

Who gets to choose? Coercion, consent and the UN Trafficking Protocol

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Introduction

In December, 2000, over 80 countries signed the 'Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children' (The Trafficking Protocol) in Palermo, Italy. This event was the culmination of over two years of negotiations at the UN Centre for International Crime Prevention in Vienna. The Trafficking Protocol was the target of heavy feminist lobbying. These lobby efforts were split into two 'camps' according to their views on prostitution. One group, the Human Rights Caucus, saw prostitution as legitimate labour. The other, represented by the Coalition Against Trafficking in Women (CATW), saw all prostitution as a violation of women's human rights.

I and other sex worker rights activists were concerned about the impact of a new international trafficking instrument on the lives of sex workers. Historically, anti-trafficking measures have been used against sex workers, migrant sex workers, and immigrants. Several activists from the Network of Sex Work Projects (NSWP) joined the Human Rights Caucus in their lobby efforts, in the hope of ensuring a result that would not damage sex workers' human rights. This paper reviews the arguments made by both lobby groups at the negotiations. It focuses in particular on how trafficking came to be defined, and the pivotal role played by the notion of 'consent'. It examines how 'consent' emerged as the international standard for determining 'trafficking in women', placing current debates in historical context. Finally, it assesses the potential for the Trafficking Protocol to be used to promote sex workers' and migrants' human rights.

Consent or coercion: negotiating the definition of trafficking

In Vienna, the differences between the lobby groups became most apparent in the most controversial part of the Protocol negotiations: deciding just how 'trafficking in persons' should be defined. CATW's lobby group argued that 'trafficking' should include all forms of recruitment and transportation for prostitution, regardless of whether any force or deception took place (CATW 1999). This is in line with their view of prostitution per se as a violation of women's human rights. The Human Rights Caucus, who supported the view of prostitution as work, argued that force or deception was a necessary condition in the definition of trafficking for sex work and for other types of labour. They also maintained that trafficking for prostitution should not be treated as a different category to other other types of labour. This was based on the recognition that men, women and children are trafficked for a large variety of services, including sweatshop labour and agriculture (Human Rights Caucus 1999), as well as fear of the potentially repressive consequences of attempts to turn the Protocol into an anti-prostitution document.

These two positions ended up revolving around the notion of 'consent'. Several government delegations, backed by CATW's lobby group, argued that the definition of trafficking had to specifically include situations in which a person both consented to travel and consented to do sex work, even if no force or deception was involved. This position has as its root the idea that a woman's consent to sex work is meaningless. This definition of trafficking differed little from the proposed definition of trafficking in children: in this view, neither women or children can be said to 'consent' to travel for work in the sex industry.

Other governments opposed the collapse of women and children. Their position was endorsed by the Human Rights Caucus, who stated: 'Obviously, by definition, no one consents to abduction or forced labour, but an adult woman is able to consent to engage in an illicit activity (such as prostitution, where this is illegal or illegal for migrants). If no one is forcing her to engage in such an activity, then trafficking does not exist... The Protocol should distinguish between adults, especially women, and children. It should also avoid adopting a patronizing stance that reduces women to the level of children, in the name of 'protecting' women. Such a stance historically has 'protected' women from the ability to exercise their rights' (Human Rights Caucus 1999: 5).

The argument that sex work is inherently a human rights violation, and thus cannot be consented to, is one that I disagree with. But it is not my intention in this paper to repeat the arguments for treating sex work as a legitimate profession. Rather, I want to focus on the harmful political consequences of arguing that coercion (including deception) is not an essential part of any definition of trafficking. The argument that women cannot consent to commercial sexual interactions coincides all too easily with anti-feminist ideas about female sexuality, particularly, with that of the threat of women's sexual autonomy. It also can be used to give what are basically anti-immigrant prejudices and policies a more palatable gloss, borrowing terms from human rights and feminist argumentation.

Consensual history

Historically, efforts to combat trafficking have ended up justifying repressive measures against prostitutes themselves in the name of 'protection' for women and children. Modern debates around the relationship of consent to 'trafficking in women' have a long history. At the beginning of the last century, there was a great public outcry against 'white slavery', in Europe and America. 'White slavery' referred to the abduction and transport of white women for prostitution. In a manner similar to today's campaigns, the issue was covered widely in newspapers, a number of organisations were set up to combat it, and national and international legislation was adopted to stop the 'trade'. The international debates around 'white slavery' were highly concerned with the issue of consent. Many campaigners against the white slave trade saw all prostitutes as victims in need of rescue; others argued the importance of distinguishing the 'willing' prostitute from the victimised white slave.

