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Criminal Policy, Migration Policy and Trafficking in Human Beings – addressing the dark figure

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Abstract The combat against Trafficking in Human Beings (THB) has become a major global concern. The present article discusses policy developments which tend to focus on victim oriented approaches and critically assesses biases that lead to an underestimation of migrant victims and male victims of exploitation. It concludes with the suggestion of the criminal law approach focusing more on prosecutions of traffickers and the approach in general focussing more on the protection of these specific categories of exploited individuals.

Keywords trafficking, exploitation, dark figure, criminal policy, crimmigration

1. Introduction

The exploitation of individuals for profit – which is generally seen as the core of the crime of trafficking in persons - has a long history. International efforts to address it can be traced back at least a century. For a long time, trafficking in human beings (THB) was considered a phenomenon of the past in countries of the western world. Whereas over the years some attention was given to women who were trafficked for the sex industry, trafficking has only become a major global concern in the last 15 years. This concern has risen with increasing globalisation and the rise of transnational crime (Aronowitz 2001).

The present article will look at the increasing attempts to combat exploitation. Where does the anti – THB – policy focus on and what are the consequences of this approach? These attempts will be addressed through the criminological the lens of dark figure and selectivity. The term ‘dark figure’, ‘dark number’ or ‘hidden figure’ is used in criminology and sociology to represent unknown or unreported crime (Hagan 2011, p. 38). A certain amount of crime remaining invisible is inevitable. What is of particular interest is to what extent the unknown share of THB is selective: what do we know about certain types of THB that run a higher likelihood of being overlooked than other types of THB? This question will also be addressed critically against the backdrop of punitive migration control policies that steer their own course, relatively independent from the more protective THB policies. Given the nature of the guiding question, it cannot be answered with certainty, but an analysis of the available

knowledge can give some indications nonetheless. The article uses examples of the situation in the Netherlands but EU-wide secondary data (as collected by Eurostat) suggest that the mechanism in place are not limited to a single country.

2. Streamlined definitions

THB is now commonly seen as a serious crime and severe violation of individual freedom and dignity. The first internationally accepted definition of trafficking was incorporated into the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol). That definition has since been incorporated into many other legal and policy instruments as well as national laws including Dutch criminal law in 2005. In these definitions, lack of choice is crucial and definitions have been broadened to include all forms of exploitation both related and unrelated to the sex industry. The three key elements that must be present in conjunction for a situation of trafficking in persons to exist are: (i) action (recruitment); (ii) means (threat or coercion); and (iii) purpose (exploitation). In case of child victims the ‘means’ are not a necessary element and more in general consent is irrelevant.

Trafficking in human beings (THB) is often confused with human smuggling and migration. These concepts have in common that they involve the movement of persons and they are all at least commonly associated with illegality and vulnerability. Yet, there are important differences between them. As indicated above, crossing borders is not a necessary condition in the case of human trafficking, whereas human smuggling in turn requires consent. With THB the person is victimized, with human smuggling the nation state – with its migration policies - is affected. Although the legal concepts are different, there are also similarities and interconnections between human smuggling and human trafficking in practice, and one form can evolve into another (Aronowitz 2001).

The fact that there is a uniform generally accepted definition of THB has been an important step. Yet, a shared official definition does not offer any guarantee that it is fully understood and applied in practice. A complication is for instance that the word trafficking is often associated with cross border activities, whereas legally trafficking can also take place within a single country. Another example is that the fact that this definition is derived from

the combat against organized crime has influenced perceptions of the crime as well as the national approaches. A third example is that media attention tends to focus on high profile violent cases connected with prostitution, which can also have the unintended side effect that the general public and law enforcement officers may overlook less sensational cases. The present article focuses on a more structural complication; the interrelation between anti THB policy and migration control. One could state that whereas human smuggling is perceived primarily in the context of international migration and organized crime, trafficking is, by and large, seen as an issue of (organized) crime as well as of human rights (with victims whose fundamental rights are violated) and often separated from debates on migration (Loftus 2011, Van der Leun & Van Schijndel 2016).

3. Stepping up against THB

Across Europe, the coordinated approach against THB usually puts emphasis on the following aspects: identifying, protecting and assisting victims of trafficking, stepping up the prevention and enhanced coordination and cooperation among actors in the different policy domains (European Commission 2017). In general, international pressure and sharing of policies appears to have led to increased knowledge on different forms of trafficking in human beings. Although the policies started out as policies in the realm of organized crime, they have strongly developed into human rights policies with a strong emphasis on protecting victims.

