

The role and limitations of national legislation against trafficking in human beings*

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Laws do not prevent trafficking.

Laws cannot protect victims.

Maybe human beings who enforce and apply the laws can.

I want to talk about the likelihood and limitations of national legislation to combat trafficking. To understand what an *effective* approach could be, it is important to differentiate between forms of trafficking, the groups a law should target and the different involvements of countries.

Necessary distinctions

Forms of trafficking

Trafficking in human beings has various forms. The draft protocol to prevent trafficking notes three kinds:

- trafficking in prostitution and other forms of sexual exploitation
 - trafficking in forced labor including begging
 - trafficking in human organs
- not mentioned but not less important
- trafficking in adoption.

To discuss national and international legislation involves taking a stance on what a society/world should look like: Does a society accept – even reluctantly - prostitution, begging, organ transplantation or foreign adoptions? Or do all actions aim at eliminating certain social behaviors?

My observation is that law-making tries to get around these very difficult discussions by assuming that the focus of the laws is mainly the protection of victims. The problems arise when law enforcers - and the public - are confronted with the fact, that not everybody found in prostitution fits the underlying image of a victim, that begging might be just one way to make a living and not necessarily forced upon a person, and that, therefore, the underlying understanding might be vague or inappropriate.

Country involvement

Another – very important – distinction is whether a country addresses the problem as country of

- source
- transit or
- destination.

Most countries in Asia – unlike the States in the western world – are all three: countries of source, transit and destination.

Affected persons

A law-makers also have to decide which groups to address and in which way. In general we should distinguish between four target groups:

- The traffickers,
- the customers,
- the 'victims' and
- their families [or other 'profiteers'].

I call '*traffickers*' the people who actually recruit and transfer the victims. *Customers* can be the brothel owner, the client, but also the future parents, the recipient of an organ, the employer and in a broader sense, the buyer of a product. I would like to limit the concept '*victim*' to all those who are forced into a certain form of exploitation. A problem occurs when we start questioning the degree of free will a person has under certain circumstances. In other words: does any kind of economic pressure make this person a victim? And finally: trafficking creates – by nature – a net of *profiteers*: the families who sell their children, but also the families who simply live from the victim's earnings.

The different target groups have to be addressed in a different way to make a law against trafficking in human beings effective.

An effective legislative approach

Target group: Traffickers

No question trafficking is and should be defined as a serious – as a rule organized – crime and therefore should be punished. Beyond the repressive component, we also associate a preventive component with punishment, as we assume that the pure threat of punishment can deter people from committing a crime. But as many studies show: the threat of punishment is clearly not enough.

Trafficking is first of all big business. The estimated number of trafficked women and children ranges from 700.000 to four Million a year. According to the Council of Europe, the profits from trafficking are estimated up to 15 Billion US Dollar per year – with an estimated growth of 400 % in 10 years. In Europe we recently heard about a case where a gang earned an estimated 16 Million Euro in two years by transporting illegal immigrants from Italy via Belgium to England.

We can assume that traffickers make a clear risk assessment which includes:

- How likely is detection?
- What are the consequences in case of detection?

As long as the discovery is unlikely and the consequences are – compared to the expected profit – not severe, traffickers will take the risk.

This means first of all that the detection rates have to be improved. That's easier said than done. As far as I can see, most countries rely on police work – and focus on *crime* detection. Not only is this a quite expensive system but also not very successful in *preventing* crimes and detecting *hidden* criminal acts.

Effective anti-trafficking legislation should aim at preventing trafficking by increasing the risk for traffickers of being detected. One effective strategy could be to increase the rate of denunciations. I see two possible strategies for this

- Incentives for denunciations or
- Obligations to report traffickers.

This, together with the required punishment of attempted acts of trafficking,¹ could help limit trafficking at an early stage.

¹ See Article 5, 2. (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Human Beings.

Another strategy that increases traffickers' risk is that probable losses surpass possible gains. I'm not only talking about confiscation, forfeiture or transfer of profits, but to block accounts if the money comes from suspected sources.

The detection of illegal migrants and people who smuggle them across borders is doomed to failure. That does not mean that states should not control their borders, it only means that this is probably a very ineffective and expensive way to fight trafficking.

Target group: Customers

Another important target group for legislative measures to combat trafficking that goes almost unnoticed is the customers: They are the ones who create a demand and take advantage of trafficking. They might be better targets than traffickers - especially as their self concept is not that of a criminal. It should, therefore, be possible to target their reputation: employers and customers who profit from slave labor; respected men who go to places where women or children are held in slavery; parents who order their sons and daughters from developing countries; and people from rich countries who pay any price for organs from poor countries.

Legislative action can target this group. Not only can states define criminal activities, such as employing smuggled people or buying children;² they, as well, could increase the 'social' costs by e.g. prohibiting sentenced customers from holding public positions or running certain businesses.