The distinction between 'white slavery' and prostitution was maintained by campaigners of differing ideological bent. On the one hand were so-called 'purity' campaigners, who

aimed to rid society of 'vice' and who focused in particular on youthful sexuality. For example, the US District Attorney Edwin W. Sims wrote in the preface to the influential 1910 tract, *Fighting the Traffic in Young Girls or War on the White Slave Trade*, 'The characteristic which distinguishes the white slave traffic from immorality [prostitution] in general is that the women who are the victims of the traffic are forced unwillingly to live an immoral life. The term "white slave" includes only those women and girls who are actually slaves' (Sims 1910 p.14). 'Purity' reformers' relationship with the prostitute herself was ambiguous: while professing sympathy for the lost innocents sacrificed by white slavers, they were severe in their judgement of girls and women whose immodest behaviour led them into a life of shame.

On the other hand were the so-called 'regulationists', who believed that the 'necessary evil' of prostitution should be controlled by stringent state regulations. Dr. Parent-Duchatelet, whose 1836 study of French prostitutes was a model for regulationists, wrote: 'Prostitutes are as inevitable in a great conurbation as sewers, cesspits and refuse dumps. The conduct of the authorities should be the same with regard to each' (in Roberts 1992: 223). Harnessing rational scientific arguments to moral disapproval, 'regulationists' argued that state regulation was the only way to control venereal disease. 'Innocent' women and girls needed protection from immorality; however, once fallen, it was society that needed protecting from the immoral woman. The best way to protect society, argued regulationists, was to register and medically control prostitutes. Other campaigners, particularly women's rights activists, made little distinction between 'white slavery' and prostitution itself. These early feminists attempts to break down the distinction between 'innocent' victims and 'immoral' prostitutes started with Josephine Butler's campaign against the regulation of prostitution through the Contagious Diseases Acts in Great Britain. Under these Acts, any woman who was suspected of prostitution could be detained by the police and forced to undergo an internal examination. Butler and other 'abolitionists' argued that men were responsible for prostitution, placing the blame for prostitution squarely on the shoulders of unbridled male lust. No woman could be said to truly consent to prostitution: if a woman appeared 'willing', this was merely the result of the power that men held over her. By turning all prostitutes into victims, Butlerite feminists undercut the rational for regulationist systems. When the Contagious Diseases Acts were repealed in 1886, Butler and her followers turned their attention to the fight against 'white slavery'. In the abolitionist vision, prostitution and white slavery would come to an end if laws targetted those who made money from prostitutes, rather than the prostitute herself. No woman would enter prostitution of her own accord, they reasoned, with no one to lure or deceive her, woman's innate moral superiority would ensure her purity. In this, feminist abolitionists shared a view a women's sexuality that was common to all the various anti-white slavery campaigners. Women were considered sexually passive, which made them more 'virtuous' than men, but, paradoxically, once that virtue was 'lost' through illicit sexual behavior, women's sexual nature became dangerous. Consequently, calls for the need to protect women's purity alternated with attempts to reform and discipline prostitutes.

Feminist abolitionists displayed a curious mixture of progressive refusal to condemn the prostitute and a moralistic, middle-class urge to protect the virtue of young, working class and immigrant women. This ambiguity is clearly illustrated in the work of the notable US feminist campaigner, Jane Addams. In her book on 'white slavery', *A New Conscience and an Ancient Evil*, Addams argues forcefully against police harassment of prostitutes and for improved wages for working women. While she relates with heart-rending pathos the stories of poor girls whose only hope of feeding their families is by giving in to the blandishments of 'white slavers', she is scornful and dismissive of those girls who would contemplate selling their virtue in slightly less desperate circumstances: 'Although economic pressure as a reason for entering an illicit life has thus been brought out in court by the evidence in a surprising number of cases, there is no doubt that it is often exaggerated; a girl always prefers to think that economic pressure is the reason for her downfall, even when the immediate causes have been her love of pleasure, her desire for finery, or the influence of evil companions' (Addams 1912: 60). According to Addams, these moral failings made young working-class and immigrant girls 'easy prey' for white slavers. Certainly, belief in these girls' innate moral weakness made them the ideal target of the reforming impulses of middle-class feminists.

The consequences of denying consent

The first international agreement against 'white slavery' was drafted in 1902 in Paris and signed in 1904 by 16 states. Largely due to the input of regulationist countries such as France, the International Agreement for the Suppression of the White Slave Trade did not equate 'white slavery' with 'prostitution'. The agreement only addresses the fraudulent or abusive recruitment of women for prostitution in another country. In 1910, a new agreement broadened the scope of the crime to include recruitment for prostitution within national boundaries. Both of these conventions were limited to the traffic in 'unwilling' women, and covered only recruitment, not conditions in prostitution workplaces. It was not until 1933 that an international agreement was drafted that reflected the abolitionist position. The International Convention for the Suppression of the Traffic in Women condemned all recruitment for prostitution in another country. It obliges states to punish 'Any person who, in order to gratify to passions of another person, procures, entices or leads away, even with her consent, a woman or a girl of full age for immoral purposes to be carried out in another country' (in Wijers and Lap-Chew 1997, emphasis added).