Whereas in the past this involved mainly victims who reported themselves or who were detected by others, a crucial judgement of the European Court of Human Rights (2010) has also made clear authorities have to be more proactive. If authorities are aware, or ought to have been aware, of a concrete risk of trafficking, a failure to take appropriate measures is a violation of that person's rights¹. This implies that national authorities have to actively look for and act upon (potential) trafficking situations.

When reporting on policies against THB, the continuous production of laws, regulation and policy measures is often equated with the success of the international approach. Countries have gradually developed their policies to combat THB and they keep developing and fine-tuning them accordingly, but it is not realistic to assume that they will fully succeed in that

¹ (Rantsev v. Cyprus and Russia, Application No. 25965/04, Judgement of 7 January 2010, para. 286).

enterprise. Therefore they have to make choices. Moreover, it is likely that policy tradition that already exist shape and limit national policies and local implementation practices. This may lead to a dark number which is likely to be highly selective.

4. Dark figure

When criminologists or sociologists use the term dark figure they refer to undetected crime. With THB it is evident that there is a significant dark figure. After all, every time a newly labelled type of exploitation is defined, cases are found. It is not very likely that these type of cases did not exist before. In 2004, I was involved in an inventory of indications of labour exploitation in the Netherlands (Van der Leun & Vervoorn 2005). The study was commissioned by the Ministry of Security and Justice, preceding the broadening of the definition of THB in Criminal Law that would follow in 2005. In our 2004 inventory of empirical knowledge on labour exploitation cases, we only found reports about vulnerable groups, but no concrete cases. It only took some years before cases started to be uncovered. Similar conclusions can be drawn for organ trafficking (see a recent study by Ambagtsheer 2016) and criminal exploitation of children (see a recent study for the Ministry of Security and Justice by Bos et al. 2016). These developments can be traced more in detail in the reports of the Dutch special rapporteur on THB². The Dutch experiences show that wherever the spotlight is on, new types of cases are detected. By looking better, the dark figure decreases. This is certainly an intended outcome, but it also demonstrates that these instances have not been recognized before, whereas it is not very likely that they did not exist. THB is a typical crime that has to be actively looked for but can also be ignored or dealt with otherwise. Crimes with these characteristics leave a lot of room to maneuver for the authorities – including leaving certain forms of trafficking hidden in the dark. This is not a Dutch problem per se. EU-wide data on detected probable victims of THB show that despite a broader definition and attempts to raise awareness the main emphasis is still very much on THB in or for the sex industry.

² <https://www.dutchrappporteur.nl/>

Figure 1. Registered victims of THB (%) in EU 28 by type of exploitation, 2010-2012



Source: Eurostat 2015, page 30 (based on data of 22 countries)

There are no reliable estimates of the ‘real number’ of victims, but it is clear that the actual number of victims outside the sex industry is likely to be much higher than these registrations suggest. Many people who are exploited will not easily approach the authorities. The latter holds in particular for unauthorized migrant workers who might fear expulsion from the country or detention once in contact with the authorities. This makes them often overlooked and particularly vulnerable to exploitation.

Eurostat data on registered victims disaggregated by different forms of exploitation for all showed that over two thirds of registered (presumed) victims were trafficked for the purpose of sexual exploitation, with only 15-20 % for labour exploitation and 7-13 % for other forms of exploitation such as the removal of organs, criminal activities, or selling of children. Of all the female victims registered, the overwhelming majority were trafficked for the purpose of sexual exploitation. Among registered male victims, the majority were trafficked for labour exploitation.

Eurostat also collected data on prosecuted human traffickers. Out of 28 countries, only 14 were able to provide data. Over the years 2010-2012 these data added up to the figures below. As far as we know, a total of 7704 traffickers is known to be prosecuted for THB EU wide.

Table 2. Number of prosecuted traffickers by citizenship for EU-28 (2010-2012)

Year	2010	2011	2012	3 yrs total
Number of traffickers prosecuted	2 415	2 486	2 803	7 704

Source: EUROSTAT 2015, page 54, based on data of 7 countries

These data can only offer some indications as they are likely to be incomplete. We also have to take into account that traffickers can also be prosecuted for other crimes that were more easy to prove for instance. Having said that, the available figures on victims and on prosecuted traffickers do point into the direction of a selective dark figure and an emphasis on victims rather than on perpetrators. An important observation is the likely underestimation of migrant victims and men and boys as victims, a second observation is the relatively low number of prosecutions of traffickers. These findings raise the question: what influences these forms of selectivity?

