the view that as prostitution is often the only available option for them, any form of consent is invalid and further that if giving consent is due to no other viable alternative, then it is ineffective.²²

Benedet (2013), Raymond (1999) and the Coalition Against Trafficking in Women²³ often portray women as a homogenous group who are automatically presumed vulnerable to external factors that renders them incapable of making informed and valid decisions. They argue therefore that it would be a dangerous precedent to accept the consent of an individual woman as an acceptance of prostitution for women per se. This discourse is supported by the EU’s interpretation of prostitution as a form of violence against women since 2014.²⁴ Arguably, there is therefore no basis for consent in prostitution as it is inconceivable that any woman would consent to the conflated crime of sex trafficking and must be presumed victims.²⁵

¹⁷ O’Connell Davidson (2008)

¹⁸ Interview Usa Lerdsrisuntad Foundation For Women 4th November 2015

¹⁹ Stinchcombe and Nielson, 2009; Wertheimer, 2003; Bergelson 2008

²⁰ Boonchalaksi and Guest, 1994

²¹ Benedet (2013) and Barry (1995)

²² Don Herzog as considered in Jones 2009 & Special Rapporteur in Trafficking in Humans 2006 report. (32)

²³ Benedet, 2013; Raymond, 1999 and CATW <http://www.catwinternational.org/>

²⁴ 5 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0162+0+DOC+XML+V0//EN>

²⁵ Benedet, 2013; Barry, 1979; 1995; MacKinnon, 1998

But should all forms of coercion be regarded as forced and thereby negate consent? Wertheimer (2003) views coerced consent to be interpreted as forced consent only if it affects that person's moral or legal rights. Proponents argue that individual circumstances should be considered when assessing the validity of consent and should include relevant socio-economic circumstances. Obakata (2006) suggests that economic hardship could be interpreted as a form of coercion based on traffickers taking advantage and profiting from them. If this is the case, then this could seriously question the distinction between smuggling and trafficking, as it risks portraying trafficked victims as smuggled and so treated as criminals, and those smuggled as victims. Presuming or disregarding consent makes correct victim identification opaque and could be a serious issue to the intention of protecting and preventing trafficking. "In sum, the existence of consent can be used to distinguish between those who require protection and those who do not."²⁶

Certainly the question of whether a woman can consent to commercial sex work continues to be debated. What is understood as coercion and therefore forced consent to one woman, is a form of considered choice based on her circumstances to another. It remains a fact that even with considered and competent advice anyone can make a bad decision, but does this mean it should be irrelevant and if so, be rendered a victim? Critics of this paternalistic approach argue that it trivialises undertakings, undermines autonomous decisions, and ignores the reality of existing socio-economic circumstances that dictate the need to work in order to survive.²⁷ The majority of the world's population who live below the poverty line are women, disadvantaged due to gender discrimination,²⁸ and the existing patriarchal and social hierarchy. This existing societal structure equates to being "forced to work",²⁹ but not necessarily being a victim and should not equate poverty with "force as a way of establishing the innocence of "trafficked victims" and thus their eligibility for human rights protection."³⁰ Consent should not be vitiated just because of a lack of presumed reasonable alternatives as long as the consentor is not the one who is creating the detrimental factors leading to providing consent,³¹ and ignores accountability.

The Law and Consent

The law is engendered,³² and consent within that framework is based on a sliding scale proportionate to women, ethnicity, race, class and economic worth.³³ Prostitutes in particular were, and in many cases still are, vilified as promiscuous and dishonest and therefore undermines their credibility and consent.³⁴ Attitudes were noted to change around the 1980s and 1990s, when the courts were less inclined to presume a lack of consent simply because the victim was a prostitute.³⁵ Consent involved being

²⁶ Obakata, 2006, p. 26

²⁷ Jones 2012; Heidi Fleiss (2003)

