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**Trafficking in Women in Europe:  
Revisiting Feminist Perspectives on ‘Sex Trafficking’**

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## INTRODUCTION

### *Research Issues and Aims*

In recent years, increasing public and political attention has been directed toward the issue of ‘sex trafficking’. Images and episodes of women recruited by use of force or deception for exploitation in the sex industry have been presented as dangerous manifestations of global gendered inequalities. While media accounts have recounted similar stories of coercion, transport and forced sexual labour of women, social activists and policy makers have put forth new legislation and policies at local, national and transnational levels. In this political scenario, feminist scholars and activists – in a variety of ways and from different approaches – have expressed and theorized diverse conceptions of ‘sex trafficking’, revealing different views on gender violence, sexuality and women’s agency and rights.

This research aims to examine the issue of trafficking in women for the sex industry in European Union (EU) countries, critically exploring the ways this topic has been conceptualized and addressed by feminist scholars and activists. In so doing, it also investigates anti-trafficking interventions in Europe and suggests some alternative rubrics for intervening in the different forms of gender violence contained within ‘trafficking’ as a political frame. Drawing from a wide array of ethnographic and theoretical texts, as well as activists’ writings and policy and legal documents, this study considers questions such as the following: How do feminist interpretations and responses to ‘sex trafficking’ shift in response to broader cultural and geopolitical interests? Do feminists have a vocabulary that is adequate to theorizing trafficking in women in all its complexities? What are the challenges to a feminist critique of trafficking? And, how does the issue of trafficking require us to reframe the notion of gender justice?

Far from being a simple narrative of victims or autonomous subjects capable of agency, the research addresses the complex material and symbolic issues that

characterize the topic of trafficking in women in the sex industry. Such an approach allows an exploration of trafficking both as an empirical phenomenon associated with global capital and successive waves of gendered migration and as a political rubric. In this light, dealing with ‘trafficking in women’ involves examining the issue of sexuality,<sup>1</sup> labour migration, citizenship and access to justice in Europe. Specific attention in this study is thus dedicated to critically analysing concepts such as agency, victimhood and (sexual) exploitation and their relation with the issue of human rights.

The use of the expression ‘feminist perspectives’ in the title of this research is intended to do justice to the different positions, voices and approaches of feminism. Indeed, when we talk about feminism or feminist thought it is impossible to reduce it to a singular and unified theoretical *corpus*. Since its origin<sup>2</sup> feminism has characterized itself as a variety of ‘theoretical practices’<sup>3</sup>, that is a plurality of practices and theoretical elaborations, strategies of resistance and political reflections. This choice of not distinguishing clearly between ‘intellectual’ and ‘practical/militant’ approaches can be indirectly identified in the feminist aim of challenging the binary oppositions – mind/body, reason/emotion, etc. – on which the dominant male vision has based its claim to hegemony by suppressing the second aspect of these dichotomies (the supposedly ‘female’ aspect). This was made explicit in the 1970s with the famous slogan ‘the personal is political’, which states that what is related to the privacy, emotions and the bodies of women has an immediate political value. In this sense, there is no separation between the concrete forms of activism and resistance and the theoretical reflections and awareness that accompanies them.<sup>4</sup>

The constant attention to the concrete dynamics of real life and to the forms of discrimination against women, explains the variability of feminist analysis and interpretations and their sensibility to the diversity of the contexts – historical, geographical and cultural – of reference. This awareness, which has strongly emerged since the early 80’s thanks to the circulation of materials from non-Western women, has also led to the deconstruction of what, in previous years, had emerged as the hegemonic

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<sup>1</sup> In using the term sexuality, I am referring to socially-constructed meanings, expectations, practices and identities related to sex.

<sup>2</sup> According to the Western periodization, the origin of feminism can be identifiable, at least for its first organised expression, in the mid nineteenth century, with the suffragettes’ movement.

<sup>3</sup> The expression “theoretical practices” is taken from Louis Althusser.

<sup>4</sup> Therefore, for example, it is difficult to separate analytically the theoretical justification of the right to vote from the political campaigns that were carried out in Britain in those years; or to separate analytically postcolonial feminist reflections from the contexts of resistance and struggle in which they originate.



form of feminism (white, Western and middle class feminism). The result has been the recognition, both in theory and in practice, of the existence of various *feminisms*, and therefore of different theoretical analyses and strategies of political organization.

However, what characterizes the various feminisms, from an epistemological point of view, is their capacity to challenge – from different disciplines and approaches – mainstream knowledge. They do this by showing how power relations are embedded in discourse and, at the same time, by identifying categories and practices which pose insightful questions by women and about women, to document the ‘experiences’ of their socio-political oppression and marginalization.

On the basis of these considerations and being aware of the impossibility of offering a comprehensive overview of all feminist positions on the issue of trafficking in women in Europe, this study employs the expression ‘feminist perspectives’ to indicate the feminist theoretical reflections and practices which, in my opinion, offer from different approaches and with diverse emphasis important analyses and conceptualizations of the topic of ‘sex trafficking’.

It is worth highlighting that the phenomenon of trafficking is not limited to the sex industry, although this is a common belief, and not all prostitution involves trafficking. Trafficking can apply to other sectors such as agriculture, domestic work, manufacturing, construction and can also affect children, men and transgender people.<sup>5</sup> However, despite their limitations,<sup>6</sup> international sources estimate that between 68% and 87% of the entire volume of trafficking victims is involved in sexual labour and that the majority of trafficked persons are women and children.<sup>7</sup>

This research focuses on trafficking in women in the sex industry in EU countries. It can be argued that the focus on women maintains a gendered divide and thus reinforces the general and dominant view that ‘sex trafficking’ – and trafficking more generally – involves only women and girls. In response to such a critique, I claim that my intention to reframe the issue of trafficking through feminist perspectives – investigating the gendered and racial aspects of labour migration, exploitation and discrimination – is fuelled by the knowledge that women are disproportionately represented among the poor, the undocumented, and the international migrant

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<sup>5</sup> See N. Mai (2009). Mai carried out interesting research on migrants in the UK sex industry, and utilises information collected from in-depth interviews with 67 women, 24 men and 9 transgender people employed in London.

<sup>6</sup> This issue is examined further in the following pages.

<sup>7</sup> IOM (2005) and UNODC (2006).

workforce. Indeed, as feminist scholar Kamala Kempadoo highlights, “gendered inequality remains a central feature that guides research and investigators, with situations of poor women and girls becoming a main concern of those involved with anti-trafficking work”.<sup>8</sup>

Following feminist activists Marjan Wijers and Lin Lap Chew, trafficking in women can be defined as “all acts involved in the recruitment and/or transportation of a woman within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion”.<sup>9</sup> However, it is worth noting that trafficking in women is a broad and complex phenomenon covering various forms of violence and that often the recruitment happens without coercion. In fact, an increasing amount of feminist research demonstrates that the realities of migrant sex workers are multiple and differing. These studies do not deny that there are women that find themselves in situations of so called ‘slavery-like’ conditions. Rather, they highlight that despite the risk of violence and abuse, most women voluntarily decide to contact organised crime groups and to work in the sex industry because it appears the fastest way of realizing their projects.

Whether trafficking in women for the sex industry is mainly a problem of patriarchal violence and organised crime or rather a problem mainly of the non-recognition of sex workers’ rights, is a question that has created, and still creates, the most heated quarrels within feminism. This has raised questions about whether trafficking is a problem of consent and whether agency is an adequate concept for analyzing the issue of ‘sex trafficking’.

In recent years, many feminist scholars have addressed trafficking for the sex sector in Europe from the perspective of migration and labour revealing that this phenomenon is caused by a combination of economic, social and political factors and mediated by residency and employment regulations in EU countries. Such a perspective considers ‘sex trafficking’ as not simply a form of organised crime but as a phenomenon strongly intertwined with the reorganisation of European citizenship and its hierarchical organisation via differential as well as gendered access to the labour market. In this sense, it begs the question of whether it is possible to distinguish trafficking from other forms of exploitation and abuse against migrant workers.

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<sup>8</sup> K. Kempadoo, 2005, p. ix.

<sup>9</sup> M. Wijers and L. Lap-Chew, 1997, p. 69.

The sex sector in European countries continues to expand, recruiting an increasing number of migrants.<sup>10</sup> In the late 1970s and the early 1980s Latin American women were the predominant ethnic group working in the sex industry. Since the 1980s there has been a noticeable influx of women from Africa who came to work in the sex sector. And since the second half of the 1980s considerable numbers of women have arrived from Thailand and French Overseas Territories. The year 1989 and the political changes that followed were crucial for a constant increase in the number of ‘Central’ and ‘Eastern’ European migrants into ‘Western’ Europe’s sex industry, so that in 2000 women from ‘East’ Europe constituted 30-40 % of migrant prostitutes in ‘Western’ Europe.<sup>11</sup>

As an interesting report put together by TAMPEP<sup>12</sup> demonstrates, the existence of already established migrant communities and economic links between countries of origin and countries of destination play a crucial role in the composition of the migrant sex worker population. In Italy, for example, most women come from Bulgaria, Romania, Moldova, Ukraine and Nigeria; in Greece, women are mainly from Russia, the Ukraine, Albania and Bulgaria; in Spain the majority of women come from Latin America. Moreover, with the process of EU enlargement and changes in visa and immigration requirements many of the new EU member states have become countries of destination for migrants to work in the sex industry. For instance, women from Ukraine, Moldova, Russia and Bielorrussia work in the sex industry in Romania, Poland, Hungary and Bulgaria. However, it needs to be underlined that many migrant women working in the sex sector have been trafficked but not all.<sup>13</sup>

It is worth noting that is hard to find accurate quantitative data on trafficking in the sex sector, and more generally on trafficking in human beings. Although the claim remains that the number of trafficked person is ‘huge’ and journals narrate sensationalistic stories that support this claim, there is no clear data on trafficked persons.<sup>14</sup> This is due to many reasons. Firstly, data collection is often greatly

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<sup>10</sup> See in particular L. Brussa (2002).

<sup>11</sup> L. Brussa, 2002, p. 19. According to this data in 2000 migrant women were estimated to be a significant percentage, in some case as high as 70% of the total sex worker population in European countries.

<sup>12</sup> TAMPEP is an international networking and intervention project operating in 25 countries in Europe which aims to act as an observatory in relation to the situation and needs of female and transgender sex workers of Central and Eastern Europe, Asia, Africa and Latin America. TAMPEP aims to develop appropriate and effective responses.

<sup>13</sup> L. Brussa (2002).

<sup>14</sup> ASI (2003).

complicated by the precarious and often irregular positions of migrants, by the degree of freedom in which they work and by the level of fear and distrust they may have towards the police. Secondly, collecting numerical data on trafficking is also difficult because of the lack of clarity in the definition of trafficking. Indeed, as the International Centre for Migration Policy Development (ICMPD) points out, the understanding of the international definition of trafficking in national legislation varies, and this undermines international cooperation and renders comparison between countries difficult.<sup>15</sup> Finally, it is important to observe that many EU countries do not have sufficient human, technical and financial resources for the collection of data.<sup>16</sup>

With the exception of certain studies,<sup>17</sup> many published reports and official statistics on trafficking present weakness and limitations in data and method. In fact, they lack of methodology transparency and source documentations as well as of a standard definition of ‘victims’ as basis for estimates of the magnitude of the problem.<sup>18</sup> In 2006, US Governmental Accountability Office (GAO) questioned the US government estimate of global trafficking flows, showing methodological weaknesses, gaps in the data and numerical discrepancies.<sup>19</sup> In a similar vein, researchers from the European NGOs Observatory on Trafficking, Exploitation and Slavery have pointed out that at time of the European Conference on Preventing and Combating Trafficking in Human Beings (2002),<sup>20</sup> various estimates were suggested about the number of trafficked persons in the European Union but none of these estimates were based on evidence. As the researchers have noted “the largest estimate – 500,000 women trafficked each year – was attributed to the IOM, though it is unclear where or when this estimate was made. Despite its vagueness, this estimate was still repeated in 2010 as if it had a factual base”.<sup>21</sup> In an effort to substantiate claims about the numbers and statistics, UNESCO has designed a project to identify and research sources and research methods used to collect data on trafficking. The aim is “to clarify the bases on which estimates of the numbers of trafficked persons are derived, and to separate trafficking

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<sup>15</sup> B. Hancilova and C. Massey, 2009, p. 24.

<sup>16</sup> *Ibidem*.

<sup>17</sup> For example, TAMPEP reports present accurate indicators and baseline estimates. See L. Brussa (2002, 2007).

<sup>18</sup> See L. Kelly (2005) and E. Gozdziaik and E. Collett (2006).

<sup>19</sup> GAO (2006).

<sup>20</sup> The Conference was organized by the European Commission together with the International Organization for Migration (IOM) in Brussels in 2002.

<sup>21</sup> European NGOs Observatory on Trafficking, Exploitation and Slavery, 2010, p. 37. See also F. Laczko (2002).

myths from trafficking reality”.<sup>22</sup>

In addition to questionable statistics, another (related) problem is that many reports offer an insufficient discussion of the critical issue of *root causes* or *factors* that make people vulnerable to trafficking. For example, the last annual Trafficking in Persons Report (TIP Report) released by the US State Department addresses human trafficking stating that “some people work to combat root causes - to end the demand for commercial sexual exploitation, to end the constant downward price pressure that often connects corporate supply chains to the shackles of compelled service, and to provide options for women and girls so that risky migration is not their only choice.”<sup>23</sup> The TIP report does not really focus on the ‘root causes’ but it seems to assume that ‘demand’ for sex is one of the main causes of trafficking without any discussion or evidence. The TIP report does not examine in depth the interplay of political, social and economic factors that creates the conditions that render people vulnerable to trafficking – for instance, it does not mention the impact of restrictive labour migration policies on migrants, the lack of efficacious social welfare services or the failure of many governments to protect the basic rights of migrants.<sup>24</sup> Moreover, it tends to conflate sex work with trafficking, overlooking both that people can sell sex without having been trafficked and that people can be also trafficked for other types of works.

### *Structure of the Thesis*

The research is structured in five chapters. *Chapter 1* critically addresses UN Trafficking Protocol and European interventions against trafficking. Through the inconsistent definitions that are applied to the terms of the debate on trafficking, this chapter analyses the pivotal question of the definition of trafficking; its historical developments and the doctrinal bond between trafficking and prostitution. Today, there is persistent confusion between the terms smuggling, trafficking and sex work. While the definition of trafficking in the UN Protocol has provided a baseline, this has not resolved the debates which coalesce around unresolved positions on the issues of migration and prostitution. The lack of definitional clarity allows a constant shift

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<sup>22</sup> For the UNESCO Statistic Projects see <http://www.unescobkk.org/index.php?id=1022>

<sup>23</sup> Trafficking in Person Report, 2011, p. 15.

<sup>24</sup> A. Jordan (2011).

between ‘trafficking’, ‘illegal immigration’ and ‘forced prostitution’ (which also means convergence between anti-prostitution and anti-trafficking policies). Moreover, this conceptual confusion in some instances “serves political and ideological ends and in others represents a sincere attempt to reflect the complexities of lived experiences”.<sup>25</sup> From this standpoint, the chapter critically analyses the UN Protocol on Trafficking and European standards in anti-trafficking measures arguing that these instruments facilitate cooperation between states (and consequently border controls) to combat organised crime groups rather than to protect the victims. While States are encouraged to offer protection to trafficked persons, actual obligations and the protection provisions are weak. In this scenario, the *Convention on Action against Trafficking in Human Beings*, adopted by the Council of Europe in 2005, constitutes an important exception.

*Chapter 2* focuses on trafficking and the politics of prostitution/sex work. Prostitution reform debate is still at centre of feminist discussion and research on trafficking in women in the sex industry and, consequently, it strongly affects anti-trafficking policies and advocacy campaigns, which often conflate sex trafficking and prostitution. The purpose of this chapter is to explore the core elements of the feminist debate on ‘sex trafficking’ developed around the ideological positions of neo-abolitionist feminists and sex workers’ rights feminists. The first part of the chapter is dedicated to examining the meaning of the notion of *agency* which is most frequently invoked by feminist scholars, in particular in the debate on prostitution and trafficking. Understanding what the concept of agency means and what are the limitations of radical feminist and postmodern feminist interpretations of this category, is a crucial step in exploring the topic of prostitution and trafficking. Therefore, although the notion of agency is specifically analysed in this chapter, this concept will be present throughout the research. The second part of this chapter investigates the ways through which neo-abolitionist feminists and sex workers’ rights feminists theorize the issues of prostitution and trafficking. More precisely, drawing on a wide array of ethnographic, sociological and theoretical texts, it explores the different conceptualizations of women’s power, sexuality and consensus proposed by these feminist standpoints.

*Chapter 3* explores feminist research that looks at the issue of trafficking in Europe from the perspective of migration and labour. These studies investigate trafficking in women by challenging the assumed correlation between ‘sex trafficking’ and organised crime. In doing so, they contemplate the role of immigration and

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<sup>25</sup> L. Kelly, 2005, p. 239.

employment regulations in EU countries and, at the same time, the different ways migrant sex workers negotiate tensions and contradictions in their life stories. This critical body of scholarship is examined in the last (third) part of the section. In order to facilitate this examination, the first part of this chapter is dedicated to analysing the concepts of ‘slavery’, ‘white slavery’ and ‘exploitation’. The second part, instead, investigates the issue of female mobility in Europe, highlighting the transformations of the gendered division of labour and how these transformations also involve the dimension of sexuality and intimacy. In so doing, it critically focus on the relationships between female mobility, sex work and domestic and care work.

*Chapter 4* addresses the issue of trafficking in women from the perspective of human rights exploring the issues of protection and identification of trafficked women and recognition of their rights. The first part of the chapter critically investigates the centrality of the issue of violence against women to the notion of women’s human rights, arguing that this focus has in parts constructed the terms on which women can claim human rights, that is as *suffering subjects* without power and in need only of protection by the law and States rather than as subjects deserving of positive rights. Moving on this perspective, the second part of this section examines the so called ‘rescue’ model adopted by many anti-trafficking interventions in EU countries and supported by neo-abolitionist feminists. By prioritizing criminal and immigration aspects of trafficking, ‘rescue operations’ seriously compromise the human rights of migrant sex workers and in general of sex workers. In this light, it seems necessary to accurately examine anti-trafficking interventions, questioning if they have to do with monitoring women’s mobility and behaviour rather than with protecting and strengthening women’s human rights. Building on feminist ethnographic research and reports, this section also explores the limits of anti-trafficking empowering strategies advanced by social ‘helpers’ arguing that these strategies can also produce narratives of victimization of trafficked women. The final part of this chapter is dedicated to the rights claims of those – sex workers and migrant sex workers – who are affected by anti-trafficking intervention, highlighting that their voices are often silenced and not heard. Indeed, despite the fact that the aims of anti-trafficking interventions seem to be the protection of human rights, those who are supposed to suffer violations are rarely invited to talk and be listened to.

*Chapter 5* takes us to the conclusion of this study, both outlining the theoretical implications of the research and pointing to the need to rethink notions of gender

justice. By developing a widened framing and more interdisciplinary approach to the issue of trafficking in women, this research contributes to feminist analyses on ‘sex trafficking’ not only enhancing theoretical understanding but also providing firmer ground on which to build strategies to protect and expand the rights of migrant women, that is their rights as women, as migrants and as workers.

### *Notes on the Methodological Approach Adopted*

This research relies on a critical analysis of studies carried out by feminist scholars from different countries and from different disciplines. More precisely, it examines the works and studies of European, American and Asian scholars from diverse disciplines, such as legal studies, philosophy, political science, anthropology, sociology, history and migration studies. Although the attention has been mainly dedicated to research carried out by European scholars, the theoretical and ethnographic research conducted by non-European scholars have been useful for questioning and reformulating the theoretical categories and concepts used. The intellectual effort required by such a transnational and interdisciplinary approach has been one of the most interesting and exciting challenges of this work. It has allowed me to combine these different bodies of literature in order to grasp the peculiarity of what scholars have proposed.

This transnational and interdisciplinary approach, consequently, has led to continuous geographical shifts (mainly between Italy, Spain, France and UK). In fact, even though my research explores the phenomenon of trafficking in EU countries, it does not focus on a single country. These geographical shifts, on one hand, can lead to a loss of the specific evolution of a concept or issue in the local context, but on the other hand, they permit movement between different representations and categories in a moment in which the concept of space appears increasingly heterogeneous and complicated in its constitution. Indeed, as Sandro Mezzadra argues, “one of the distinctive features of contemporary process of globalization lies in the continuous reshaping and intertwining of different geographical scales, which can no longer be taken for granted in their stability”.<sup>26</sup>

The research also relies on the analysis of activists’ writings, policies and legal

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<sup>26</sup> S. Mezzadra, 2011, p. 589.



documents as well as on the examination of reports. In the study of these materials particular attention has been dedicated to the language, frameworks and to the contexts in which they were produced. The reports have been critically examined with concern to the methods that authors used in collecting and analysing the data. As mentioned above, many reports present weaknesses and limitations in both data and method. There is often confusion with respect to methodology, tools and analysis, resulting in minimal documentation of how research was actually undertaken. The lack of methodological transparency provides little foundation for assessing the depth and quality of research.

The analysis of the ethnographic and theoretical texts, as well as activist writings and policy and legal documents, has been integrated with discussions and conversations with judges, feminist scholars, lawyers, migrant women, social workers and sex workers' rights activists, in Italy and during my periods of research in Barcelona, London and New York. Talking with these people and comparing their statements with the relevant literature on the topic has enabled me to identify the gaps between the theoretical framework used and people's practical experiences. In this sense, it helps to inform my view and to reject or reframe certain lines of research.

### *Notes on the Terminology*

This study refers to the term 'sex trafficking' as it is defined in the main legal and policy documents – commonly defined as a process by means of which people are purposely recruited by use of force for exploitation in the sex industry. The term is put in inverted commas to indicate the limitations of this definition as it is often unable to capture the complexity of the real experiences of migrant women involved in trafficking in the sex sector.

Furthermore, for the purpose of this research the terms 'prostitute' and 'sex work' are used to refer to persons who engage in paid sexual contact with clients. More specifically, the term 'prostitution' is used in reference to situations in which the criminalisation and stigmatisation of sexual labour are predominant. The terms 'victims of trafficking' and 'trafficked persons' are used interchangeably without prejudice either to the status of a victim at a given time or to their agency, considered as the capacity to make choices within a determined context.<sup>27</sup> In this sense, such a study employs the

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<sup>27</sup> See A. Giddens (1984) and P. Bourdieu (1977).

term 'victim' in inverted commas to indicate situations in which this notion is used without attributing a degree of agency to the individuals involved.



## TRAFFICKING IN HUMAN BEINGS IN THE UN TRAFFICKING PROTOCOL AND EUROPEAN LEGAL INSTRUMENTS

In December 2000, the United Nations adopted the *Convention Against Transnational Organised Crime*. The goal of this international treaty is to prevent and combat criminal offences of a transnational nature committed by organised crime. The Convention is supplemented by two optional Protocols,<sup>28</sup> one designed to combat “Trafficking in Persons, especially Women and Children” and the other to address the “Smuggling of Migrants by Land, Air and Sea”. The Convention and its Protocol were negotiated during eleven sessions of a special intergovernmental ad hoc Committee under the auspices of the *United Nations Commission on Crime Prevention and Criminal Justice*, which were held in Vienna from January 1999 until October 2000 and in which more than 100 countries took part. Since they were developed within the UN Crime Commission, the Convention and its Protocol constitute primarily a law enforcement instrument, not a human rights instrument.<sup>29</sup> They were opened for signature in December 2000 at the high level meeting in Palermo, Italy. By August 2011, 147 countries had signed the Convention Against Transnational Organised Crime,

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<sup>28</sup> A third protocol, *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition supplementing the United Nations Conventions against Transnational Organized Crime* was adopted by the General Assembly in its resolution 55/255 of 8 June 2001. The decision for separate protocols was taken in 1998 at a meeting of an intergovernmental group of experts established by the General Assembly to elaborate a draft of a possible convention against transnational organised crime. During this meeting, the group concluded that the negotiation process would have been simplified if the need to deal with specific offences could be addressed by additional protocols, which could then be negotiated separately, not affecting the comprehensiveness of the convention or its operability and effectiveness. See the report of the meeting at <http://www.uncjin.org/Documents/7comm/5e.pdf>

<sup>29</sup> Priority areas within the mandate of the UN Crime Commission are: international action to combat national and transnational crime, including organised crime, economic crime and money laundering; promoting the role of criminal law to protect the environment; crime prevention in urban areas, including juvenile crime and violence; and improving the efficiency and fairness of criminal justice administration systems. For additional information see <http://www.unodc.org/unodc/en/commissions/CCPCJ/>

<sup>29</sup> J. Chuang, 2006, p. 442.

117 have signed the Trafficking Protocol and 112 have signed the Smuggling Protocol.<sup>30</sup>

This chapter critically addresses UN Trafficking Protocol and European legal instruments against trafficking. More specifically, the chapter analyses the pivotal question of the definition of trafficking; its historical developments and the doctrinal bond between trafficking and prostitution. Today, there is persistent confusion between the terms smuggling, trafficking and prostitution. This confusion emerges in the various, sometimes contradictory, definitions and concepts used by national governments, European bodies, as well as in the ongoing international debate.<sup>31</sup> While the definition of trafficking in the UN protocol has provided an important baseline, this has not resolved the debates which coalesce around unresolved positions on the issues of migration, prostitution and agency. The lack of definitional clarity allows a constant shift between ‘trafficking’, ‘illegal immigration’ and ‘forced prostitution’ - which means also convergence between anti-prostitution and anti-trafficking policies. Moreover, this conceptual confusion in some instances “serves political and ideological ends and in others represents a sincere attempt to reflect the complexities of lived experiences”.<sup>32</sup>

From this standpoint, the chapter critically examines UN Protocol on Trafficking and European standards in anti-trafficking measures, arguing that these instruments facilitate cooperation between states (and consequently border controls) to combat organised crime rather than to protect the victims of crime. While states are encouraged to offer protection to trafficked persons, actual obligations are minimal and the protection provisions are weak. From this perspective, the *Convention on Action against Trafficking in Human Beings*, adopted by the Council of Europe in 2005, represents an important exception.

The chapter is divided into three parts. The first part provides an overview of key international legal initiatives on trafficking before of the adoption of the UN Trafficking Protocol. The second part is dedicated to the Vienna Negotiations on UN Trafficking Protocol and its major outcomes with particular focus on the issue of trafficking. More precisely, it focuses on Trafficking Protocol, addressing the pivotal question of the

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<sup>30</sup>The countries that have signed the Convention and the Protocols can be found at the UN website <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>

<sup>31</sup> See B. Hancilova and C. Massey (2009).

<sup>32</sup> L. Kelly, 2005, p. 239.

definition of trafficking and the difference between trafficking and migrant smuggling. The third part of this chapter is a critical analysis of European instruments against trafficking, in particular the Council of Europe Convention on Action against Trafficking and the EU legal instruments on trafficking.

## **1.1 International Legal Developments in Trafficking before UN Trafficking Protocol**

### **1.1.1 The Early Conventions on Trafficking**

Despite the fact that human trafficking has been recognised as an international offence since the early 1900,<sup>33</sup> for most of the twentieth century trafficking was considered a private-sphere issue primarily concerning women and relegated to the margins of the international human rights system. The first international treaty on trafficking in women was the *International Agreement for the Suppression of the White Slave Traffic* adopted in 1904.<sup>34</sup> The title of this Agreement, as Stephanie Farrior has pointed out, “shows that *only* the exploitation of white women was of enough concern to prompt treaty protection”.<sup>35</sup> The 1904 Agreement was promulgated to stop the sale of women into prostitution in Europe when the economic conditions were so disastrous that women were increasingly vulnerable to being trafficked and forced to work as prostitutes.<sup>36</sup> It implicitly distinguished between ‘pure’, ‘innocent’ women and those who have worked as prostitutes. Thus, this Agreement already incorporated the distinction that, as feminist jurist Janie Chuang has highlights, “continues to foster an ambivalent attitude toward victims of trafficking for forced prostitution”.<sup>37</sup>

The 1904 Agreement aimed at protecting the victims and not at punishing procurers. States Parties had to set up authorities in their respective countries to collect

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<sup>33</sup>For an overview of the early anti-trafficking treaties see E. Scully, 2001, pp. 75-106 and S. Farrior, 1997, pp. 216–20.

<sup>34</sup>For the text of 1904 *International Agreement for the Suppression of the White Slave Traffic* see <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html>.

<sup>35</sup>S. Farrior, 1997, p. 217 [my emphasis]. The issue of so called ‘white slavery’ is explored in Chapter 3.

<sup>36</sup>*Ivi.* p. 217. Marlene D. Beckman argued that “[c]ondition were considered to be so bad in some European cities, and the sale of women into prostitution so prevalent that [eventually] thirteen countries signed an agreement to take action to stop the international traffic in prostitutes”. M. Beckman, 1984, p. 1113. In Chapter 3, I critically examine the phenomenon of ‘white slavery’.

<sup>37</sup>J. Chuang, 1998, p. 74. This issue is examined in the next chapter.

and coordinate information on the procurement of women for prostitution abroad.<sup>38</sup> Regarding the protection of victims, Article 3 of the Agreement stated that “the Governments undertake, within legal limits, and as far as can be done, to entrust temporarily, and with a view to their eventual repatriation, the victims of a criminal traffic when destitute to public or private charitable institutions, or to private individuals offering the necessary security”. At the same time, Article 3 provided that “The Governments also undertake, within legal limits, and as far as possible, to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them. Repatriation shall only take place after agreement as to identity and nationality, as well as place and date of arrival at the frontiers. Each of the Contracting Countries shall facilitate transit through its territory”. Many scholars have highlighted the limit of this provision since most of the time the repatriation had the result of giving the victims back to the procurers.<sup>39</sup>

It was with the promulgation of the *International Convention for the Suppression of White Slave Traffic* in 1910 that States Parties were required to criminalise the procurement of women.<sup>40</sup> The provisions of the 1910 Convention aimed to punish any person who “procured, enticed, or led away, even with her consent, a [white] woman or girl under age, for immoral purposes”<sup>41</sup> or who “by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes”.<sup>42</sup> However, the 1910 Convention did not criminalise the retention of a girl or woman in a brothel against her will because such issues were considered matters of domestic jurisdiction. Both the 1904 Agreement and the 1910 Convention, as Janie Chuang has stressed, were “limited to the process of recruitment and transportation and did not address the end purposes of trafficking”.<sup>43</sup>

After the World War I, under the League of Nation’s auspices, both the 1921 *International Convention for the Suppression of the Traffic in Women and Children*<sup>44</sup>

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<sup>38</sup> The 1910 Convention Art. 1.

<sup>39</sup> See N. Demleitner (1994).

<sup>40</sup> For the text of 1910 *International Convention for the Suppression of White Slave Traffic* see <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html>

<sup>41</sup> The 1910 Convention Art. 1.

<sup>42</sup> *Ivi* Art. 2.

<sup>43</sup> J. Chuang, 1998, pp. 74-75.

<sup>44</sup> For the text of 1921 *International Convention for the Suppression of the Traffic in Women and Children* see <http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=TtpwTP7PgRXqLyh1LpV2fCBn1LcG1HRb4ISG9Kv52X5YrxgflY>

and the 1933 *International Convention on the Suppression of the Traffic in Women of Full Age*<sup>45</sup> were concluded. The purpose of the *International Convention for the Suppression of the Traffic in Women and Children* was to combat trafficking process by prosecuting persons who were engaged in the traffic of children, licensing and supervising employment agencies, and protecting migrant women and children. It extended the protective measures provided in previous instruments to non-white women and children, both male and female. Nevertheless, there were improvements neither in terms of cooperation between States nor in terms of protections of the victims. The international Community was mainly focused on the criminalisation of procurers rather than helping and supporting the victims. The 1933 *International Convention on the Suppression of the Traffic in Women of Full Age* stated that “[w]hoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries” (Art. 1). Furthermore, the 1933 Convention declared that although women might consent to being trafficked, the consent would not constitute a defence to the crime of trafficking.<sup>46</sup> Both the 1921 Convention and the 1933 Convention continued to consider the end purposes of trafficking to be a matter of domestic jurisdiction of each signatory country.

### 1.1.2 The 1949 Convention

The early conventions on trafficking were consolidated by the United Nations in the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.<sup>47</sup> The 1949 Convention was the first international agreement to consider the issue of trafficking in gender neutral terms and to criminalise procurement in both international and domestic trafficking. More specifically, the 1949 Convention was the first international instrument to see the forced prostitution as a problem of international law rather than exclusively as a matter of

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[ON!797973069?id=3e45bb04-38d9-4f66-b7f1-bde3ea47361e](https://www.unhcr.org/refugees/ON!797973069?id=3e45bb04-38d9-4f66-b7f1-bde3ea47361e)

<sup>45</sup> For the text of 1933 *International Convention on the Suppression of the Traffic in Women of Full Age* see <http://ec.europa.eu/anti-trafficking/entity?id=904ed57d-d500-4028-8392-c40575647b11>

<sup>46</sup> See S. Farrior 1997, p. 217.

<sup>47</sup> For the text of 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* see <http://www2.ohchr.org/english/law/trafficpersons.htm>.



domestic jurisdiction.<sup>48</sup> This, as many feminist scholars have highlighted, prompted many States to not ratify such Convention.<sup>49</sup>

The 1949 Convention declares in its preamble that “prostitution and the accompanying evil of the traffic for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger(ed) the welfare of the individual, the family and the community”. The Convention does not criminalise or prohibit prostitution, for fear that criminalization or prohibition would push prostitution underground.<sup>50</sup> According to Article 6 States Parties agree that prostitutes will not be punished or subjected to any special supervision or registration. However, the Convention requires States Parties “to punish any persons who [...] procures, entices or leads away, for purpose of prostitution, another person, even with the consent of that person; exploits the prostitution of another person, even with the consent of that person”.<sup>51</sup> These acts, in accordance with Article 1, are punished even if the victim has not been transported across international borders and independently of the gender, age or race of the victim.

The 1949 Convention establishes three levels of obligation.<sup>52</sup> First, it binds States Parties to a general anti-trafficking principle and requires that States to work for the abolition of ‘sex trafficking’. Second, in accordance with Articles 8 through 15, States Parties agree to participate in enforcement measures and activities, such as the extradition of traffickers, joint investigation and the sharing of information regarding trafficking. Third, in accordance with Article 16, States Parties agree to undertake general social measures to support and help the victims.

