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De strafbaarstelling van mensenhandel ontrafeld. Een analyse en heroriëntatie in het licht van rechtsbelangen

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Summary

UNRAVELLING THE CRIMINALISATION OF TRAFFICKING IN HUMAN BEINGS.
An analysis and reorientation in light of the concept of legal interests.

The seriousness of the crime of trafficking in human beings cannot easily be overestimated. On a worldwide scale, every year millions of people are traded and exploited; used as an object, sometimes sold, literally, as commodities. For years now, strict international and European obligations have been in place to combat trafficking in human beings. One of these obligations is the duty to effectively criminalise trafficking.

In the Netherlands, trafficking in human beings is criminalised by virtue of Article 273f of the Dutch Criminal Code (DCC), a very complex provision. Theft, manslaughter or murder are all crimes with legal provisions that are relatively easy to read and understand. In the provision on trafficking in human beings, however, a total of nine different acts are criminalised, all under the same qualification – ‘trafficking in human beings’ – and all carrying the same high penalties (with a maximum of twelve years’ imprisonment). As a consequence, Article 273f DCC is the longest provision in the Dutch Criminal Code. Unsurprisingly, the provision has acquired a bad image over the years and has been applied in very different ways in the courts. In recent years, the Dutch Supreme Court has taken a very active position to further clarify and interpret the various criminal acts laid down in Article 273f DCC. However despite this progress, the actual scope of the penal provision on trafficking in human beings remains unclear.

Chapter 1 of this PhD thesis further elaborates on why the ambiguity concerning the scope of the provision on trafficking in human beings is so problematic. Accessible penal provisions are not there for the lawyers’ or legal scholars’ sake, but have a major role to play in the actual fulfilment of the notion of legal certainty and, thus, the legality principle: they help to guide people’s behaviour and are key elements in the transparency and legitimacy of a system of criminal law. Furthermore, clear penal provisions are pivotal for the effectiveness of interventions and the use of state powers based on these provisions by criminal law professionals such as law enforcement officials, public prosecutors and judges. Uncertainty concerning the scope of penal provisions is thus not only problematic in relation to the legality principle: clear provisions

are an absolute condition for a criminal law system to function in an effective manner.

The uncertainty about the scope of Article 273f DCC was the reason to write this dissertation; the main objective being to unravel the provision and reveal its scope. The compact and concise research question in this book is therefore:

What is the scope of the criminalisation of trafficking in human beings in the Netherlands?

The research question can be answered in different ways, taking different paths. This study chooses to focus on the concept of legal interests, which has its roots – as the *Rechtsgut* principle – in German criminal law doctrine. Protecting legal interests can be conceived as the core aim of criminal law systems: criminalising a human act can only be legitimate if certain interests are at stake. The criminalisation of theft, for example, protects property interests. The legal interest of life – generally considered the most valuable interest – is mainly protected by the criminal acts that are known as ‘murder’ and ‘manslaughter’.

The concept of legal interests makes it possible to clarify the legal interests the legislature aimed to protect when criminalising the various acts contained in Article 273f DCC. Knowledge of this background can provide valuable insights into revealing the scope of the provision and it also has a powerful structuring effect: by looking at the penal provision from a clear perspective, various developments concerning the provision can be discussed in a structured way. This specifically applies when the penal provision in question is affected by national and international developments, as is the case with Article 273f DCC.

How the concept of legal interests can be of use for the further analysis of Article 273f DCC is the central question in *Chapter 2*. The subquestion posed in this chapter reads as follows: *How can the concept of legal interests help in the analysis and evaluation of the penal provision on trafficking in human beings?* The main objective of the chapter is to study how the concept of legal interests can serve as an analytical as well as a normative tool. Therefore it was first and foremost necessary to answer the question of how the concept of legal interests can be understood. Chapter 2 illustrates and focuses on a common dichotomy, derived from German and Anglo-American criminal law literature, between a *descriptive approach* of the concept of legal interests and a *normative approach*.

The primary goal of the descriptive approach is to provide an adequate description of the legal interests that the legislature aimed to protect when criminalising the human conduct in question. This approach thus depends on the choices made by the legislature and is therefore non-critical in nature. The normative approach takes a very different, opposing point of view. Scholars who consider themselves part of this school, aim to set out their own

framework of principles which allows them to independently answer the question whether and, if so, which legal interests are protected by the penal provision in question. This approach thereby transcends from the choices and preferences of the legislature, and critically assesses the claim made by the legislature that certain legal interests are protected by the penal provision.