²⁸ WHO report 2008 -

http://www.who.int/gender/women_health_report/full_report_20091104_en.pdf

²⁹ Stinchcombe and Nielson, 2009, p. 74

³⁰ Doezema, 2001, p. 44

³¹ Robert Nozick's (1974) theory in "Anarchy, State and Utopia"

³² Kennedy, 2005; Sullivan, 2007

³³ Kennedy, (2005); Doezema, (2001)

³⁴ Sullivan, 2007

³⁵ Case of DPP v Daly (2003) Australia as quoted in Sullivan, 2007, p. 136 42; R v JA Canadian Court supra notes at paras 135-137

recognized and valued as a human rather than an object,³⁶ and men began to be convicted of rape.³⁷ However, issues of credibility remain in cases of alleged sexual abuse that are too often found in the man's favour due to legal and patriarchal bias. Perhaps this is why consent is deemed irrelevant in trafficking cases. But is this the correct strategy to adopt in an attempt to balance the scales of justice?

The UK's Sexual Offences Act 2003 removes the element of consent from the criminal act. An assessment of the presence of the victim's consent must still be established using evidence including a victim's statement, before it is deemed negated or irrelevant. The general rule of Western law³⁸ is that once the intention (*mens rea*) and the act (*actus reus*) of a crime have been established, there is no actual defense of consent or an alternative, although evidence including consent can be entered to mitigate the sentence. It is therefore arbitrary as well as absolute.³⁹ If consent is presumed irrelevant, the court is disregarding the basic principles and human rights to due legal process. The application of the concept of consent in Western law⁴⁰ is if the act is not in itself wrong, then you must have the consent element to prove culpability. So if consent is alleged as a defense and proved, it is what determines sex from rape. Similarly, trafficking with consent is in fact smuggling, with a very different outcome for both the alleged victim and perpetrator. Currently, as consent is considered to be irrelevant under the U.N Trafficking Conventions, it is dismissing an important aspect of evidence that would prove whether the act is fundamentally wrong or not; whether there is indeed a victim and whether the alleged trafficker is guilty. This is not a fair and democratic process due to the consequences against the defendant and the alleged victim.

Thai Understanding of Consent

Essentially based on Western principles,⁴¹ the legal system in Thailand has borrowed much from Western law, but when reviewing the Penal Codes, there is clear inconsistencies as to the interpretation and how it is applied that may affect their potency. For example Section 276 states "Whoever has sexual intercourse with a woman, who is not his wife, against her will..." This was later amended to "with another person who is unable to resist..."⁴²

Consent is not clearly mentioned, and rather considering the intention (*mens rea*) it is more relative to the physicality of the act (*actus reus*). In Western law both elements are required to be proved or negated.⁴³ Evidentially then, Thai law perceives guilt

³⁶ Benedet, 2013

³⁷ Sullivan, 2007

³⁸ UK; US; Australia

³⁹ Bergelson, 2008

⁴⁰ UK; US; Australia

⁴¹ Interviews with Somchai Homlaor 23rd February 2016

⁴² Thai Penal Code available

<http://www.thailawonline.com/images/documents/Criminal%20Code%20of%20Thailand.pdf>

⁴³ Rape (1)A person (A) commits an offence if— (a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b)B does not consent to the penetration, and (c)A does not reasonably believe that B consents. (2)Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. Available through:

<http://www.legislation.gov.uk/ukpga/2003/42/section/1>

based on the consideration of the extent of force used as an indication as to the actual or presumed consent of the victim (here the legal bias is against the predominantly female victims of violence). This is a dangerous precedent, for in cases of alleged rape or sexual assault where consent is based on physical evidence and not the intention of the victim, it would preclude any allegations of these crimes being made if there was an absence of physical injury.

Section 282, clearly mentions “with or without consent”, but Section 283 in relation to prostitution interestingly does not mention consent at all. However, it does say “using deceitful means, threats, physical assault, immoral influence, or mental coercion by any means...” These are elements that would affect consent being given or refused, so there is an inconsistent use of the term to give proper and clear guidance as to what is evidentially required. What this suggests is that despite the necessity to “consider the intent of the victim”⁴⁴ there are different standards of consent to be given and/or proved in Thai law based on the circumstances and not the intention. How has this ambivalent interpretation of consent been adopted into Thai trafficking law and why was it included in the U.N’s Trafficking Conventions?