The 1949 Convention does not provide clear definitions of trafficking and forced prostitution. Under the Convention, trafficking is not a distinct, cognizable offence but it is linked to prostitution. As Janie Chuang notes, “[b]y collapsing the distinction between trafficking and forced prostitution in its treatment of trafficking, the 1949

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<sup>48</sup> N. Demleitner (1994).

<sup>49</sup> As Janie Chuang has pointed out, “this extension of the 1949 Convention to the issue of domestic prostitution influenced the decision of a number of States Parties to the earlier anti-trafficking instruments to refuse to accede to this new convention”, J. Chuang, 1998, p. 75.

<sup>50</sup> See UN Department of International Economic and Social Affairs, Study on Traffic in Persons and Prostitution U.N. Doc. ST/SOAS/SD/8, U.N. Sales No. 59. IV.5 (1959) quoted in J. Chuang, 1998, p. 77.

<sup>51</sup> Art. 1. According to many comments, this provision is potentially in conflict with article 12 of the Convention which declared that the “Convention does not affect the principle that the offenses to which it refers shall in each State be defined, prosecuted and punished in conformity with its domestic law. As Farrior stressed, “this deference to national law could be explained by the fact that in 1949, the notion of human rights as a matter of international concern was still relatively new in international law”. S. Farrior, 1997, p. 218.

<sup>52</sup> S. F. Toepfer and B. S. Wells, 1994, p. 97.

Convention confuses the notion of whether trafficking as an act of recruitment absent any intent to force the women into prostitution is a prohibited practice”.<sup>53</sup>

By highlighting that States Parties should work to prevent prostitution, the 1949 Convention aims for the abolition of brothels (regarded as an inducement to trafficking) and for the punishment of any person who keeps, manages or knowingly finances a brothel.<sup>54</sup> According to the 1949 Convention, States Parties shall take measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the Convention.<sup>55</sup> In addition, States Parties must guarantee temporary care and maintenance to trafficked persons while arrangements are being made for their repatriation. Article 19 declares that victims of trafficking have to be repatriated if they wish or if their “expulsion is ordered in conformity with law”. Under the latter clause women without legal resident status in a country are likely to be expelled.<sup>56</sup> Moreover, in order to prevent persons seeking employment, in particular women and children, from being exposed to the danger of prostitution, States Parties shall take measures for the supervision of employment agencies.<sup>57</sup>

As many feminist scholars have argued, while the 1949 Convention clearly requires States Parties to refrain from regulating prostitution and criminalising prostitutes, it is unclear whether in combating the exploitation of prostitution, they should address *all* forms of prostitution or only the situations of forced prostitution.<sup>58</sup> Furthermore, the 1949 Convention has been criticised because of its failure to take a rights-based approach in order to protect trafficked persons. Although human rights provisions exist in the 1949 Convention, they are minimal and general in terms of the specific protections and assistances that must be granted to prostitutes and/or trafficked persons. Moreover, as Fariior points out, the 1949 Convention provides one limited procedural right that enables trafficked women to participate in proceedings against offenders; “however that right is available only if allowed by national law of the State Party”.<sup>59</sup>

The 1949 Convention contains weak enforcement and implementation mechanisms. It requires States Parties to report annually to U.N. Secretary General

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<sup>53</sup> J. Chuang, 1998, p. 82.

<sup>54</sup> The 1949 Convention art. 2.

<sup>55</sup> *Ivi* Art. 16.

<sup>56</sup> *Ivi*. Art. 19.

<sup>57</sup> *Ivi* Art. 20.

<sup>58</sup> See J. Chuang (1998).

<sup>59</sup> S. Fariior, 1997, p. 219.

those laws and measures that they have adopted to give effect to the Convention's provisions.<sup>60</sup> But it does not provide the institution of an independent supervisory body with the responsibility for monitoring the compliance with the Convention, for questioning the reports of States Parties or for receiving and acting on petitions brought by victims of trafficking who declare that a State Party has failed to try to combat trafficking. In 1974, the *Economic and Social Council* of the United Nations (ECOSOC) decided that States Parties to the 1949 Convention should submit regular reports on the situation of trafficking in their countries to the *UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*.

### 1.1.3 Trafficking in Women in the CEDAW

The issue of trafficking has been also addressed explicitly by the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) adopted in 1979 by the UN General Assembly.<sup>61</sup> The CEDAW requires States Parties to take all “appropriate measures including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.<sup>62</sup> Article 17 of the CEDAW establishes the creation of a CEDAW Committee that monitors the progress individual States Parties have made implementing their obligations arising under the CEDAW convention. This takes place primarily by examining reports which States Parties submit to the CEDAW Committee. Accordingly, under article 18, States Parties undertake to report periodically on the legislative, judicial, administrative and other measures they have taken to give effect to the Convention's provisions, and on the progress they have made. Although the CEDAW does not define what measures are ‘appropriate’ in Article 6, Article 2 identifies a general framework of steps that States Parties must undertake.<sup>63</sup>

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<sup>60</sup> *Ivi* Art. 21.

<sup>61</sup> For the text of *Convention on the Elimination of All Forms of Discrimination Against Women* see <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

<sup>62</sup> *Ivi* Art. 6.

<sup>63</sup> Article 2 requires States Parties “to embody the principle of mean and women in their national constitutions or other appropriate legislation [...] and to ensure [...] the practical realization of this principle; to adopt appropriate legislative and other measures [...] prohibiting all discrimination against women; to establish the legal protection of their rights on an equal basis with men and to ensure [...] the effective protection of women against any act of discrimination; to refrain from engaging in any act or practice of discrimination against women [...]; to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices

The CEDAW Committee elaborates what states must do under each of the tasks indicated by the CEDAW.<sup>64</sup>

By highlighting the separation between “all forms of traffic in women” and “exploitation of prostitution”, the CEDAW seems to include within its protections victims of trafficking for purposes other than forced prostitution, such as trafficking for forced domestic labour and forced marriage. Indeed, while the 1949 Convention addresses trafficking only for sexual purposes and does not consider the trafficking of men, women and children into non-sex sectors, CEDAW seems to encompass broader manifestations of trafficking in women and aims to prohibit only forced prostitution.<sup>65</sup> However, notwithstanding the possibility of interpreting the CEDAW to encompass trafficking for purposes other than prostitution, the prevailing interpretation of international anti-trafficking law has limited, and in past still limits, the applicability of its protections to victims of trafficking for forced prostitution.<sup>66</sup>

It is worth mentioning that another international treaty that explicitly prohibits trafficking is the *Convention on the Rights of the Child* (UNCRC) adopted by United Nations General Assembly in 1989.<sup>67</sup> The UNCRC contains several provisions applicable to trafficking in children for prostitution, particularly in its provision regarding child labour and sexual exploitation. In accordance with the treaty, States Parties “undertake to protect the child from all forms of sexual exploitation and sexual abuse”<sup>68</sup> and to take “all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose and in any form”.<sup>69</sup> In addition, States Parties undertake to “protect the child against all forms of exploitation prejudicial to any aspect of the child’s welfare”.<sup>70</sup>

While trafficking has been explicitly prohibited in both CEDAW and UNCRC, none of the two Conventions has specifically focused on the nature of states’ obligations. Also, none of Conventions’ respective Committee<sup>71</sup> has produced little

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which constitute discrimination against women; to repeal all national penal provisions which constitute discrimination against women”.

<sup>64</sup> See Articles 5, 7, 9, 12, 13 and 14 of the CEDAW.

<sup>65</sup> As Janie Chuang has stressed, this intention was evidenced by the rejection of a Moroccan proposal to include a provision obligating states to combat all form of prostitution. See J. Chuang, 1998, p. 76.

<sup>66</sup> This issue is analysed in the following sections.

<sup>67</sup> For the text of 1989 *Convention on the Rights of the Child* see at <http://www2.ohchr.org/english/law/crc.htm>

<sup>68</sup> *Ivi* Art. 34.

<sup>69</sup> *Ivi*. Art. 35

<sup>70</sup> *Ivi* Art. 36.

<sup>71</sup> The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors

substantive guidance.<sup>72</sup> As Ann Gallagher has asserted, “[...] states could not even agree on a definition [of trafficking], much less on specific legal obligations,” and “occasional, confused reports emanating from a marginal and marginalized [U.N.] body” provided little help.<sup>73</sup>

## 1.2 UN Trafficking Protocol Negotiations

During the 1990s, the rise of the women’s rights movement drew the attention to the problem of trafficking. At the same time, the increase in labour migration and the role of transnational organised crime in the clandestine movement of people caught the attention of governments, who adopted measures to strength their border controls. Increasing poverty and economic crisis in many parts of the world forced more and more people to migrate abroad for survival. The result was an increase of trafficking of men, women and children for sexual and non-sexual purposes, including exploitative factory labour, domestic work and other forced labour and slavery-like practices.

From this standpoint, it was clear that a development of a new international law on trafficking was necessary. International human rights advocates advocated for the development of a new international law aimed at addressing the broad and complex manifestations of trafficking involving migrant abuse and labour exploitation. In this sense, such a law needed to redefine trafficking as comprehensive phenomenon which deals with the recruitment or movement of persons, using force, fraud or coercion, for the purpose of subjecting the persons to sex-sector or non-sex sector exploitation.<sup>74</sup> Moreover, as Janie Chuang has argues, “a new international law needed to provide the necessary infrastructure to ensure cooperation among governments with respect to protection of trafficked persons, prosecution of traffickers, and prevention of the underlying causes of the phenomenon”.<sup>75</sup>

The international Community found the opportunity to address trafficking as matter of international criminal law through a trafficking specific protocol to the *UN*

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implementation of the Convention on the Rights of the Child.

<sup>72</sup> See J. Chuang, 2010, p. 1661.

<sup>73</sup> See A. Gallagher (2009).

<sup>74</sup> J. Chuang, 2010, p. 1662.

<sup>75</sup> *Ivi* p. 1663.

*Convention Against Transnational Organised Crime*.<sup>76</sup> In 1998 the United Nations General Assembly established an intergovernmental, ad-hoc committee and charged it with developing a new international legal framework to combat transnational organised crime. Two years later, after eleven sessions involving participation from more than 120 states, the ad-hoc committee concluded its work<sup>77</sup> signing the UN Convention Against Transnational Organised Crime and its Protocols. The long and intense negotiation processes for Trafficking Protocol, known as the ‘Vienna process’, reflected the strong international community’s commitment to the issue of trafficking. In fact, the Trafficking Protocol debate represented the opportunity for states, intergovernmental organizations and NGOs to revisit the prostitution debate within the context of an international legal drafting process.<sup>78</sup>

### **1.2.1 UN Convention against Transnational Organised Crime**

Developed within the *UN Commission for Crime Prevention and Criminal Justice*, the UN Crime Convention was the first international treaty to deal with transnational organised crime.<sup>79</sup> As Anne Gallagher notes, the UN Crime Convention is referred to as the “parent” agreement.<sup>80</sup> Its provisions apply *mutatis mutandis* to its protocols.<sup>81</sup> All governments can ratify the Convention and its Protocols. However, only the countries that become parties to the Convention can ratify the Protocols.<sup>82</sup>

The Crime Convention and its Protocols were designed to overcome the lack of uniformity in national legislation on transnational organised crime and the resulting

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<sup>76</sup> Hereafter called UN Crime Convention. For the text of the Convention see

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>77</sup> See *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*

available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents/383e.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/383e.pdf)

<sup>78</sup> A. Gallagher, 2001, p. 984.

<sup>79</sup> J. Chuang, 2006, p. 442.

<sup>80</sup> See A. Gallagher, 2001, p. 977.

<sup>81</sup> According to the Interpretative Notes for the official records of negotiation process, the words “mutatis mutandis” meant “with such modifications as circumstances require” or “with the necessary modifications”. “Provisions of the United Nations Conventions against Transnational Organized Crime that are applied to the Protocol [...] would consequently be modified or interpreted so as to have the same essential meaning or effects in the Protocols as in the Convention”. See [http://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf)

<sup>82</sup> Article 37.2 states that “in order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention”.

difficulty in cooperation between national law enforcement authorities.<sup>83</sup> Article 1 states that the purpose of the Convention is “to promote cooperation to prevent and combat transnational organized crime more effectively”. Under the Crime Convention, State Parties shall adopt measures to criminalise the offences established in the document;<sup>84</sup> they shall adopt a range of measures to enhance effective law enforcement, improving communication and enhancing cooperation between relevant authorities;<sup>85</sup> and they shall take appropriate measures to provide assistance and protection to victims of offences covered by the Convention<sup>86</sup> and to witnesses those who give testimony concerning offences covered by the Convention.<sup>87</sup>

The offences covered by the UN Crime Convention, whether committed by individuals<sup>88</sup> or corporate entities, are: participation in an organized criminal group, corruption, money laundering, obstruction of justice and “serious crime”.<sup>89</sup> However, two principal prerequisites are required for the application of the Convention. First, the offence must be transnational in nature and, second, it must involve an organised criminal group.<sup>90</sup> Both preconditions are defined in broad terms. According to the Crime Convention, an offence is transnational in nature if : “it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State”.<sup>91</sup>

The Crime Convention defines the organised criminal group as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.<sup>92</sup> The Article 3(c) defines ‘structured group’ as a group in which there is continuity in its membership. A randomly formed group for the commission of the

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<sup>83</sup> A. Gallagher, 2001, p. 979.

<sup>84</sup> UN Crime Convention Articles 5, 6, 8 and 23.

<sup>85</sup> *Ivi* Art. 26.

<sup>86</sup> *Ivi* Art. 25.

<sup>87</sup> *Ivi* Art. 24.

<sup>88</sup> *Ivi* Art. 10. This important provision ensures that all countries have domestic laws establishing the liability of ‘legal persons’. See A. Jordan (2002).

<sup>89</sup> Art. 2 (b) defines “serious crime” as a conduct “constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

<sup>90</sup> UN Crime Convention Art. 3.

<sup>91</sup> *Ivi* Art. 3.

<sup>92</sup> *Ivi* Art. 2(a).

offence is not considered a structured group.<sup>93</sup> However, as discussed below, scholars and researchers have different opinions about the nature and the role of organised crime.

The inclusion of these broad definitions allows States Parties to use the Crime Convention to address a wide range of criminal activity, “including trafficking and related exploitation as well as migrant smuggling”.<sup>94</sup> This factor, as Anne Gallagher points out, is particularly important if one considers the fact that States may become parties to the Convention without signing any or all of the additional Protocols.<sup>95</sup>

It is worth noting that the Crime Convention contains very little in terms of hard obligations. In fact, it leaves, especially in matter of sanctions, States to decide the appropriate measures in accordance with their domestic law. Section 11.6 of the Convention states that “[n]othing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and such offences shall be prosecuted and punished in accordance with that law”. This provision is probably the result of a political decision aimed at obtaining the support of many States, even if at the expense of uniformity in national legislation.

Nonetheless the Crime Convention provides some criminalization obligations.<sup>96</sup> States Parties shall take measures to criminalise: participation in an organized criminal group;<sup>97</sup> laundering of the proceeds of crime<sup>98</sup> and public sector corruption.<sup>99</sup> In order to combat these criminal offences, the Convention sets out a range of measures to be adopted by States Parties to improve communication and enhance cooperation between national law enforcement authorities.<sup>100</sup> Therefore, States Parties shall afford one another the measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention.<sup>101</sup> Mutual

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<sup>93</sup> S. Scarpa (2008).

<sup>94</sup> A. Gallagher, 2001, p. 979.

<sup>95</sup> *Ivi* p. 979.

<sup>96</sup> *Ivi* p. 979.

<sup>97</sup> UN Crime Convention Art. 5.

<sup>98</sup> *Ivi* Art. 6.

<sup>99</sup> *Ivi* Art. 8. This article of the Convention provides that each State Party shall criminalise a range of conduct when committed intentionally “The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties” and “The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties”.

<sup>100</sup> Organized Crime Convention, art. 26.

<sup>101</sup> *Ivi* Art. 18.



legal assistance can be requested for many purposes including taking evidence or statement from persons; effecting service of judicial documents; examining objects and sites; providing information and documentations.<sup>102</sup>

The Crime Convention contains an important provision on victims of transnational organised crime.<sup>103</sup> Article 25 requires States Parties to adopt appropriate measures within their means to provide assistance and protection to victims, in particular in cases of threat of retaliation or intimidation.<sup>104</sup> Furthermore, section 25.2 ensures that trafficked persons have a right to compensation and restitution. This right to compensation should not be limited to money. As Ann Jordan points out, trafficked persons also must have the right to access the courts and seek compensation, restitution and damages from the traffickers' assets.<sup>105</sup>

States Parties shall also take appropriate measures to provide effective protection to witnesses and their relatives and friends.<sup>106</sup> In order to ensure protection for all persons who give testimony concerning offences covered by the Crime Convention, States Parties should ensure that no one is deported to the country of origins if the risk of retaliation or intimidation by traffickers persists.<sup>107</sup> If this risk exists, States Parties can relocate persons to another part of their country. Furthermore, if a government is unable to ensure the safety of a person within its territory and it is too dangerous for the person to return home, the relocation of witnesses and trafficked persons to a third country is necessary.<sup>108</sup> Yet, it is worth noting that there are few third country offers to give hospitality to trafficked persons. Third countries have no incentive to assist trafficked persons when the trafficking did not occur in their territories.

In order to promote and review the implementation of the Crime Convention as well as to improve the capacity of States Parties to contrast transnational organised

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<sup>102</sup> *Ivi* Art. 18.3.

<sup>103</sup> *Ivi* Art. 25.

<sup>104</sup> Convention Article 25 is similar but not identical to Trafficking Protocol Article 6. In fact, Article 25 contains stronger obligations than does Article 6. As Jordan explains, "the Trafficking Protocol is subordinate to the main Convention and so stronger provisions in the Convention should apply in such cases". See A. Jordan, 2002, p. 22.

<sup>105</sup> See A. Jordan, 2002, p. 23.

<sup>106</sup> UN Crime Convention, art. 25. This provisions is ensures protection to all witnesses, whether or not they are victim, while the Trafficking Protocol only protects victim-witnesses.

<sup>107</sup> Governments must not deport persons to countries in which their lives would be in danger - see the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (see <http://www.hrweb.org/legal/cat.html>) and the *UN Convention Relating to the Status of Refugees* (see <http://www2.ohchr.org/english/law/refugees.htm>). However, unfortunately, most of the governments deport trafficked persons and witnesses to their countries of origin without ensuring the conditions of their safety.

<sup>108</sup> UN Crime Convention, Art. 24.3.

crime, the Convention establishes a Conference of the Parties.<sup>109</sup> The Conference of Parties has a special role in facilitating activities by States Parties, improving information flows among States Parties and enhancing cooperation with relevant international and regional organisations and non-governmental organisations. The Conference is also responsible for periodic examination of the implementation of the Convention as well as making recommendations to improve this Convention and its implementation.<sup>110</sup> It is important to note, as Ann Gallagher explains, that the Conference of Parties concerns uniquely with the Crime Convention and it does not have any authority with respect to the protocols, “except insofar as their respective subject matters can be brought within the provisions of the Convention itself”.<sup>111</sup>

### **1.2.2 The UN Trafficking Protocol**

The purpose of the Trafficking Protocol is “to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote cooperation among States Parties in order to meet these objectives”.<sup>112</sup>

Government delegates, U.N. bodies representatives and NGO lobbyists participated in the negotiations that led to the formulation of the Trafficking Protocol. These negotiations quickly became a battlefield for highly contentious debates. Central issues in the discussions concerned whether the definition of trafficking should encompass ‘voluntary’ prostitution and whether trafficking should be addressed primarily as a crime and border control issue or as a matter of states’ obligations under international law to safeguard trafficked persons’ human rights.<sup>113</sup>

The depth of this debate was reflected in the presence of two opposed NGO-lobbying blocs, representing two opposing feminist stances with regard to sex work and, accordingly, to the problem of how to define trafficking in persons. One bloc, led by the originally American based Coalition Against Trafficking in Persons (CATW), advocated an approach to the Trafficking Protocol which would preserve the abolitionist

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<sup>109</sup> *Ivi* Art. 32.

<sup>110</sup> *Ivi*, Art. 32.3 (d-e).

<sup>111</sup> A. Gallagher, 2001 p. 981.

<sup>112</sup> UN Trafficking Protocol Art. 2.

<sup>113</sup> B. Anderson and J. O’Connell Davidson (2003).

nature of the 1949 Convention. The concern was to ensure that trafficking remains linked to ‘consensual’ as well as ‘forced’ or non-consensual prostitution. In contrast, the other bloc, led by International Human Rights Caucus, advocated to move away from the 1949 Convention and supported a definition of trafficking which could not be used to obstruct or penalize consensual migrant sex work.<sup>114</sup>

### **1.2.2.1 UN Definition of Trafficking in Persons**

Given the lack of an international consensus on a definition of trafficking and the link between trafficking and prostitution, the discussion around a new international legal definition of trafficking posed numerous problems and became embroiled in broader debate over prostitution reforms. From this standpoint, the main question was whether the definition of trafficking should include the non-coerced, adult migrant prostitution and consequently, whether the definition of trafficking should include an explicit force/fraud/coercion requirement and, in relation to this, whether trafficking should be defined by the nature of the work involved or by the use of deceit or coercion.<sup>115</sup>

One group of States, supported by a coalition of NGOs led by the American based Coalition Against Trafficking in Persons (CATW), argued that given the fact that prostitution is by definition ‘forced’, a coercion requirement would legitimise prostitution by creating a false distinction between ‘forced’ and ‘voluntary’ prostitution.<sup>116</sup> According to CATW and its partners, among which are the European Women’s Lobby (EWL) and the International Abolitionist Federation (IAF),<sup>117</sup> the institution of prostitution is itself, as a violation of human rights, similar to slavery. From their view all prostitution, as well as other sex work, are a human rights violation and should be abolished and punished, without punishing prostitutes themselves

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<sup>114</sup> The debate between abolitionist feminist and sex workers’ rights feminists will be examined in the next chapter.

<sup>115</sup> M. Ditmore and M. Wijers, 2003, p. 82.

<sup>116</sup> As explained in chapter 2, within an abolitionist view the distinction between “free” and “forced” is misleading because it suggests that the term “forced” refers only to the conditions of recruitment. According to abolitionists, the term “forced” does not address coercive working conditions but only the way a woman originally came to be a prostitute: as a result of their own decision or forced into it by others. In the next chapter I shall critically examine this interpretation.

<sup>117</sup> Abolition here stands for the abolition of prostitution. Other members of the CATW-led coalition were Soroptimist International, the International Human Rights Federation and Equality Now. See the CATW website to learn more details regarding their position [www.catwinternational.org](http://www.catwinternational.org)

because this would be punishing the victims. Any distinction regarding the will or the consent of the women is fallacious as no person, not even adult, is believed to be able to give genuine consent to engage in prostitution. From this perspective, the CATW led faction advocated for a definition of trafficking that would not encompass a coercion requirement and also advocated for including in the trafficking definition ‘use in prostitution’ as a separate end-purpose.<sup>118</sup> Accordingly, the CATW led network asserted that it was necessary to include in the definition of trafficking terms/language such as “irrespective of the consent of the person” or “with or without her consent”. Otherwise, according to CATW, the consent of the victim could be used as a defence by traffickers to escape punishment. This argument in turn was used to support the position that all migrations for sex work should be defined as trafficked without concern for the means used.<sup>119</sup>

In contrast to the abolitionist view, the other group of States supported by a coalition of non-abolitionist NGOs known as the International Human Rights Caucus and the U.N. bodies that intervened in the negotiations,<sup>120</sup> pointed out that the lack of a coercion requirement would make the trafficking definition overbroad and divert the scarce resources away from the real problem. Thus, they argued in favour of requiring coercion and against including non-coerced prostitution as an end purpose. Moreover, they worked to include human rights protections for trafficked persons, regardless of their willingness to act as witnesses for the prosecution and including the right to safe shelter and social, medical and legal assistance.

The Human Rights Caucus consisted of an alliance of human rights, anti-trafficking and sex workers’ rights organizations and activists, with a leading role for the International Human Rights Law Groups (IHLG) and the Global Alliance Against Trafficking in Women (GAATW). Lobbying efforts by the Human Rights Caucus focused on a “broad and inclusive definition of trafficking in women to cover all trafficking into forced labour, slavery and servitude, irrespective of the nature of the work or service provided or the sex of the trafficked person”.<sup>121</sup> From this perspective, sex work and trafficking are considered different issues. Trafficking should be defined

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<sup>118</sup> See *Coalition against Trafficking in Women, Guide to the New U.N. Trafficking Protocol*, [http://action.web.ca/home/catw/attach/un\\_protocol.pdf](http://action.web.ca/home/catw/attach/un_protocol.pdf)

<sup>119</sup> J. Doezeema, 2005, 14, p. 83. For a further discussion of the issue of consent see K. Abramson (2003).

<sup>120</sup> These included the UN Office of the High Commissioner for Human Rights (UNOHCHR), the International Labor Organization (ILO) and the UN Children’s Fund (UNICEF). The now-defunct UN Working Group on Contemporary Forms of Slavery, which monitored the implementation of the 1949 Convention, supported the abolitionist view but did not formally participate in the negotiation process.

<sup>121</sup> M. Ditmore and M. Wijers, 2003, p. 82.

by the presence of coercion, deception, debt bondage and other forms of abuse regarding the conditions of recruitment and/or the condition of work.<sup>122</sup> Therefore, trafficking should not be defined by the nature of the work but by the use of coercive means and/or purposes. Moreover, according to Human Rights Caucus, while people can consent to migrate or to work in prostitution, they cannot consent to forced labour, ‘slavery’ or servitude: “[o]bviously, 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 patronising 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 human rights”.<sup>123</sup>

It is important to underline that while International Labour Organization (ILO) and Office of the High Commissioner for Human Rights (OHCHR), among the other human rights advocates, agreed with the anti-abolitionist NGO coalition regarding the distinction between trafficking and voluntary prostitution, they disagreed with sex workers’ rights advocates about their goal of using the anti-trafficking law to define and establish affirmative rights for those in the sex industry. Despite representatives of the ILO and OHCHR were quickly labelled as ‘pro-prostitution’ and supporters of sex work industry by abolitionist groups for their refusal to endorse the abolitionist agenda, the majority of them were deeply ambivalent on the prostitution as violence vs. prostitution as work debate.<sup>124</sup> In fact, many of human rights advocates feel uncomfortable with the rapid growth of the sex industry but, at the same time, they lend support to the defence of the human rights of those involved in sex industry to not be subject to abuses, including violence from state actors. Other human rights advocates, although they do not consider themselves “pro-prostitution”, argue that the efforts to eradicate prostitution drive the industry of sex further underground and ultimately endangers the prostitutes/sex workers.<sup>125</sup>

However, as sex worker activist Jo Doezema has pointed out, from the beginning sex workers activists were highly sceptical about the fact that international legislation

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<sup>122</sup> However, an element of coercion is not required in the case of children since their legal status is different from that of an adult.

<sup>123</sup> Human Rights Caucus (1999).

<sup>124</sup> See J. Chuang, 2010, pp. 1672-1673.

<sup>125</sup> *Ivi* p. 1673.

on trafficking could advance their goal of removing sex work specific offences from criminal law and applying laws covering sexual violence and worker's rights to sex work.<sup>126</sup> The first paragraph of the Network of Sex Work Projects (NSWP) statement on UN Trafficking Protocol, asserted:

[H]istorically, anti-trafficking measures have been more concerned with protecting women's "purity" than with ensuring the human rights of those in the sex industry. This approach limits the protection afforded by these instruments to those who can prove that they did not consent to work in the sex industry. It also ignores the abusive conditions within the sex industry, often facilitated by national laws that place (migrant) sex workers outside of the range of rights granted to others as citizens and as workers<sup>127</sup>

However, in order to be able to continue to exercise influence in the debate, sex worker groups accepted the invitation of human rights advocates to participate in the negotiations of trafficking protocol. But, as foreshadowed by the NSWP statement, the "trafficking Protocol offers nothing to sex workers whose human rights are abused, but who fall outside of the narrowly constructed category of "trafficking victim".<sup>128</sup>

After protracted debate, the definition of trafficking in persons adopted by States Parties is:

(a) [...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other form of sexual exploitation, forced labour<sup>129</sup> or services,

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<sup>126</sup> J. Doezema, 2005, p. 76.

<sup>127</sup> *Ivi* p. 77. Quoting the *NSWP Commentary On The Draft Protocol To Combat International Trafficking In Women And Children Supplementary To The Draft Convention On Transnational Organized Crime*. <http://www.walnet.org/csis/groups/nswp/untoc-comment.html>

<sup>128</sup> *Ivi* p. 80. This issue is examined in chapter 4.

<sup>129</sup> The term 'forced labour' is defined in the Art. 2.1 of the *ILO Convention Concerning Forced Labour* N. 29, 1930, as follows: "For the purpose of this Convention term forced or compulsory labor shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". See <http://www.ilo.org/ilolex/cgi->

slavery<sup>130</sup> or practices similar to slavery, servitude or the removal of organs.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.<sup>131</sup>

This definition reflects a tenuous compromise on the prostitution debate. In fact, two aspects of the definition allowed both neo-abolitionist<sup>132</sup> and non-abolitionist groups to be satisfied: the inclusion of language concerning the irrelevance of consent and the use of the terms “exploitation of the prostitution of others” and “sexual exploitation”.<sup>133</sup> According to neo-abolitionist groups, the inclusion of language concerning the irrelevance of consent signifies that all migration for prostitution or for other sex work into the scenario of trafficking. The non-abolitionist coalition, on the contrast, argued that the presence of the coercion requirement means the exclusion of consensual migration for prostitution from the definition of trafficking. Moreover, they argued that the use in subparagraph (a) of the terms ‘irrelevance’ of the consent does not imply that all migration for prostitution are defined as trafficking rather it aims to avoid that the consent of the victim could be used by traffickers to escape punishment.<sup>134</sup>

About the inclusion of the terms such as “exploitation” of the prostitution of others and “sexual exploitation”, neo-abolitionist coalitions interpreted these undefined terms as signifying the inseparability of trafficking and exploitation of prostitution. On the contrary, non-abolitionists argued that these terms were intentionally left undefined because there is no international agreement on the meaning of ‘exploitation’ and ‘sexual exploitation’. In fact, as explained in the *Interpretative Note to the Protocol*, the

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[lex/convde.pl?C029](#) The issue of ‘forced labour’ is examined in chapter 3.

<sup>130</sup> The term 'slavery' is defined in Article 1.1 of the *UN Slavery Convention* (1926) as follows: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. See <http://www2.ohchr.org/english/law/slavery.htm>. The issue of slavery is examined in chapter 3.

<sup>131</sup> UN Trafficking Protocol Art. 3.

<sup>132</sup> The use of the term neo-abolitionism instead of abolitionism is explained in chapter 2.

<sup>133</sup> J. Chuang, 2009, p. 1676.

<sup>134</sup> See A. Gallagher, 2001, pp. 984-985.

use of these vague terms allows each State Party to decide for itself on the legal treatment of voluntary adult sex works: “The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other form of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol which is therefore without prejudice to how States Parties address prostitution in their domestic laws”.<sup>135</sup>

#### **1.2.2.2. Human Rights Protections for Trafficked Persons and Repatriation**

During the Vienna Process, another controversial issue was the inclusion in the Protocol of substantive human rights protections for trafficked persons, separate from their value as witnesses of the prosecution. Throughout the late 1980s and 1990s, advocacy organisations worked to frame trafficking as a human rights problem. Reports by Human Rights Watch<sup>136</sup> and the *UN Special Rapporteur on Violence against Women*<sup>137</sup> showed the main factors, among which unequal access to education and employment opportunities, that increased the feminisation of poverty and migration and consequently women’s vulnerability to traffickers. Moreover, these reports pointed out that the absence of strong assistance and protection provisions for victims of trafficking created conditions of vulnerability and, in some circumstances, led to re-trafficking.

Central issues during the Protocol negotiations were access to adequate housing, health care, legal assistance; protection of trafficked persons against immediate deportation and/or detention for offences related to their status of being trafficked (violation of immigration law, prostitution, etc.); right to privacy; right to information, with regard to court and administrative proceedings; access to a temporary or permanent residence; guarantees on safe and voluntary return; and access to adequate remedies.<sup>138</sup> Human rights advocates sought to convince states that the inclusion and the recognition of these protections would not only be in the interest of trafficked person and in

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<sup>135</sup> UN Interpretative Note to the Protocol, Art. 3. The issue of the lack of a clear definition of the terms 'exploitation', 'slavery' and 'forced labour' is examined in Chapter 3.

<sup>136</sup> For Human Rights Watch Reports see <http://www.hrw.org/publications/reports?page=13&topic=681&region=All>

<sup>137</sup> For the *UN Special Rapporteur on Violence against Women* see <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx>

<sup>138</sup> M. Ditmore and M. Wijers, 2003, p. 85.



accordance with international human rights law but would also be in the interest of prosecution proceedings because it could encourage trafficked persons to collaborate with national authorities.<sup>139</sup> Many human rights advocacy organisations expressed their concern over the fact that the first international legal instrument on trafficking in a half-century would be drafted by the UN Crime Commission rather than the UN Commission on Human Rights. In their view, adopting a criminal justice perspective on trafficking would allow governments to justify restriction on immigration under the guise of protecting trafficked persons. Restrictive migration policies would thus drive labour migration further underground and, at same time, increase the amount of trafficking.<sup>140</sup>

Despite the efforts of human rights advocacy organisations, it was the concern about the crime and immigration elements of trafficking that ultimately motivated governments to develop a new international law on trafficking. Although human rights advocates managed to convince States to include a savings clause that ensures that the measures in the Protocol do not alter any other obligation of governments under international humanitarian or human rights law,<sup>141</sup> they were unable to convince States to include strong trafficking-specific human rights protections. Therefore, while the Protocol provides strong law enforcement provisions, it contains few protection and assistance provisions that are all *discretionary* and not mandatory.

It is worth highlighting that many government delegates who participated in the Vienna negotiations did not want to commit their countries to protect the rights of non-nationals and were able to skip out discussion on the need for mandatory protections.<sup>142</sup> Moreover, many government delegates came from a law enforcement background and did not have much experience in the field of human rights. This meant that a number of

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<sup>139</sup> *Ivi* p. 85.

