Towards conceptual clarity - the example of ongoing debates on labour exploitation in Germany

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DemandAT Stakeholder Workshop
5th June 2015, Brussels

This project has received funding from the European Union’s Seventh Framework Programme for research, technological development and demonstration under grant agreement no 612869
Demand and Exploitation

• “Demand” arguments evoke economic understanding of trafficking as business
  • Demand → Exploitation → Trafficking

• Demand for what?
  • Neither Exploitation nor Trafficking can be bought and sold
  • What is bought and sold are goods and services produced under conditions of exploitation and/or trafficking

• Distinction between Trafficking and Exploitation
  • Trafficking addresses circumstances of entering or remaining in an economic transaction
  • Exploitation addresses the nature of economic transactions (Munro 2008)
    • Disparity of value
    • Wrongful use
Pyramid of exploitation

- Cases of exploitation prosecuted as trafficking (≈ *wrongful use*)
- Cases of exploitation prosecuted as wage usury, bodily injury caused by negligence (≈ *wrongful use*)
- Cases of exploitation not considered by penal law (considerable and consistent disregard of tariff or usual wage standards) (≈ *disparity of value*)

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Disregard of exploitation

• „the Trafficking Protocol does not equate „exploitation“(…) with trafficking but is concerned only with prohibiting forms of dealing which facilitate or lead to exploitation.‘

• „There is (…) no obligation flowing from the Trafficking Protocol to do anything about the condition of being exploited, much less to provide a remedy to exploited persons.‘

• (Hathaway 2008-2009: 10).
Curbing trafficking by addressing exploitation

• TP does not define exploitation (Gallagher 2015)
  • Enumeration of exploitative situations as minimum definition
  • Exploitation designates purposes of trafficking acts
  • Exploitation not introduced as punishable act
  • TP does not outlaw exploitation as such

• Implementation at national level (Bhabba 2015)
  • Exploitation is addressed in national jurisdictions differently
  • Exploitation as such remains often undefined

• However, UN Trafficking Protocol stimulates attention to exploitation
Adressing exploitation as such

• ‘From a human rights perspective, the primary concern is to stop exploitation of people under forced labour or slavery-like conditions, no matter of how people arrive in such conditions and whether it concerns a victim of trafficking, a smuggled persons, an illegal migrant or a lawful resident.’

• ‘The logical way forward – at least from a human rights point of view – would be to focus on policy interventions on the forced and slavery-like outcomes of trafficking, rather than on the mean of trafficking.’

• M. Wijers (2015: 71)
The debate in Germany

• Criticism of the current trafficking law

• Practitioners and analysts
  • Formulation is complicated and difficult to understand
  • Application is challenging and intricate

• Exploitation as such is not comprehensively outlawed
  • Protection of the liberty to dispose of the own labour
  • Including the liberty to agree to exploitative relations

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New draft law in German: Exploitation as an offence

- Current debate on amendment of anti-trafficking law
  - Draft law under parliamentary review
  - Basic points of the draft law
    - Offences of trafficking and “severe trafficking”
    - Criminalization of purchasers of commercial sexual services knowingly exploiting trafficked persons
  - Exploitation as such on the agenda
  - Final result still open
  - Ongoing confidential negotiations
Impulse for law amendment

• Research study (2011) commissioned by Federal Ministry of Labour recommended
  • Amendment of anti-trafficking law
  • Improving coherence of legislation
  • Introduction of new offence labour exploitation

• Proposal elaborated by Professor of Law Joachim Renzikowski (2014)
  • Separating offences of trafficking and labour exploitation
  • Proposal for new offences „labour exploitation“ and „severe labour exploitation“
Basic points of the proposal

• Clarification of the trafficking offence
  • Focus on acts of recruitment and transfer
  • Reference to exploitative acts as purposes of trafficking

• Proposal of new exploitation offences
  • Labour exploitation
    • Paying less than two thirds of the tariff or usual remuneration
    • Employment circumstances considerably worse than circumstances of other workers performing the same type of work (disparity of value)
  • Severe labour exploitation
    • Slavery-like conditions (wrongful use)

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Conclusion

• The example of German law amendment negotiations...
  • indicates that the UN Trafficking Protocol’s reference to demand and exploitation increased attention and sensitivity for the necessity to tackle exploitation as such
  • opens the floor for the development and evaluation of judicial concepts dealing with trafficking and exploitation and its interdependence
  • offers an example for approaches how to tackle and end impunity to exploitation

• Defining and outlawing exploitation as such promises to
  • Complement trafficking legislation
  • Close existing gaps in the culpability for exploitation

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Selected References


- **Renzikowski, Joachim**: 2014, Strafvorschriften gegen Menschenhandel und Zwangsprostitution de lege lata und de lege ferenda. Halle und Wittenberg: Institut für Wirtschaftsstrafrecht

- **KOK (ed.)**: 2011, Studie Entwicklung tragfähiger Unterstützungsstrukturen für die Betroffenen von Menschenhandel zur Arbeitsausbeutung. Berlin: BMAS.

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Proposal by Renzikowski: Trafficking offence

• Whosoever recruits, refers, transports, passes over harbours or receives another person in order to bring her or to exploit a situation in which the person cannot detract in a reasonable way from the exploitation of sexuality, labour or begging, continuous committing of culpable acts or illicit organ removal shall be liable to imprisonment up to 10 years.

• Focus on coerced recruitment and transfer acts

(Renzikowski 2014, transl. by NC)
Proposal by Renzikowski: Labour Exploitation

• Whosever let a person work under conditions that are in clear discrepancy to those of other workers performing the same or a similar activity shall be liable to monetary fine or imprisonment up to three years. Such disproportionate circumstances include in particular, when earnings are less than two thirds of earnings customary in a place for the same or similar activity or when the generally accepted standards of employment protection are substantially disregarded.

• Equally sanctioned shall be whosoever determines another person that is begging or performing activities which generates only a symbolic value to deliver a substantial part of earnings.

• (Renzikowski 2014, transl. by NC)
Proposal by Renzikowski: Severe Labour Exploitation

• Whosoever let another person work under slavery-like conditions shall be liable to imprisonment not less than one year.

• (Renzikowski 2014, transl. by NC)
Proposal by Renzikowski: Forced Prostitution

• Whosoever exploits another person’s predicament of helplessness arising from being in a foreign country in order to let her execute prostitution shall be liable to imprisonment from one to ten years.

• Equally sanctioned is whosoever exploits another person’s predicament of helplessness arising from being in a foreign country in order to determine the extent or other circumstances of prostitution.

• (Renzikowski 2014, transl. by NC)