The Problem of Consent in the UN Trafficking Legislation

The U.N anti-Trafficking Convention (2000) is a legal tool to ensure protection of trafficked victims as it permits the presumption that a woman’s consent is irrelevant in these circumstances, therefore negating the necessity to consider any potential external factors, confirming her as a victim of sex trafficking rather than a consenting prostitute. There remains concern that women in circumstances of sex trafficking/prostitution have been compelled to provide their consent or refuse to give a statement due to fear of harm or loss of a job and are “often coached what to say”⁴⁵ and so can be unreliable as evidence.

Gallagher (2010) argues that, “the reference to the non-applicability of consent merely confirms that the means element of trafficking (coercion, deception, abuse of authority, etc.) operates to annul meaningful, informed consent”⁴⁶ So the concept of consent being irrelevant is then merely tautological in that it is just another way of saying there is no defense of consent. There was concern then that including consent may negate the validity of the ‘means’ that some states interpreted should include an element of force.⁴⁷ As already discussed above, consent is a complex concept, exacerbated by the differing interpretations of its varying context. So is there a uniform understanding of its use by practitioners and advocates and has it been adopted as intended by States into their domestic trafficking legislation?

From a legally practical perspective the U.N Report on The Role of Consent in Trafficking in Persons⁴⁸ found that when dealing with trafficking cases, there was a

⁴⁴ Comparative Laws and Advanced Civil Laws by Professor Phichaisak Harayanggur, Ajarn Narisara Daengpai of Thammasat University.

⁴⁵ Interview Jurgen Thomas Alliance Anti Traffic 19th October 2015

⁴⁶ Gallagher, 2010, p. 28

⁴⁷ Travaux préparatoires https://www.unodc.org/pdf/ctococp_2006/04-60074_ebook-e.pdf

⁴⁸ UN Report on the Role of Consent, 2014

https://www.unodc.org/documents/humantrafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

lower threshold of proof of exploitation in a sexual context, as the commercial act is considered exploitative in itself, with the consent principle almost specifically presumed in sex trafficking cases involving female victims. This means that cases of prostitution are far more likely to be interpreted by many States as a form of exploitation that falls within the realms of trafficking, thereby ignoring the consent of the prostitute and potentially proving a false case of trafficking.

The U.N report also found that many legal practitioners acknowledged the concept of consent was in fact necessary to correctly identifying whether a victim was trafficked. Consent proved helpful in prioritising cases to investigate/prosecute; considering relevant charges to be brought and evidential weight; and allowing both juries and judges' consideration of the validity of evidence presented and mitigating circumstances when sentencing and should always be considered.⁴⁹ So ignoring consent outright could be problematic and in practice it wasn't being adhered to.

Furthermore, authorities having a default presumption that all migrant women and consenting sex workers are victims, also creates a huge burden on States to manage a significant number of undocumented migrant workers as trafficked victims. Resources that should be channeled into efforts to identify genuine victims of trafficking and to provide for their short and long-term needs, are overshadowed by unnecessarily processing the huge number of women who are in actual fact not victims and do not require this type of assistance. This causes inefficiency within the identifying process and creates obstacles to formulating programmes that should be dealing with the victims, without restricting the liberty of consenting women.