<sup>140</sup> Chapter 3 deeply examines the issue of trafficking from the perspective of migration.

<sup>141</sup> UN Trafficking Protocol Art. 14. This provision declares that “[n]othing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”; and that “[t]he measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination”.

<sup>142</sup> Melissa Ditmore and Marjan Wijers argue that “in discussing the need for mandatory protections, there was a clear division between countries which perceived themselves as ‘sending states’, those countries whose nationals were expected to be trafficked and who were interested in protecting the rights of their nationals in other states, and countries which perceived themselves as receiving states, who expected trafficked persons to arrive, perhaps illegally, within their jurisdiction and whom they expected to prosecute or deport or offer protections as required. In many cases however it was not so clear where a state’s interests lay”. M. Ditmore and M. Wijers, 2003, p. 85

them did not see that effective prevention and eradication of trafficking is inextricably linked to the recognition and protection of trafficked persons' human rights. The need for protecting human rights of the persons involved in trafficking context was recognised in the course of the negotiation, but it was considered as a prosecution tool rather than a state obligation.<sup>143</sup> As feminist activists Melissa Ditmore and Marjan Wijers have highlighted, during the negotiations numerous delegates argued that trafficked persons were valuable as witnesses and, thus, deserving of protection during the trial, but that they should be immediately repatriated after the trial.<sup>144</sup> In fact, there were different interests at stake. As Ditmore and Wijers have pointed out, “whereas the developed countries were mostly concerned about according rights to ‘illegal migrants’, the developing countries were especially concerned about the financial costs of taking up obligations to provide protection and assistance. This meant that both types of countries had their own - be it different - interests in keeping such provisions discretionary”.<sup>145</sup>

Another additional problem related to the inclusion of strong human rights protections was the tension between the two NGO lobbying blocs. Despite the fact that the issue of the protection of human rights was not directly connected to the definition of trafficking and, consequently, was not at the centre of the dispute between the two NGO lobbying blocs, it was impossible to build a concerted lobby for achieving mandatory protection. Though the CATW led network could agree about the inclusion of human rights protections, while maintaining different position on the definition of trafficking, it refused to accept the Human Rights Caucus's invitation to join forces to advocate for strong rights protections.<sup>146</sup> The CATW led network probably refused for fear that it would have meant taking a step back on their positions. However, it is possible to assert that a coalition between two NGO-blocs probably would have helped to achieve mandatory protections and not only few protection provisions.

Almost all protection and assistance provisions are indicated in Articles 6 and 8 of the Protocol. More specifically, Article 6 declares that:

1. *In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal*

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<sup>143</sup> *Ivi* p. 85.

<sup>144</sup> This aspect will be examined in chapter 4.

<sup>145</sup> *Ivi* p. 85.

<sup>146</sup> *Ivi* p. 86.

proceedings relating to such trafficking confidential.

2. Each State Party *shall ensure* that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in *appropriate cases*:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at *appropriate stages* of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party *shall consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, *in appropriate cases*, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.<sup>147</sup>

The *optional tone* adopted in this provision – such as “in appropriate cases and to the extent possible under its domestic law”, “shall consider” and “shall endeavour” - means that there is no obligation for the States Parties to implement the protection provisions.<sup>148</sup> The discretionary nature of the Protocol’s protection provisions

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<sup>147</sup> UN Trafficking Protocol Art. 6. [my emphasis].

<sup>148</sup> It is important to underline that the Crime Convention Section 24.2 discussed above is similar to the Protocol provision, but not identical and it provides a stronger basis for such legislation. In fact, it contains much stronger language on protection measures and covers all witnesses, not just victim-witnesses. For a interesting analysis see A. Jordan (2002).

constitutes a step backwards in international human rights law and undermines, as Melissa Ditmore and Marjan Wijers have noted, commitments in other international human rights instrument “because it transforms rights into privileges that can be conferred or withheld by governments for any reason”.<sup>149</sup> Furthermore, the weakness of these protection provisions also compromises the effectiveness of the Protocol as a law enforcement instrument. Indeed, the identification and prosecution of traffickers is strongly linked to the cooperation of trafficked persons. But, under the Protocol, trafficked persons appear not to receive any advantage by cooperating with national authorities.<sup>150</sup>

The Trafficking Protocol provides that each States Party “shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”.<sup>151</sup> Thus, the Protocol merely states that States Parties “shall consider” temporary or permanent residence in “appropriate cases”, they are not required to do so. However, it is important to mention that several governments have recognised that it is always ‘appropriate’ to provide a short term residence of 45-60 days to allow trafficked persons to learn their rights and options, and to decide whether to cooperate with law enforcement or not.<sup>152</sup>

The repatriation was also a delicate issue during the negotiations. In the end, the final text of the Protocol provides that States Parties of origin “shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay”.<sup>153</sup> The phrase “with due regard for the safety of that person” is extremely important as it imposes the obligation upon governments to ensure that trafficked person is not in danger upon returning home. Moreover, the Protocol states that “the return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary”.<sup>154</sup> It is worth highlighting that although the Protocol declares that return “shall preferably be voluntary”, UN Interpretative Note makes it clear that it can also be involuntary. More precisely, UN Interpretative Notes say that “the *travaux préparatoires* should indicate that the words “and shall preferably be voluntary” are understood not to place any obligation to the State Party returning the

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<sup>149</sup> M. Ditmore and M. Wijers, 2003, p. 86.

<sup>150</sup> Chapter 4 examines the limits of approach that links protection to cooperation.

<sup>151</sup> UN Trafficking Protocol Art. 7.

<sup>152</sup> This point is examined in chapter 4.

<sup>153</sup> UN Trafficking Protocol Art. 8.1.

<sup>154</sup> *Ivi* Art. 8.2.

victims”.<sup>155</sup>

### 1.2.2.3 Law Enforcement and Border Controls

The Trafficking Protocol establishes an international crime control cooperation framework to coordinate a transnational response to trafficking. Together with the Crime Convention, the Trafficking Protocol defines concrete measures to improve communication and cooperation between national law enforcement authorities, to engage in mutual assistance and to establish bilateral and multilateral joint investigative bodies and techniques.

Chapter III of the Protocol, entitled “Prevention, cooperation and other measures”, contains specific law enforcement measures such as border controls, control of documents, investigation, cooperation with civil society, international exchange of information and preventive efforts. Article 9 of the Protocol provides that States Parties shall take measures for preventing and combating trafficking in persons as well as protecting trafficked persons, “especially women and children”, from the risk of “re-victimization”. In particular, section 5 of Article 9 encourages States Parties to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”. The notion of ‘demand’ is particularly ambiguous and problematic and it is not clearly defined in the Protocol. As many feminist scholars have highlighted, the demand for trafficked labour is not simply a matter of ‘pull’ and ‘push’ market forces or a result of criminal interventions. Rather, it is produced by a combination of economic, social and political factors and mediated by residency and employment regulations in the destination states. In this regard, immigration laws play a crucial role. Indeed, immigration laws in countries of destination are almost uniformly restrictive and prevent migrant workers for entering legally to work. As a consequence of restrictive immigration laws, migrants are forced into a relationship of dependency on organised crime. Stricter immigration regulations push criminal organisations to exercise greater control over trafficked persons’ labour and mobility.<sup>156</sup>

In the area of law enforcement, Article 10 of the Protocol asserts that States

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<sup>155</sup> See A. Jordan, 2002, p. 25.

<sup>156</sup> These issues are examined in chapter 3.

Parties shall cooperate with one another through information exchange aimed at determining perpetrators or victims of trafficking as well as means and methods adopted by organised criminal groups for the purpose of trafficking in persons. In addition to this, States Parties “shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons”.<sup>157</sup> The training should include a focus on methods to prosecute the traffickers and protect the rights of the victims, including protecting victims from the traffickers. Moreover, the training should consider human rights and gender sensitive issues and it should encourage cooperation with NGOs and other relevant organisations of civil society.<sup>158</sup>

Border controls are clearly at the centre of the law enforcement measures delineated in the Trafficking Protocol to combat trafficking in persons. Article 11 requires States Parties to “strengthen, to the extent possible, [...] border controls as may be necessary to prevent and detect trafficking in persons”. State Parties shall also adopt legislative and other appropriate measures to prevent commercial transport being used in the trafficking process and to penalise such involvement.<sup>159</sup> In addition, Article 12 declares that each State Party shall ensure the “integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use”.<sup>160</sup>

As mentioned above, the UN Convention Against Transnational Organised Crime defines an organised criminal group as ‘a structured group of three or more persons’. Feminist scholar Rutvica Andrijasevic highlights that there is a sort of disproportion between such a definition and the imaginary idea of the organised crime as a large overarching structure.<sup>161</sup> Scholars and researchers on trafficking disagree on the involvement and role of organised criminal networks. Some ascribe a key role to large transnational criminal organisation such as the Russian Mafia.<sup>162</sup> Others, instead, argue that traffickers are more likely to be smaller groups or corrupt individuals and

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<sup>157</sup> UN Trafficking Protocol Art. 10.2.

<sup>158</sup> *Ivi* Art. 10.

<sup>159</sup> *Ivi* Art. 11. UN Interpretative Notes state that: “The *Travaux préparatoires* should indicate that the victims of trafficking in persons may enter a State legally only to face subsequent exploitation, whereas in cases of smuggling of migrants, illegal means of entry are more generally used. This may make it more difficult for common carriers to apply preventive measures in trafficking cases than in smuggling cases and legislative or other measures taken in accordance with this paragraph should take this in account”.

<sup>160</sup> *Ivi* Art. 12. UN Interpretative Note state that: “The *Travaux préparatoires* should indicate that the term “travel documents” includes any type of document required for entering or leaving a State under its domestic law and that the term “identity documents” includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State”.

<sup>161</sup> R. Andrijasevic (2010).

<sup>162</sup> A. Aronowitz (2009); N. I. O. Ebbe (2008).

entrepreneurs.<sup>163</sup> At the same time, different studies, in particular feminist studies, point out that the relationships between traffickers and ‘trafficked’ persons are profoundly different<sup>164</sup> and that often people with whom women establish the initial contact are not those who wait them on arrival. In that case a mix of smuggling and trafficking is present.<sup>165</sup> As Ilse Van Liempt argues, “generally speaking the criminals fit on a continuum ranging from individuals working on the side, to loose, flexible networks and ending with professional, high structured criminal organisations controlling the trafficking process from start to finish”.<sup>166</sup>

As Anne Gallagher rightly notes, the principle emphasis of the Protocol appears to be the *interception* of the traffickers rather than the *protection* of victims.<sup>167</sup> Although several draft provisions were modified in order to ensure that the law enforcement measures of the Protocol did not prejudice the international commitments in relation to the free movement of people or affect other international human rights provisions, the final version is far from this ideal. The use of obligatory language in law enforcement measures, as opposed to discretionary language adopted for protection measures, underlines the fact that border control measures have priority over the protection of trafficked persons.<sup>168</sup> Moreover, Protocol’s border control measures could potentially limit further the rights of individuals to seek asylum from persecution in other countries. On the basis of these considerations, the inclusion of the above mentioned savings clause in Article 14 has been advocated. This savings clause, as said above, ensures that the Trafficking Protocol does not compromise and alter any other obligations of governments under international humanitarian or human rights law. It ensures no discrimination to persons on the ground that they are victims of trafficking in persons and it also prohibits discrimination against trafficked persons in accordance with internationally recognised principles of non-discrimination.

The issue of the protection of the trafficked persons is closely related to the problem of their *identification*. In this regard, it is important to highlight that one of the major weakness of the law enforcement/border control provisions of the Protocol is the failure to address the issue of the identification of trafficked persons. As Canadian Refugee Council has rightly pointed out: “If authorities have no means of determining

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<sup>163</sup> J. Finckenauer and J. Schrock (2003).

<sup>164</sup> This point is examined in Chapter 4.

<sup>165</sup> R. Andrijasevic (2010); L. Maluccelli (2001).

<sup>166</sup> I. van Liempt (2006).

<sup>167</sup> A. Gallagher, 2001, p. 994.

<sup>168</sup> *Ivi* p. 994.

among the intercepted or arrested who is being trafficked, how do they propose to grant them the measures of protection they are committing themselves to?”<sup>169</sup> The result of this *lacuna* is that national authorities have an incentive to identify irregular migrants as smuggled rather than trafficked because trafficked persons are to be granted additional protections to those accorded to smuggled migrants. Therefore, dealing with trafficked persons would impose a greater financial and administrative burden on States than dealing with smuggled migrants.<sup>170</sup> While States Parties claim to be able to identify who has been smuggled and who has been trafficked, the additional protections accorded to trafficked persons are likely to be of limited practical utility.

#### 1.2.2.4 Trafficking and Smuggling: a Controversial Distinction

The term ‘smuggling’ generally refers to a consensual transactions where both the transporter and those who are transported agree to avoid immigration control for mutually advantageous reasons. According to the *Migrant Smuggling Protocol*, “smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.<sup>171</sup>

The Smuggling Protocol provides minimal reference to the protection needs of smuggled persons. The preamble of the Smuggling Protocol states “the need to provide migrants with humane treatment and full protection of their rights” and expresses concern that “the smuggling of migrants can endanger the lives or security of migrants involved”.<sup>172</sup> States are also required to embark on a range of prevention measures (Article 15), including strengthening domestic information programs to increase public

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<sup>169</sup> Quoted in Gallagher (2001).

<sup>170</sup> *Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*. Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children’s Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons. <http://www.uncjin.org/Documents/Conventions/dcatoc/8session/27e.pdf>.

It is important to remember that in contrast to the Trafficking Protocol, States Parties to the Migrant Smuggling Protocol will not be required to consider the possibility of permitting victims to remain in their territories, either temporarily or permanently.

<sup>171</sup> UN Smuggling Protocol Art. 3. For the text of the Smuggling Protocol see [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_smug\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf) According to the Smuggling Protocol, illegal entry means “crossing borders without complying with the necessary requirements for legal entry into the receiving State” (Article 3 (b)).

<sup>172</sup> *Ivi*.



awareness of dangers facing smuggled migrants and collaborating with other states to prevent migrant recruitment by criminal organizations. However, the Smuggling Protocol does not make provisions regarding medical, psychological or social recovery. States are not obligated to collaborate with NGOs, or to guarantee temporary legal residency as in the Trafficking Protocol. Furthermore, the requirement to provide protection to at-risk smuggled migrants is, as Jacqueline Bhabba argues, “very heavily qualified”<sup>173</sup>: states should “take appropriate measures to afford migrants appropriate protection” against violence from smugglers. But, again, the term “appropriate” is not clearly defined. According to Jacqueline Bhabba, “this clause undercuts the more robust protections afforded by the recently ratified 1990 UN International Convention of the Protection of the Rights of All Migrant Workers and Members of their Families”.<sup>174</sup> Moreover, it is worth noting that according to the Smuggling Protocol States Parties can detain smuggled migrants provided they are afforded the requisite consular access. Also, the Smuggling Protocol requires States to return smuggled migrants to their home countries expeditiously.

The Trafficking Protocol establishes a clear distinction between human trafficking and smuggling: if the crucial element of human smuggling is the illegal crossing of borders, the key determining factor of human trafficking is the exploitation of migrants. Smuggling, thus, is a crime against a *state* while trafficking is a crime against a *person*. In this light, as Maybritt Jill Alpers has argued, “the relationship between a trafficker or smuggler and the person crossing the border could serve as an indicator to tell the two phenomena apart”.<sup>175</sup> In the context of smuggling, the relationship between the person and the smuggler is considered to be that of client and service provider. Within the trafficking scenario the relationship between the migrant and the trafficker is considered to be that of victim and exploiter.

These legal definitions, however, appear reductive in respect to the complicated context within which “migrant and migration broker interact with one another”<sup>176</sup>. As an extensive body of literature demonstrates, distinguishing between smuggling and trafficking is highly complex. Certainly, there are cases that conform to the definitions offered by trafficking and smuggling Protocols. But, as Bhabba has pointed out “the available evidence suggests that most transported undocumented migrants consent in

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<sup>173</sup> J. Bhabba, 2005, p. 19.

<sup>174</sup> *Ivi* p. 19.

<sup>175</sup> M. Jill Alpers 2010, p. 118.

<sup>176</sup> *Ivi* p. 117.

some way to an initial proposition to travel, but that, en route or on arrival in the destination country, circumstances frequently change”.<sup>177</sup> The complexity and variety of migration strategies and circumstances challenge easy definition and categorisation. In this sense, as Liz Kelly has highlighted, “what we know about smuggling and trafficking suggests that it would be more accurate to view them as a *continuum*, shading into and out of one another across a number of dimensions”.<sup>178</sup>

Moreover, as many feminist scholars have emphasised, the trafficking/smuggling distinction is frequently based on the assumption that smuggled persons are men while the majority of trafficked persons are women and children.<sup>179</sup> Therefore, the trafficking/smuggling distinction often relies on a gender essentialist model of social relations in which men are imagined to be capable of making an independent and voluntary decision to migrate. Women, instead, are considered together with children, as persons that require special protection and imagined as passive victims and objects of third parties within a migration scenario.

### **1. 3 European Legal Instruments Against Trafficking**

#### **1.3.1 The Council of Europe Convention on Action against Trafficking in Human Beings**

In Warsaw on 16 May 2005, the *Council of Europe Convention on Action against Trafficking in Human Beings* was opened for signature. The Council of Europe Convention entered into force on 1 February 2008 and by December 2011, it had been ratified by 34 States.<sup>180</sup> The Council of Europe Convention relies on the definition of trafficking in persons offered by the UN Trafficking Protocol. But, as its preamble specifically states, the Council of Europe Convention aims to improve the protection afforded under the UN Protocol and develop the standards established by it.<sup>181</sup> In this sense, it can be argued that the Convention adds value to the Palermo framework since

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<sup>177</sup> J. Bhabha, 2005, p. 21.

<sup>178</sup> L. Kelly, 2005, p. 238 [my emphasis].

<sup>179</sup> See J. O'Connell Davidson and B. Anderson (2006); J. Chuang (2010).

<sup>180</sup> For the chart of ratifications see

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>

<sup>181</sup> Council of Europe Convention, Preamble. For the full text of Council of Europe Convention see <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm>

it explicitly recognizes trafficking as a human rights violation and as an offence to the dignity and integrity of human beings. Moreover, the Convention specifically guarantees gender equality in relation to both prevention and protection.

The stated purposes of the Council of Europe Conventions are:

- A) To prevent and combat trafficking in human beings, while guaranteeing gender equality
- B) To protect the human rights of the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution
- C) To promote international cooperation on action against trafficking in human beings<sup>182</sup>

Chapter III of the Convention requires States Parties to take measures to protect and promote the rights of victims of trafficking in the framework of guaranteeing gender equality – in this respect, it is important to mention that the Convention dedicates particular attention to the protection of the rights of child victims. Probably, the most important of all victim protection provisions is that which concerns the identification of trafficked persons (Article 10). As the explanatory report explains, the Council of Europe Convention recognizes that the correct identification of victims is essential to give them the necessary protection and assistance. The Convention emphasises the need for adequate identification procedures in order to “ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence [...] has been completed by the competent authorities and shall likewise ensure that that person receives [...] assistance”.<sup>183</sup> Indeed, “the failure to identify a trafficking victim correctly will probably mean that victim’s continuing to be denied his or her fundamental rights”.<sup>184</sup> States Parties, thus, are required to ensure the necessary legal framework and the availability of competent personnel for the identification process. However, it is

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<sup>182</sup> *Ivi* Art. 1.

<sup>183</sup> *Ivi* Art. 10.2.

<sup>184</sup> Council of Europe Convention Explanatory Report, 127. For the Text of the Explanatory Report see <http://conventions.coe.int/treaty/en/reports/html/197.htm>

important to note that the Convention does not contain a blueprint for the identification process.

According to the Council of Europe Convention, States Parties shall adopt measures necessary to assist all victims of trafficking – even if only provisionally identified as such – within their territory.<sup>185</sup> Assistance and protection provisions cannot be reserved only for those who decide to stand as a witness.<sup>186</sup> Assistance includes: access to emergency medical treatment, translations and interpretation services, counselling, information and assistance including in relation to the legal process.<sup>187</sup> All protection measures are to be provided on a non-discriminatory, consensual and informed basis.<sup>188</sup> Furthermore, it is worth noting that the Council of Europe Convention explicitly emphasizes the importance of avoiding the criminalisation of trafficking victims.

States Parties are required to “provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”.<sup>189</sup> It is significant to note that the language employed here by the Council of Europe Convention is weak: non-prosecution is not a concrete *requirement*. Thus, there is still nothing in practice to stop States Parties from treating victims of trafficking as criminal and prosecuting them for their involvement in unlawful activities. Nonetheless, the importance of this provision cannot be overestimated<sup>190</sup> given that, as Anne Gallagher emphasizes, “trafficked persons in Europe are regularly detained and then either prosecuted and deported, usually for offences related to their immigration status or their involvement in the sex industry”.<sup>191</sup>

With regard to the status of victims of trafficking and their repatriation, the Council of Europe Convention constitutes an important improvement compared to what is available to victims under the UN Trafficking Protocol. More precisely, the Convention provides a recovery and a reflection period of at least 30 days, which allows the victim to stay in the country with support and assistance “regardless of whether he or she co-operates with the police”.<sup>192</sup> During this period victims cannot be repatriated against their will. After the 30 days, States Parties shall issue a renewable permit to

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<sup>185</sup> Council of Europe Convention, Art. 10.2 and 12.

<sup>186</sup> *Ivi* Article 12.7

<sup>187</sup> *Ivi* Article 12.1.

<sup>188</sup> *Ivi* Article 12.7.

<sup>189</sup> *Ivi* Article 25.

<sup>190</sup> It need to underlined that non-criminalisation of victims is not specifically addressed by the Trafficking Protocol.

<sup>191</sup> A. Gallagher, 2006, p. 178.

<sup>192</sup> Council of Europe Convention, Art. 13.

victims if “their stay is necessary owing to their personal situation” or if “their stay is necessary for the purpose of their co-operation with the competent authorities in an investigation or criminal proceedings”.<sup>193</sup> However, this provision has the effect of ensuring the States to grant residence permits only to those who decide to cooperate with the authorities. As some scholars have noted, under the Convention trafficked persons have no right to appeal negative decisions concerning residency applications or the provision of assistance.<sup>194</sup>

According to the Council of Europe Convention, the return of victims to their country of origin “shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary”.<sup>195</sup> All States Parties shall adopt measures to provide victims with the information necessary to promote their integration and to avoid their re-victimisation.<sup>196</sup> However, the effectiveness of these provisions remains questionable. As Gallagher has pointed out, “the fact that no risk assessment is required in such cases (except for children) means that States are ultimately not accepting legal or moral authority for the safety and security of returned victims”.<sup>197</sup>

Chapter IV and V contain the criminalisation provisions of the Council of Europe Convention. These provisions are similar (almost identical) to those contained in the UN Trafficking Protocol. Yet there are some important extensions. States Parties are required to criminalise trafficking and acts relating to trafficking, such as document fraud (Article 20). States are also required to criminalise attempting, aiding or abetting (Article 21). Moreover, under the Convention States Parties must consider criminalisation of those using the services of a victim of trafficking.<sup>198</sup> There is also provision for legal persons to be held liable for a criminal offence referred to in the Convention (Article 22). The compulsory jurisdiction of States Parties is extremely broad. Indeed, according to Article 31 States Parties must establish jurisdiction over an offence when committed in their territories; or by one of their nationals or against one of their nationals.

Regarding penalties, the Council of Europe Convention is much more explicit

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<sup>193</sup> *Ivi* Art. 14.

<sup>194</sup> See in particular A. Gallagher, 2006, p. 180.

<sup>195</sup> I will come back to this point in chapter 4.

<sup>196</sup> Council of Europe Convention, Art. 16.5 and Art. 16.6.

<sup>197</sup> A. Gallagher, 2006, p. 180.

<sup>198</sup> Art. 19

than the UN Trafficking Protocol.<sup>199</sup> Article 23 states that all criminal offences established under the Convention are punishable by “effective, proportionate and dissuasive sanctions. These sanctions shall include [...] penalties involving deprivation of liberty which can give rise to extradition”. It is worth noting that under the Convention States Parties are required to provide “for the possibility” of taking final sentences passed by another State Party into account when determining penalties (Article 25).

The Council of Europe Convention wants to create a broad legal framework/base for cooperation between European States and beyond.<sup>200</sup> The aim is to prevent, protect and assist victims of trafficking, penalise traffickers and foster international cooperation not only in criminal matters but also in trafficking prevention. States Parties are required to take responsibility for the whole process of trafficking from recruitment in the country of origin to the exploitation in the country of destination. As Isabel Borges argues, the Council of Europe Convention entails “positive states responsibility going beyond the mere individual criminal responsibility of traffickers and clients”.<sup>201</sup> In this sense, the Convention aims to reinforce the coordination between national bodies responsible for preventing and combating trafficking (Article 29). It requires States parties to “consider appointing *National Rapporteurs* or other mechanisms for monitoring the anti-trafficking activities of States institutions and the implementation of national legislation requirements” (Article 29) but does not make appointing a National Rapporteurs mandatory.

The Council of Europe Convention establishes two monitoring bodies: a *Group of Experts on action against Trafficking in Human Beings* (GRETA) which is an independent body of experts mandated to assist States in their implementation of the treaty,<sup>202</sup> and the Committee of Parties, which is composed of one representative from each State Party. The role of GRETA is to monitor the implementation of the Convention obligations, regularly publish evaluative reports on the measures carried out by State parties and to make recommendations in cases of non compliance to step up State Parties’ action. The Committee of Parties has a political role, it cannot interfere with these reports but can ask States Parties to adopt certain measures to implement

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<sup>199</sup> *Ivi*, p. 182.

<sup>200</sup> Article 32, 33, 34 and 35.

<sup>201</sup> I. Borges (2009).

<sup>202</sup> Council of Europe Convention, Art. 36.

GRETA's conclusions.<sup>203</sup>

It is also worth highlighting that the Council of Europe Convention recognises the importance of civil society organisations more explicitly than UN Trafficking Protocol (Article 16, 28 and 35) in the prevention and protection of victims. In particular, Article 28 states that “Each Party shall adopt such legislative or other measures as may be necessary to provide, when necessary, appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for members of groups, foundations, associations or non-governmental organisations”.

### 1.3.2 EU Legal Instruments against Trafficking

In 2002, the EU passed a Framework Decision on Combating Trafficking in Human Beings<sup>204</sup> stressing the need to develop a common legal and judicial approach throughout the EU to prevent and combat human trafficking. The Framework Decision 2002/629/JHA defined human trafficking along the same lines as the UN Protocol and established penalties for those that instigate and commit trafficking “provided for by national legislation [which] must be ‘effective, proportionate and dissuasive’”.<sup>205</sup>

The Framework Decision 2002/629/JHA contained weak provisions concerning the protection of, and assistance to, victims and prevention of trafficking. To remedy this, in March 2010 the European Commission proposed a Directive on preventing and combating trafficking in human beings and protecting victims. The European Parliament voted in favour of the proposed directive in December 2010 and the Council of Ministers adopted a final text on 21 March 2011.<sup>206</sup> This new Directive (2011/36/EU) replaces the 2002 Framework Decision.

Directive 2011/36/EU represents the first substantive criminal law measure to be

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<sup>203</sup> As noted in the Explanatory report, the purpose of this additional procedures was to: “[...] ensure the respect of the independence of GRETA in its monitoring function, while introducing a ‘political’ dimension into the dialogue between parties”. Council of Europe Convention Explanatory Report, 369.

<sup>204</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0629:EN:NOT>

<sup>205</sup> I. Borges (2009).

<sup>206</sup> The process for adopting this new Directive was affected by the entry into force of the Lisbon Treaty in December 2009, which meant that new legislation would in future be adopted by a majority of Member States at the Council, together with the European Parliament. For the full text of Directive 2011/36/EU see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

adopted by the EU since entry into force of the Lisbon Treaty (2007).<sup>207</sup> Directive 2011/36/EU builds on the requirements sets out in the UN Trafficking Protocol and the Council of Europe Convention but it has the important advantage of being a binding instrument of European Law, with the enforcement mechanisms related to that – in particular, the potential role of the national courts and the European Court of Justice.<sup>208</sup> The Directive refocuses attention on criminalisation but it also addresses issues concerning prevention and protection. As stated in Article 1, the Directive establishes minimal rules about the definition of criminal offences and penalties in the area of trafficking in human beings. Also, it introduces “common provisions, taking into account gender perspective, to strengthen the prevention of this crime and the protection of trafficked persons” (Article 1). In this light, it marks a significant improvement on existing instruments that have tended to adopt a law enforcement approach that regards trafficking mainly as a violation of criminal and immigration laws.

Directive 2011/36/EU offers a definition of trafficking that is similar to the definition offered by the UN Trafficking Protocol and the Council of Europe Convention. It presents a list of what exploitation should include – “as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs”<sup>209</sup> – but, in the same way of the other treaties, it does not provide a clear definition of exploitation.<sup>210</sup>

Article 8 of Directive 2011/36/EU states that “Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of human trafficking for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the

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<sup>207</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed in December 2007. The main changes introduced by the Treaty of Lisbon are: the move towards a more qualified majority voting in the EU Council, the increasing involvement of the European Parliament in the legislative process through extended co-decision with the EU Council, a consolidated legal personality for the EU and the creation of a long-term President of the European Council and a High Representative of the Union for Foreign Affairs and Security Policy to present a united position on EU policies. The Treaty of Lisbon also made the Union’s human rights charter, the Charter of Fundamental Rights (which explicitly prohibits slavery or servitude, exploitation and trafficking of human beings under Article 5), legally binding. It is also worth noting that the Treaty of Lisbon abolished framework decisions and the EU can now enact directives and regulations in the area of criminal justice by means of the ordinary legislative procedure. According to the Lisbon Treaty, regulations, directives and decisions are the legally-binding instruments of the Union for legislative acts and for all kinds of non-legislative acts.

<sup>208</sup> See J. P. Gauci (2011).

<sup>209</sup> Article 2(3).

<sup>210</sup> The issue of the definition of exploitation is examined in chapter 3.



offences referred to in Article 2” of the Directive. It is to be observed that this provision does not directly provide for non-criminalisation. Indeed, it merely obliges States Member to allow competent national authorities not to prosecute or impose penalties on victims.

Article 9 provides that Member States shall ensure that investigation into or prosecution of offences is not “dependent on reporting or accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement”. Also, Member States shall take necessary measures to ensure that those persons or services responsible for investigating or prosecuting the offences are trained and have necessary resources.

In a similar way to the Council of Europe Convention, Directive 2011/36/EU dedicates particular attention to the issue of identification of trafficked persons. In this sense, it requires that Member States shall take the necessary measures to establish appropriate mechanisms for identification of, assistance to and support for victims (Article 11). The Directive also acknowledges the fundamental role that civil society organisations, such as non-governmental organisations, schools and local groups, can play in planning and implementing measures to prevent and counter trafficking. Moreover, the Directive makes specific provisions regarding trafficking who are minors, clearly pointing out their particular needs.<sup>211</sup>

Directive 2011/36/EU is also intended to complement the EU Council Directive 2004/81/EC of 29 April 2004 on “the residence permit issued to third country nationals who are victims of trafficking or who have been subject of an action to facilitate illegal immigration, who cooperate with competent authorities”.<sup>212</sup> Council Directive 2004/81/EC is the only EU policy instrument adopted which explicitly addresses human trafficking from a migration perspective. At the core of this Directive is the aim of encouraging victims of trafficking to step forward and co-operate with European authorities in the prosecution of suspected traffickers. The Directive links cooperation with the competent authorities with assistance for victims by providing them with a short-term residence permit. Thus, the granting of the residence permit and related assistance is made necessarily conditional on the cooperation of the victim in proceedings. From this perspective, such a Directive insufficiently addresses the

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<sup>211</sup> See Articles 13, 14, 15 and 16.

<sup>212</sup> Directive 2004/81/EC applies to all Member States except for Denmark, Ireland and the UK. For the full text of Directive 2004/81/EC see <http://www.unhcr.org/refworld/publisher,COUNCIL,,4156e71d4,0.html>

legitimate needs and rights of victims to support, assistance and protection.

Directive 2011/36/EU obliges States to take the appropriate measures to guarantee assistance and support, which “are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings” (Article 11). According to the Directive, “Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial”.<sup>213</sup> It needs to be underlined that the Directive talks about cooperation with investigations, while the Council of Europe Convention only prohibits conditionality when the person is a witness. In this respect, this provision of the Directive constitutes an important improvement.<sup>214</sup>

However, it is worth highlighting that although ‘assistance and support’ are provided to all trafficked persons, protection is only reserved to the context of criminal justice proceedings. As discussed in the following pages, for trafficked persons the decision to cooperate is not easy; such an act can expose them to further risk. Some women might be afraid of the traffickers, others might not trust the authorities and others might be too traumatized to go through what may sometimes add up to a secondary victimisation. In this light, the new Directive appears not to capture the complexity of the trafficking context and in so doing it effectively penalizes women who do not cooperate with the authorities. Furthermore, there are insufficient guarantees concerning a possible right to remain on the territory after national proceedings are completed. Consequently, victims may be reluctant to give evidence.

Sex workers’ rights groups and associations have highlighted another limit of the new Directive.<sup>215</sup> Indeed, although the Directive provides for not prosecuting or imposing penalties on victims, it states that the Member States “should take in consideration the possibility of imposing sanctions on the users of any service from a victim, with the knowledge that the person has been trafficked”.<sup>216</sup> This approach does not consider the fact that criminalising clients can be counterproductive and can increase the vulnerability of sex workers.<sup>217</sup>

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<sup>213</sup> Article 11(3).

<sup>214</sup> See J. P. Gauci (2011).

<sup>215</sup> See in particular <http://www.lucciole.org/content/view/641/14/>

<sup>216</sup> Article 26.

<sup>217</sup> This issue is examined in the next chapter.

## 1.4 Conclusion

The UN Trafficking Protocol constitutes the first serious attempt made by the international Community to invoke the weapon of international law in its battle against transnational organised crime. In this sense, it provides measures to improve communication and cooperation between national law enforcement authorities to address this problem. The Protocol establishes a set of pre-existing and new rights for trafficked persons and specifies the obligations of State Parties to support these rights. However, it is worth noting that the Trafficking Protocol is not a human rights instrument but a criminal justice instrument. It does not provide any solid obligation upon States to assist and protect trafficked persons. As many feminist scholars point out, the UN Trafficking Protocol constitutes an instrument designed to facilitate cooperation between states, and consequently border controls, to combat organised crime rather than to protect the victims of crime. In fact, while states are encouraged to offer protection to trafficked persons, actual obligations are *minimal* and the protection provisions are weak.