The 'victims'

If we agree that one of the main reasons for trafficking is poverty, one of the prior solutions should be education and income

² See Article 5, 2. (b) and (c) of the Protocol

generation for the poor. Legislation can respond by ensuring minimum incomes for poor families: Social security and welfare systems, minimum wages, protected concessions on land, and easily enforceable court titles in cases of separation and divorce, are steps in this direction. One of my favorite ideas is to make school kids the “breadwinners”: Food [for a poor family] in exchange for school attendance by their kids.

One of my concerns is that we all too easily accept poverty as an - almost mono-causal - explanation for trafficking. Still we have to see that the majority of poor families don’t sell their children and many women prefer living in poverty to a life in a brothel.

In fact, there are few studies on the reasons of human trafficking. We rely mainly on – more or less – plausible assumptions. Asked why they allowed girls of two Nepali villages to be trafficked, more than 85% of the respondents answered “no option”.³ Apart from the fact that this might be an easy to give answer; it shows that hopelessness could be the even more important factor: The feeling of having no option does not arise in one day. Less than 5% of respondents said they did it for money.

This shows that a society should not concentrate on only monetary assistance, but provide qualified social and psychological support. In Germany we have a law that *entitles* people to ask for [free] help from different social services if children are in any danger. This law is exemplary.⁴ Besides an entitlement of the family to seek help, the law also contains an obligation of the [municipal] youth office to provide shelter and protection for children, if necessary, to protect

³ http://www.panasia.org.sg/nepalnet/mahilaweb/trafficking/facts_and_figures.htm

⁴ I brought some copies of this law with me because the approach of social welfare laws is not widely known in Asia.

them from danger. This could refer be applicable as a good practice in cases of child protection.

No matter what legislative action is taken, the overall question is: What are women and children worth? If there is no common understanding that women and children are not just assets that can be sold, there will be no changes in the long run.

While measures such as these look at the problem from the point of view of a source country, other approaches focus more on the situation in the receiving country.

One of the problems we face in public discussions and legislative procedures is the mixing of anti-trafficking legislation with underlying problems: I already mentioned prostitution; I could also refer to illegal immigration. Therefore, adequate legal activities should at least attempt to define who is a 'victim'. According to the ILO, only 20 – 25 % of the prostitutes in Asia are victims of trafficking. Therefore, it is necessary to agree who needs and can claim protection. Clear distinctions also help to increase public support.

The same for the question on illegal immigration: Illegality is one of the factors that allows traffickers and 'employers' to put heavy pressure on a trafficked person. A strict immigration policy can turn out to be part of the problem and not – as we might assume – part of the solution. Italy for example is very successful with a simple method: Women, who want to leave prostitution and get a legal employment, can get temporary limited permission to stay. If they succeed they can get residence. The same mechanism could be effective if school attendance was linked with permission to stay.

Legislative measures should aim at diminishing the pressure, because this could allow a trafficked person to escape and seek for help. Therefore, the suggested - temporary or even permanent - legal

status of victims in the receiving state⁵ is not only important for the victim to recover, and for the state to have a criminal case, it is also important because it diminishes the threat of detention and expulsion. This strengthening effect could be supported by a right to return to the source country, i.e. to one's own family.

I don't want to go into details about the social and legal assistance for victims – not only in the receiving state but also in cases of repatriation. The Protocol to Prevent, Suppress and Punish Trafficking in Persons gives sufficient clues:

- Housing respective shelter
- Counseling & information
- Medical & psychological assistance
- Financial support
- Job, education & training opportunities
- Information about court procedures and court assistance
- Mandatory compensation/restitution

My point is the legal construction: Do the law makers entitle victims to claim support or do public authorities decide as they think fit? In other words: are victims kept in dependency or are they allowed to make steps on their own – with all the social and legal assistance they might need? This might seem irrelevant, but, though it's difficult and sometimes unnerving, it is worth it, because it is a first, big step to avoiding re-victimization.

The families and other 'profiteers'

All measures to empower victims of trafficking have to include their families, and others who are financially supported or generate their income through the victim. As long as a person knows that her

⁵ Article 7, 1. of the Protocol

dependants cannot survive without her earnings, she is subject to blackmail and pressure. Therefore, whatever social programs are developed, both to prevent trafficking and to support repatriation, they have to provide a decent living not only for the victim but also for their dependants.

Ideal and reality

Everything could be easy, if everybody would agree on only one target: protect victims of trafficking – and if we could identify the victims. But in reality other interests might prevail: A society's stance against prostitution, its fear of attracting migrants, interest in accessing vital organs, and the sorrows of infertile parents. These ambiguities make reasonable laws difficult to achieve. But law-makers still have to try.