Added to which, more focus should be placed on the process of trafficking and the human rights abuses involved that would gather evidence of abuse against the traffickers, both from a criminal and a holistic perspective.⁵⁰ To this end, consent and the perspective of the women involved are tantamount to identifying a crime and pursuing a successful prosecution. The U.N report concluded that evidentially, where 'means' is linked to the Irrelevance of Consent, practitioners must consider the circumstances of 'means'. The problem this causes is that when organisations have to report numbers of trafficking victims without a clear identifying distinction, this disproportionately inflates the number of trafficking 'victims' and suggests that some member states are artificially fulfilling their international trafficking requirements and prosecutorial quotas. Thailand was downgraded to Tier 3 of the Trafficking in Persons (TIP) report from 2014, although is now positioned on the Tier 2 Watch List as of the 2016 TIP report, and faced sanctions as a penalty. If the matrix to identify trafficking victims was altered to reflect the actual harm committed, including the presence of consent, rather than just based on evidence that the crime may have been committed, this could reflect more accurate figures for reporting purposes. This could then help differentiate victims from undocumented workers and so redefine rehabilitation programmes and labour and immigration law infringements.

Interestingly, Dempsey et al (2008) found that there was no continuity across the States who had adopted the U.N Trafficking Convention 2000. This was due to insufficient legal advice; no methods of non-compliance; economic resources

⁴⁹ Bergelson, 2008

⁵⁰ Obakata, 2006

available; vague definitions; disagreement of definition of sex trafficking if a victim consents to exploitation. Furthermore, they determined that due to ‘means’ involving elements that did not include force or coercion, such as abuse of power and vulnerability (Thailand only adopted abuse of power), that this broadened the definition of trafficking. Ditmore (2011) however, still considers the element of force to be present to prove trafficking and so should be interpreted on a narrower basis. The 2014 U.N Report also confirmed that there were differences in adoption, interpretation, priorities and the realities within different States’ usage of applying the principle of the irrelevance of consent. Significantly, the report considered the effect that the presence of a ‘means’ element had on consent being deemed irrelevant. Liability of the victim can depend on the level of their consent to participate in the criminal activities for the purpose of the trafficking ie where prostitution is illegal the women are presumed either criminals or victims, neither are acceptable or protect their rights.

Thai Trafficking Legislation

Thailand has adopted the “irrelevance of consent”⁵¹ but linked consent to ‘exploitation’ (‘purpose’) rather than ‘means’. The Thai definition of exploitation includes all forms of prostitution. So even if a woman consents for socio-economic coercive reasons (“means”) to be transported (“action”) to work as a prostitute (“purpose”), then she is arguably trafficked, as she is unable to consent to exploitative circumstances (as per Thai Trafficking Act 2008 definition) and all the criteria are present. Ultimately this would now be classed as a trafficking case against the manager and not the person who brought her, which is possibly a better and fairer reflection as to whether she has been trafficked or not, as it is not just limited to primary intention, but to the resulting conditions. Dempsey et al (2012) were of the opinion that this was drafted in because it obviated the criminal principles, similar to the reasons behind its inclusion in the Palermo Protocol.

This conflation of prostitution and sex trafficking encourages the need to substantiate previous laws that suppress prostitution in an attempt to eradicate trafficking.⁵² There has been no indication from research that these policies have had any effect on suppressing either prostitution or trafficking for sex. Instead there is evidence that the ‘raid and rescue’ approach legitimized by Section 27 of the 2008 Act encourages arbitrary and corrupt police invasions on premises of entertainment used by consenting prostitutes (allowed under the 1966 Entertainment Act) at the expense of the women’s human rights.⁵³ It was found by the National Human Rights Commission of Thailand in 2003 that corrupt police were commonly exploiting this Act to extort money from the women and that strict guidelines should be imposed on its use.

⁵¹ Article 3(b) of the Palermo Protocol 2000

⁵² Contagious Diseases Prevention Act 1908; Trafficking in Women and Girls Act (Anti-Trafficking Act) (1928); Suppression of Prostitution Act (1960) amended by the (Prevention and Suppression of Prostitution Act B.E. 2539) (1996); Act on Entertainment Places, B.E. 2509, (1966); Immigration Act B.E. 2522, (1979); Measures in Prevention and Suppression in Trafficking in Women and Children (1998) amended in the (The Anti-Trafficking in Persons Act B.E 2551) (2008).