From this perspective, the Council of Europe Convention represents a significant development in the international legal framework of trafficking, in terms of recognition of the rights of victims and international cooperation. By October 2011, 26 out of 27 EU states (all EU states except the Czech Republic) had formally acknowledged the Council of Europe Convention as a standard to respect and implement. For this reason, the Convention can be viewed as a regional standard that in theory all EU Member States regard as appropriate to respect.<sup>218</sup>

As discussed in this chapter, the new EU Directive (2011/36/EU) marks a significant improvement on the existing EU framework on trafficking. It builds on UN Trafficking Protocol and the Council of Europe Convention and in some respects goes beyond them. It makes the requirements set out in these international instruments more enforceable. Nevertheless, as argued above, Directive 2011/36/EU presents certain limitations. Indeed, although the Directive dedicates attention to the protection of trafficked persons, it insufficiently addresses the protection of their rights and needs. The requirement to place human rights at the centre of anti-trafficking measures necessitates superior protection measures for victims, irrespective of whether they participate in relevant national proceedings.

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<sup>218</sup> As discussed in chapter 4, many States do not respect the Council of Europe Convention.

From this perspective, it can be argued that despite the important steps made by Directive 2011/36/EU in assisting and supporting victims, the issue of trafficking remains strongly linked to the question of national security and the fight against illegal immigration. As feminist scholar Rutvica Andrijasevic highlights, the difficulty of pursuing a human rights agenda within a securitarian framework, has often been commented upon and has raised issues of whether EU's strategy on human trafficking is contradictory rather than comprehensive (the comprehensive strategy consists of three elements: prosecution, protection and prevention).<sup>219</sup> However, the impact of this new Directive remains to be seen.

In addition to these considerations, it is necessary to highlight that the definition of trafficking proposed by the Trafficking Protocol and adopted by the Council of Europe Convention and the 2011/36/EU Directive, does not clearly define many of the constituent elements of trafficking. Indeed, the definition of the terms "sexual exploitation", "exploitation", "coercion" and so on, is not specified. This lack of definitional clarity, among other things, makes it "virtually impossible to specify who has or has not been "trafficked" into the commercial sex trade becoming embroiled in the more general debate about the rights and wrongs of prostitution".<sup>220</sup>

Furthermore, the definition of trafficking adopted by these legal instruments seems to rely on the idea that there is a neat distinction between involuntary and non-consensual (trafficking) and voluntary and consensual (smuggling) processes of migration. Unfortunately, as discussed in the following chapters, these processes are far more complex and frequently overlap.

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<sup>219</sup> R. Andrijasevic (2011). See also M. H. Chou (2008).

<sup>220</sup> B. Anderson and J. O'Connell Davidson, 2003, p. 7.



## **‘SEX TRAFFICKING’ AND PROSTITUTION/SEX WORK FROM FEMINIST PERSPECTIVES**

“Prostitution itself is violence against women..[there is a] need for asylum and culturally relevant treatment when considering escape or treatment options for those in prostitution”<sup>221</sup>

“Sex work is, on principle, considered legitimate work, not violence. At the same time, it is acknowledged that the illegal status of sex work and its consequences do violate the civil and workers’ rights and integrity of sex workers”<sup>222</sup>

The UN Trafficking Protocol defines trafficking as the movement or recruitment of men, women, and children, using force, fraud, or coercion for the purpose of subjection to involuntary servitude or slavery in a variety of sectors. This definition embodies an effort to move toward a broader vision of the phenomenon which includes many practices and not only sexual exploitation of women, man and children. At the same time, this definition allows states to adopt different policies on prostitution.<sup>223</sup>

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<sup>221</sup> M. Farley and H. Bakan, 1998, p. 406.

<sup>222</sup> I. Vanwesenbeeck, 2001, p. 243.

<sup>223</sup> The ways in which States regulate prostitution can be simplified into three major models: the prohibitionist model, the abolitionist model and the regulationist model. The first model sees prostitution as an immoral activity and wants sanctions for clients and prostitutes; the second distinguishes between voluntary prostitution and forced prostitution, condemning the latter; the third

Negotiations over the UN Trafficking Protocol were dominated by feminist lobbying groups who were particularly concerned with the issue of prostitution. In particular, these feminist groups turned their attention to the issue of whether the definition of ‘trafficking’ should include voluntary prostitution and, at the same time, if prostitution and sex work are activities to which individuals are capable of freely consenting. One main feminist faction was represented by neo-abolitionists that were spearheaded by the Coalition against Trafficking in Women (CATW). Neo-abolitionists argue that prostitution is always a form of exploitation and violence against women that should be abolished and never consented. From this viewpoint, it is prostitution that creates the conditions for trafficking, rather the other way around. On the other side of the UN Protocol debate, there were sex workers’ rights’ advocacies and activists who challenged the idea that all prostitution is forced and intrinsically degrading.<sup>224</sup> This group was headed by the International Human Rights Law Group (IHLRG) with the Global Alliance Against Trafficking in Women (GAATW)<sup>225</sup> and the Asian Women’s Human Rights Council (AWHRC). This configuration of transnational lobby groups called itself the Human Rights Caucus (HRC). Sex workers’ rights’ feminists supported the idea that women can choose to engage in prostitution and, accordingly, they object the criminalisation of prostitution and sex work.<sup>226</sup> In contrast to the neo-abolitionist view, they stressed the distinction between trafficking and prostitution and claimed that ‘sex trafficking’ happens only in those cases involving forced prostitution.

Debate about prostitution is still at centre of feminist discussion and research on trafficking and it strongly affects anti-trafficking policies and advocacy campaigns, which often conflate ‘sex trafficking’ and prostitution<sup>227</sup>. The most evident example of this conflation can be seen in the policy introduced in 2003 by the Bush administration which, following an abolitionist approach, prohibits the use of US funds for programs “that promote, support, or advocacy the legalization or practice of prostitution” and any organization “that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support or advocate the legalization or practice of prostitution.” As feminist jurist Janie Chuang rightly points out, the “power to control the meaning of

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argues that prostitution is a necessary evil that has to be tolerated but also regulated.

<sup>224</sup> See J. Chuang (2010).

<sup>225</sup> Like CATW, IHLRG and GAATW are international NGOs with strong local affiliates throughout the world.

<sup>226</sup> See Alexander P. (1997); NSWP (1994).

<sup>227</sup> The statement of the stipulation, released by US Secretary of State Colin Powell, reads: “Organizations advocating prostitution a sane employment choice or which advocate or support the legalization of prostitution are not appropriate partners for USAID anti-trafficking grants and contracts”. Powell quoted in M. Dittmore, 2005, p. 26.

trafficking is perhaps the greatest of neo-abolitionist gains, through its global influence over how anti-trafficking interventions are constructed and implemented on the ground”.<sup>228</sup> This trend is clearly visible in many European countries where in recent years the abolitionist position has gained dominance promoting discourse on trafficking that simplistically depicts trafficking as involving poor women and girls forced into sexual slavery by ‘bad men’. From this perspective, neo-abolitionists support the extension of state power and in particular of law enforcement – Sweden, for example, has pioneered the outlawing of the purchase of sex and the United Kingdom has sought to criminalize both sex workers and men who buy sex.<sup>229</sup> One of the consequences of intervening with a punitive approach, is that it increases, rather than decreases, the levels of insecurity, risk and vulnerability of those who are involved in sex industry.

The purpose of this chapter is to explore the core elements of the feminist debate on ‘sex trafficking’ developed around the ideological positions of neo-abolitionist feminists and sex workers’ rights feminists. The first part of this chapter is dedicated to examining the meaning of the notion of *agency*, the notion most frequently invoked by feminist scholars, in particular in the debate on prostitution. In particular, firstly I examine the radical feminist critique of the *gendered* character of liberal autonomy and secondly, I explore the ways by which the radical feminist vision of women’s systematic oppression has in turn, been criticised by feminists for not recognising the possibilities of women’s agency. Building upon these critiques, I refer to agency as the capacity to (try to) resist and subvert subjugation, to negotiate or fail to negotiate power and to enact change within a given context of both structural constraints and power relations. In this sense, I do not consider individual agency only in terms of opposition to dominant or oppressive structures but, in line with feminist scholar Saba Mahmood, I would rather highlight the contradictory and conflicting ways in which subjects may negotiate power.<sup>230</sup> Such an approach allows us to go beyond the questions concerning agency or lack thereof, and to focus instead on the different and various social and political practices by which individuals claim and enact agency.

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<sup>228</sup> J. Chuang, 2010, pp. 1655-1656. As Janie Chuang rightly highlights one of the collateral impacts of the anti-prostitution restriction funding has been in the field of HIV/AIDS prevention: “in the HIV/AIDS prevention field, in particular, adopting an explicit prostitution stance compromises the ‘non-judgmental’ attitude required for gaining access to stigmatized - and hence vulnerable populations - such as prostitutes”. J. Chuang, 2010, p. 1713.

<sup>229</sup> This issues is examined in chapter 4.

<sup>230</sup> Saba Mahmood in particular has explored the construction of subjects in relation to oppressive and affirmative power dynamics, highlighting how norms are not only consolidated and/or subverted but “performed, inhabited and experienced in a variety of ways”. See S. Mahmood, 2005, p. 12.



The second part of the chapter examines the ways in which neo-abolitionist feminists and sex workers' rights feminists theorize the issues of prostitution and trafficking. More precisely, drawing on a wide array of ethnographic, sociological and theoretical texts I shall explore the different conceptualizations of women's power, sexuality and consensus of these various feminist standpoints.

For the purpose of this research, as mentioned above, I use the terms prostitute and sex worker to refer to persons who engage in direct paid sexual contract with a client. However, the term 'prostitute' is used here in reference to the feminist theories that reject the word 'sex work'. The term 'sex work' is used instead to refer to those that recognize prostitution as labour.

## **2.1 Exploring the Concept of Agency**

### **2.1.1 Radical Feminist Critiques of Liberalism**

Although liberalism is not a single position but a family of various positions subject to historical changes and cultural variation, it could be said that it is generally characterized, as John Christmas and Joel Anderson point out, by the approach to the "justification of political power developing from the social contract theory of the European Enlightenment, where the authority of the state is seen to rest exclusively on the will of a free and independent citizenry."<sup>231</sup> Central to this perspective is the idea that the interests and choices of the independent and self-determining citizen are fundamental to the specification of justice.<sup>232</sup> It follows that liberalism centrally values the 'autonomy' of individuals and their rationality and claims that government has to treat citizens with *equal* concern and respect.<sup>233</sup> In this sense, liberalism promotes the respect of the liberty of the 'choice', as the exercise of an individual autonomous will.<sup>234</sup> Whether implicitly or explicitly, then, crucial questions raised about the nature and the representative authority of the autonomous agent and about the extent to which the state can legitimately limit individual 'choice' and the extent to which the state must

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<sup>231</sup> J. Christmas and J. Anderson 2005, p. 4.

<sup>232</sup> *Ivi*.

<sup>233</sup> R. Dworkin, (1978).

<sup>234</sup> In Locke's account, "Man being born [...] with a Title to perfect Freedom [...] hath by Nature a Power to preserve [...] to judge [...] to punish". J. Locke (1689)

guarantee and protect an individual right to make a choice.<sup>235</sup> Unfortunately, these issues cannot be fully examined here. My intention, instead, is to focus on the problematic nature of the liberal autonomous subject, in particular on the *gendered* character of liberal autonomy.

The liberal conception of the person as autonomous, self-determining and independent agent has been the object of various critiques that have highlighted how this liberal model presumes a conception of individuals as abstracted from their particular historical, social and political conditions.<sup>236</sup> Communitarians and defenders of identity politics have pointed out that the liberal emphasis on autonomy has obscured the importance of the social and historical differences among people and the relational dynamics that define the identities and values of most people.<sup>237</sup> Marxist and other radical writers have accused liberalism of ignoring the dynamics of economic and social power that establish and dominate society.<sup>238</sup> Postmodernists have criticized the assumptions of a stable and transparent ‘self’ who acts autonomously through rational choices. Feminists and critical race theorists have showed the *gendered* and *racialised* aspect implicit in the liberal conception of autonomy.<sup>239</sup> In particular, feminist scholars have denounced the gendered masculine character of the liberal subject, highlighting that the liberal conception of the person as an autonomous, self-determining and independent agent depends for its sustenance on the *subjection* of those who are considered ‘non-autonomous’, ‘non-self-determining’ and ‘non-independent’ subjects – in particular, women.<sup>240</sup>

In this light, Carole Pateman’s book, *The Sexual Contract*, is very powerful. Focusing on the *contractarian* tradition of liberalism, Pateman highlights that contractarian liberalism has a strong political and conceptual force in contemporary understandings of freedom, agency and power and how it is presupposed in contemporary institutions, including prostitution.<sup>241</sup> Pateman argues that the social contract theory is conventionally thought of as a story about freedom. But, instead, it is

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<sup>235</sup> For overview discussion, see W. Kymlicka (1998).

<sup>236</sup> As Kathy Miriam points out, although not all liberal scholars adopt this stark individualistic view, “however even those philosophers who develop theories of situated autonomy/freedom, often implicitly construe individuals as having the power to have and be affected only by those aspects of that determinateness that an individual ‘decides’ to accept.” K. Miriam, 2005, p. 2.

<sup>237</sup> M. J. Sandel (1982); MacIntyre (1981).

<sup>238</sup> See M. Foucault (1975); W. Brown (1995).

<sup>239</sup> See for an view of liberal feminism see M. Nussbaum (1999). Liberal feminists generally take the core conceptions of liberalism as uncontested started point. In particular, liberal feminists focus on the issues of equality and women’s rights.

<sup>240</sup> See in particular W. Brown (1995).

<sup>241</sup> K. Miriam, 2005, p. 3.

the story of both freedom and domination: men's freedom and women's subordination.<sup>242</sup> As she notes: "women are not party to the original contract through which men transform their natural freedom into the security of freedom. Women are the *subject* of the contract."<sup>243</sup>

As Pateman explains, the social contract creates the 'modern patriarchy' which is defined as a *fraternity patriarchy*.<sup>244</sup> However, when apparently anti-patriarchal contract theorists, like Locke, rejected 'paternal right' as the model for political right, they apparently ignored "a momentous aspect of the paternal power: the fact that a man's power as a father comes after he has exercised the patriarchal right of a man (husband) over a woman (wife)."<sup>245</sup> Patriarchal power comes before paternal power, and contract theorists have focused on the latter, without taking into consideration the former. Accordingly, they have incorporated the 'male sex right' – a man's political right (husband's political right) over a woman's (wife) – into their theories, considering such rights as 'politically irrelevant' and related to the private sphere. According to Pateman, this reveals that even before the theorists conceived the social contract, they tacitly assumed a prior 'sexual contract.' To ignore this latter contract, as Pateman argues, means ignoring half of the original contract: "the original pact is a sexual as well as social contract: it is sexual in the sense of patriarchal – that is, the contract establishes men's political right over women – and also sexual in the sense of establishing orderly access by men to women's bodies."<sup>246</sup>

Pateman highlights how the social/sexual contract appears in real-life contracts in contemporary society. In these contracts what is exchanged is the 'the property in person' – such as the wage-labour contract, the marriage contract, the 'surrogate contract', and the 'prostitution contract'. As Pateman argues, the core of the liberal conception of freedom – the freedom to be left alone – originates from the proprietary concept of the individual.<sup>247</sup> John Locke states that "every man has a property in his own person. This nobody has any right to but himself. The labour of his body, the work

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<sup>242</sup> C. Pateman, 1988, p. 2.

<sup>243</sup> *Ivi* p. 6 [ my emphasis].

<sup>244</sup> *Ivi* p. 3. As Pateman argues, fraternity patriarchy is different both from the traditional patriarchy based on the analogy between paternal power and political power, and from the classical patriarchy, held by Robert Filmer, that considers the procreative power of the father as the origin of political right.

<sup>245</sup> *Ivi* p. 3.

<sup>246</sup> *Ivi* p. 2. As Pateman points out, with the exception of Hobbes, classic contract theorists, consider women as creatures of unlimited desire, incapable of sublimating their passions in the manner of men who are able to develop the sense of justice required to maintain the civil order and support the civil, universal law as citizens. Women are incapable of transcending the contingency, in particular their sexual passion, and directing their reason to the demands of universal order and public advantage.

<sup>247</sup> See C. Pateman (2002).

of his hands, we many say, are properly his”.<sup>248</sup> The individual, defined as the owner of the propriety in his person, is constructed as ‘free’ to sell his capacities through the contract relation in exchange for certain benefits. This exchange presupposes that a person’s capacities are detachable from the person of their ‘owners’. By strongly criticizing this perspective, Pateman argues that the idea that person’s capacities are separable is a powerful political fiction that serves to conceal or naturalize strong disparities of economic, social and political power. In Pateman’s view a person’s powers, talents, capacities and skills (whether sexual, emotional, mental or manual) are not separable, like pieces of property, from their owner. The real transaction in social/sexual contracts is not in fact an exchange but it is a practice of *alienation*. In contracts involving labour power, gestational and sexual services and so on what the worker is offering to his/her employer/boss through contract is his/her situated/embodied autonomy. In other words, what is really offered/sold is not a fictional ‘property’ but a relation of subordination<sup>249</sup>: that means subjection to a master’s command (the boss acquires the right of command over the worker or the husband over the wife). When the commodity refers to a woman’s body, moreover, the (sexual) contract establishes the “male sex right”: male sexual dominance and female subjection.”<sup>250</sup>

Pateman follows the line of radical feminist thinkers, such as Catharine Mackinnon and Andrea Dworkin, who conceive relations of domination and subordination in terms of master/subject relations.<sup>251</sup> For radical feminists (also called ‘dominance’ feminists), male dominance is pervasive and systemic: all men dominate women and all women are subject to men’s domination.<sup>252</sup> From this perspective, differences between men and women are the effects of a system of domination and subordination. As MacKinnon, argues “women/men is a distinction not just of difference, but of power and powerlessness [...] power/powerlessness is the sex difference”.<sup>253</sup>

According to MacKinnon, who is one of the main representative scholars of

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<sup>248</sup> J. Locke (1689), Trad. it. 1993, p. 274.

<sup>249</sup> K. Miriam, 2005, p. 3.

<sup>250</sup> N. Fraser, 1997, p. 226.

<sup>251</sup> It should be noted that Carol Pateman does not define herself a ‘radical feminist’, even if she has declared that her work has been strongly influenced by radical feminism. It is important to say that during the late 1980s and early 1990s, radical feminism gained prominence as an explanation of and response to the oppression of women.

<sup>252</sup> C. MacKinnon, 1989, p. 170.

<sup>253</sup> *Ibidem*

radical feminism,<sup>254</sup> sexuality is the organizing principle of male supremacy. “Sexuality is to feminism”, she argues, “what work is to Marxism.”<sup>255</sup> Work is the “organization of human productive power” and sexuality is “the organization of human desire.”<sup>256</sup> The former creates class and the latter creates gender. In this sense, Mackinnon claims that “[a]s the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its social structure, desire its internal dynamic, gender and family its congealed form.”<sup>257</sup>

In Mackinnon’s view, sex, that is “the sexuality of dominance and submission”, is fundamental in the process of subordinating women to men. The male regime is different from the other forms of oppression because it is sexualised: “Male dominance is sexual. Meaning: men in particular, if not men alone, sexualise hierarchy; gender as one.”<sup>258</sup> Indeed, in male dominant society female sexuality is not only expropriated by men, heterosexual desire itself produces gender subordination by eroticizing dominance and submission as gendered positions.<sup>259</sup> According to MacKinnon, masculinity as mastery and femininity as subordination are constructed through the desire of male supremacy, a desire that eroticises hierarchy. Sexuality is the *eroticization* of male dominance, an eroticization that creates, moulds and enforces gender identity. In this interpretive light, Mackinnon claims that: “[f]eminism is a theory of how the eroticization of dominance and submission creates gender, creates woman and man in the social form in which we know them.”<sup>260</sup> Therefore, every woman’s issue, each violation of women – rape, battery, prostitution, pornography, sexual harassment - devolves upon sexuality.<sup>261</sup>

Since the current system of heterosexuality institutionalizes the sexual male domination and female sexual subordination, MacKinnon claims that:

All Women live in sexual objectification the way fish live in water.

Given the statistical realities, all women live all the time under the

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<sup>254</sup> See C. MacKinnon (1989; 1988).

<sup>255</sup> C. MacKinnon, 1989, p. 4.

<sup>256</sup> W. Brown, 1995, p. 81.

<sup>257</sup> C. MacKinnon, 1989, p. 3.

<sup>258</sup> *Ivi* p. 127

<sup>259</sup> For MacKinnon sexuality «[...]is not confined to that which is done as pleasure in bed or as an ostensible reproductive act [...] Sexuality is conceived as a far broader social phenomenon, as nothing less than the dynamic of sex as social hierarchy, its pleasure the experience of power in its gendered form», *ivi* p. xiii.

<sup>260</sup> C. MacKinnon, 1988, p. 81.

<sup>261</sup> C. MacKinnon, 1989, cit. p. 138.

shadow of the threat of sexual abuse. The question is, what can life as a woman mean, what can sex mean, to targeted survivors in a rape culture?<sup>262</sup>

The liberal conception of a subject capable of ‘freely-acting’ and of exercising meaningful choices in the direction of her own life, with exceptional constraints by society or the state, is replaced in MacKinnon, and in radical feminism, with a “complex political determinism.”<sup>263</sup> For radical feminism, women’s actions are contextualized and situated in a strong system of power and they are responses to, or attempts to respond to, conditions determined by male power.<sup>264</sup> As MacKinnon argues, women live in a situation of systematic oppression and their choices can often (inadvertently) perpetuate existing male dominance and, consequently their subordination. She writes:

Women often find ways to resist male supremacy and to expand their sphere of action. But *they are never free of it*. Women also embrace the standards of women’s place in this regime as “our own” to varying degrees and in varying voices –as affirmation of identity and right to pleasure, in order to be loved and approval and paid, in order just to make it through another day. This, and not inert passivity, is the meaning of being a victim<sup>265</sup>

MacKinnon’s emphasis on the systematic victimization of women has been the object of serious critiques that have stressed the *anti-agency* implications of this perspective. As Kathryn Abrams points out, sometimes MacKinnon describes these anti-agency implications as erroneous interpretation of her thought,<sup>266</sup> sometimes she argues that her emphasis on victimization of women could have a limited effect on the existing and embedded system of female oppression.<sup>267</sup> In this sense, MacKinnon says:

[T]he parade of horrors demonstrating the systematic victimization of women often produces the criticism that for me to say women are victimized reinforces the stereotype that women "are" victims, which

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<sup>262</sup> *Ivi* p. 149.

<sup>263</sup> *Ivi* p. 47. See also C. MacKinnon, 1988, pp. 34-40, where MacKinnon criticizes the liberal premises of the “second wave” feminist and civil rights movements.

<sup>264</sup> *Ivi* p. 47.

<sup>265</sup> *Ivi* p. 138. [my emphasis]

<sup>266</sup> *Ivi* p. 138

<sup>267</sup> K. Abrams, 1995, p. 328.

in turn contributes to their victimization. If this stereotype is a stereotype, it has already been accomplished, and I come after. To those who think "it isn't good for women to think of themselves as victims," and thus seek to deny the reality of their victimization, how can it be good for women to deny what is happening to them? Since when is politics therapy?<sup>268</sup>

### 2.1.2 The 'Complexity' of Agency: Feminist Critiques of Radical Feminism

Radical feminists do offer an important critique of the liberal notion of autonomy that presumes an individual detachable from relations of power. Nevertheless, their theory suggests a vision of male domination of women that is too absolutist to do justice to the complexity and heterogeneity of contemporary cultural politics. In particular, radical feminists promote a restrictive conception of power that reduces power as a whole to a relation of domination over others and further reduces domination as a whole to a master/subject relationship. In so doing, they do not consider how today the structures of dominance and subordination have taken more impersonal and fluid social and cultural forms. As Amy Allen argues, a dyadic master/subject conception of domination promoted by radical feminists is "ill-equipped" to make sense of the complexity of power relations.<sup>269</sup>

By reducing all relations of power to binary oppositions or oppressor/oppressed relations, radical feminists overlook the various ways women can exercise and manifest agency<sup>270</sup> and do not pay attention to the differences between women (in terms of class, race, sexual preference, religion etc.). In this vein, in the introduction to her book, *Pleasure and Danger*, Carole Vance argues that "initially useful as an ideological interruption, this critique [dominance/radical feminism] now shares the same undialectical and simplistic focus on its opposition. Women's actual sexual experience is more complicated, more difficult to grasp, more unsettling [...] The truth is that the rich brew of our experience contains elements of pleasure and oppression, happiness and humiliation".<sup>271</sup> Similarly, postcolonial feminist Lata Mani argues:

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<sup>268</sup> C. MacKinnon, 1988, p. 220

<sup>269</sup> A. Allen (2002).

<sup>270</sup> K. Crenshaw (1991); A. Harris (1990); M. Mahoney (1993).

<sup>271</sup> C. Vance, 1989, p. 6

The discourse of women as victims has been invaluable to feminism in pointing to the systematic character of gender domination. But if not employed with care, or in conjunction with a dynamic concept of agency, it leaves us with reductive representations of women as primarily beings who are passive and acted upon [...] [It is important] to engage simultaneously with women's systematic subordination and the ways in which they negotiate oppressive, even determining, social conditions [...] [and to begin] from conviction that structure of domination are best understood if we can grasp how we remain *agents* even in the moments in which we are being intimately, viciously oppressed.<sup>272</sup>

Focusing on the significant importance of the concept of agency and its complexity, postcolonial feminists<sup>273</sup> and black feminists<sup>274</sup> have put forward interesting critiques of radical feminism. Crucial in this regard is the theoretical contribution offered by black feminist scholar Angela Harris. In her brilliant article of 1990, *Race and Essentialism in Feminist Legal Theory*, Angela Harris claims that radical feminist theory, especially MacKinnon's work, has relied on what she called 'gender essentialism', a tendency to find women's commonality in their shared victimization by men considering women's experiences independently of race, class, sexual orientation and other realities experiences. According to Harris, by trying to speak for all women Mackinnon's analysis universalizes the experiences of white women and ends up silencing the experiences of those who have traditionally been marginalized, women of colour. Furthermore, Harris argues that the idea that women's commonality lies in their unifying victimization directly reflects a "male supremacist thinking"<sup>275</sup> that portrays women as passive victims incapable of transformative actions. This portrait obscures

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<sup>272</sup> See S. Andermahr *et al.* (2000) [my emphasis]

<sup>273</sup> See C. T. Mohanty (2004); C. Sandoval (2000); G. Spivak (1988). Moreover, the concept of agency has been deeply explored in the early works of anti-colonial thinkers such as Fanon and Memmi and the later subaltern historiography of scholars like D. Chakrabarty (2000) and R. Guha (1988). As Geeta Chowdhry and Shelia Nair point out, in Fanon and Memmi's work, agency is conceptualized as "recovery", more precisely "recovery of self" G. Chowdhry and S. Nair (2002). This recovery entails political struggle and liberation from political rule, and the search for cultural identity, an identity that has been systematically degraded and denied by the colonizers. F. Fanon (1965); A. Memmi (1965). The project of the subaltern school is to push into the foreground the voices, histories, locations, struggles and movements of the oppressed and marginalized, challenging nationalism's exclusions and address its complications with capital. See D. Chakrabarty (2000) R. Guha (1988).

<sup>274</sup> A. Harris (1990); K. Crenshaw (1991). See also P. H. Collins (2000).

<sup>275</sup> b. hooks, 2000, p. 45.



the ways in which women can be the *oppressed* as well as the *oppressors*<sup>276</sup> and erases the different choices of women and their ability to define and change their own life experiences. Speaking of this, Harris says:

This story of woman as victims is meant to encourage solidarity by emphasizing women's shared oppression, thus denying or minimizing difference. [...] Moreover, the story of woman as passive victim denies the ability of women to shape their own lives, whether for better or worse. It also may thwart their abilities. [...] Women who rely on their victimization to define themselves may be reluctant to let it go and create their own self-definitions<sup>277</sup>

Harris stresses the necessity of considering the complexity of the process of individual identification (or dis-identification), highlighting the different, sometimes contradictory, parts of the self that constitute the single personality.<sup>278</sup> In her view, a women's agency should be considered as an effect of a complex and conflicting mediation between personal experiences, external influences and contingent events.

In this respect, the well known concept of *intersectionality* appears extremely valuable and useful. This concept has been introduced by feminist and critical race theorist Kimberly Crenshaw in 1989 to refer to the various ways in which class, race, gender, sexuality and other axes of identity interact shaping the multiple dimensions of women's subjectivities and experiences.<sup>279</sup> The notion of intersectionality indicates that oppression can not be reduced to one fundamental type of violation but that different forms of oppression, such as racism, sexism, classism, homophobia and other forms of oppression, act *simultaneously* producing multiple forms of discrimination and injustice. As Crenshaw argues, intersectionality offers a way of negotiating the differences among us and the means through which these differences can find expression.<sup>280</sup> In this sense, as Nash rightly notes, the merit of intersectionality is not only that it "furnishes a particularly adept tool for capturing and theorizing the simultaneity of race and gender as social processes" but also that by showing differences it mediates "the tension between the assertion of multiple identities and the ongoing necessity of group

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<sup>276</sup> Many feminists have stressed that the view of women as victims of sexualized domination often obscures the ways white women have used their race privilege against women of color. See, in particular, the work by a white feminist M. Mahoney, 1993,

<sup>277</sup> A. Harris, 1990, p. 613.

<sup>278</sup> Angela Harris uses in particular the term «multiple consciousness», see *ivi* p. 584.

<sup>279</sup> K. Crenshaw (1991).

<sup>280</sup> *Ivi*

politics.<sup>281</sup>

The issue of multiple identities and of simultaneity of oppression has been carefully addressed by postcolonial feminists. Challenging the assumption that all women, across race, class and nationality lines, constitute socially an homogeneous group on the basis of shared oppression, feminist postcolonial theory has shown the complexities of women's experiences by suggesting a fundamental reconceptualization of the dominant categories of analysis so that women's differences can be historically specified and considered as part of a larger political project.<sup>282</sup> Crucial in this regard is the well-known theoretical contribution offered by postcolonial scholar Chandra Tapalde Mohanty. At the core of Mohanty's analysis resides a sustained critique of the mainstream Western feminist representation of women in the Third World which is located in a universal and an historical context. Third World women as a group or category are automatically represented as ignorant, poor, uneducated, religious, tradition-bound, victimized etc. in contrast to the (implicit) self-representation of Western women as educated, modern and having control of their own bodies. This image of an "average Third World woman" leads to the construction of a reductive and homogeneous vision of non-western women erasing the pluralities of the simultaneous location of different groups of women in social class and ethnic contexts; thus it ultimately robs them of their historical and political agency.<sup>283</sup>

By highlighting the idea of multiple, fluid structures of domination that intersect to locate women differently in particular spatial and temporal context, Mohanty insists on the dynamic of 'oppositional agency' of individuals and collectives and their engagement in 'daily life'. Mohanty uses the term 'oppositional agency' to indicate the different ways women resist and act to recuperate power (even re-installing and intensifying hierarchies among women) in circumstances of structural constraint.<sup>284</sup> It is

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<sup>281</sup> J. Nash (2008).

<sup>282</sup> See C. T. Mohanty (2004); C. Sandoval (2000); G. Spivak (1994).

<sup>283</sup> Adrienne Rich has developed what she calls the "politics of locations" from a strong critique to the classic V. Woolf, *The Three Ghinees*, in particular Woolf's famous sentence "...". The concept of *location* introduced in the mid-1980 by Adrienne Rich and has been object of several specifications, reformulation and modifications. From this perspective, as postcolonial feminists points out, special attention should be devoted to the concept of *location*. Considering location means collocating women's experiences in time and space. Thus, it means taking into account the different positions that individuals occupy in relation to hierarchically relations of power. Location is marked by a complex intersecting of social determinants such as race, ethnicity, class, gender, sexual preferences, religion and etc.. And all these axes of differentiation shape and determine the process of subject formation. As Adrienne Rich points out, the politics of location invites to abandon the arrogance of a gaze that pretends to know and understand everything and asks us to take into consideration the different social positions and the contingency of the point of views.

<sup>284</sup> C. T. Mohanty (2004); C. T. Mohanty, A Russo and L. Torres (1991).

this focus on dynamic oppositional agency that, according to Mohanty, reveals the intricate connection between systemic relationships and the directionality of power.

The issue of the simultaneous process of resistance and recuperation of power of the subjects has been also analyzed by poststructuralist feminist Judith Butler. In particular, drawing on Michel Foucault's insights on power, Butler focuses on what Foucault calls the paradox of subjectivation: the dynamics and conditions of power that secure a subject's subordination are also the means through which she/he becomes a self-conscious identity and agency.<sup>285</sup> Such a perspective on power and subject formation lets us look at agency not only as a synonym of resistance to relations of domination, but also as a capacity for action created by the specific relations of power.

In this interpretative light, Butler asks a key question: "If power works not merely to dominate or oppress existing subjects, but also forms subjects, what is this formation?"<sup>286</sup> Combining the Foucauldian analysis of the subject with psychoanalytic theory – in particular adopting Lacanian notions of 'foreclosure' and 'abjection'<sup>287</sup> – Butler argues that the subject is simultaneously produced through a necessary repudiation of identities, forms of subjectivities and discursive logics which are part of all that is 'unspeakable' and 'unintelligible' from the perspective of the subject but that are fundamental to the subject's self-comprehension. This process is performatively and reiteratively enacted, in the sense that "the subject who speaks within the sphere of the speakable implicitly reinvokes the foreclosure on which it depends and, thus, depends on it again".<sup>288</sup> In particular, by paying attention to sex/gender distinction, Butler argues that the subject in her sexed and gendered materiality is constituted performatively through a reiterated enactment of heterosexual norms. As Butler has pointed out, her analysis of performativity constitutes a theory of agency.<sup>289</sup>

Therefore, by contrasting a long tradition of feminist scholarship that view norms as an external social imposition that constrain the individual, Butler invites us to reconsider this external-internal opposition by arguing that social norms are necessary for the subject to realize and enact her agency. However, as poststructuralist and postcolonial feminist Saba Mahmood rightly notes, although Butler's conception of agency is very compelling it tends to remain grounded in an agonistic framework "one

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<sup>285</sup> M. Foucault (1973, 1976); J. Butler (1993, 1997).