If it took until 1933 for the abolitionist position to become encoded in international law, abolitionist influence on national legislation in several countries was much more marked. Throughout Europe and in the United States, anti-white slavery activists were successful in their campaigns for abolitionist laws aimed at protecting the prostitute from 'white slavers', 'pimps' and 'profiteers'. These new laws neither ended prostitution nor improved prostitutes working conditions: rather, these laws were used against prostitutes themselves. Thrown out of brothels and red-light districts, prostitutes were forced into illegality, and arrests of prostitutes actually increased. Prostitutes' husbands and boyfriends were targeted as pimps, especially if they were black or 'foreign'. In a famous case in the US, the 1910 Mann Act (The White Slave Traffic Act) was used to

punish Jack Johnson, a black boxer, for his marriage to a white woman. In Britain, the Criminal Law Amendment Bill of 1921 (The White Slave Act) was used against prostitutes and working class women (Walkowitz 1980). Greece fought 'white slavery' by passing legislation in 1912 forbidding women under 21 to travel abroad without a special permit (Bristow 1977, 178).

Ambiguous standards

The legacy of abolitionism is still being felt today. In international law, the abolitionist standards of the 1933 convention were reiterated in the 1949 UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others. In this agreement, prostitution is considered incompatible with the dignity of the person. Until the adoption of the Trafficking Protocol, this was the only international document to deal comprehensively with trafficking and prostitution. Though signed by few countries, the 1949 served as a model for much domestic legislation. In a large number of countries, abolitionist laws are still on the books: preventing prostitutes working together (lest one be arrested for pimping), blocking prostitutes attempts at union-forming (considered as unlawful 'promotion of prostitution'), and barring them from legal redress in cases of violations of their labour, civil, and human rights.

If there is one lesson that we can learn from history, it is that increased state power to repress prostitution ends up being used against prostitutes themselves. Has history repeated itself in the Trafficking Protocol? The answer is not yet clear, as the Protocol has the potential to be used for repressive, as well as for emancipatory, ends. On the one hand, the final definition of trafficking in the Protocol can be considered a victory for those who argue that the only way to protect sex workers' rights is to recognise prostitution as a legitimate profession. The use of force or coercion is included as an essential element of trafficking in the definition. This is a significant departure from the abolitionist stance of the 1949 Convention, and leaves states free to recognise sex work as labour and regulate it under according to labour standards. On the other hand, while the Protocol makes an implicit distinction between 'coerced' and 'non-coerced' migration for prostitution, it offers very little in terms of human rights protections for trafficking victims, and nothing at all for (migrant) sex workers who were not coerced. If the Protocol leaves the way free for governments to treat sex work as labour, it also in no way prevents governments from persecuting, criminalising, and denying equal protection of the law to sex workers in the name of fighting 'trafficking'.

Conclusion: beyond 'trafficking'?

Despite the potential of the Trafficking Protocol to be used to protect (migrant) sex workers' human rights, recent government actions seem to indicate that the repressive potential of the Protocol will prevail. In a number of countries, anti-trafficking measures have led to restrictions on movement and migration for women, increased surveillance of sex workers, and increased deportation of migrant sex workers. This point was made forcefully by Radhika Coomariswamy, the UN Special Rapporteur on Violence Against Women, at a recent conference. Arguing that 'trafficking' and 'prostitution' should not be linked, she described how many Asian governments were responding to trafficking fears by legislating to restrict women's freedom of movement. Deportations of sex

workers are commonplace, one recent example is the UK, where the police raided London brothels and sent migrant sex workers packing. In the Netherlands, trafficking fears have led to a law which requires all sex workers to carry identification papers-the only occupational group for whom this is required.

The lessons from history about the repressive consequences of anti-trafficking laws has led some activists to search for a new way to conceptualise migration and prostitution. The contours of a framework to replace that of trafficking have begun to emerge, sketched out in discussions, demands and demonstrations from Delhi to Detroit by sex workers and those who support their agenda. This new framework would reject both the neo-abolitionist position that would deny women the ability to consent to prostitution, and a neo-regulationist perspective that condemns 'forced' prostitution but offers nothing in the way of rights for the 'guilty', 'voluntary' prostitutes. This new framework would incorporate elements of labour rights, insisting that sex workers be treated as legitimate workers, rather than as moral reprobates. It would challenge the mentality that demands the women bear the responsibility for the moral guardianship of society. It would recognise that gender relations in the sex industry are not a simple matter of oppressed women and oppressive men, but that men, women, and transgenders take up varying positions and have varying amounts of power as clients, sex workers, and associates. It would grant third-world women the same degree of self-awareness, autonomy and agency that is taken as self-evident for western women. Most importantly, this new framework may be able to move beyond the legacy of repression clinging to the trafficking framework because it will be developed by sex workers themselves.

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