⁵³ Empower interview 22nd October 2015; Phongpaichit, Piriyaarangsana and Treerat, 1998

Sex trafficking masked as prostitution proves economically restrictive for sex workers and their freedom of movement, as many migrant women regard prostitution as a necessary form of work and not one of trafficking. Consequently, the inclusion of prostitution in Thai trafficking and immigration legislation becomes an instrument of restricted movement of women and their human rights. Coomaraswamy surmised that although all forms of trafficking involve illegal migration, not all illegal migration is trafficking.⁵⁴ In other words, recognizing consent could not only distinguish forms of labour from exploitation, it could determine cases of illegal migration from trafficking.

Consequences

Conflating sex trafficking with prostitution, directly targets women and contributes to enacting oppressive immigration and prostitution laws that are discriminatory and have negative connotations for women. It ignores consent, and so obscures the overriding objective of proving an element of force and the seriousness of an actual trafficking crime, compared to an act of prostitution. The need to distinguish the two is vital in identifying a victim as opposed to a sex worker and the extent of harm committed; “‘prostitution’ should not be used as a euphemism for ‘human trafficking’”. Prostitution per se and trafficking for the purpose of prostitution are fundamentally different things.”⁵⁵ Importantly, neither identify as the other and nor should they be determined to be so by legislation;⁵⁶ and it questions how many actually genuinely want or need to be rescued.⁵⁷

Incorrectly focusing on prostitution legislation to eradicate sex trafficking obscures the fundamental issues involved: those of poverty, gender discrimination, severe exploitation and comprehensive immigration and labour laws; “Governments, in their attempts to respond effectively to growing international concern about trafficking, may misconstrue the needs of victims and, in so doing, institute policies and practices that further undermine the rights of women, especially the freedom of movement and the right to earn a living.”⁵⁸

The reason behind the conflation of prostitution and sex trafficking is simple - it is easier to deal with both issues as a symbiotic relationship, and so abolishing one will eradicate the other.⁵⁹ The consequences are that by criminalising prostitution it renders sex trafficking crimes as an immigration issue and not as national or transnational criminal acts. Women are more easily ‘identified’ and often prevented from entering or arrested in the destination country and deported and/or placed into a shelter. “Given that most of those trafficked into Thailand are illegal immigrants, law enforcement authorities mainly apply immigration law to deport them without seeking to identify and prosecute traffickers...”⁶⁰ It is far simpler to deport them rather than

⁵⁴ UN Special Rapporteur on Violence Against Women; available through: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G00/113/34/PDF/G0011334.pdf?OpenElement>

⁵⁵ Elliot (2015, p. 115),

⁵⁶ Lisberg, 2002; Meaker, 2002

⁵⁷ Boonchalaksi and Guest, 1994

⁵⁸ Special rapporteur R. Coomaraswamy 2000 pg 7, 4

[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf)

⁵⁹ Kranrattanasuit (2014)

⁶⁰ Obakata, 2006, p. 55

investigate a crime and prosecute the traffickers involved. The inclusion of prostitution as a specific form of exploitation in legislation, assumes the understanding that sex trafficking includes all informal migration for and all forms of, prostitution, whether or not it was by choice. It essentially removes the element of consent and agency from women who choose to enter into sex work.

Furthermore, by criminalizing consenting sex workers, it re-focuses any assessment and remedy of exploitative conditions in prostitution, to the criminal act of prostitution being committed, and so supplants any liability from the managers/owners onto the women. By ignoring the concept of consent, it violates the women's human rights to choose their occupation and their agency as a human being. It also fails to enforce the labour rights of those sex workers who although consented to the sex trade, did not consent to exploitative conditions of work. The current legislation therefore fails to clearly define the difference between the crime of sex trafficking through acts of force, with consenting migration of women for the sex industry. In so doing, it fails to protect these consenting women from exploitative practices and instead reinforces a removal of their human rights and exposes them to becoming exploited further.