<sup>286</sup> J. Butler (1997).

<sup>287</sup> Judith Butler uses these notions to highlight certain exclusionary process that she considers necessary to subject formation.

<sup>288</sup> J. Butler, 1997, pp. 139-40.

<sup>289</sup> J. Butler, 1999, xxiv.

in which norms suppress and/or subverted, are reiterated and/or re-signified – so that one gets littler sense of the work norms perform beyond this register of suppression and subversion within the constitution of the subject”.<sup>290</sup> Indeed, as Mahmood highlights, individual agency is entailed not only in those acts that consolidate and/or subvert norms but also in the multiple ways in which one inhabits and experiences norms.<sup>291</sup>

Informed by these critical feminist scholars – in particular by Mahmood’s theoretical contributions – which have brought to light the complexity of individual experiences in relation to both oppressive and affirmative power dynamics and consequently, the complexity of individual agency, I argue that is useful to look at the issue of agency beyond the oppression/resistance framework. Such an approach, as discussed in the following pages, lets us consider women’s agency beyond the question concerning agency or lack thereof <sup>292</sup> and focus instead on the different and various social and political practices by which women claim and enact agency. In this view, as sex workers’ rights feminists point out, the issue of women’s agency in the sex industry should be examined by contemplating the different, often contradictory and conflicting, ways in which women respond, negotiate or try to negotiate power relations and discourse.<sup>293</sup> Adopting such a perspective does not imply a romanticization of individual autonomy, since the ambivalence of subjective practices and behaviour, as well as the complex mediation between personal experiences, external influences and contingent events are kept in mind.

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<sup>290</sup> S. Mahmood, 2005, p. 22.

<sup>291</sup> *Ivi* p. 15.

<sup>292</sup> As Giulia Garofalo says “this debate on agency strike me for its absurdity and resemblance to the legendary medieval disquisition on the existence of women’s soul”. See G. Garofalo (2007).

<sup>293</sup> A. Giddens (1984) and P. Bourdieu (1977) are particularly interesting here.

## 2.2 ‘Neo-Abolitionist’ Feminist Perspectives

### 2.2.1 Prostitution as a Construction of Male Power

The radical feminist conception of agency and power informs the arguments of so-called neo-abolitionist feminists. Perceiving prostitution as inherently degrading and exploitative, ‘neo-abolitionist’ feminists have strategically adopted the label ‘abolitionist’ in an effort to invoke an analogy to nineteenth century movement to abolish the trans-Atlantic slave trade.<sup>294</sup> Moreover, the label ‘abolitionist’ revives early nineteenth-century feminist campaign and rhetoric to combat ‘white slavery,’ which initially referred to the system of licensed prostitution that existed throughout much of Europe and parts of the United States.<sup>295</sup> These early feminists, called ‘white slavery abolitionists’, of whom Josephine Butler is most renowned, argued that “government-licensed prostitution institutionalized the oppression and corruption of women and was not successful in stemming the spread of venereal disease.”<sup>296</sup> But, the term ‘white slavery’ soon became synonymous with all prostitution,<sup>297</sup> and as a consequence the abolitionist movement against state regulation of prostitution became a broader “social purity crusade to abolish prostitution”.<sup>298</sup> Thus, by sharing conservative attitudes towards women’s sexuality and stressing the link between prostitution and discriminated racial minorities, the abolitionist movement focused its attention on the “‘trafficking’ of women from Europe and North America for the purpose of prostitution” by foreign or immigrant males in the colonial regions in Asia, Africa and South America.<sup>299</sup> Although, as Nadelmann argues, the ‘white slavery’ phenomenon was “smaller than popularly depicted”,<sup>300</sup> the movement led to series of international laws on ‘white slavery’ and ‘trafficking’, in particular the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. However, the 1949 Convention, as we saw in the previous chapter, had little impact: few states signed it and the treaty lacked an effective mechanism to monitor states.<sup>301</sup>

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<sup>294</sup> J. Chuang, 2010, p. 1666

<sup>295</sup> E. A. Nadelmann, (1990). The anti-slavery movement initially targeted state licensing prostitution and not prostitution itself.

<sup>296</sup> *Ivi* p. 515.

<sup>297</sup> J. Chuang, 2010, p. 1666. The issue of ‘white slavery’ is examined in chapter 3.

<sup>298</sup> *Ivi* p. 515

<sup>299</sup> D. Otto, 2006, pp. 318-324.

<sup>300</sup> E. A. Nadelmann, 1990, p. 514.

<sup>301</sup> L. Reanda, 1991, p. 210.

Modern-day abolitionists have revived abolitionist campaigns and rhetoric, addressing prostitution at a global level. For neo-abolitionists, prostitution is damaging for all women since if one woman is a prostitute, all women could be potentially considered and treated as prostitutes.<sup>302</sup> Leading thinkers from the neo-abolitionist camp are radical feminists Catharine Mackinnon, Kathleen Barry, Sheila Jeffreys and Janice Raymond. They view prostitution as the central plank of male dominance, something that not just involves but also legitimates the violation of a human being.

For Mackinnon, as seen above, sexuality is not only socially constructed but is constructive of the political system of male regime. As she claims “what is called sexuality is the dynamic of control by which male dominance [...] eroticizes and thus defines man and woman, gender identity and sexual pleasure. It also that which maintains and defines male supremacy as a political system.”<sup>303</sup> In this view, every feminist issue and every injustice suffered by women is part of this pervasive understanding of sexuality. Therefore, prostitution as well as rape, incest, sexual harassment and pornography are not primarily ‘crimes of violence’, although they are also that. Rather, “[t]hey are abuses of women, they are abuses of sex”.<sup>304</sup> Prostitution is one of the most potent and tangible vehicle of women’s submission in contemporary society.<sup>305</sup> Like pornography, prostitution “institutionalizes the sexuality of male supremacy.”

Following on the path blazed by Mackinnon, Pateman points out that the history of sexual contracts helps us to understand the dynamics and mechanisms through which men claim the right of sexual access to and the right of command over women’s bodies.<sup>306</sup> Problematizing the boundary between private and public spheres, Pateman highlights that patriarchal rights are not only relegated to the private sphere but that they are continuously renewed and reaffirmed in the public realm through the mechanism of contract.<sup>307</sup> The most tragic example of this public aspect of patriarchal rights is the fact that men can buy sexual access to women’s bodies in the capitalist market. In this sense, Pateman points out that prostitution is an “integral part of patriarchal capitalism”,<sup>308</sup> prostitution is a commercial manifestation of the sexual contract.

Pateman argues that in prostitution, as in the employment contract, a powerful

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<sup>302</sup> S. Jeffreys, 1997, pp. 239, 319.

<sup>303</sup> C. MacKinnon, 1989, p. 137.

<sup>304</sup> *Ivi* p. 113.

<sup>305</sup> C. MacKinnon, 1993, p. 13.

<sup>306</sup> C. Pateman, 1988, p. 17.

<sup>307</sup> *Ivi* p. 114

<sup>308</sup> *Ivi* p. 189.

‘political fiction’ masks the fact that a person’s capacities are not detachable from the embodied persons. With respect to prostitution, the central political fiction is the idea that women can sell ‘sexual services’ for money as if sexuality is not embodied, as if there exists a subject who is capable of severing the integrity of the body and the self, something that would have grave psychological consequences. According to Pateman, this “conjuring trick” called “sexual services” obscures the fact that prostitution contract establishes a master/subject relation<sup>309</sup> in which men command female bodies. Prostitution implies the patriarchal meanings of masculinity as sexual mastery and femininity as sexual subjection. It institutionalizes a master/subject relation in which women are subjects to men’s commands and there is no space for women’s autonomy and agency. In other words, prostitution legitimizes and establishes ‘male sex-right’

The employment contract gives the employer right of command over the use of the worker’s labour, that is to say, over the self, person and body of the worker during the period set down in the employment contract. Similarly the services of the prostitutes cannot be provided unless she is present: property in the person, unlike material property, cannot be separated from its owner<sup>310</sup>

In her interesting article, *What is Wrong with Prostitution?*, Christine Overall considers what makes prostitution worse than other forms of paid labour in capitalist society, such as “cooking, secretarial service or professional work”<sup>311</sup>. Indeed, she says:

Assuming that all labour now occurs within the constraints of capitalist exchange, I am asking the deliberately essentialist question of whether there is anything inherent in sex work as practiced today that renders it inevitably morally problematic in a way that other forms of work are not, and whether it is possible to change sex work in such a way as to overcome those moral objections<sup>312</sup>

Objecting to the idea that women cannot ‘choose’ to work in the sex market, Overall claims that what makes prostitution different from the other forms of work is the fact that prostitution is not equally open to men. Prostitution is the only form of

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<sup>309</sup> N. Fraser (1997).

<sup>310</sup> *Ivi* p. 203.

<sup>311</sup> C. Overall, 1992, p. 709.

<sup>312</sup> *Ivi* p. 183.

labour constructed from oppression of women and by male dominance. Therefore, what is bad about prostitution is not just the sexual exchange itself but the fact that prostitution is “women’s servicing of men’s sexual needs under capitalist and patriarchal conditions.”<sup>313</sup> Capitalistic and patriarchal conditions do not construct sex work an exchange of benefits between equals. Rather, they construct the buying of sexual services as a benefit for men.

Thus, according to Overall, what characterizes prostitution is its *irreversibility*. As a consequence sexual equality in prostitution is therefore unattainable.<sup>314</sup> Though a lot of other exploitive service jobs, in which women similarly serve men - such as office work, cooking, cleaning and child care - can be (and must be) performed by men, prostitution is not similarly reversible. Overall does not argue that it is empirically implausible for men working as prostitutes but, rather, that this is impossible to consider prostitution as an equal opportunity service equally available to both women and men, as workers and as clients. Indeed, unlike other forms of labour mostly performed by women, prostitution is a political construction arising from male dominance and it is structured in terms of a power imbalance in which “women, the less powerful, sell to men, the more powerful.”<sup>315</sup> As Overall argues, prostitution is an unequal practice constructed by the intersection of capitalism and patriarchy.

Drawing on Overall’s work but paying greater attention to the profound bodily experience of women involved in prostitution, Sheila Jeffreys asserts that prostitution is distinguished from other kinds of work because it arises from the political system of creating ‘manhood’. Men’s use of women in prostitution confirms the hierarchy between the superior class of men and the subordinate class of women, based upon their biological sex and through their sexuality. It is because of this political significance, as Jeffreys stresses, that prostitution “endangers women’s lives, and causes the physical and emotional damage that women suffer from abusive johns, pimps, male passers-by.”<sup>316</sup> Prostitution is a form of violence against women because it ignores the pleasure and the personhood of the woman whose body is used. To endure this violence, women disassociate themselves emotionally from their bodies. Jeffreys argues that the prostitute feels “as if she is moving through life inside a boil or clothed head to toe in a rash.”<sup>317</sup> In this view, defence mechanisms against the violence of prostitution are ineffective.

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<sup>313</sup> *Ivi* p. 724.

<sup>314</sup> *Ibidem*

<sup>315</sup> *Ivi* p. 721.

<sup>316</sup> *Ivi* p. 195.

<sup>317</sup> S. Jeffreys, 1997, p. 108.



By describing women in prostitution as object appropriated by men - and thus as subjects unable to exercise agency, Jeffreys, like other neo-abolitionist feminists, does not recognize the variety of ways women can experience and deal with sexuality and with sex work. In neo-abolitionist's view, there is "no room for the working prostitute as an active subject, however constrained."<sup>318</sup> As O'Connell Davidson notes, neo-abolitionist feminists consider that by "requiring a woman to temporarily fix herself as an object, prostitution permanently, completely and literally extinguishes her as a subject".<sup>319</sup>

### 2.2.2 Consensual Dilemmas

In the 1980s the language of 'choice' was introduced by many prostitutes' rights advocates, such as Call Off Your Old Tired Ethics (COYOTE). This language has been strongly attacked by neo-abolitionist feminists who criticize its liberal ideology. For neo-abolitionists, women do not consent to prostitution; women are in prostitution because men choose to buy them for sex. Choice and consent are not possible because prostitution is the systematic practice of sexual exploitation. As a consequence, women who (believe they) choose prostitution suffer from a 'false consciousness', or the inability to recognize their own oppression. As Dorchen Leidholdt argues "just as prostitution isn't about individuals, it isn't about choice. Instead, prostitution is about the absence of meaningful choices"<sup>320</sup>. In this vein, Mackinnon asks: "if prostitution is a free choice, why are women with the fewest choices the ones most often found doing it?"<sup>321</sup>

In her interesting work, *Sexual and Reproductive Liberalism*, Janice Raymond critically explores the reasons why many feminist theorists and activists have started to use the rhetoric of a woman's 'right to choose' investing an old, liberal discourse regarding choice with new feminist arguments.<sup>322</sup> As Raymond notes, previously most feminists agreed that women's choices were constructed, constrained and limited by patriarchal power. Then, some feminists started to talk about the importance of seeing

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<sup>318</sup> C. Wolkowitz, 2006, p. 127.

<sup>319</sup> J. O'Connell Davidson, J. (2002).

<sup>320</sup> D. Leidholdt, 1993, p. 136.

<sup>321</sup> C. MacKinnon, 1993, p. 15.

<sup>322</sup> J. Raymond, 1990, p. 105

women as agents and not as victims – i.e. in pornography. According to Raymond, this shift was the result of some women starting to gain benefits from male dominant society:

More women went to graduate and professional schools, grew ‘smarter’, were admitted to the bar, went into the academy and became experts in all sorts of fields. They partook of the power that the male god had created and ‘saw that it was good’<sup>323</sup>

For Raymond it is strongly problematic to see women’s agency in situations in which women opt into oppressive institutions that are based on male dominance. She points out that to talk about the victimization of women in the sex industry, or in other male dominant institution, does not mean to deny the victim’s agency. Rather, it means to look for women's agency in very different places: in women’s resistance to oppressive institutions, and not in women’s conformity to them.<sup>324</sup> In a similar vein, scholar and activist Sheila Jeffreys notes that pro-prostitution feminists see women as agents when they opt into oppressive institutions but they do not consider the agency of those women who resist oppression, and struggle against exploitation.<sup>325</sup>

As Raymond argues, neo-abolitionist feminists do not deny that some women do consent to their own exploitation. This can happen. But, what neo-abolitionists stress is that consent is not the issue. The issue is the exploitation and violence done to the women. Women who consent are still subject to violence and exploitation. In this view, Raymond draws a parallel with the issue of consent in cases of domestic violence:

When feminists first began to talk about battering, and domestic violence, people including the police used to say that if a battered woman consents to stay with her batterer, there was nothing they could or should do. It was her choice. Now, of course, we can arrest, prosecute and punish a batter regardless of whether a battered woman consents.

According to neo-abolitionist feminists, what happens in the case of domestic violence is similar to the situation that women face with prostitution. Women in prostitution allegedly consent but in most cases it is not consent but a *survival strategy*.

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<sup>323</sup> *Ivi* p. 103.

<sup>324</sup> A. Miles, 2004, p. 28.

<sup>325</sup> S. Jeffreys, 1997, p. 144.

Therefore, governments should not legalize or decriminalize the institution and individuals, such as pimps and ‘customers’ who perpetrate violence and exploit women. Governments should prosecute the perpetrators, even if women give consent which, most of the time, is a compliance.<sup>326</sup>

In this light, Kathleen Barry, founder of the neo-abolitionist Coalition Against Trafficking in Women (CATW), argues that it is useless to consider ‘choice’ in explaining prostitution because prostitution is not about or for women, but *for men*. It is irrelevant how and why women get into the male consumer market.<sup>327</sup> And it does not matter whether women claim the right or choice to prostitute themselves or if they see themselves as victims. Consent cannot determine or identify *oppression*.<sup>328</sup> As Barry explains, consent is not a very effective indicator of freedom – neither can its absence be the principal way of determining the existence of forms of exploitation – since even in slavery there was some degree of consent – if consent is defined as the impossibility of an alternative:

If, for example, consent was the criterion for determining whether or not slavery is a violation of human dignity and rights, slavery would not have been recognized as a violation because an important element of slavery is the acceptance of their condition by many slaves. So deeply is the self-hatred of racism and sexism encoded.<sup>329</sup>

According to Barry, the liberal construction of consent has reduced the feminist analysis of oppression to a matter of individual wrongs and accordingly it has led feminism to an individualistic ethic. Indeed, feminists who define prostitution in terms of consent, shift the issue of oppression from being a female class condition to one of the personal choices of the individual. Such an approach ignores “how sex is used, how it is experienced and how it is constructed into power.”<sup>330</sup> In other words, the emphasis on the ability to exercise individual autonomy and agency will hide the real effects of women’s multi-layered oppression. In Barry’s view, the ideology of consent has made feminists reluctant to see prostitution as a form of sexual violence. It has falsely distinguished prostitution from rape, legally and socially.<sup>331</sup>

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<sup>326</sup> A. Miles, 2004, p. 32.

<sup>327</sup> K. Barry (1995).

<sup>328</sup> See S. Jeffreys (1993); D. Russell (1990).

<sup>329</sup> K. Barry, 1995, p. 66.

<sup>330</sup> *Ivi* p. 89.

<sup>331</sup> *Ivi* p. 90.

But if prostitution and rape are the same, what is then the difference between prostitution and rape?

According to Barry, in the prostitution worlds what distinguishes between rape and prostitution is not the act itself but the payment of money. However, in reality there is little difference. As Barry explains, “prostitution is sex *bought* on men’s terms. Rape is sex *taken* on men’s terms”.<sup>332</sup> Both prostitution and rape are constructions of male sexual power in sustaining the subordination of women. In this sense, Barry claims that “when a prostitute woman tries to assert sex divorced from rape, she defies on instance of sexual power – rape – to be subordinated in another instance – prostitution”.<sup>333</sup>

By taking a distance from this position, feminist sociologist Julia O’Connell Davidson (who does not define herself a pro-prostitution) highlights the need to distinguish between prostitution and rape. More precisely, O’Connell Davidson criticizes the conception of prostitution as “a straightforward expression of patriarchal domination,”<sup>334</sup> arguing that it reduces prostitution to one of social/power relations and consequently elides any difference between rape and prostitution. O’Connell Davidson points out that it is necessary to distinguish prostitution as a practice characterized by a *contracted relation* from rape as the act “of being taken by force”. Although she recognizes that the contract in prostitution is *fictional* – prostitution is not a genuinely voluntary exchange – she claims this *fiction* is important to the specific social relations that characterize prostitute’s relationship with a john, pimp, etc.. In other words, this fiction is important to the degrees of agency that women exercise in this relationship, even if as O’Connell Davidson notes this agency means degrees of control over one’s lack of freedom.<sup>335</sup>

Furthermore, O’Connell Davidson rightly argues that to assert that rape and prostitution are the same thing can be politically and legally dangerous. In fact, if prostitution is the same as rape this implies that women who work in prostitution renounce their physical and moral integrity and consequently they may run the risk of being punished (by being raped). Unfortunately, as many cases demonstrate, this perspective is often adopted by political and legal discourse. In consideration of this, it is worth mentioning that in Italy, in 2009, the Court of Appeals of Rome issued a ruling declaring that the rape of a sex worker is less punishable than the rape of a woman who

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<sup>332</sup> *Ivi* p. 37 [my emphasis].

<sup>333</sup> *Ibidem*

<sup>334</sup> J. O’Connell Davidson, 1998, p. 120

<sup>335</sup> *Ivi* p. 102.

has not chosen to be a prostitute.<sup>336</sup> The principal idea behind this sentence was that sex workers, by choosing to “work on the street, renounce their physical and moral integrity.” The sentence, thus, implies different punishments for two kinds of rape. There are rapes of “series A” which have to be strongly punished, and then there are those of “series B” which require less punishment because the victim’s moral transgression or behaviour encourages sexual violence.

Although O’Connell Davidson shares with radical feminists a common phenomenological view that considers the body as an integral part of the self (“to contract out sexual use of the body requires the woman to sever the integrity of body and self, something that carries grave psychological consequences”<sup>337</sup>) she conceptualizes the relations between client and prostitute in less totalizing terms. For O’Connell Davidson, it is important to pay attention to the different ways through which women working in prostitution exercise power in their relations with clients. Women’s capacity to deploy power depends on the conditions of their work and, at the same, on ‘race’, class etc..<sup>338</sup> From this perspective, O’Connell Davidson argues that male dominance persists today even in the absence of a ‘dyadic model’ that involves the ‘authoritative will of superior’, a man, over his female subordinate(s). This model is too absolutist to give justice to the complexity and heterogeneity of the possible connections between gender, sexuality, political community and prostitution.<sup>339</sup> In a similar vein, political philosopher Nancy Fraser asserts: “[G]ender inequality is today being transformed by a shift from dyadic relations of mastery and subjection to more impersonal structural mechanisms that are lived through more fluid cultural forms.”<sup>340</sup>

### **2.2.3 Banning Prostitution to Prevent ‘Sex Trafficking’**

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<sup>336</sup> See L. Palumbo (2009).

<sup>337</sup> J. O’Connell Davidson, 2002, p. 87.

<sup>338</sup> On the basis of these considerations, in contrast to radical feminists O’Connell Davidson supports the decriminalization of prostitution, but she does not defend prostitution as an institution.

<sup>339</sup> J. O’Connell Davidson, 1998, pp. 169-170.

<sup>340</sup> N. Fraser, 1997, pp. 234-235. A. Allen, 2001, p. 515.

According to neo-abolitionist feminists, the economic ideology of neo-liberalism combined with sexual liberalism – which sees prostitution as a form of ‘freedom’ – has enabled the sex industry to be legalized and normalized, and to be developed as market opportunities for both domestic and global economies. As a result of these trends, women and girls have been “trafficked into all forms of the sex industry, brothel, street and escort prostitution, strip clubs, pornography, military prostitution and prostitution tourism sites.”<sup>341</sup> Trafficking of women and girls into debt bondage has become “the main method of supply for national and international sex industries”.<sup>342</sup> In other words, as neo-abolitionist feminist Dorchen Leidholdt argues, ‘sex trafficking’ has become globalised prostitution:

Sex industry profiteers transport girls and women across national and regional borders and ‘turn them out’ into prostitution in locations in which their victims are least able to resist and where there is the greatest demand for them. The demand is greatest in countries with organized women’s movements, where the status of women is high and there are relatively few local women available for commercial sexual exploitation.<sup>343</sup>

For neo-abolitionists, ‘sex trafficking’ is a problem of *supply* and *demand*: is due to the low status of women and supported by the demand from men “to use prostituted women”. While the main forces creating the supply of women are poverty, histories of abuse and small or civil wars, the main factors that lead to an increase in the male demand for sex of prostitution are sex tourism and military prostitution. As Jeffreys explains, massive prostitution industries have developed in response to the large US military presence in Saigon, Thailand and Philippines, and as a result of this trend local prostitution has increased.<sup>344</sup>

Though trafficking takes place for a variety of purposes, according to neo-abolitionists the main cause of trafficking is prostitution; it is prostitution that creates the demand for trafficking. The majority of victims are women and the vast majority of these women are trafficked in prostitution. Prostitution and trafficking are then strongly

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<sup>341</sup> S. Jeffreys, 2009, p. 152.

<sup>342</sup> *Ivi* p. 152.

<sup>343</sup> D. Leidholdt, 2003, pp. 177

<sup>344</sup> S. Jeffreys, 1997, p. 339.

connected; they are the same human rights ‘human rights catastrophe’.<sup>345</sup> Both are part of a system of male domination based on violence against women and girls.<sup>346</sup> Therefore, in neo-abolitionists’ view, any attempt to differentiate between prostitution and trafficking is a deliberate political strategy aimed at supporting the sex industry and protecting its growth and profitability.<sup>347</sup>

By highlighting the relation of domination and subordination that characterizes trafficking, neo-abolitionist feminists define trafficking as a form ‘sexual slavery’. As Jeffreys points out, trafficked girls experience a great deal of coercion and abuse from those who organize their travel and their work. They are kidnapped, tricked or clearly forced. “They are owned and controlled”. Some trafficked women, as she explains, can be recruited without coercion, but they do not know the degree of force and control that will be exercised over their traffickers. In any case, what characterizes both these groups of women is the debt bondage which creates profit from the practice of trafficking.<sup>348</sup> Debt bondage, as Jeffreys explains, is defined as a contemporary form of slavery by the 1956 Supplementary Convention on the Abolition of Slavery, which “acts to ban debt bondage, serfdom, servile marriage, child servitude”. In particular, the Convention defines debt bondage as:

[...] the status or condition arising from the pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and the nature of those services are not respectively limited and defined<sup>349</sup>

Therefore, in neo-abolitionists’ view, the term ‘sexual slavery’ expresses the condition of slavery, defined by United Nations Slavery Convention, combined with the sexual violence that is prostitution. In this respect, neo-abolitionists strongly criticize sex workers’ rights feminists and activists, who portray trafficking in women as a form of ‘migration for labour’ connecting the experiences of trafficked persons to that of smuggled and voluntary economic migrants. This approach, as Jeffreys asserts, does not pay attention to the *embodied* experiences of trafficked women. In particular, it ignores

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<sup>345</sup> D. Leidholdt (2003).

<sup>346</sup> *Ivi.*

<sup>347</sup> *Ivi.*

<sup>348</sup> S. Jeffreys (2009).

<sup>349</sup> United Nation Slavery Convention 1956, Article 1.

the fact that trafficked women are held in debt bondage, usually under coercive control, subject to violence and abuse and suffer psychological trauma, pain, unwanted pregnancies and abortions, sexually transmitted diseases and HIV/AIDS. All this, according to neo-abolitionist feminists, makes trafficked women's experiences very different from smuggling and voluntary migration.

By paying attention to the physical and psychological harm that women experience in trafficking, Melissa Farley stresses that many studies of prostitutes and trafficked women have demonstrated that these women experience psychological and physical health problems such as post traumatic stress disorder, severe depression, damage to their reproductive systems, damage from assault and beatings, and sexually transmitted diseases.<sup>350</sup> Indeed, women are often raped by pimps and their friends. And from the rapes by pimps and the ordinary sexual use by clients, women often suffer infections and trauma, and they often become infected with AIDS/HIV.<sup>351</sup>

On the basis of these considerations, Farley strongly accuses 'postmodern' discourse on prostitution/trafficking of helping to keep the real harm of women invisible. More precisely, she argues that by introducing concepts and terms such as 'sex work', 'voluntary prostitution', 'forced trafficking' (which implies that some chose to be voluntarily trafficked into prostitution) and 'migrant sex workers', postmodern theorists mystify the reality of prostitution/trafficking via a "politics of abdication and disengagement".<sup>352</sup> Farley points out that "the disconnected verbosity of postmodern theorists on prostitution seems incomprehensible to those of us who know the real women in prostitution. Under postmodern theory, the woman is re-objectified as a 'signifying system' or a 'plane of consistency of desire'."<sup>353</sup> Thus, postmodern discourse denies the psychological fragmentation and the violence that women experience in prostitution, pornography and trafficking; it trivializes "the existence of real violence against real women in prostitution".<sup>354</sup>

In neo-abolitionist's view, the only way to contrast prostitution and trafficking is the criminalisation of johns, pimps and traffickers.<sup>355</sup> Neo-abolitionists argue that states that legitimate prostitution by legalizing, decriminalizing or regulating the sex industry

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<sup>350</sup> M. Farley (2006).

<sup>351</sup> *Ivi*

<sup>352</sup> C. MacKinnon, 2000, p. 687.

<sup>353</sup> M. Farley, 2006, p. 125.

<sup>354</sup> *Ivi* p. 134.

<sup>355</sup> A. Dworkin (1988).



do not defend women in prostitution. Rather, they dignify the sex industry<sup>356</sup> and in so doing they support trafficking: to legitimize prostitution increases the male demand for prostitution that in turn promotes trafficking.<sup>357</sup> Therefore, as neo-abolitionist feminists point out, legitimating prostitution normalizes male dominant power and consequently increases the risk of violence and exploitation of women. It leads to serious problems for women in their relationships with their bodies and sexuality, in their relationships with husbands, sons, and friends and in the workplace. In other words, legitimating prostitution does not protect the women, rather it protects the men.<sup>358</sup> As Raymond stresses:

Those who defend state sponsored prostitution want to make the system 'better' for women. But they have nothing to say about the system itself. Abolitionists maintain that the system of prostitution is the problem, and that woman should not have to engage in prostitution to survive. To legitimate the sex industry by regulating it is to tolerate the reality that a group of women can be segregated into sexual slavery because men want, need, or desire the sex of prostitution.<sup>359</sup>

In this interpretative light, the Swedish law is viewed by neo-abolitionists as the best model for combating prostitution and trafficking: the 1998 Sweden law denounces prostitution as a form of gendered violence against women by criminalising the purchase of, but not the sale of, sex.<sup>360</sup> Nevertheless, in contrast to neo-abolitionist positions, a great deal of research has pointed out that this law has had a questionable impact on prostitution and trafficking.<sup>361</sup> More precisely, studies have highlighted that the effect of law has been to push prostitution underground, creating more dangerous conditions for women who choose to work in the sex industry or who are forced into it.<sup>362</sup> Rather than leading to a decrease in prostitution, criminalisation leads to new (such as on internet and cell phones) and hidden forms of prostitution increasing the risk of exploitation and violence against women. This has made it more difficult for social assistance to help and protect sex workers.<sup>363</sup> In this light, feminist sociologist Elizabeth

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<sup>356</sup> A. Miles, 2004, p. 26.

<sup>357</sup> *Ivi* p. 28.

<sup>358</sup> *Ivi* p. 31

<sup>359</sup> *Ibidem*.

<sup>360</sup> G. Ekberg (2004).

<sup>361</sup> See B. Hancilova and C. Massey (2009).

<sup>362</sup> E. Bernstein and L. Schaffner (2005); D. Kulick, (2003). See also D. Danna (2010).

<sup>363</sup> See in particular D. Kulick, (2003).

Bernstein claims that “the criminalization of clients primarily serves as a street-sweeping device, facilitating the redevelopment of gentrifying urban centres”.<sup>364</sup>

At the same time, Swedish police have declared that it is more difficult to investigate cases of ‘sex trafficking’.<sup>365</sup> Moreover, different studies have demonstrated that many trafficking activities are to some extent being diverted from Sweden to neighbouring countries.<sup>366</sup> It might be interesting to note that when Swedish lawmakers were confronted with the possibility that this law might drive prostitution underground and make sex workers more vulnerable to abuse and divert trafficking to other countries, they responded that “the purpose of the law was first and foremost to [...] ‘send a message’ that ‘society’ did not accept prostitution”.<sup>367</sup>

## **2.3 Sex Workers’ Rights Feminist Perspectives**

### **2.3.1 The Voices of Sex Workers**

Since the 1970s women, men and transgender people in different part of the world have started to fight to keep brothels open, challenge the various stigmas about prostitution and denounce social and political injustice.<sup>368</sup> The first prostitutes’ organization was (COYOTE), Call Off Your Old Tired Ethics, formed in San Francisco in 1973. However, the main recorders of the prostitutes’ rights movement identify the emergence of a highly politicized prostitute rights’ movement with the strike by French prostitute occurred in 1975: 150 prostitutes took over the main church in Lyons to protest against unsolved murders of local prostitutes and multiple arrests. The strike led to the formation of the French Collective of Prostitutes which in turn inspired the creation of such groups as the English Collective of Prostitutes in England (1975), the New York Prostitutes Collective (1979), the Australian Prostitutes Collective (1981), the Italian Committee for the Civil Rights of Prostitutes (1982) and similar other groups subsequently formed in many parts of the world, such as Latin America, India (the

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<sup>364</sup> E. Bernstein, 2007°, p. 184.

<sup>365</sup> J. Chuang, 2010, p. 1719.

<sup>366</sup> See D. Danna (2010); C. Valentini (2010).

<sup>367</sup> D. Kulick, 2003, pp. 203-204

<sup>368</sup> K. Kempadoo and J. Doezema (1998).

Nahila Samanwaya Committee) and Thailand (the group EMPOWER).<sup>369</sup>

Sex workers' activism has led to a rethink of the issue of prostitution, challenging the idea that the "traditional feminists analysis of sexual oppression alone exhausts all possible interpretations of commercial sex".<sup>370</sup> The first books that have given space to sex workers' voices were *Good Girls/ Bad Girls: Feminists and Sex Trade Workers Face to Face*<sup>371</sup> (1987), *Sex Work: Writings by Women in the Sex Industry* (1987)<sup>372</sup> and *A Vindication of the Rights of Whores* (1989).<sup>373</sup> In these volumes, sex workers expressed the need for liberated and informed discourse about the contemporary sex industry. In so doing, they offered an analysis and critique of the selling of sexual services that attempt to problematise the issue of 'violence' in feminist debates of sexual commerce, arguing that a large degree of the violence that women experience in sex industries is the result of the criminalisation of paid-for sex. In this sense, the book's contributors highlighted the necessity of struggling for decent working conditions, for basic human rights, for decriminalization and for the inclusion of sex workers in mainstream feminism. Such issues, despite the increasing visibility of the global sex worker rights movement, are still central to the struggle of sex workers.

According to hegemonic feminist logic of the 1970s, feminists and sex workers were considered two different groups with mutually exclusively loyalties: sex workers who serve male clients support the system of power that traditional feminism seeks to contrast. Challenging this perspective, sex worker activists have claimed to be part of the feminist community. In particular, sex worker activists have argued that many prostitutes identify themselves with feminist values such as independency, economic autonomy, sexual self-determination and sisterhood.<sup>374</sup>

Certainly, the issue of sexual self-determination is one of the most problematic topics in the relationship between feminists and sex workers. As discussed above, for neo-abolitionist feminists prostitution is the epitome of women's oppression and

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<sup>369</sup> As K. Kempadoo and J. Doezema pointed out, it is important to note that 'while the emergence of prostitutes' rights groups and organizations in Western Europe and North America up to early 1990s has been well documented, there is little written on the global movement'. K. Kempadoo and J. Doezema, 1998, p. 19. In Calcutta, the Nahila Samanwaya Committee has implemented large literacy campaigns for sex workers and has been very important in the fight against the spread of HIV. The group Empower has also been a vital force in the fight against HIV in Thailand.