The main method of the normative schools to critically assess the question whether the legal interests selected by the legislature are actually protected by the criminal law, is to focus on the legal interests themselves, placing special emphasis on the quality of the connection between the criminal act on the one hand, and the selected legal interest on the other hand. Chapter 2 draws the conclusion that the descriptive as well as the normative approach to the concept of legal interests could be of use to answer the research question. The descriptive approach permits an adequate analysis of Article 273f DCC, whereas the normative approach facilitates a critical assessment of the connections made by the legislature over the years: have the legal interests selected by the legislature really been protected by the criminalisation of the acts contained in Article 273f DCC?

To further unravel the penal provision on trafficking in human beings from the perspective of the concept of legal interests, it is necessary to have a thorough insight into the historical background of Article 273f DCC. After all, a good understanding of the current functioning and application of this provision is only possible with knowledge of its historical development and awareness of the societal, cultural and political background to the provision. The subquestion in Chapter 3 therefore reads: *How did the penal provision on trafficking in human beings historically develop and what societal, cultural and political developments influenced this development?*

In answering this question, special attention is paid to the legal interests that have been distinguished by the legislature over the years. Chapter 3 concludes that the provision on trafficking has a very complex history, and can be considered a product of divergent criminalisation processes in different eras. What stands out after conducting an in-depth historical study, is that the establishment of the criminal laws on trafficking more or less always had an international component. Furthermore, the penal provision was always affected by the whims of time; depending on the era, the strictness of the provision differed, ranging from strict morality laws forbidding all kinds of exploitation, regardless of the consent of victims, to laws in which non-consent and means of coercion were the key elements. Without any doubt, the trafficking laws are thereby also exemplary of more general societal developments that took place in the twentieth century, when liberal approaches alternated less liberal legal approaches. Consequently, these developments also had an impact on the legal interests that were selected over the years. In stricter years, regulating public morality was seen to be more important than protecting the

individual freedom of victims; whereas in the more liberal years, the legal interest of personal freedom was the primary driving force.

The knowledge of the historical background to the trafficking provision forms the basis for the in-depth treatise on the functioning and application of the current provision on trafficking in human beings as set out in *Chapters 4 and 5*. In both chapters the subquestion is: *Which acts are criminalised as trafficking in human beings in the Dutch Criminal Code?* To study this question, first the structure in which the penal provision is embedded is considered. *Chapter 4* discusses the location of this article in the paragraph that deals with crimes against personal liberty. Another important question in this chapter, is how the different acts of trafficking relate to one another; what does the legislature say about this in the explanatory documents?

Chapter 4 shows that the legislature used different techniques to structure the various trafficking acts further. In the underlying documents, a useful distinction is evident between acts that precede the exploitation (the actual act of trafficking), the exploitation itself (on which the specific intention of the perpetrator is focused) and profiting from the exploitation. At the same time, it becomes clear that the term 'trafficking in human beings' is used and applied by the legislature in different ways, creating a confusing and ambiguous vocabulary. The same applies to the use of the concept of exploitation. This notion functions as a constituent element of some of the trafficking acts, but has not been used and interpreted in a consistent way in the underlying legislative documents. The different explanations make 'exploitation' a homonym concept in Dutch legal history; a definitive explanation of this concept cannot be derived from the authoritative legal documents.

An in-depth analysis of the various trafficking acts contained in Article 273f, paragraph 1, DCC is conducted in *Chapter 5*, where a commonly used dichotomy of constitutive and non-constitutive acts is applied. Constitutive offences require evidence of an actual consequence resulting from the crime. Non-constitutive offences criminalise the actual acts; it is not necessary to prove that the act had any consequences directly related to the interest of freedom. Seen from this perspective, it appears that paragraph 1 of Article 273f DCC consists of very different acts, constitutive and non-constitutive, with a very divergent scope. Since proving consequences is not always necessary, the connection between these acts and the protected legal interest of personal freedom varies enormously.