The THB approach which emphasises human rights infringements is often seen as a step forward in bringing victims of exploitation out of the shadows and offering them protection. Yet at the same time, literature on migration control and crimmigration stresses the increasingly penal stance towards irregular migration (the ‘punitive perspective’) (Chacon 2009; Guia, Van der Woude & Van der Leun 2013) which seems to pull in the opposite direction by focussing on excluding, apprehending and expelling irregular migrants, sometimes with the use of criminal law. To a certain extent this is vicious circle as migrant victims without lawful residence will not only try to keep away from the police – who plays a large role in the combat against THB – they will also be less likely to perceive themselves as victims. As they are more often men or boys than victims in the sex industry this also leads to a gendered bias that is largely in line with the stereotypical images of THB that are widely presented and reinforced. It might be even go a step further: migrants who are exploited run the risk of not being seen as potential victims, but rather as individuals that can be expelled or detained under migration laws and regulations. This can even imply that THB policies which were meant to protect victims of exploitation have the side effect of leading to expulsion and detention rather than to protection (Skrivankova 2010, Van der Leun & Van Schijndel 2015). One way or another, the exploited migrants and their traffickers often stay hidden away from those involved in combating THB.

5. Conclusions and policy suggestions

Studies on migration control and those on THB lead rather separate lives (cf. Loftus 2011) and the same still holds for policies addressing the issues (Van der Leun & Van Schijndel, 2015). As far as the THB policy apparatus, with an emphasis on protecting victims, recognizes this inherent tension with the punitive stance in migration control, the solution is usually sought in better cooperation between agencies and more training activities. These suggestions might indeed help to a certain extent, but the problem is much more fundamental than this proposed remedies suggests. Fighting exploitation of migrants in the labour market must include fundamentally rethinking the relation with migration control and the fact that migrants – especially men - are more easily seen as perpetrators than as victims. The above mentioned holds even more because there is a large gap between the (THB) victim discourse which is central in anti-THB policies and the perception of many irregular migrants themselves who often do not identify with the idea of being a victim (Hiah & Staring 2016).

THB has to be actively looked for by national authorities, as the Rantsev arrest has made clear. A glance at the outcomes of the THB policies, however, suggests that although there has been a huge production of policies, laws and regulations, authorities still have much room to maneuver in terms of what they are aware of and what they can safely ignore and/ or deal solely with as issues of migration control. This is a very specific and selective dark number indeed.

Becoming more aware of exploitation of migrant workers requires political will. It is only realistic if other actors than the police and traditional actors in the field of anti-trafficking measures are seriously involved in the combat against exploitation in the general labour market. This would also involve looking beyond the crime and punishment agenda, and more seriously focussing on migration-policy related factors that make certain categories of individuals vulnerable to exploitation. This is not an easy option, as this will also draw attention to migration control policies that put migrants in these vulnerable positions, whereas a criminal law approach tends to obscure these complex and politically sensitive policy interactions (in fact these policies are very often presented as two of the same kind). The role of civil society, including NGOs, trade unions and migrant organizations can and should also be enhanced to be able to bring about these changes. Especially given the current migration

crisis in Europe, the potential exploitation of migrants and refugees requires serious attention. (Rijken 2016).

The proposed changes might have the advantage of also resulting in more concerted and more effective criminal law efforts to enhance the number of perpetrators detected and prosecuted, which is still consistently low. After all, traffickers and their accomplices are seldom arrested, investigated, prosecuted or convicted and this problem is worsened as victims of trafficking with a migrant background are rarely identified and brought into the criminal justice process as witnesses. The suggested changes also call for another measurement of policy success. After more than 15 years of sharpening the anti-THB approaches and putting energy in streamlining definitions and raising awareness at different governmental layers, it might be time to move further and start assessing the success of these attempts not only by referring to laws, policies, conventions, victims registered and police officers involved, but rather by numbers of convictions of perpetrators. This number should be raised also for traffickers who exploit their victims outside the sex industry. After all, if we take the link with criminal law and criminal policy serious, that is what the approach should be capable of and should focus on. In line with international protocols and in line with the initial organized crime perspective, it is very clear that policies in this area should focus on those behind trafficking in human beings, rather than on those who are exploited.

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