<sup>370</sup> J. Nagle, 1997, p. 2.

<sup>371</sup> L. Bell (1987).

<sup>372</sup> F. Delacoste and P. Alexander (1987).

<sup>373</sup> G. Pheterson (1989). All these books were followed by Kempadoo and J. Doezema (1995) and L. Lean Lim (1998). This book puts forward the issue of prostitution in Southeast Asia as constituting its own bounded and quantifiable economic sphere.

<sup>374</sup> International Committee For Prostitutes' Rights (ICPR).

consequently any degree of sexual determination for women in prostitution is impossible. Taking distance from this position, sex workers activists have stressed that prostitution can be seen in more complex ways than simply as an expression of male dominance: prostitution can be considered as a site of resistance and agency where sex workers make active use of and subvert the existing sexual order. From this perspective, sex worker activists have claimed that stigmatization and social condemnation of prostitutes should be strongly combated and have invited feminists to abandon the categories of ‘good’ and ‘bad’ women (virgin/whore, Madonna/prostitute, chaste/licentious women), categories that belong to patriarchal societies and that reinforce the differences among women.<sup>375</sup> As Gail Pheterson argues, the social stigmatization of sex workers as impure, immoral, promiscuous and on so, is both violent and constitutive of the conditions for violence against sex workers to take place.<sup>376</sup> Pheterson claims that:

Historically women’s movement have opposed the institution of prostitution while claiming to support women. However, prostitutes reject support that requires them to leave prostitution; they object to being treated as symbols of oppression and demand recognition as workers. Due to feminist hesitation or refusal to accept prostitution as legitimate work and to accept prostitutes as working women, the majority of prostitutes have not identified themselves as feminist; nonetheless many prostitutes identify with feminist values such as independence, financial autonomy, sexual self-determination, personal strength and female bonding<sup>377</sup>

Sex worker activists mark their theoretical and political ground, in part, linguistically. The term *sex work* was coined in 1980 by the activist Carol Leigh (also know as ‘Scarlot Harlot’) in response to the neglect and rejection of the labour performed by prostitutes and to the traditionally derogatory labels used for prostitution. In contrast to the negative connotations linked to the term ‘prostitution’ (“prostitute” does not refer to the business of selling sexual services – it means ‘to offer publicly’), sex work is an umbrella term which encompasses a variety of people engaged in sex industries (not only women but also men, homosexuals, transsexuals, etc.); and, at the

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<sup>375</sup> C. Queens (1997).

<sup>376</sup> G. Pheterson (1989).

<sup>377</sup> *Ivi* p. 192.

same time, it emphasizes the labour/employment aspect of sexual labour.<sup>378</sup> In this sense, Leigh writes:

The concept of sex work unites women in the sex industry who are enjoined both the legal and social needs to disavow common ground with women in other facets of the business. [...] This usage of the term 'sex work' marks the beginning of a movement. It acknowledges the work we do rather than defines us by our status.<sup>379</sup>

The term 'sex work' leads us to consider prostitution not as an "identity – a social or psychological characteristic of women" – but rather as one of potentially "multiple activities employed for generating income".<sup>380</sup> For many, sex work is a means of survival; for others, it is the best option among other jobs; for others, it means the possibility of migrating from their countries; for yet others, it is associated with debt-bondage or drug uses; and for others, it means living on the margins.<sup>381</sup>

Therefore, sex work is viewed like any other income-generating activity or form of employment – such as mental and physical labour – involving specific parts of the body and particular types of skills which should be listened to, respected and viewed also as feminist.<sup>382</sup> This perspective exists in relation to an acknowledgment that women's relationships with their sexuality are *multiple*, not singular, and any attempt that requires uniformity in women's responses is dishonest and oppressive.<sup>383</sup> As Kamala Kempadoo highlights, all women negotiate their sexuality and the relation between sexual acts and "love" differently; she says: "any conflation of sex with the highest form of intimacy presupposes a universal meaning of sex, and ignores changing perceptions and values as well as the variety of meanings that women and men hold about sexual lives."<sup>384</sup>

By classifying prostitution as labour, sex worker activists shift the terms of analysis from sexual exploitation to *labour abuse* in sex work. They do not deny the violence involved in prostitution but point out that is the lack of protection for workers in the sex industry, rather than the existence of a market for commercial sex in itself,

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<sup>378</sup> J. Koken, 2010, p. 31.

<sup>379</sup> J. Nagle, 1997, p. 230.

<sup>380</sup> K. Kempadoo and J. Doezema, 1998, p. 4

<sup>381</sup> *Ivi* p. 4.

<sup>382</sup> T. D. Truong (1990).

<sup>383</sup> C. Vance (1989).

<sup>384</sup> K. Kempadoo and J. Doezema, 1998, p. 4.

that increases forms of exploitation, including trafficking. As Priscilla Alexander says “it is the laws against prostitution and the stigma imposed on sex work that provoke and permit violence against prostitutes, and ensure poor working conditions and the inability of many sex workers to move on to other kinds of work without lying about their experience.”<sup>385</sup> Sex workers, therefore, ask for a decriminalization or legalization of prostitution and for the recognition of “those civil, occupational and human rights already available to other citizens and workers”, including the right to be free from violence and bodily harm in the workplace.<sup>386</sup> Indeed, as Bindman and Doezema argue, many of the problems faced by sex workers in terms of working conditions appear similar to the problems experienced by those who work in low status jobs in the informal sector.<sup>387</sup> Actually, Bindman and Doezema say:

We first need to identify prostitution as work, as an occupation susceptible like the others to exploitation. Then sex workers can be included and protected under the existing instruments which aim to protect all workers from exploitation and women from discrimination<sup>388</sup>

Under this interpretative light, if prostitution were to be defined as ‘sex work’ then a sex worker could be brought under the auspices of international labour law.<sup>389</sup> Such a change of focus, as Bindman and Doezema highlight, is necessary because sex workers are subjected to discrimination and exploitation daily (by employers and state authorities). And this renders them more vulnerable to trafficking.<sup>390</sup>

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<sup>385</sup> F. Delacoste and P. Alexander, 1997, p. 185.

<sup>386</sup> B. Sullivan, 2003 p. 70.

<sup>387</sup> K. Kempadoo and J. Doezema, 1998, p. 3.

<sup>388</sup> J. Bindman and J. Doezema, 1997, p. 1.

<sup>389</sup> B. Sullivan, 2003, p. 71.

<sup>390</sup> *Ivi* p. 6.

### 2.3.2. Sex Workers' Strategies

I think that we [prostitutes] really began to get to the core of the sexual transaction with the client when we became free to chose the client and the type of services<sup>391</sup>

If sex work is a form of labour, how do sex workers maintain their emotional wellbeing during their work? How do they manage the impact of their work on their personal life? How do they mark the boundaries between their professional life and their private/intimate life? These are some of the questions addressed by feminist scholars who examine the nature of sexual services in prostitution, exploring the ways through which sex workers strategically manage their own emotions and identities on the job.

Since the 1990s many feminist researchers have argued that sex work is not the only work that is sexual and gendered in nature. Female sexualisation is an intrinsic factor of work relations and structures.<sup>392</sup> Indeed, as many studies have demonstrated, conventional feminized jobs demand specific 'notions of sexual personhood'<sup>393</sup> and the commodification of the female body is often reproduced through workplace dynamics. Workplace relations and discourses are shaped by a strong and complex *interaction* between the economic and the personal (the sexual). Sexuality, as Teela Sanders points out, is not just a defining aspect of sex industry but it is integral part of work based relations. Sexuality is a "cultural product and practice that is intrinsically linked to the structure of economic relations in official modes of production and [...] also to illicit enterprises where sexuality is the mode of exchange."<sup>394</sup> This is particularly noticeable in service occupations such as secretaries, waitresses, beauty therapists, air hostesses and other 'caring' professions. In these occupations, where the body is an integral part of the product on offer, female workers have to demonstrate specific *sexual skills* insofar as 'aesthetically pleasing performance'<sup>395</sup> constitutes a business strategy for gaining and maintaining clientele. An interesting example is offered by Lisa Adkin's

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<sup>391</sup> C. Corso quoted in F. Bettio and T. K. Nandi, 2009, p. 20.

<sup>392</sup> See in particular T. Sanders (2005).

<sup>393</sup> *Ivi* p. 321.

<sup>394</sup> T. Sanders, 2005, p. 321.

<sup>395</sup> C. A Wellington and J. R. Bryson 2001, p. 934.

work on the hotel and leisure industry revealing how female attractiveness is one of the requirements for obtaining the position and the fetishization of image is a fundamental part of the job.<sup>396</sup> Furthermore, Adkin's research demonstrates that female workers perform strategies for managing their identities on the job and for dealing with sexual dynamics and worker expectations in the workplace.

Moving on from this perspective, Wendy Chapkis in her books, *Lives in Sex Acts: Women Performing Erotic Labour*, has explored the ways in which sex workers manage their emotions on the job highlighting the complex realities of women's experiences in sexual labour.<sup>397</sup> Chapkis develops her analysis drawing on feminist social psychologist Arlie Russel Hochschild's theory of 'emotional labour.' According to Hochschild, there are activities and jobs for which care and feeling are required and also commodified and commercialized. Indeed, in certain occupations, such as airline service work, workers have to be capable of managing their feelings and displaying them in a persuasive way to the costumers. The objectification of feeling that occurs in the process of this kind of work does not lead to the deconstruction of the self. Indeed, as Hochschild argues, workers develop various strategies for separating their work from private life and so preserving a sense of distance from emotionally demanding work. In other words, workers develop strategies for dealing with dissonance between their 'true feeling' and the emotions they are required to display.<sup>398</sup>

Informed by Hochschild's insights and in view of the results of extensive interviews with sex workers in the Netherlands and the United States, Chapkis asserts that prostitution can be considered as 'emotional labour' – such as acting, massage work, psychotherapy or child care - in which workers manage certain feelings and emotions considered *ad hoc* by the clients. Sex workers perform emotional labour in order to produce the desired response in their clients. In doing so, sex workers are able to distinguish the self from the roles they play at work, much in the same way that actors or therapists are able to separate their work from private life. Chapkis points out that the women she interviewed describe a variety of strategies to "summon and contain emotion within the commercial transaction" that helped them in erecting and maintaining boundaries between their work lives and their personal lives. These techniques allow them to interact with the client without 'selling' a 'private/personal'

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<sup>396</sup> L. Adkin (1995).

<sup>397</sup> W. Chapkis (1997).

<sup>398</sup> However, she claims, that there «is a cost to emotional work, it affects the degree to which we listen the feelings and sometimes our capacity to feel»



part of themselves in the process. As sex worker activist Jo Doezema states: “it is true that there are parts of myself that I don’t want to share with my clients. But drawing boundaries in my work doesn’t mean that I am in danger of begin destroyed by it.”<sup>399</sup>

In their interesting study on female prostitutes in the UK and Australia, sociologist Joanna Brevis and Stephen Linstead argue that there is a degree of similarity between the strategies and approaches employed by prostitutes in terms of distancing their personal life from their work: these strategies can include the development of skills in time management or can be more symbolic such as the use of a different name.<sup>400</sup> However, Brevis and Linstead emphasize that the boundary between work and private life it is not easy to maintain. It requires constant internal processes:

Prostitutes, due to the intensity and intimacy of their physical involvement in their work, do not necessarily find the distancing process easy, and a variety of styles and methods are employed by working girls (and boys) to sustain the mask, or series of masks, which make earning a living through the sale of sex possible

Sex workers, therefore, create pragmatic, symbolic and psychological defence dynamics to deal with the stress of selling sex. In this regard, Teela Sanders points out that under certain material conditions sex workers create a ‘manufactured identity’ specifically for the workplace (this identity is supported by a pseudonym, a fictitious life story, family background and childhood). This manufactured identity constitutes both an effective business strategy for attracting and maintaining clientele as well as a self-protection mechanism to manage the tensions by selling access to parts of the body.

Sanders highlights that while female sex workers operate within a gendered, hetero-centric professional context, they also work to “manipulate male sexuality and sexual desire for their own advantage.”<sup>401</sup> Therefore, she points out that “theory that locates power and influences only with male customers or the wider structures that determine economic relations leaves female sex workers theoretically devoid of agency, responsibility and rationality.”<sup>402</sup> In this sense, prostitution is not vastly different from other service professions (such as waitressing, nursing, or being a flight attendant) that are gendered and required an intimate interaction and displays of ‘appropriate’ emotions

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<sup>399</sup> Doezema quoted in W. Chapkis, 1997, p. 75.

<sup>400</sup> There are also significant differences depending on individual circumstances.

<sup>401</sup> T. Sanders, 2005, p. 338

<sup>402</sup> *Ivi* p. 336

and physically appearance (in the service economy the body is an integral part of the product on offer).

Following this interpretative light, some feminist scholars argue that sex work can be linked to the category of *body work*, a form of employment that “takes the body as its immediate site of labour, involving intimate, messy contact with the body, its orifices or products through touch or close proximity.”<sup>403</sup> Bringing together sociology of work and sociology of body, the scholarship on body work indicates new paths to examine the social-institutional role of body work occupations and the social inequalities at the heart of them. More precisely, by focusing on the body, its cure, its discipline and the micro-politics of bodily interactions that workers negotiate, studies on body work have importantly highlighted the *interplay* of emotional and embodied experiences of workers employed in body work occupations.<sup>404</sup> According to this scholarship, the invisibility of the sexual labour and of other forms of body work in research on employment is due to the assumed distinction between the body and the immaterial aspect of emotional work related to intelligence and cognition. The Cartesian mind-body dualism has led to the identification of performance of physical tasks with ‘mindlessness or mechanical activity’, or with ‘dirty work’. This dualism has also determined the spatial separation that characterizes body work: body work “is usually less public than other service sector activities and less frequently observed by outsiders.”<sup>405</sup> Furthermore, as sociologist Carol Wolkowitz argues, the neglect of body work in the economy has strengthened the gendered (and sexualized) and racialised character of body work (for instance, “care work is overwhelmingly female and male practitioners are either positioned as exceptions, like doctors”;<sup>406</sup> sex work is organised around stereotypes about white and ‘other’ sexualities).

The perspective offered by studies on body work is particularly interesting as it situates sex work within the “changing institutional environments within which bodies are positioned”<sup>407</sup> and the relations and social inequalities in which actors are embedded. At the same time, drawing attention to the body’s agency, this perspective invites a focus on the strategies through which sex workers produce their working bodies as mean of resisting objectification. These strategies are heavily dependent on

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<sup>403</sup> C. Wolkowitz (2006).

<sup>404</sup> D. Glimin (2007).

<sup>405</sup> C. Wolkowitz (2006).

<sup>406</sup> *Ivi*

<sup>407</sup> *Ivi*

race, class and other aspects of social hierarchy.<sup>408</sup>

Thus, challenging the neo-abolitionist position that all prostitution/sex work is always oppressive and violent for the agents involved and that there is no space for exercising individual agency, sex workers' rights feminists provide firm evidence that women's experiences with sex work are different. It is worth underlining that sex workers' rights feminists do not foreclose the possibility that women can deal with personal struggles and even serious emotional harm within sex work. Rather, they suggest a more expansive definition of violence experienced by sex workers. This more expansive definition includes considering structural concerns, such as class and education, and the framework of economic, cultural and social rights. Sex workers' rights feminists furthermore highlight that women in the sex industry negotiate power relations in different ways and that the conditions in which women experience prostitution expose them to violation and vulnerability. In this respect, it may be interesting to mention the research carried out by Sarah Romans et al. comparing the emotional health of sex workers to non-sex workers. The results of this study indicate that sex work and increased adult psychiatric morbidity are not inevitably associated. As Sarah Romans et al. explain, while female sex workers constitute a subgroup of worker with particular problems of stigmatization and marginalization, sex work is not inherently traumatizing in itself. Rather, *the working circumstances and conditions* constitute a serious problem for the wellbeing of some sex workers.

Regarding sex workers' health, it needs to be noted that sex worker activists and feminists have strongly criticized stringent anti-prostitution grant restrictions applied to HIV/AIDS funding under the Global AIDS Act. This act requires that "no funds be used to promote or advocate the legalization or practice of prostitution or sex trafficking" and that "no funds [...] be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking."<sup>409</sup> Recipients of HIV/AIDS funds thus have to adopt a policy explicitly opposing prostitution. However, rather than reducing prostitution activities and combating trafficking, the funding restrictions have made the conditions of the sex sector more dangerous and have further marginalized and stigmatised sex workers.<sup>410</sup>

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<sup>408</sup> *Ivi* p. 141.

<sup>409</sup> J. Chuang, 2010, p. 1684.

<sup>410</sup> See J. A Koken, 2010, pp. 36-39. J. Chuang 2010, p. 1686. As Chuang illustrates, in defence of the funding restrictions neo-abolitionists argue that while promoting condom use in the sex industry has reduced the spread of Aids among those in the sex industry, "it is unacceptable to provide medical

In the matter of HIV/AIDS prevention, sex workers' rights feminists have highlighted the need for a non judgmental attitude towards sex work and have pointed out that the development of meaningful relationships with target groups is a key issue, requiring time and empathy.<sup>411</sup> In a similar vein, epidemiologist Nicole Franck Masenior and Chris Beyer have argued that “a substantial body of peer-reviewed published studies suggests that the empowerment, organization and unionization of sex workers can be an effective HIV-prevention strategy and can reduce the other harms associated with sex work, including violence, police harassment, unwanted pregnancy and the number of underage sex workers”.<sup>412</sup> In fact, as some public health experts stress, the Sonagachi Project – a community-based sex worker union in Calcutta, India – constitutes a good example of a nongovernmental group that promotes empowerment and prevents the exploitation and abuse of underage girls – for instance, thanks to the Sonagachi Project condom use has dramatically increased in Calcutta.<sup>413</sup>

### 2.3.3 Migrant Sex Workers and Trafficking

Since the 1990s, sex workers' rights feminists have challenged the abolitionist assertion that prostitution is the principal cause of trafficking and have invited us to look at the issues of 'sex trafficking' within the larger framework of labour rights and immigration policies. By highlighting the complexities of the trafficking process, sex workers' rights feminists have pointed out that all trafficking involves prostitution but that *not all* prostitution involves trafficking. Trafficking in women is a broad category that covers different forms of exploitation and violence within various labour sectors, including prostitution, domestic work and entertainment. From this perspective, 'sex trafficking' can be defined in a narrow sense as a process in which migrant women are brought into prostitution through the use of violence and in which they are denied human rights and freedom.<sup>414</sup>

During the negotiations of the UN Trafficking Protocol, sex workers' rights activists and advocates within the Human Rights Caucus<sup>415</sup> argued that trafficking occurs when women are recruited or work in conditions where force and deception have

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services and condoms to enslaved persons and ignore the slavery”.

<sup>411</sup> *Ibidem*

<sup>412</sup> N. F. Masenior and C. Beyer, 2007, 1159.

<sup>413</sup> H. Burkhalter (2003).

<sup>414</sup> M. Wijers (1998).

<sup>415</sup> See chapter 1.

been used. They advocated for distinguishing between women who choose to work in prostitution and those who are forced into it. Although this distinction might be viewed in terms of the recognition of the self-determination right of sex workers, in recent years sex workers' rights feminists and activists have expressed their concerns about the focus on the differentiation between 'forced' and 'voluntary' prostitution. First of all, by reproducing the whore/Madonna dichotomy this differentiation focuses only on the victims of forced prostitution, leaving most sex workers outside the protective umbrella: as Doezema points out "it is one thing to save innocent victims of forced prostitution, quite another to argue that prostitutes deserve rights."<sup>416</sup> From this perspective, then, measures that rely on the differentiation between 'forced' and 'voluntary' prostitution reinforce the dichotomy between 'innocent victims' - deemed deserving of support and protection, and 'guilty' sex workers eligible only for imprisonment and deportation.<sup>417</sup> As such, these measures "neither empower most migrant prostitutes by protecting their rights as workers nor offer any assistance to the majority of abused sex workers interested in leaving the trade."<sup>418</sup>

Secondly, the differentiation between 'forced' and 'voluntary' *racialises* these two categories. This critique, which was largely disseminated in 1998 with Jo Doezema's article *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, is based on the thesis that the only ones who are granted the possibility of choosing to work in the sex industry, if there are any at all, are Western citizens, preferably white and middle class. Women who are not Western are automatically 'trafficked women' or 'slaves,' represented as most likely having been abducted and sold into the industry, or having had no choice but to enter it through their own economically impoverished circumstances. Reminiscent of Chandra Mohanty's formulation of the 'third world women' construction as 'a homogeneous, powerless' group, often considered victims of a particular socioeconomic system, 'forced' sex-workers are portrayed as helpless, unwitting and non-Western, while voluntary sex workers are seen as unrepentant, immoral, Western, and capable of agency.<sup>419</sup> As a consequence, this distinction fosters the divisions between migrant and non-migrant sex workers in the sex-industry, and prevented common organizing, not only in work practice but also politically.<sup>420</sup>

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<sup>416</sup> K. Kempadoo and J. Doezema (1998).

<sup>417</sup> W. Chapkis, 2003, p. 930.

<sup>418</sup> *Ivi* p. 929.

<sup>419</sup> C. T. Mohanty, A. Russo, and L. Torres (1991).

<sup>420</sup> G. Garofalo (2010).

By invoking the image of the ‘suffering third world prostitute’ neo-abolitionist feminists often support repressive campaigns to ‘protect’ and ‘save’ women, including more restrictive immigration policies, more penalization and stronger effective prosecution. Such repressive measures, as sex worker activist Marjan Wijers argues, often work against women instead of in their favour, for example by restricting their movement or by using women as witnesses for combating organised crime without allowing them the corresponding protection.<sup>421</sup> Indeed, as Amy O’Neill Richards explains, many ‘trafficked’ women who have been abused are reluctant to ask for assistance because they do not trust law enforcement and they are afraid of deportation even more than continued exploitation.<sup>422</sup> Repressive measures, therefore, push sex industry underground and, in doing so, leave women at potentially greater risk of violence and exploitation in the context of trafficking.<sup>423</sup>

Over the last decade, abolitionist discourse that portrays trafficking simply as ‘sexual slavery’ has strongly affected anti-trafficking policies and measures over the world. This reductive narrative not only conflates labour trafficking with ‘sex trafficking’, but also conflates all prostitution with ‘sex trafficking’.<sup>424</sup> In so doing, such a narrative elides the complex social and economic problems that characterise the trafficking phenomenon – such as exploitative labour practice and migrant abuse – and simultaneously invites and justifies state intervention. Indeed, in the name of protecting ‘victims’ of trafficking, States of destination impose tighter border controls and more criminal laws to persecute illegal migration for work.<sup>425</sup> In this regard, Chapkis highlights that by giving assistance to victims contingent on their willingness to assist in the prosecution of traffickers, the American Trafficking Victims Protection Act (TVPA) seals US borders against illegal foreign workers.<sup>426</sup>

At the same time, viewing most of female migration as trafficking, States of origin restrict women from travelling overseas for work. In fact, in some countries of Western Asia and Northern Africa female migration is subject to many official restrictions – for instance, in India government officials can deny permits to women migrating for work when the work is considered against public policy or public interest. Moreover, women must be at least thirty to work as domestic workers in Western Asia

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<sup>421</sup> M. Wijers (1998).

<sup>422</sup> A. O’Neill Richards (2000).

<sup>423</sup> *Ivi*; See also K. Kempadoo and J. Doezema (1998).

<sup>424</sup> D. Brennan (2008).

<sup>425</sup> D. Brock, K. Gillies, C. Oliver and M. Sutdhibhasilp (2000).

<sup>426</sup> W. Chapkis (2003).

or Northern Africa.<sup>427</sup>

By portraying women as victims of sexual slavery, the dominant discourse on trafficking has generated a “moral crusade” that not only legitimizes increasingly restrictive immigration policies and more criminalization but also masks the role of States in increasing the vulnerability of migrants.<sup>428</sup> In other words, it masks states’ responsibilities to reduce legal migrants’ mobility and to impede sex workers to work safely.

According to sex workers’ rights feminists, the dominant anti-trafficking discourse obscures the fact that many ‘trafficked’ women are first and foremost migrants – persons seeking economic, social, political and affective opportunities away from home. Much feminist research has demonstrated that although women might experience a great deal of coercion and abuse from those who organise their travel and their work, they may also be recruited without coercion, and may or may not find themselves in forced-labour conditions.<sup>429</sup> In this vein, in her research Sharma reveals that many illegal female migrants exercised agency representing themselves as victims of trafficking in order to legally stay in Canada. In such a case, the strong coercion faced by these women was not being removed from their country but being forcibly returned there.<sup>430</sup>

Sex workers’ rights feminists and advocates have mainly centred their campaign on the decriminalization or legalization of prostitution, arguing that criminal justice control often increases levels of vulnerability and insecurity among sex workers. However, in recent years it has become increasingly clear among activists and advocates that even though the legalisation or decriminalisation of sex work constitutes a significant step for the recognition and protection of sex workers’ rights, the regulation in itself is no guarantee for emancipation and improvement. If it is not supported by a more integrated process of inclusion around the principles of social justice and cultural citizenship, the legal approach in itself does not preclude the development of abusive power relations.<sup>431</sup> In this vein, Scouler argues, and Sullivan’s empirical work attests,<sup>432</sup> “decriminalization and legalization do not result in or require

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<sup>427</sup> See N. Oishi (2005); J. Chuang (2010).

<sup>428</sup> R. Weitzer (2007).

<sup>429</sup> L. Agustin (2007); R. Andrijasevic (2010). This point is examined in the next chapter.

<sup>430</sup> N. Sharma (2005).

<sup>431</sup> In this regard, see Sex Workers in Europe Manifesto (ICRSE 2005b) and Declaration of the Rights of Sex Workers in Europe (ICRSE 2005°). These documents are analysed in chapter 4.

<sup>432</sup> B. Sullivan (1999).

an absence of law but rather deploy law in different ways”.<sup>433</sup> Individualised forms of control occur, not only in exit strategies, but also in the licensing system of the Netherlands which, as Scoular points out:

[e]ncourage[s] workers to self-regulate their behaviour in the interests of public health promotion, to conform to certain modes of working in order to meet the conditions of registration. Inclusion is offered to those who ‘can perform the rituals of middle class society’ with all the typical exclusions based on age, status, race, health and class that this entails<sup>434</sup>

In this respect, it is worth noting that although Dutch policy legalises indoor prostitution and brothel keeping, there is no opportunity for migrant who are not European citizens to work legally in the sex industry in the Netherlands. This has led many migrant prostitutes to rely on criminal networks in obtaining fake identification documents.<sup>435</sup>

In order to evaluate the effective usefulness of the legal approach, thus, it would be better to look beyond the rhetoric of law to its regulatory processes and meanings and its impact on sex workers. As feminist jurist Praba Kotiswaran highlights, “the prospects for redistributive law reform for all sexual workers are dim unless the arbitrary legal distinctions drawn between markets in sexual labour are overcome.”<sup>436</sup>

## 2.4 Conclusion

This chapter has critically examined the core elements of the feminist debate on ‘sex trafficking’ developed around neo-abolitionist feminists’ and sex workers’ rights feminists’ ideological positions. In particular, in the first section, I have analysed the concept of agency, which is a core concept in the feminist debate on prostitution/sex work and ‘sex-trafficking’. I have argued that although radical feminists have offered an important critique of the liberal notions of autonomy and freedom which presume

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<sup>433</sup> J. Scoular and T. Sanders, 2010, p. 10.

<sup>434</sup> *Ivi* p. 10.

<sup>435</sup> See E. Bernstein and L. Schaffner (2005); D. Danna (2010).

<sup>436</sup> *Ivi* p. 10.



autonomous individuals abstracted from relations of power, they propose inadequate and incomplete conceptions of power that reduce all power relation between men and women to a master/subject relationship of sexual domination denying any possibility for women to exercise agency.

From this perspective, the radical feminist strategy of abolitionism in relation to prostitution and trafficking also presents serious limitations. Firstly, by considering prostitution and trafficking as indistinguishable and as the ‘foundation’ of a global system of male dominance,<sup>437</sup> neo-abolitionist feminists do not pay attention to the differences between women and different narratives about the meaning of prostitution and then of sexuality. As Kempadoo points out the experience of being a prostitute (or being a client) can vary enormously in different cultural contexts:

The global sex trade cannot simply be reduced to one monolithic explanation of violence to women [...] colonialism, recolonizations, and cultural imperialism as well as specific local cultural histories and traditions [...] shape the sexual agency of women [and] are important for any account of global manifestation of sex work<sup>438</sup>

The neo-abolitionist feminist approach is also problematic because it does not recognise any possibility for women to exercise agency in the context of prostitution: male dominate and all prostitutes are oppressed, subordinated and unfree. For neo-abolitionist feminists, there is no room for power negotiations within the scenario of prostitution and trafficking. Any possibility of consent in relation to prostitution is declined. Thus, all prostitution tendentially involves rape.

Taking a distance from this position and suggesting a more complex conception of women’s agency, sex worker activists have objected to the idea of a ‘false consciousness’ in those who choose prostitution and have accused neo-abolitionist feminists of ignoring the voices of sex workers. From this perspective, sex workers’ rights activists and feminists have shifted the terms of analysis from sexual exploitation to labour abuse in sex work, arguing that women in the sex trade should be able to access the same labour rights as women in other industries. This should include, for example, efforts to improve the health and safety of sex workers’ working conditions and their rights to employment–related social provisions, such as health care and social

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<sup>437</sup> S. Jeffreys defines that prostitution as “a form of brutal cruelty on the part of men that constitutes a violation of women’s human rights wherever and however it takes place”, 1997, p. 339.

<sup>438</sup> J. Kempadoo, 2001, p. 28

security.

The neo-abolitionist feminist approach to trafficking has favoured the development of a reductive narrative of trafficking that “simplistically depicts trafficking as involving women and girls forced into ‘sexual slavery’ by social deviants.”<sup>439</sup> As a result of this melodramatic narrative, the anti-trafficking campaign in many countries has transformed into an anti-prostitution campaign that legitimises repressive measures, such as stronger border controls, more penalisation and stronger effective prosecution. Such responses, most of the time, work against women instead of in their favour and, at the same time, leave unaddressed the inadequacy of migration policies and the exploitation of vulnerable labour - issues which play a central role in the practice of trafficking.

In addition to diverting attention from key problems, the neo-abolitionist view of trafficking implicitly strengthens dangerous gender stereotypes: for instance, the idea of migrant women as passive and powerless subjects. This gender-biased vision is based on the assumption that women are particularly susceptible to victimization and, consequently, it leads to the identification of female migration with trafficking. In this light, exploited migrant women are viewed as victims of trafficking, while men (for whom the traditional roles are of ‘breadwinners’ and ‘providers’) are more commonly considered as agent subjects. Thus, they are seen as irregular migrants rather than as victims. In turn, such a gender-biased vision has also made it more difficult to identify cases of trafficking in men and to assist them. On the other hand, sharing the idea that ‘victimhood’ is something related to disempowerment, many trafficked men can be reluctant to accept assistance.

Furthermore, as Janie Chuang points out, by portraying trafficked women as innocent and powerless victims of slavery, “neo-abolitionist discursive practices sustain a crusader impulse that resists a self-critical evaluation and assessment of the effects of neo-abolitionist policymaking on its target populations.”<sup>440</sup> In this regard, it is worth noting that in Europe institutionalised feminism has become strongly neo-abolitionist and it often lends legitimacy to certain policies and analyses on migration that support racist, xenophobic discourses, defining migrants as second-class citizens.<sup>441</sup>

In some formulations, the sex workers’ rights perspectives can run the risk of

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<sup>439</sup> J. Chuang, 2010, p. 1659.

<sup>440</sup> *Ivi* p. 1659.

<sup>441</sup> See chapter 4.

being as totalizing and essentialist as the neo-abolitionist approach. However, it is important to note that by paying attention to the voices of sex workers and treating prostitution as a form of work, many sex workers' rights feminist analyses give attention to the differences among women and to the specificities and the problems of the various contexts.<sup>442</sup> In this light, far from suggesting an abstract idea of individual autonomy, many sex workers' rights feminists propose a concept of women's agency that takes into consideration the different, often contradictory and conflicting, ways in which women respond, negotiate or try to negotiate power relations and discourse. In so doing, as Sullivan emphasizes, the sex workers' rights feminist approach might open up space for important policy changes.<sup>443</sup>

As argued above, regulating the sex industry does not entail counteracting "racism, xenophobia and prejudice against migrants and ethnic minority groups" in the sector and could actually strengthen existing racial, ethnic and national hierarchies and tensions.<sup>444</sup> By comparing the Swedish and Dutch prostitution strategies, Janie Chuang argues that "neither the Swedish nor Dutch prostitution-reform strategy addresses the complex mix of socioeconomic factors, including poverty and discrimination, [...] neither strategy addresses the exploitation of migrants, [...] neither strategy ultimately addresses the demand for trafficked or easily exploited services or labour".<sup>445</sup> Therefore, in Chuang's view, both these different approaches are "ill suited as solutions to the problem of human trafficking".<sup>446</sup> Accordingly, it is necessary to situate strategies that deal with trafficking within a broader political, economic and cultural framework.<sup>447</sup>

Though my stance would come close to that of sex workers' rights feminists, I believe that the problem of 'sex trafficking' cannot only be framed in terms of victimhood and agency regarding sex work. It is also necessary to pay attention to the *complexity of the migration aspect* of 'sex trafficking' in Europe, exploring the relationship between 'sex trafficking' and processes of *re-bordering* Europe. Indeed, over the last decade many feminist scholars have started to look at the issue of 'sex trafficking' in Europe from the perspective of migration and labour, challenging the

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<sup>442</sup> B. Sullivan, 2003, p. 78.

<sup>443</sup> *Ivi*

<sup>444</sup> B. Anderson and J. O'Connell Davidson, 2003, p. 43.

<sup>445</sup> J. Chuang, 2010, pp. 1724-1725.

<sup>446</sup> J. Chuang, 2010, p. 1724.

<sup>447</sup> This issue is examined in the next chapter.

assumed correlation between ‘sex trafficking’ and organised crime.<sup>448</sup> More precisely, these studies look at ‘sex trafficking’ contemplating the responsibility of the state and, at the same time, the different ways migrant sex workers can negotiate tensions and contradictions in their life stories. This perspective shows a much more complex picture about ‘sex trafficking’ and about trafficking in general.