After conducting the theoretical analysis, *Chapter 5* shifts to the study of the case law of the Dutch Supreme Court. In recent years, the Supreme Court has interpreted and applied certain acts contained in Article 273f DCC using a (very) restrictive method, thereby limiting the overall scope of the trafficking provision. This development is discussed in *Chapter 5* from various angles. One of these perspectives considers the method with which the Supreme Court established its restrictive interpretation. It is remarkable that the Supreme Court

does not interpret existing constituent elements of the acts involved, but considers that these acts lack the constituent element of 'exploitation' and decides that this element should be read into the text, although the legislature had intentionally left this element out. It is evident from the considerations of the Supreme Court that the contextualisation of the trafficking crime as a crime against individual liberty played a role in reaching this interpretation.

In Chapter 6, the findings of the previous chapters are assessed from the perspective of the concept of legal interests. The subquestion posed in this chapter reads as follows: *What is the relationship between the legal interest protected by the criminalisation of trafficking in human beings and the acts that were criminalised as such in the Dutch Criminal Code?* In this chapter it becomes clear that not all the trafficking acts contained in Article 273f DCC have a logical connection with the legal interest of personal freedom. For some of the acts – especially those included in subparagraphs 3, 4, 5, 8 and 9 – it can hardly be said that personal freedom is protected as a result of them being criminalised; some of these acts are more related to protecting public morality than protecting individual freedom.

In recent years, it has become apparent that the Dutch Supreme Court is restrictive in its interpretation of the acts of trafficking contained in the Dutch Criminal Code. The question then arises: how legitimate is it to restrict the scope of the law relying on the legal interest of personal freedom? *Prima facie*, this approach should be encouraged: the critical and normative potential of the concept of legal interests is fully employed when its application in the courts leads to criminal law being applied in a restrictive and reticent way. But what is plain in this case, however, is that the interpretation of the Supreme Court, where it is guided by legal interests, is not always compatible with the *rationale* of the legislation and what was intended by the legislature. Problematic here is that the legislature did not thoroughly assess the question whether criminalising an act would actually add to the protection of the legal interest of personal freedom.

By answering the subquestion in Chapter 6, it also becomes possible to answer the central research question of this study. The answer to the question concerning the scope of the criminalisation of trafficking in human beings is, in short: its scope is versatile and multidimensional, in the sense that the provision consists of a variety of different acts which do not all – in contrast to what is claimed by the legislature – protect the legal interest of personal freedom. Furthermore, it can be said that although the Supreme Court has over time clarified the various acts further, the solutions provided do not automatically lead to a clearer and more consistent penal provision.

Taking into account the previous findings, it is clear that the penal provision on trafficking in human beings is considered a problematic construct with good reason. This becomes even clearer when we look at the findings from the

perspective of the functions of the concept of legal interests. How legitimate is it that certain trafficking acts are listed in the Dutch Criminal Code as being crimes against personal freedom, while those acts are not actually related to this interest? Should the courts be free to base their (restrictive) interpretation on this legal interest when it appears this connection is so weak? *Chapter 7* discusses these questions and raises a number of issues. The fact that the criminalisation of certain trafficking acts does not protect the legal interest of personal freedom, raises a problem on all functional levels of the concept of legal interests. If the legislature did not think through the connection between the act that was criminalised and the legal interest protected, this legal interest can hardly be used as a valid justification for criminalisation; nor is it a convincing method to structure the codification of legislation, or interpret the acts laid down therein.

Apart from the problematic relationship with its 'protected' legal interest, the findings in this book have also been discussed from other angles in *Chapter 7*. The way Article 273f DCC is currently evolving in legal practice is also undesirable for other reasons. The technique that has been used by the Dutch Supreme Court to limit the scope of the trafficking provision – 'reading' a constituent element into the crime – has led to the situation where the text of the penal provision can no longer be perceived as a correct representation of what kind of conduct is punishable as trafficking in human beings, and what kind of conduct is not. Of course, this automatically raises the question whether the provision is still in line with the principles embedded in the legality principle: how accessible can a penal provision be if important constituent elements can only be derived from case law? In the civil law tradition of the Netherlands, this situation certainly causes a problem. Moreover, this state of affairs also raises the issue of separation of powers: should the task of establishing extra constituent elements in crimes (instead of interpreting existing elements in crimes) not exclusively lie in the hands of the legislature? The answer in *Chapter 7* is in the affirmative and, as a consequence, it is recommended that the legislature reconsiders the penal provision on trafficking in human beings.