Equally concerning, failing to distinguish between sex workers and trafficked victims re-directs focus away from the correct identification of genuine victims of trafficking; obscures the ability to establish the actual crime of trafficking and ignores the criminality of the perpetrators; and misappropriates effective policies of rescue and rehabilitation, which are all surely the intention and objective of trafficking legislation. It confuses policy makers in creating unsuitable programmes that are based on incorrect data that has been improperly obtained. Economic assistance provided by international and domestic organisations are often wasted on irrelevant strategies, simply because the correct identification of women and their needs are not accurately or effectively assessed.⁶¹

Recommendations – A New Hope

A comprehensive review of Thai prostitution, immigration and trafficking laws to encourage a freer flow of migration/movement of women into different industries and so satisfying the demand for labour and maximizing the economic value of female labour, is encouraged.⁶² Indeed, the establishment of more legal channels for migration and so affording protection for them in receiving countries, has been advocated by the U.N's Advancement of Women since 1996.⁶³

⁶¹ GAATW Anti-Trafficking Review Issue 3, September 2014

⁶² Jurgen Thomas acknowledged a change was needed, including "protection policies to allow women work visas while in the shelter; for the women to be asked if they wish to be returned to their home country as a 'victim' or migrant, which have different consequences for them; for both countries involved, not just Thailand; MOUs need to be more effective; seized assets from traffickers at the time of arrest and not at the conclusion of the case."

⁶³ United Nations, Advancement of Women. Traffic in Women and girls. Report of the Secretary General. General Assembly Document A/51/309 27 August 1996 (1996) UNIFEM gender fact sheet 2 Trafficking in Women and Children [Online] Available from: <http://www4.worldbank.org/afr/ssatp/resources/html/genderrg/Source%20%20documents/Issue%20and%20Strategy%20Papers/trafficking/ISTRFK2%20UNIFEMtrafficking%20fact%20sheet.pdf>

The terminology of ‘forced prostitution’, or ‘trafficking for sex’, is vague, implies partial blame on the victim and belies the actual crimes committed. If the fractious element of morality is removed and replaced with consent, in practicality, prostitution remains a form of economic labour, and sex trafficking or ‘forced prostitution’, is revealed to be the heinous crime of imprisonment, rape, torture and slavery. Little has changed so far in the history of sex trafficking and women’s rights and so if it means making policy makers and advocates uncomfortable to elicit the change needed, then lets force the issue by using language that is realistic, relative and effective.

A change in perception of the context of exploitation and trafficking is suggested. Establishing a spectrum of exploitation can differentiate between trafficking and exploitative working conditions;⁶⁴ as many migrants consent to exploitative work conditions;⁶⁵ with consent being the determining factor.⁶⁶ Elliot proposes an additional category for “consensual facilitated exploitative migration”⁶⁷ would help distinguish and categorise victims from workers, but still errs on the side of caution to presume a lack of consent if in doubt. This would support the relevance of consent as a necessary tool for victim identity and to reduce a default presumption of victim or criminal.

Interestingly, the U.N Office of the High Commissioner for Human Rights, the U.N Children's Fund (UNICEF), the U.N Special Rapporteur on Violence Against Women; and the International Organization for Migration (IOM) have all adopted amended definitions of trafficking. They contextualise it more as a human rights problem involving forced labour, servitude or slavery, that are actual conditions suffered and experienced and it can be adapted to any given situation rather than limiting it to a particular business or industry, as in the Thai Trafficking Act. This adopts a more pragmatic approach considering the reality of the socio-economic situation faced by the majority of women, particularly in developing countries.

Utilising the concept of consent would distinguish prostitution as a unique entertainment industry requiring relevant labour laws and valid immigration; and determine trafficking cases as nefarious crimes and human rights violations, each to be assessed and processed separately. This would establish a clearer structure and guidelines for authorities and for the women to understand their human, labour and legal rights.

⁶⁴ Lisborg (2009)

⁶⁵ Sorajakool, 2013

⁶⁶ Jones (2012)

⁶⁷ Elliot 2015, p. 127

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