As Bridget Anderson and Julia O’Connell Davidson have rightly pointed out, the ‘demand’ for ‘trafficked’ persons is not simply about responding to sexual desire or taking advantage of cheap migrant labour but is strongly linked to the conception of the ‘trafficked’ person as a migrant ‘other’.<sup>449</sup> The condition of vulnerability that results from the migrant status - foreign and/or undocumented - strengthens the perception that they are more ‘flexible’ with respect to poorer and ‘unsafe’ working conditions. In addition, the racial ‘otherness’ makes it easier to “dress up a relation of exploitation as one of paternalism/maternalism” toward the poor ‘other’.<sup>450</sup> According to Anderson and Davidson, in order to address the demand for ‘trafficked’ persons it is necessary to target the social norms that permit the exploitation of vulnerable workers.

In the next chapter, drawing on a wide array of ethnographic and theoretical texts, as well as activist writings and policy documents, I examine the theoretical contributions offered by feminist theories that look at ‘sex trafficking’ from the perspective of migration and labour. In doing so, I shall consider questions such as the following:

1) What is slavery today? What is coercion? What are the effects of the discourse on ‘sex trafficking’ as slavery in Europe? And at the same time what are the effects of the discourse on sex trafficking as a form of migration?

2) What is the relationship between sex work, ‘care’ and mobility in contemporary Europe? Which are the transformations of gender roles which are related to this context?

3) What are the effects of the inclusion of ‘sex trafficking’ discourse in state policy? Does the state enforce a normative sexual order through its immigration controls?

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<sup>448</sup> R. Andrijasevic (2010); J. Bernman (2010); L. Malucelli (2001).

<sup>449</sup> B. Anderson and J. O’Connell Davidson (2003)

<sup>450</sup> *Ivi* p. 32.



## ‘SEX TRAFFICKING’, LABOUR AND MIGRATION FROM FEMINIST PERSPECTIVES

Today neo-abolitionist feminists have a strong influence on national and international policies. Indeed, despite well known disagreements around the politics of sex and gender, neo-abolitionist feminists and state officials have embarked upon multiple campaigns to combat prostitution and trafficking.<sup>451</sup> In this regard, it is interesting to mention that ‘Together for a Europe Free from Prostitution’<sup>452</sup> is the name of the European Women’s Lobby’s Campaign which receives public funding from the EU programme called ‘Progress’, established to “support financially the implementation of the objectives of the European Union in employment, social affairs and equal opportunities”.<sup>453</sup>

By strongly criticising this campaign promoted by European Women’s Lobby, sex worker activists and advocates have accused this campaign of ignoring the fact that several EU member States permit some sorts of sex work and prostitution and have also questioned the use of public funds for this sort of initiatives.<sup>454</sup> In particular, Italy’s *Comitato per i Diritti Civili delle Prostitute* has declared that this campaign denies the right to self-determination and the free choice of people who choose prostitution and

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<sup>451</sup> The next chapter examines this alliance in greater depth.

<sup>452</sup> See <http://www.womenlobby.org/spip.php?rubrique187&lang=en>

<sup>453</sup> See <http://ec.europa.eu/social/main.jsp?catId=327>

<sup>454</sup> See Press Note 1 July Sex Workers against the European Women Lobby’s CampaignK "http://www.lucciole.org/content/view/680/14/"<http://www.lucciole.org/content/view/680/14/>

imposes the vision that establishes, tout court, that prostitution is always violence. In so doing, as the *Comitato per i Diritti Civili delle Prostitute* has pointed out, such a campaign produces only the stigmatization and discrimination of those who work in the sex industry.<sup>455</sup>

It needs to be underlined that the campaign ‘Together for a Europe Free from Prostitution’, which stresses the link between anti-prostitution and anti-trafficking, was launched after the approval in December 2010 of Anti-trafficking Directive (2011/36/EU) by the European Parliament.<sup>456</sup> Directive 2011/36/EU represents the first substantive criminal law measure to be adopted by the EU since entry into force of the Lisbon Treaty (2007). The Directive includes the recommendation to take measures that discourage and reduce the demand that foster all forms of exploitation related to trafficking. Also, Member States shall “[...] consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation [...], with the knowledge that the person is a victim of an offence”<sup>457</sup> concerning trafficking in human beings.<sup>458</sup> The current EU commissioner for Home Affairs, Cecilia Malmström, has defined this Directive as an important step towards tackling ‘modern slavery’.<sup>459</sup> However, as discussed in chapter 1, this Directive seems to focus more on criminalization rather than on stronger provisions for victims’ protection, support and rights - for instance, it does not include a rule on residence permits for victims. In general, the Directive seems to overlook the complexity of the issues of labour and migration linked to the phenomenon of trafficking.

This chapter analyses feminist studies that look at the phenomenon of trafficking in women in the sex industry in Europe from the perspective of migration and labour. This critical body of scholarship is examined in the last (third) part of the section. Before examining such studies, I focus on the discourse on trafficking as a ‘new

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<sup>455</sup> In line with this critique, last July Gianni Vattimo, member of the European Parliament, required clarification about the campaign submitting to the European Parliament the following questions: [...] How EU funds can be used to promote a certain legislative model, notably on a matter where Member States have different policies and sensitivities on the matter? If EU funds have been directly or indirectly used, will a campaign be launched to legalize prostitution and sex work or promote a different legislative model? Will the same EU funds be eligible for it? If not, why not? Will the Commission request that EU funds are given back? Is the campaign funded without the knowledge of the Commission? See

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-006854+0+DOC+XML+V0//EN>

<sup>456</sup> See chapter 1.

<sup>457</sup> Art. 18

<sup>458</sup> It seems that France has responded positively to the input of the Directive 2011/36/EU. Indeed, it is considering to criminalise the clients of sex workers. See <http://www.guardian.co.uk/world/2011/apr/13/france-illegal-pay-sex>

<sup>459</sup> See Cecilia Malmström’s blog <http://blogs.ec.europa.eu/malmstrom/tag/trafficking/>

slavery’ and on the main aspects that characterise contemporary female migration and female labour mobility. More precisely, the first section of this chapter focuses on the notions of slavery, exploitation and ‘white slavery’. A critical analysis of these notions helps to understand the complexity of migrant women’s experiences in the trafficking scenario and, at the same time, the political effects of discourse on trafficking as a new form of ‘slavery’. The second section examines the characteristic features of female migration in Europe, highlighting the transformations of the gendered division of labour and how these transformations also involve the spheres of sexuality and intimacy. Particular attention is dedicated to the relationships between female mobility, sex work and domestic and care work.

### **3.1 Slavery and Exploitation**

[I]ronically, there are more slaves now than there were even at the height of the transatlantic slave trade<sup>460</sup>

#### **3.1.1 Slavery, Coercion and Freedom**

Nobody is, in theory, in favour of slavery. As legal scholar James Hathaway points out, “the fight against slavery is one of the very few human rights imperatives that attracts no principled dissent”.<sup>461</sup> Thus, talking of trafficking as a form of slavery produces political consensus.<sup>462</sup> However, defining, or trying to define, the meaning of slavery today is not an easy task as it raises questions concerning the boundaries between volition and coercion, contract and bondage within labour.

In classical liberal thought, the contract has been celebrated as the principle basis for the transition from slavery to freedom. Contract represented the antithesis of bondage and the essence of economic and political arrangement in liberal capitalist

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<sup>460</sup> S. L. Leach, 2004, p. 16.

<sup>461</sup> J. Hathaway, 2008, pp. 7-8.

<sup>462</sup> J. O’Connell Davidson (2010).



democracies. It became the marker of free relations within social exchanges.<sup>463</sup> In her brilliant study of the ‘paradoxes’ of contract as the organizing principle of Gilded Age economic and social relations, historian Amy Dru Stanley highlights how the categorical opposition of contract and bondage became the dominant ideology of the West during the era of slave emancipation. Indeed, in the nineteenth century, during the struggle over slavery, the contract was at the heart of personal and ideological relations. Labour and marriage were idealized as relations properly relied on consent and contract. As Stanley claims “in the age of slave emancipation contract became a dominant metaphor for social relations and the very symbol of freedom”.<sup>464</sup> Moreover, Stanley notes that the very legitimacy of commodity exchanges, such as capitalism in the nineteenth century, rested upon maintaining appropriate boundaries between free labour and chattel slavery.<sup>465</sup>

In the years following the emancipation of slaves, labour and feminist movements continually challenged any absolute difference between relations of slavery and freedom and strongly called into question the idea that the presence of contract cannot prevent bondage. More precisely, labour and feminist movements brought to light the ambiguities and contradictions of wage labour, marriage and sexual relations. Indeed, they revealed that despite both being created by contract, wage labour and marriage shared certain attributes considered intrinsic to slavery, such as dispossession, exploitation and alienation. Contract rather than be a guarantee of freedom, is often the source of discrimination, in particular sexual and racial discrimination, and of extensive restrictions placed upon individuals considered to be free.<sup>466</sup>

Labour radical movement targeted the wage labour contract using the phrase ‘wage slavery’.<sup>467</sup> As Eric Foner observes “the idea of wage slavery contained condemnation of slavery itself. The central value of the early labour movement – liberty, democracy, personal independence, the right of the worker to the fruits of his or her labour – were obviously incompatible with the institution of slavery”.<sup>468</sup> Feminists observed that working women faced the same wage slavery of low pay and harsh

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<sup>463</sup> L. Brace, 2004, p. 161.

<sup>464</sup> A. D. Stanley, 1998, p. x.

<sup>465</sup> *Ivi* p. xi.

<sup>466</sup> C. Pateman (1988), Pateman, as seen above, denounces how women’s subordination is constructed as ‘freedom’ under the liberal contract. See also C. W. Mills (1997).

<sup>467</sup> As A. D. Stanley argues the symbolism of wage slavery “cast doubt on the idea that freedom meant being a merchant of one’s own labor, raising questions that were metaphysical as well as moral and economic – about the nature of the human essence, about autonomy and alienation, about the relation of self ownership, labor and time” (2000, p. 84). See also R. Roediger 1991, p. 87, 175-181.

<sup>468</sup> E. Foner quoted in R. Roediger 1991, p. 73.

conditions as men. Yet they highlighted that were unable to live independently not simply because they were wage slaves, but because men exercised control and power over them. In this sense, they denounced a persistent bondage in women's dependence on men, in marriage contract and in prostitution, and used the term 'white slavery' to refer to the situations of women in prostitution and in marriage.<sup>469</sup> From this perspective, thus, in the nineteenth century the notion of slavery was used by the labour and feminist movements as a metaphor to describe the conditions of bondage imposed by the supposed instrument of freedom, the contract.

Drawing the precise boundaries between slavery and freedom is no easy task. The defining feature of slavery is considered to be that it entails the treating of human beings as property. As Luigi Ferrajoli points out, slavery is the "classical and extreme image of reduction of the human being to a thing, it consists in the property of a person or otherwise in the domination over their body and against their will on the part of another person".<sup>470</sup> The 1926 Slavery Convention of the League of Nations defines slavery as "the status or the conditions of a person over whom any or all powers attaching to the right of ownership are exercised".<sup>471</sup> Such a definition requires the paying of attention to 'any' as well as 'all' powers attaching to the rights of ownership. From this perspective, it does not clearly distinguish master-slavery relationship from other social relationships.<sup>472</sup> This is because some of the powers, claims and privileges generally associated with ownership can be often exercised over people who are socially deemed to be free – such as spouses, children and employers.<sup>473</sup>

Slavery, as sociologist Julia O'Connell Davidson stresses, has always stood at "one pole of a continuum of exploitation, shading off into servitude and other forms of exploitation, rather than existing as a wholly distinct, isolated phenomenon".<sup>474</sup> Furthermore, as many scholars point out, it is particularly controversial to draw a line between slavery and 'free' wage labour by considering whether or not the worker performs the work *voluntarily*.<sup>475</sup> In his interesting study on the history of 'free wage labour' and the development of capitalism in United States and Britain, legal scholar

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<sup>469</sup> The notion 'white slavery' is examined in the next section.

<sup>470</sup> L. Ferrajoli, 2007, p. 326 [my translation]

<sup>471</sup> The development of this Article is represented by Article 4 of the 1948 Universal Declaration of Human Rights (UDHR): "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms".

<sup>472</sup> J. O'Connell Davidson, 2010, p. 246.

<sup>473</sup> *Ibidem*. See also C. Pateman (1988); L. Brace (2004); O'Connell Davidson (2005).

<sup>474</sup> J. O'Connell Davidson 2010, p. 246.

<sup>475</sup> See in particular R. J. Steinfeld (2001).

Robert Steinfeld argues that neither free nor coerced labour exist independently of social, legal or political convention but involve judgments about “what kinds of coercive pressures are legitimate and illegitimate in labour relations”.<sup>476</sup> In this light, Steinfeld points out that when we talk about *coercion* in labour relations – both slavery and modern free wage labour – we are talking about situations in which “the parties may be said to have been coerced into performing the labour or to have freely chosen the lesser evil”.<sup>477</sup> Indeed, the labour of the slave is not usually “elicited through overpowering physical force” but it is compelled by forcing them “to choose between very unpleasant alternatives, such as death, torture and endless confinement, on the one hand, or back-breaking physical labour in the other”.<sup>478</sup> Similarly, the labour of free wage workers is normally “elicited by offering workers a choice, for example, between life on an inadequate welfare stipend or, in the extreme, starvation, on the one hand, and performing more or less unpleasant work for wages on the other”.<sup>479</sup>

Although Steinfeld’s main thesis is quite radical, his work is highly interesting as it allows us to reframe what he calls the “conventional wisdom” that establishes a false picture of a pure and non-coercive free wage labour. Steinfeld’s analysis leads us to reconsider our perspective and to use the notions of servitude and slavery to rethink the history of employment relations in the Anglo-American world. In so doing, he invites us to challenge the idea of a clear opposition between free and coerced labour and to think about labour relations “in terms of degrees of coercive pressure that can be brought to bear to elicit labour”.<sup>480</sup>

Steinfeld’s work follows the line of other historians of slavery that have argued that slavery relationships were constantly negotiated and contested by slaves, opening up the possibility of talking – along with huge differences – about the similarities between slavery and certain basic dynamics of wage labour.<sup>481</sup> Both slavery and wage labour, as Steinfeld writes, “were negotiated relationships in which labour’s ultimate source of power were very similar: the power to withdraw labour and the power to work

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<sup>476</sup> R. J. Steinfeld, 2001, p. 16.

<sup>477</sup> *Ivi* p. 15.

<sup>478</sup> *Ivi* p. 14

<sup>479</sup> *Ivi* pp. 14-15. In particular, Steinfeld analyses the English Master and Servant Acts that gave English employers the power to enforce employment contracts through summary criminal actions before magistrates. According to the law in force in that period in England, criminal defendants could not testify on their own behalf, as consequences employees were unable to offer any evidence. Steinfeld notes that, despite the criminal sanctions under the Master and Servant Acts, both British employees and employers seemed to view wage labour as free labour.

<sup>480</sup> R. J. Steinfeld, 2001, p. 16.

<sup>481</sup> See for example I. Berlin (1998).

less hard or well than was possible”.<sup>482</sup> In this light, historians have emphasised the legal restraints historically imposed on non-slave workers revealing that people from poor and labouring classes in the capitalist metropolis until the mid to late nineteenth century, and their counterparts in the colonies in the twentieth century, were subject to continuous forms of exploitation and restrictions placed on their freedom and mobility. Similarly, many scholars have demonstrated that today, the vigorous condemnation of trafficking as a form of slavery coexist with continued restrictions, discrimination and exploitation that migrants experience.<sup>483</sup> This perspective helps to show that the boundary separating free from coerced labour is not natural, but born of convention and, as a consequence, it leads us to investigate the political effects of discourse on trafficking as a new form of ‘slavery’.

### 3.1.2 The Spectre of ‘White Slavery’

Discourse on trafficking as a new form of slavery has been developed in direct continuity with the rhetoric of ‘white slavery’ that characterised Europe and North America during the second half of the nineteenth century.<sup>484</sup> Originally, the term ‘white slavery’ emerged at the beginning of the nineteenth century as a powerful metaphor to indicate white workers’ oppression in England.<sup>485</sup> However, after the passage of the ten-hour factory law,<sup>486</sup> the term came to be much more narrowly invoked by abolitionist feminists in their campaign against prostitution.<sup>487</sup> As discussed above, neo-abolitionist feminists have strategically adopted the label ‘abolitionist’ to evoke nineteenth-century feminist campaign to counter ‘white slavery’.<sup>488</sup>

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<sup>482</sup> R. J. Steinfeld, 2001, p. 8.

<sup>483</sup> B. Anderson (2007); B. Rogaly (2008); J. O’Connell Davidson (2010).

<sup>484</sup> J. Doezema, 2000, p. 26.

<sup>485</sup> D. R. Roediger (1991). Roediger argues that “the phrase *white slavery* over *wage slavery* or *slavery of wage* lay in the former term’s vagueness and in its whiteness, in its invocation of *herrenvolk* republicanism [...] *White slavery* also served well because it did not call into question chattel slavery itself, an issue that sharply divided the labour movement, the Jacksonians and the nation”, p. 73.

<sup>486</sup> See D. R. Roediger (1991).

<sup>487</sup> It is worth noting that the term ‘slavery’ was also used by feminists to compare the status of women in marriage, using the analogy to argue that women needed a right to autonomy. See for example letter from Elizabeth Cady Stanton to the Editor of the New York Tribune (May 30, 1860), reprinted in M. J. Buhle and P. Buhle (2005). (“An married woman can make contracts, sue and be sued, enjoy the rights of property, to her inheritance – to her wages – to her person - to her children [...] it is only in marriage that [woman] must demand the right to person, children, property, wages, life, liberty and pursuit of happiness”). On the use of the marriage-slavery analogy see E. B. Clark (1990).

<sup>488</sup> See chapter 2.

By highlighting the *racial* overtones of the notion ‘white slavery’ that made its use “inopportune, impossible and even counterproductive”, historian Nora Demleitner points out that abolitionists decided to adopt this term because they “understood the importance of employing a term they could fill with a vision and around which a large number of people could rally. In addition, in light of the then recent demise of official slavery, the term ‘white slavery’ might have also connoted eventual victory to the reformers”.<sup>489</sup>

Nineteenth-century abolitionist feminist movement initially used the notion ‘white slavery’ to refer to the entire system of regulation of prostitution by the state throughout much of Europe and in parts of United States.<sup>490</sup> Nevertheless, ‘white slavery’ became soon synonymous of all prostitution, licensed and unlicensed, and consequently the feminist abolitionist campaign became a broader campaign to eradicate all prostitution. In this light, the abolitionist movement also addressed the phenomenon of trafficking of ‘white’ women from Europe and North America to the purpose of prostitution by foreign or non-Western men in the colonial regions in Africa, Asia and South America.

Feminist historian Elein Scully has identified three interdependent developments that generated, among other things, the ‘white’ slavery trade that took place in the second half of the nineteenth century. All these three developments involved the mobilization and migration of large numbers of single males. First was the abolition of the slave trade and the consequent development of non-white, indentured labour to replace African slaves in plantation economies, to work in extractive industries such as diamond, and to work on monumental construction projects. Second, and concomitantly, was the mobilization and migration of non-Western males to colonial matrix and Western-dominated enclaves. Third was the movement of white male seeking opportunities to colonial and Western-dominated enclaves. All these interlocking developments prompted, as Scully highlights, an international traffic in sex workers “expanded regional migratory prostitution, and intensified local, indigenous prostitution”.<sup>491</sup>

Scully argues that women entered into the trade under a variety of circumstances and their grade of autonomy was strongly different. In general, American and Western European women, due to their nationality and race, were ‘off limits’ for non-Western men and enjoyed a privileged status and had substantial control over their working

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<sup>489</sup> N. Demleitner, 1994, pp. 166-167.

<sup>490</sup> E. Nadelmann (1990).

<sup>491</sup> E. Scully, 2001, p. 77.

conditions. In this sense, Jo Doezema has noted that the expression ‘white slave trade’ is incorrect since, during its initial phase between 1804 to 1880, women who took part in it were not slaves but rather sex workers from North America and Western Europe. However, this situation changed during the years between 1880 and 1940 when, following the economic inequalities between core and peripheral regions, white women’s sex work migration and labour was replaced by low-cost labour performed by third world women in more exploitative working conditions.<sup>492</sup>

Nineteenth-century abolitionist feminist campaigns against ‘white slavery’ have had the indubitable merit of recasting the image of prostitution, enabling the causes of prostitution to come to light not in the pathology of the individual prostitute but in the economic, social and sexual inequalities between the sexes. In this sense, they allowed a shifting of attention away from the prostitute and towards the understanding and interpreting of male and female relations.<sup>493</sup> However, if, on one hand, abolitionist feminists fought for women’s emancipation from dominant male sexual standard, on the other hand, this approach went hand in hand with the ‘impulse’ to control women who did not follow the high moral standards decided by their (white) ‘sisters’.<sup>494</sup> This impulse, as discussed above, is present today in most of the neo-abolitionists feminist’s arguments.<sup>495</sup>

The metaphor of ‘white slavery’ created and spread the image of prostitute as a ‘woman in chains’, leaving no room for voluntary prostitution. Abolitionist feminist campaigns were often characterised by the rhetorical vocabulary of female victimisation: young and pure women “driven by poverty, lured by trickery and compelled by force to prostitution in foreign lands”.<sup>496</sup> The voice of prostitutes was *absent* in the movement that was fighting for them. As Petra De Vries argues, “[m]any of the old and new generation of campaigners earnestly wished to end the sexual exploitation of prostitutes and were appalled at the horrible stories of the brutal treatment of women. It is all the more ironic that the prostitute herself never had a voice in the campaign against the white slave traffic.”<sup>497</sup>

The complex experience of prostitutes and female migration was often reduced by

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<sup>492</sup> *Ibidem*.

<sup>493</sup> Leader of feminist abolitionist campaign against white slavery was a British woman, Josephine Butler who played a central role in persuading Parliament to repeal the Contagious Diseases Prevention Acts regulating prostitution in Britain.

<sup>494</sup> J. Doezema, 2010, p. 59.

<sup>495</sup> See chapter 2.

<sup>496</sup> J. Doezema, 2000, p. 26.

<sup>497</sup> P. De Vries, 2005, p. 55.

abolitionist feminists to a melodramatic formula of the evil (foreign) traffickers and the innocent, suffering and white female victim.<sup>498</sup> The *whiteness* of victims reflected the Eurocentric assumptions of most abolitionist perspectives on woman trafficking. Abolitionists in their campaigns did not usually address ‘non-white’ female prostitutes. Only white women were considered as victims. For instance, as historian Donna Guy illustrates, nineteenth-century abolitionist campaigns against the ‘white slave trade’ from Britain to Argentina were not concerned about the situation of native born prostitutes.<sup>499</sup> ‘Non-whiteness’ was usually considered the ‘otherness’. In this light, as De Vries argues in her research on the Dutch campaign against the trafficking of women in the early twentieth century, “the white slave campaign represented not only the wish for (white) female physical and sexual integrity, but also a longing for a national ‘white’ integrity”.<sup>500</sup>

Many contemporary historians have questioned the extent of the ‘white slave trade’, arguing that the number of white slaves was smaller than it was depicted.<sup>501</sup> According to feminist historian Ruth Rosen, who is particularly concerned with providing the existence of a white slave trade, ‘white slavery’ accounted for not more than 10 per cent of all prostitution.<sup>502</sup> Donna Guy reveals that the statistics relating to the number of foreign prostitutes in Buenos Aires were used to prove the existence of the phenomenon of white slavery on an internationally large scale. In general, historians argue that while ‘white slavery’ existed, its level of incidence was strongly exaggerated. From this perspective, many scholars have described the ‘white slavery’ phenomenon as a ‘moral panic’, more hype than reality, fuelled by Victorian discomfort about women’s sexuality and racist concerns about the perceived link between prostitution and disfavoured minorities.<sup>503</sup>

In line with this view, Jo Doezema argues that “[t]he narratives of ‘white slavery’ become something other than factual accounts of women’s experiences. Rather, ‘white slavery’ becomes a metaphor for a number of fears and anxieties in turn of the century European and American society”.<sup>504</sup> The main fears and anxieties were about women’s bodies and sexual relationships, and about the loss of national identity through

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<sup>498</sup> See J. Doezema (2000).

<sup>499</sup> D. J. Guy (1992).

<sup>500</sup> De Vries highlights that “an image of white men lusting for prostitutes of different races would have marked out quite different boundaries between sexes and nations than the image of a pure European girl sexually endangered by the exotic ‘other’”, P. De Vries, 2005, p. 49.

<sup>501</sup> See J. R. Walkowitz (1980); R. Rosen (1982); D. J. Guy (1991).

<sup>502</sup> R. Rosen (1982).

<sup>503</sup> J. Chuang (2009); see also M. A. Irwin, (1996).

<sup>504</sup> J. Doezema, 2000, p. 23.

‘foreigners’ and migrants. Such fears and anxieties were – and still are – strongly intertwined.<sup>505</sup> Women’s independence has always been perceived as a threat to the stability of the family and consequently of the nation.<sup>506</sup> In this regard, Guy argues:

The central issue that united anti-white slavery campaigns in Europe and Argentina was the way unacceptable female conduct defined the behaviour of the family, the good citizen and ultimately national and religious honor [...]. Rather than reflecting a completely verifiable reality, white slavery was the construction of a set of discourses about family reform, the role of women’s work in modernizing societies and the gendered construction of politics<sup>507</sup>

Sexuality, gender, race and ethnicity are central to the making of the nation as ‘imagined community’.<sup>508</sup> In constructing the boundaries of nation and empire, women are evoked as mothers, as symbols of “the national hearth and home” and as wise daughters who are the bearers of masculine honour.<sup>509</sup> Women’s bodies are constructed symbolically as embodiments of the boundaries, culture and traditions of the nation and physically as agents of reproduction through childbirth.<sup>510</sup> From this perspective, as sociologist Stephanie Limoncelli points out, “unbounded female sexual activities have been seen as dangerous and unpatriotic, a threat to the strength of the nation and the honour of men”.<sup>511</sup> If the women are the mothers of empire and nation, men are the leaders and the protectors, ensuring their defence.

Immigration policies play a crucial role in defining and reinforcing the gender and sexuality norms inasmuch as they impose conditions of marriage and reproduction based on normative assumptions about marriage and biological reproduction and thus establish who can constitute a threat to the nation and who can promote citizenship. Thus, it is not surprising that nineteenth-century abolitionist campaigns against ‘white slavery’ chose to focus, much as today’s anti-trafficking measures, on repressive immigration measures rather than on looking at the structural economic and social

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<sup>505</sup> See N. Yuval-Davis (1997) and also G. Mosse (1985). Guy points out that “fears of white slavery in Buenos Aires were directly linked to European disapproval of female migration. Racism, nationalism and religious bigotry fuelled the anxieties”, D. J. Guy, 1992, p. 7.

<sup>506</sup> J. Doezema, 2000, p. 43.

<sup>507</sup> D. J. Guy, 1992, p. 35.

<sup>508</sup> B. Anderson (1985).

<sup>509</sup> J. Nagel (1998).

<sup>510</sup> N. Yuval-Davis (1997).

<sup>511</sup> S. Limoncelli, 2010, p. 4.



causes of the phenomenon. As Frederick Gritten highlights in his research on ‘white slavery’ in America, “[b]y blaming foreign villains, native-born Americans affirmed the basic purity of the nation and simplified the solutions to white slavery and vice: immigration should be restricted and undesirable aliens deported”.<sup>512</sup>

On the basis of these considerations, as many feminist scholars have pointed out, it appears quite evident how the phenomenon of the ‘white slavery’ constitutes an important precedent in understanding today’s issue of ‘sex trafficking’.<sup>513</sup> Now as then, abolitionist feminists are involved in coalition with those who are usually antithetical to feminist goals. Now as then, even if the ‘victims’ of ‘sex trafficking’ are no longer Western European or American women, media narratives depict the widespread abduction of innocent women and girls who are seduced, deceived, or forced into prostitution, typically by ‘non Western’ men. This representation seems to communicate the idea that trafficking in women is, after all, not a European problem but a problem for Europe.<sup>514</sup>

In general, it could be said that now as then trafficking in women covers a wide range of state and feminist anxieties and concerns, regarding increasing migration, changes of labour relations and the transformation of family, kinship and intimacy.<sup>515</sup> In this regard, by stressing the repetition of crucial elements of the ‘white slavery’ myth in accounts of ‘trafficking in women’, Doezema points out that the negotiations on UN Protocol on Trafficking “showed trafficking operating in a like metaphorical function, as the arena in which shifting ideas around sexuality, the role of women and ideas of labour and citizenship were contested”.<sup>516</sup>

### **3.1.3 New Forms of ‘Slavery’**

Antislavery activists usually identifies three essential elements that distinguish ‘new slavery’ from other forms of oppression and labour exploitation: its involuntary nature, as anti-slavery activist Kevin Bales argues the slave cannot “walk away from the situation they’re in and someone’s controlling their free will”<sup>517</sup>; second, its severe economic exploitation – such as the absence of wages or payment that only covers basic

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<sup>512</sup> F. K. Grittner, 1990, p.130.

<sup>513</sup> See in particular J. Doezema (2000, 2010).

<sup>514</sup> L. Ihme (2008).

<sup>515</sup> J. Berman (2003).

<sup>516</sup> J. Doezema, 2010, p. 172.

<sup>517</sup> K. Bales (2007).

needs; and its violence or the threat of violence. In this sense, Bales argues:

Slavery means the loss of free will, it means that violence will be used to maintain control over the slave, and it means that the slave will be exploited, normally in some sort of economic activity, but possibly for sex or even as an object of conspicuous consumption. Slaves may be kidnapped or captured, tricked into slavery, or born into slavery, but their lives will be controlled through violence and they will be exploited. Normally the life of a slave is marked as well by the fact that they receive no payment for their work, only subsistence.<sup>518</sup>

The definition offered by Bales is highly important but what concerns us here, is that it does not really capture the complexities and nuances of people's experiences. Indeed, there are cases that are defined as examples of slavery, but that do not always involve the essential elements defined by the anti-slavery activists – such as extensive physical and sexual violence or lack of payment. Vice versa, there are cases that present situations of exploitation – such as situations in which people work long hours for little pay, or who are prevented from quitting their jobs by a range of non-economic constraints – which are often not defined or identified as forms of slavery.

With respect to the former cases, the practice of debt bondage is an interesting example. As said above, debt bondage, common in South Asia, is one of the slavery-like practices defined in a 1956 *United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*. More precisely, debt bondage is defined as the “status or conditions arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of these services as reasonably assessed is not applied towards the liquidation of the debt or the length and the nature of those services are not respectively limited and defined”.<sup>519</sup> Debt-bondage in prostitution is usually taken as one of the main examples of modern slavery. However, for instance, as many researchers argue, debt-bonded brothels do not necessarily involve either violence or the complete absence of payment. Feminist scholars highlight that many women and girls

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<sup>518</sup> *Ivi* p. 1.

<sup>519</sup> Article 1.

involved in anti-trafficking programmes escape from the shelters to which they are taken, and return to work in the debt-bonded brothels.<sup>520</sup> In this vein, in her research on ‘sex trafficking’ in Italy, feminist scholar Rutvica Andrijasevic has highlighted that the “debt did not play a determining role in maintaining the conditions of confinement and that women did not give too much weight to the debt. They did not consider themselves to be ‘bound’ by debt but instead regarded it as a risk of the trade that concerned third parties alone”.<sup>521</sup> Far from suggesting that the practice of debt bondage always excludes forms of violence or coercion, these studies reveal, as O’Connell Davidson points out, that “economic and/or other impersonal forces can lead people to consent to ‘severe economic exploitation’ and to an employment relationship that entails close restriction on their freedom of choice and movement”.<sup>522</sup>

Regarding to cases that are often not identified as forms of slavery, domestic work is an interesting sector to examine – also because it is another sector wherein many people are held to be ‘trafficked’.<sup>523</sup> Domestic workers, especially migrant domestic workers, are particularly vulnerable to discrimination, exploitation and coercion by employers because they are isolated within private sphere and because in many cases they are not protected by national labour law. In this respect, it is important to mention the famous case *Siliadin v. France* (2005)<sup>524</sup> and the case *Rantsev v. Cyprus and Russia* (2010).<sup>525</sup> These cases of violence in domestic work are not isolated cases. Various studies have demonstrated that cases of violence and coercion in domestic work are

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<sup>520</sup> See in particular G. Soderlund (2005).

<sup>521</sup> R. Andrijasevic, 2010, p. 137.

<sup>522</sup> J. O’Connell Davidson, 2010, p. 251.

<sup>523</sup> See B. Anderson and J. O’Connell Davidson (2003); A. Ong (2006); S. Qayum and R. Ray (2010).

<sup>524</sup> ECHR Case of *Siliadin v. France*, (Application no. 73316/01) Judgment, Strasbourg, 26 July 2005 <http://www.echr.coe.int/echr>. In the case of *Siliadin v. France*, the European Court of Human Rights considered trafficking in human beings for the first time. The applicant, a Togolese woman who lived in Paris, had served as an unpaid servant for several years as minor and her passport was confiscated. Relying on Article 4 of the European Convention (Prohibition of slavery and forced labour), the applicant argued that French criminal law did not provide her with sufficient, effective protection against the “forced and compulsory” labour which in practice had made her a domestic slave. The European Court of Human Rights stated that the applicant had been subjected to forced labour and held in servitude within the meaning of Article 4 of the Convention. Nevertheless, the Court held that “it could not be considered that the applicant had been held in slavery in the traditional sense of that concept”. For an interesting examination of this case, see H. Cullen (2006).

<sup>525</sup> ECHR Case of *Rantsev v. Cyprus and Russia*, (Application No. 25965/04), Judgment, Strasbourg, 7 January 2010 [http://www.echr.coe.int/ECHR/Homepage\\_EN](http://www.echr.coe.int/ECHR/Homepage_EN). In this case, the applicant, a Russian national, submitted a complaint against the Republic of Cyprus and Russia in the European Court of Human Rights in relation to the death of his 20 year old daughter. The European Court of Human Rights stated a violation of Article 4 of the European Convention (Prohibition of slavery and forced labour). The Court highlighted “the positive obligations upon States to investigate allegations of trafficking and to implement measures to prevent and protect people from human trafficking”.

numerous over all Europe.<sup>526</sup> Anti-slavery activists generally support the idea that employment relations constitute slavery-like practices when migrant domestic workers are subjected to severe physical and sexual violence as well as labour exploitation and physical confinement.<sup>527</sup> However, it is important to highlight that there are many situations in which domestic workers work for long hours for little pay or in very poor working conditions with extensive rights violations but are not actually subject to physical or sexual abuses, or a forced confinement.<sup>528</sup> In this regard, it is worth mentioning the research carried out by sociologist Julia O’Connell Davidson and Bridget Anderson on Western expatriates in Bangkok about their practices and attitudes as employers of migrant domestic workers. This study reveals that despite the fact that the employers interviewed were nice and respectable people, their responses about the hours they required their employers to work were shocking. For example, a British expatriated couple recounted that their domestic workers didn’t have fixed hours and that they ‘had to be on call’ stating that it is the nature of domestic work that there are no fixed hours.<sup>529</sup> What kinds of relations are these? Can we talk about slavery-like practices? As O’Connell Davidson rightly argues, if we do not consider them as slavery-like practices because the employers do not torture or beat domestic workers despite the fact that they work in conditions of strong exploitation, then slavery-like circumstances are not identifiable on the basis of the possibility/capacity of individuals to control and make decisions regarding their own lives.<sup>530</sup> Rather, they are identified through reference to whether the employers exercise power in a tyrannical way or not.<sup>531</sup>

In view of these considerations, it can be argued that new forms of slavery are defined and identified considering where in different contexts “‘appropriate’ exploitation ends and ‘inappropriate’ exploitation begins”.<sup>532</sup> Therefore, as O’Connell stresses, slavery remains a highly contentious and political concept. Such a perspective leads us to question if it is possible to separate ‘trafficking’ from others forms of abuse and exploitation that migrant workers may experience.

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<sup>526</sup> See in particular G. Graig (2007).

<sup>527</sup> *Ivi*

<sup>528</sup> B. Anderson and J. O’Connell Davidson (2003).

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<sup>530</sup> D. Weissbroth and Anti-Slavery International (2002).

<sup>531</sup> J. O’Connell Davidson, 2010, p. 257.

<sup>532</sup> *Ibidem*.

### 3.1.4 Trafficking and Measuring Exploitation

As discussed above, the UN Trafficking Protocol identifies slavery as one of the possible outcomes of ‘trafficking’. More precisely, according to the UN Protocol, trafficking consists of three basic elements: the action (of recruitment etc.); the means (of the threat or use of forces or other forms of coercion etc.) and the purpose of exploitation.<sup>533</sup> Exploitation shall include “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery [...]”.<sup>534</sup> But, none of the individual elements, such as ‘coercion’, ‘exploitation’ and ‘vulnerability’, are clearly defined in the Protocol itself.<sup>535</sup>

The issue of the definition of the term exploitation in the Protocol has been considered by the International Labour Organization (ILO) Committee of Expert in 2007, in its General Survey on the application of the forced labour Convention.<sup>536</sup> The Committee observed that the notion of exploitation of labour inherent in the UN Trafficking Protocol definition of trafficking allows a link between the Protocol and the 1930 *ILO Forced Labour Convention* (No. 29) and, consequently, that trafficking in persons for the purpose of exploitation is encompassed by the definition of “forced or compulsory labour” provided by the Convention. With the expression “forced or compulsory labour”, the Convention No. 29 means “all work or service which is exacted from any person under menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>537</sup> This definition places much emphasis on the *involuntariness* of the work or service relationship. Yet, as discussed above, the dividing line between coerced and non-coerced exploitation is very thin and it cannot be drawn through reference to the voluntariness with which the labour is performed. Instead, it is important to look at conditions in which the work (or the migratory process in which the worker is involved) is effectively performed. As feminist jurist Milly Virgilio suggests, it is useful to concentrate on the places where deceit or coercion is practised, on the relations of dependence or exploitation undermining decisional autonomy of movement, on working conditions and on profits.<sup>538</sup>

In this respect, it is significant to highlight that according to the UN Trafficking

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<sup>533</sup> See chapter 1.

<sup>534</sup> UN Trafficking Protocol.

<sup>535</sup> It is worth noting that building on the Protocol definition of trafficking, the Council of Europe Convention does not offer a clear definition of exploitation.

<sup>536</sup> ILO, 2007, p. 39-40.

<sup>537</sup> ILO Forced Labour Convention, Article 2.

<sup>538</sup> M. Virgilio (2002).

Protocol the consent of a victim of trafficking to the intended exploitation should be irrelevant where means of coercion have been used.<sup>539</sup> It means, for example, that even if a person is aware of being employed in the sex industry or in prostitution, he/she may be misled as to the conditions of work which are exploitative and coercive.<sup>540</sup> In this case, while being aware of the nature of work, the person is still considered a victim of trafficking. The ILO Committee of Experts in its 2007 General Survey has recognized the importance of UN Trafficking Protocol and in particular of this provision. The ILO Committee of Experts has also referred to the concept of ‘abuse of vulnerability’ used in the UN Trafficking Protocol, in order to examine the situations in which an obligation to do overtime work under threat of penalty could be inconsistent with Convention No. 29. Indeed, despite the fact that workers can be able to refuse to work beyond normal working hours, their vulnerability means that in practice “they may have no choice and are obliged to do so in order to earn the minimum wage or keep their jobs”.<sup>541</sup>

However, the main question is: how to measure exploitation? Neither the UN Protocol nor the national legislation on trafficking<sup>542</sup> developed from it provide clear guidelines of the type and degree of exploitation that must be present for identifying cases of victims of trafficking and for distinguishing them from the cases in which migrants work in highly exploited conditions. As Anderson and O’Connell Davidson claim, “the protocol definition of trafficking [...] leaves open questions about precisely how exploitative an employment relation has to be before we can say that a person has been recruited and transported ‘for purposes of exploitation’”.<sup>543</sup> Certainly, the major problem that makes it extremely difficult to come up with consistent criteria to measure exploitation is the absence of a global political consensus on minimum employment rights and of cross-national norms regarding employment relations.<sup>544</sup> There are many variations between countries in terms of what are the socially and legally accepted working conditions in the different employment sectors.

The lack of clear guidelines allows space for conflicting interpretations about what is trafficking and what it is not; what constitutes inappropriate economic exploitation; what distinguishes trafficking from legally ‘tolerated’ forms of

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<sup>539</sup> UN Trafficking Protocol Article 3.

<sup>540</sup> As seen in chapter 1 e 2, the issue of the consent in the UN Trafficking definition has been at the centre of feminist debates during the ‘Vienna negotiations’.

<sup>541</sup> ILO, 2009, p. 7.

<sup>542</sup> See B. Hancilova and C. Massey (2009).

<sup>543</sup> B. Anderson and J. O’Connell Davidson, 2003, p. 11.

<sup>544</sup> The ILO in theory provided minimum employment rights through the declaration of fundamental rights but this is exactly no more than a declaration far from being adopted and enforced in every country in the world.

exploitation and in particular what exploitation there might be in the context of sex work. Moreover, these definitional problems explain the reason why there is a large gap between the estimated numbers of victims of trafficking who exist at the rhetorical level and a very small number who are actually identified and protected.<sup>545</sup> The case of Spain, in this respect, is particularly significant. In 2009, the Spanish government approved the “Plan contra la trata” (Plan against trafficking) that focuses exclusively on the victims of sexual exploitation, leaving aside the trafficking that occurs in other sectors.<sup>546</sup> The Plan provides different measures to protect and assist victims of trafficking. In April 2010, the Department of Equal Opportunity of Spain (Ministerio de Igualdad) made public the data from the first year of the Plan revealing unsatisfactory results: the number of centres to assist victims of trafficking are only seven in all of Spain. Given that the Spanish Department of Equal Opportunities has estimated that between 300,000 and 500,000 women are victims of sexual exploitation and 90% are victims of trafficking, the measures of the Plan appear highly insufficient. As feminist jurist Ruth Mestre highlights, this discrepancy is due to the fact that the majority of female victims of sexual exploitation are irregular migrants in the sex industry and most of them are smuggled persons.<sup>547</sup>

Thus, the vagueness of the notion of exploitation creates an oversimplified demarcation between voluntary and involuntary migration processes, between suffering and kidnapped individuals and free individuals. As discussed above, the boundary between trafficking, smuggling and legal systems of migration is not clear.<sup>548</sup> There are cases in which trafficked persons can enter States legally, for instance women may enter with tourist permit and end up being forced into work. There are also situations in which legal employment agencies have recruited and transported workers through means of deception.<sup>549</sup> Moreover, as many studies have demonstrated, there are numerous cases of exploitation and violations of the rights of migrant workers who are legally present in countries under various work permit schemes.<sup>550</sup> In fact, episodes of exploitation, and then coercion, occur in legal and illegal systems of works and in legal and illegal systems of migration. As Julia O’Connell Davidson argues, “there is no easy opposition

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<sup>545</sup> J. O’Connell Davidson (2010).

<sup>546</sup> This is not only in Spain but also in other European countries. For example, in UK Anti-trafficking Policies focuses almost exclusively on women in the sex industry. See the interesting report released by X-Talk Project (2010).

<sup>547</sup> Ruth Mestre points out that the measures of the Plan are in coherence with the official abolitionist politics. R. Mestre (2010).

<sup>548</sup> See chapter 1.

<sup>549</sup> B. Anderson and J. O’Connell Davidson (2003).

<sup>550</sup> B. Rogaly (2008); K. Calavita (2004).

in the real world between migrants who enjoy total choice over all aspects of their lives, on the one hand, and individuals who have been kidnapped and transported in shackles to settings where they are imprisoned, starved and forced to labour under the lash of a whip on the other”.<sup>551</sup> People experience a range of possible situations with, at one end, slavery and, at the other, situations of freely chosen employment. Between the two extremes there are various employment relationships in which people may experience exploitation, abuse, powerlessness and other types of restriction.

For migrant workers, in particular the undocumented ones, the boundary between free and exploited labour is always unclear. Restricted labour mobility and the lack of employment opportunities, in particular for those who have indebted themselves to migrate, lead them to accept working in unsafe conditions and to receive low wages. Given the fact that in the EU most national legislation link the authorization to enter and reside in a territory to the holding of a contract of employment, for many migrant workers their legality is dependant on the permits held by employers and this makes them particularly vulnerable.<sup>552</sup> The fear of deportation means many migrants do not complain about exploitative situations or other forms of abuse.<sup>553</sup> In this light, then, it is clear that the issue of ‘sex trafficking’ needs to be examined along with the other forms of abuse and exploitation to which migrant workers are subjected. It is necessary to look at the ways in which policies on employment, welfare and immigration can create the situations within which migrants, and in particular migrant women, become susceptible to abuse and discrimination. Over the following pages, I shall look at the features of female migration in Europe and the confinement of female mobility in the service sectors.

## **3.2 Female Migration and Labour Mobility**

### **3.2.1 “Birds of Passage are also Women”<sup>554</sup>**

Although women have always played an important role in international migration, for a long time studies on migrations have focused exclusively on male migrants,

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<sup>551</sup> J. O’Connell Davidson, 2010, p. 254.

<sup>552</sup> E. Rigo (2011).

<sup>553</sup> ILO Global Report on forced labour illustrates many examples in which employers use the possibility of deportation as the threat. See ILO (2005).

<sup>554</sup> I borrowed this title from M. Morokvasic (1984). In 1948, Mirjana Morokvasic edited a special issue of *International Migration Review* which claimed that ‘birds of passage’ were also female.



obscuring the active presence of women in migratory flows.<sup>555</sup> The image of the “adventuresome male seeking new opportunities abroad, joined later by wife and family or returning to hearth and home with cash in hand”<sup>556</sup> has pervaded research and theories on migratory flows. Behind this dominant vision, there is the assumed idea that man is the breadwinner and economically motivated actor while the migrant woman is dependent on him, and thus a ‘valueless economic actor’.<sup>557</sup> Moreover, if any significance is attributed to female migration, this is at an individual (micro) level. Indeed, the emphasis is on the liberating potential of migration, allowing women access to emancipation from patriarchal system in their country of origin, to begin their journey towards ‘modernity’. In this light, the complexity of female migration is flattened by the binomial tradition/modernity, referring the former aspect to the conditions of women in the country of the origin while, the second one to the conditions of women in the country of destination.<sup>558</sup>

Studies on migrations that view men as ‘primary’ and women as ‘secondary’ migrants have relied on the model of the male guest-worker postulated to indicate the mass labour migration in Europe between the 1950s and mid 1970s. According to this model, developed by Bohning, the migratory process is characterised by different stages: the usual sequence begins with single young men, followed in the second phase by older married men who are joined in the third stage by their wives and children.<sup>559</sup> As Eleonore Kofman argues, “[t]he persistence of this model serves to reinforce the notion of women as passive followers and dependants, whose employment, where it occurs, is of secondary consideration”.<sup>560</sup> In other words, behind this simplistic vision there is the classic ideology that identifies, on one hand, men with activity, production and the public sphere and women, on the other hand, with passivity, the duties of reproduction and the domestic/private sphere.<sup>561</sup> This dichotomy, as feminist scholars have highlighted, has led to the exclusion of women from citizenship: women are considered as dependent subjects with deprived rights.<sup>562</sup>

The fact that these representations of female mobility are distorted first emerged

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<sup>555</sup> S.K.V. Walsum and T. Spijkerboer (2007).

<sup>556</sup> Stahl C. (ed), *International Migration Today*, cited in E. Kofman (1999), p. 273.

<sup>557</sup> F. Anthias and G. Lazardis (2000).

<sup>558</sup> See in particular N. Abadan-Unat (1977); M. B. Whiteford (1978).

<sup>559</sup> W. Bohning (1984).

<sup>560</sup> E. Kofman, 1999, p. 273.

<sup>561</sup> R. Andrijasevic, 2010, p. 12.

<sup>562</sup> S.K.V. Walsum and T. Spijkerboer (2007).

during the 80s.<sup>563</sup> More precisely, since the mid-1980s women's labour has been considered to be important in migratory flows and, thus, as central in maintaining the process of globalisation. Migrant women have been recognised as 'crucial economic actors' challenging the idea of women as 'secondary' migrants. This perspective has made evident that the ways through which women negotiate shifting roles in the family, their community and the global economy are fundamental in order to understand transnational migration patterns.

Crucial in this regard has been the role of feminist migration scholars. Challenging the mainstream view of labour migration as predominately male migration, feminist migration scholars have tried to break such gender-blindness and have highlighted the active role that the women play and have always played in migratory processes. In her article of 1984, *Birds of Passage are also Women*, sociologist Mirjana Morokvasic has critically pointed out that the use of the traditional model of Western family in the analysis of migratory flows assigned women the status of 'dependent' that kept many migrant women out of paid employment.<sup>564</sup> Moreover, this ideology was confirmed by immigration regulations in several European countries which support, through family reunification schemes, a gendered division of labour. Family reunification schemes connected migrant women's citizenship, income-generating power and social benefits to the status of a male family member.<sup>565</sup> In countering this mainstream ideology, Morokvasic has emphasised the autonomy of migrant women and the high presence of migrant women in wage labour and argues that an intersection of gender, racial and class discrimination made them "the most exploited and the most vulnerable workers".<sup>566</sup>

Feminist migration scholars have denounced the relevance of patriarchal relationships in the immigration law and the influence that they have in the processes that regulate access to citizenship. As Siobhan Mullally writes "[t]he family, sexuality and reproductive rights fell within the boundaries of the private, the sphere of domestic jurisdiction and served to underpin the nation-state's claim to a distinct cultural identity".<sup>567</sup> In this light, family norms, reproductive rights and freedom of movement appear inextricably linked,<sup>568</sup> and this explains the anxieties about the independence and

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<sup>563</sup> F. Decimo (2005).

<sup>564</sup> M. Morokvasic (1984).

<sup>565</sup> See C. Raissiguier (2007).

<sup>566</sup> M. Morokvasic, 1984, p. 891.

<sup>567</sup> S. Mullally (2007).

<sup>568</sup> S.K.V. Walsum and T. Spijkerboer (2007).

sexual relations of female migrants.

Today, even though EU migrant men and women have equal rights to family reunification, *gendered* and *racialised* norms determine and influence differently women's rights and men's rights in the labour market.<sup>569</sup> The majority of migrant women work in the service sector or care sector, which are characterised by insecure and informal employment relations. This situation of precarity and instability makes it difficult to satisfy the necessary requirements for family reunification. Furthermore, as Bettie De Hart reveals in her interesting analysis of European court case law, migrant women have, in practice, less rights than men in establishing their family lives in their country of citizenship or residence.<sup>570</sup> More specifically, De Hart points out that when non-EU nationals do not obtain residence permit or run the risk of being deported, national courts expect the wife to follow her husband and, thus, to move with him to his country of origin, even if the wife is a white EU citizen. This demonstrates how, in comparison to men, women are still in a different – and disadvantaged – position regarding citizenship.

### **3.2.2 The Feminisation of Migrations**

Although women have always been present in migration flows, their number has increased from the 1970s onwards, so that they now constitute the majority of the immigrant population in European countries.<sup>571</sup> More precisely, since the 1980s, Southern European countries have shifted from being countries of emigration to countries of immigration, supporting a strong demand for female labour. Family reunification, initiated by migrant men and women, has also acquired greater importance. Since the 1990s, geopolitical factors, such as the collapse of the Soviet Union, have also had crucial implications for migration to the EU countries. The opening up of Eastern European countries and their economic transformation provoked the loss of employment for women and a widespread migration to EU countries in search of new opportunities. To some extent, this migratory process was due also to the disintegration of the family structure and society. Indeed, the crisis of 'real socialism'

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<sup>569</sup> R. Andrijasevic (2010).

<sup>570</sup> B. De Hart (2007).

<sup>571</sup> E. Kofman (2008).

caused a crisis in the traditionally established roles – 'male breadwinner'/ 'female caregiver' - on which family life and society had been based.<sup>572</sup>

Today women are on the move as never before in history. Women who move to Europe come from a wide variety of origins: Africa, South America, Central and Eastern Europe and countries of the former Soviet Union. They constitute a great resource for country of destination and most of them work in low income jobs.<sup>573</sup> While an economic and structural perspective is required in looking at female migratory flows, it is important to highlight the various factors which prompt women to migrate.<sup>574</sup> The prominence of the motifs of coercion and economic hardship often leads to a reduction and oversimplification of the complex female migratory process and portrays migrant women exclusively as victims of circumstances or brute force. Women decide to migrate to escape from patriarchal social relationships, to improve the economy of the family, to obtain financial independence and autonomy from the family and to pursue a desire for social and geographic mobility.<sup>575</sup>

As feminist scholar Sarah Farris has rightly pointed out, the increasing feminisation of international migration flows in Europe has revealed the ineffectiveness and illusiveness of the central idea of *guest workers system* – “the idea that it could have been possible to employ foreign workers for as many years as they were required and then to get rid of them”.<sup>576</sup> In fact, the post-1973 stoppage policies forced migrants to stabilize their migratory project and, consequently migrants tried to reunify their families in the countries of destination. At the same time, the presence of migrant women has revealed the conditions of inadequacy and the crisis in European welfare states regimes (in particular in Southern Europe).<sup>577</sup> The increasing participation of so-called ‘national women’ in the official labour market has led to a need for a replacement labour force in the service sectors (and in particular the care sectors) that are still perceived to be a feminine vocation and in which ‘national women’ are no longer available. This replacement labour force is largely composed of migrant women.<sup>578</sup>

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<sup>572</sup> See F. A. Vinello (2009).

<sup>573</sup> The issue of domestic and caring work is analysed in the following paragraph.

<sup>574</sup> F. Decimo (2005).

<sup>575</sup> See F. Anthias and G. Lazardis (2000).

<sup>576</sup> S. Farris, 2010, p. 100.

<sup>577</sup> E. Kofman (2008) and S. Farris (2010).

<sup>578</sup> As Sarah Farris highlights the fact that migrant women replace ‘national women’ in the sectors in which they are not available, also explains the reason why migrant women are not considered to be ‘in competition’ with national workers like male migrants. Farris (2010).

Increasing female migration is not always an indicator of increased freedom of movement for women, or increased independence.<sup>579</sup> The regulations of citizenship and migration in many European countries obstruct female migration. European countries admit permanent residents on the basis of three long established principles: family reunification, economic consideration and humanitarian concern. However, there has been an increasing move toward a weakening of these principles in ways that favour the needs and conditions of the labour market.<sup>580</sup> In this regard, it might be worth underlining that with exception of EU citizens of the ‘old Member States’ that enjoy complete freedom of movement, including labour mobility, anywhere in the EU, mobility of nationals from new EU members states and of non-EU nationals is highly regularised. A8 nationals<sup>581</sup> have obtained full labour mobility in 2011, while the access of the A2 nationals to the EU labour market is restricted until 2013.<sup>582</sup> Non-EU nationals, with the exception of those who are already residents in one of the EU member states, have no right to free movement and are subject to visa requirements and labour quotas. The regulation of circulation in the EU has been achieved through the reinforcement of external frontiers of the European space and the establishment of an area of free circulation directed at EU citizens. In this sense, the term ‘Fortress Europe’<sup>583</sup> was coined to indicate the difficulty of accessing EU territories due to border controls and at same time the border and visa regulations that the new Member states are required to apply towards the non-member states.<sup>584</sup> As many scholars point out, the EU enlargement process has led to a ‘variable geometry’ of European citizenship. Indeed, it has created a system of *differential* mobility depending on the country’s membership status in the EU. Consequently, as Rigo argues, areas adjacent to the EU are being organised into spaces that are hierarchically differentiated through a set of devices and measures aimed at controlling and channelling people’s mobility.<sup>585</sup>

The increasing move toward temporary and circular migration as opposed to permanent settlement in the destination countries is differently experienced by migrants according to their skills, gender and ethnicity.<sup>586</sup> As feminist sociologist Nicola Piper

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<sup>579</sup> N. Piper (2008).

<sup>580</sup> *Ivi*.

<sup>581</sup> These are the eight countries that joined EU in 2004: Poland, Lithuania, Estonia, Latvia, Slovenia, Slovakia, Hungary and the Czech Republic.

<sup>582</sup> Romania and Bulgaria who only joined the EU in 2007 still fall under transition regulations and permissions to work are required.

<sup>583</sup> The limits of this metaphor are analysed over the following pages.

<sup>584</sup> E. Rigo (2007).

<sup>585</sup> *Ivi*

<sup>586</sup> In this regard, it is worth mentioning that in the UK the recently introduced Point-Based System (PBS)

illustrates, “the increasing bifurcation between skilled and less skilled migration in the ease of cross border movements between countries is accompanied by a clear gender bias, with most highly skilled migrants being male. With women dominating certain sectors (household, sex/entertainment, sweatshop), they are also prominent in this category of migrants”.<sup>587</sup> In this regard, it has to be noted that many migrant women experience the phenomenon of *deskilling*.<sup>588</sup> Indeed, many skilled women become less skilled migrants workers due to the lack of demand in the jobs they are qualified for or simply because their titles are not recognised in the country of immigration. Thus, for skilled and qualified migrant workers, cross-border mobility often brings a strong devaluation of their competences. Even in cases where workers have access to supposedly ‘high skill’ sectors, the boundary between skilled and unskilled labour is often vague.<sup>589</sup>

### 3.2.3 The Confinement of Female Mobility in the Service Sector

In the scenario of the new global economy, labour mobility of migrant women is highly limited to the lowest levels of the employment hierarchy in the service industry.<sup>590</sup> This is particularly evident in countries such as Italy, which on one hand has undergone deregulation of its market as part of the EU integration process and, on the other hand, presents a large informal economy characterised by irregular employment and a flexible labour force. Sociologist Floya Anthias points out that, being cheap and flexible labour, migrant women “provide the flexibility that global capital needs”.<sup>591</sup> This flexibility has increased labour market segmentation on the basis of age, gender and ethnic lines and has produced market niches – such as the sex industry –

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for immigration, measures migrants’ eligibility and their right to work in the country according to their economic and educational situation, their linguistic skills and the holding of employment. Different studies have highlighted how this system creates a clear distinction between well-educated highly skilled migrants considered as positively contributing to the national economy and granted a range of social rights, and a low-skilled group of migrants for the low paid and temporary jobs and with few rights. See U. Erel (2009).

<sup>587</sup> N. Piper, 2008, p. 8.

<sup>588</sup> E. Kofman (2008).

<sup>589</sup> S. Mezzadra and B. Neilson (2012).

<sup>590</sup> It is necessary to highlight that although the majority of female migrants work in low skill sectors, they are not absent from the ranks of the skilled. However, they often work within feminised sectors such as health and education. Moreover, although health and education sectors are defined as skilled jobs, many of the jobs in health and education are contracted out and strongly dependent on the labour market situation. See U. Erel and E. Kofman (2003).

<sup>591</sup> F. Anthias, 2000, p. 25.

characterised by inexpensive forms of labour.<sup>592</sup>

The service sector includes domestic work (cleaning and general housekeeping), care work (caring for children, the elderly, the sick and disabled) and sex work.<sup>593</sup> The demand for low wage labour in the service sector is highly *gendered* and *racialised*.<sup>594</sup> Indeed, as many feminist studies demonstrate, the recruitment practices regarding migrant workers are often based on gender and racial stereotypes which establish differential rights and access to social advancement. For instance, in many countries, such as in Italy, Filipina women are considered the most valuable domestic workers, because they are viewed as Christian, English-speaking and well-educated. On the other hand, Albanians in Greece or Moroccans in Spain are considered less valuable and received lower wages in the same sector.<sup>595</sup> Wages and work conditions also depend, of course, on the legal status of these women, whether or not they possess work permits and on their language skills.

Many studies have highlighted the correlation between migrant's labour and 'non-standard' and temporary forms of employment.<sup>596</sup> Most migrant women work with temporary and precarious contracts with few rights. The temporality and informality of employment relations, the level of income, the type of living arrangements, the political invisibility, all increase the vulnerability of migrant women. This situation worsens in the case of undocumented migrants.

Despite the *gendered* and *racialised* dynamics and the extreme flexibility that characterise the service sector, the demand for low-wage labour in the service sector encourages female migration. According to sociologist Saskia Sassen cross border migrations, trafficking for the sex industry and the development of various types of formal and informal markets can be defined as "counter geographies" of globalisation because they represent alternative global circuits for "making a living, earning a profit and securing government revenue".<sup>597</sup> The centrality of women within these counter-geographies signals a new political-economic reality that Sassen calls 'feminisation of survival'.

The demand for migrant women in the domestic and care sector is mainly presented in countries with inadequacies or inabilities in state welfare support for the

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<sup>592</sup> F. Anthias and G. Lazardis (2000).

<sup>593</sup> L. M. Agustin (2007).

<sup>594</sup> See in particular B. Anderson (2000) and F. Anthias and G. Lazardis (2000).

<sup>595</sup> F. Anthias and G. Lazardis (2000).

<sup>596</sup> See in particular L. F. Vosko (2010).

<sup>597</sup> S. Sassen, 2000, p. 523.

care of the very young, the elderly and the disabled. Although the relationship between migratory and welfare regimes is highly complex, it is possible to note that the lack or the inefficiency of public care services means, as Eleonore Kofman argues, that “there is high dependence on labour hired by and working within the household”.<sup>598</sup> This is particularly evident in the countries of Southern Europe, such as Greece, Italy and Spain, where the management of care is delegated almost entirely to the family.<sup>599</sup> The majority of the jobs in the service sector are not formalised or regulated and this is due to the fact that traditional female labour is still excluded from the definition of economic productivity.<sup>600</sup> Exploiting these conditions, organised crime groups have developed the illicit market.

Although domestic, caring and sex work are usually considered as separate jobs, in reality the boundaries between these jobs are not always easily drawn. Very often workers do both domestic and caring work, and domestic and caring work may also require sexual labour, although this is rarely recognised.<sup>601</sup> Even in the cases in which the boundary between these kinds of work is clear, women who leave sex work often find work as domestic or care workers and vice versa.<sup>602</sup> This applies equally to migrant women who have a legal status or EU citizenship. Indeed, due to the limitations caused by the segmentation of the labour market on the basis of gender, age, race and nationality in many EU countries, even those migrant domestic workers who have a legal status or EU citizenship have difficulties in leaving the domestic sector and finding jobs in higher-wage sectors. From this perspective, migrant domestic workers may consider prostitution as the only work option available and often also as the more profitable.<sup>603</sup>

In the service sector – as discussed in chapter 2 – women experience intimate and bodily interactions and their ability to handle the job is determined by “control over the

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<sup>598</sup> E. Kofman, 2008, p. 63. Kofman presents an interesting analysis of migratory patterns and systems in relation to different European welfare regimes. Kofman shows how welfare regimes are at the same time increasingly dependent on female labour through different migratory channels and consequently how they have been restructured.

<sup>599</sup> Chiara Saraceno argues that welfare in Italy is characterised by “una elevata frammentarietà delle politiche sociali e per quanto riguarda la famiglia, da un basso livello di generosità dei trasferimenti pubblici alle famiglie con figli, da uno scarso sviluppo dei servizi sociali, da un ricorso crescente alla prova dei mezzi e dalla lunga assenza di politiche di conciliazione tra responsabilità familiari e lavoro remunerato”. C. Saraceno, 2003, p. 13. Countries, such as Scandinavia, where the benefit system provides large-scale institutional support for families, are less likely to rely on foreign domestic workers.

<sup>600</sup> *Ivi*

<sup>601</sup> *Ivi* p. 104.

<sup>602</sup> L. Malucelli, (2001); B. Anderson (2000).

<sup>603</sup> B. Anderson (2000).



conditions and terms of the exploitation of [their] emotional resources”.<sup>604</sup> Domestic, care and sex workers must be able to manage their feelings and display them in a persuasive way to their customers. Scholars on globalization have pointed out that the rise of post-industrialism and the emergence of the service economy have profoundly changed the labour market and labour relations. More specifically, one of the features that distinguishes today’s work and employment relations is the increasing subjective, relational and emotional quality of work, that has resulted in uncertain, flexible and ‘precarious’ employment. Indeed, if during Fordism the boundary between the sphere of emotions and affection and the sphere of commerce was clearly marked, today work and employment relations are invested with the emotional and affective labour once associated with the intimate or domestic spheres. Post-Fordist labour practices require the worker to put *emotions* and *feelings* into their work performance. For this reason, the expressions ‘feminisation of work’ or ‘reproductive labour’ are often used to describe these transformations. These expressions suggest that the contemporary forms of labour arrangement incorporate as central, the type of work usually delegated to women under the name of ‘reproductive labour’.<sup>605</sup> This implies that gendered division of labour – based on the division of private and public spheres and of productive and reproductive labour – has been transformed, since it no longer fully captures contemporary forms of labour arrangement.<sup>606</sup>

As discussed above, feminist scholars have made a significant contribution to reveal the new configurations of intimate life and emotional labour.<sup>607</sup> In particular, in her analysis of the customer-oriented relational work, Arlie Hochschild investigates the new transformations in the private and public spheres, highlighting the transposition of emotional labour from the sphere of domesticity to that of commerce.<sup>608</sup> In this regard, the work of feminist sociologist Elisabeth Bernstein is particularly interesting. In her book, *Temporarily yours: Intimacy, Authenticity and the Commerce of Sex*, Bernstein critically analyses the relationship between changes in the labour processes and contemporary markets in sexual labour, arguing that the change and the reconfiguration of the boundaries between public and private life and intimacy and commerce, has also transformed sex work. According to Bernstein, in post-industrial cities sexual

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<sup>604</sup> A. Hochschild, 1983, p. 135.

<sup>605</sup> Precarias a la Deriva (2004). See also T. M. Palomo, J. M. López and C. Vega Solís (2005); C. Morini (2010).

<sup>606</sup> Precarias a la Deriva (2004); R. Andrijasevic (2010).

<sup>607</sup> See chapter 2.

<sup>608</sup> A. R. Hochschild (1983).

commerce is no longer grounded in its opposition to the private sphere but, rather, it is invested by emotions and affects previously limited to the private sphere. Bernstein points out that “the spheres of public and private, intimacy and commerce, have interpenetrated one another and thereby been mutually transformed, making the post-industrial consumer marketplace one potential arena for securing *authentic, yet bounded*, forms of interpersonal connection”.<sup>609</sup> In this sense, Bernstein’s research invites us to critically reflect on the ways in which the reorganisation of the global economy leads to transformations in the sexual, and intimate sphere more generally.

### **3.2.4 Gendered Roles and Transnational Bonds**

With the increasing presence of migrant women in the service sector, a growing body of feminist literature has investigated the causes and consequences of this phenomenon from a gender perspective. By paying attention to the changes and transformations of gender roles which are related to the feminisation of migration, many feminist scholars have argued that migrant female workers constitute a necessary part of the global care system of reproduction. In their famous book, *Global Woman. Nannies, Maids and Sex Workers in the New Economy*, sociologist Barbara Ehrenreich and Arlie Russell Hochschild have pointed out that the demand for female migrant labour is the effect of a differentiation and fragmentation of roles in a social system that leaves intact the heart of traditional gender roles. The demand for female migrant labour is not simply the result of an increasing employment rate for native women, but more specifically it is the result of a failure to change the traditional division of gender roles, and thus to change the normative system which marks the domestic-affective sphere as the sphere of women’s competence. In this view, Western women have succeeded in ‘the tough male world’ only because the ‘Third world’ women have substituted them in their traditional caring roles.<sup>610</sup> The contemporary global division of care work is, therefore, a new form of exploitation and subjugation. From this perspective, Ehrenreich and Hochschild argue:

The first world takes on a role like that of the old-fashioned male in

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<sup>609</sup> E. Bernstein, 2007a, p. 21 [my emphasis]

<sup>610</sup> *Ivi.*

the family –pampered, entitled, unable to cook, clean and find his socks. Poor countries take on a role like that of traditional woman within the family – patient, nurturing, and self-denying. A division of labor feminists critiqued when it was ‘local’ has now, metaphorically, gone global<sup>611</sup>

The analysis of Ehrenreich and Hochschild has aroused much controversy as it tells us a great deal about the new forms of hierarchy and stratification of labour on the basis of gender and race. It touches too on a very complex issue, that is, the relationship between Western women and ‘third world’ migrant women, challenging the notion of *sisterhood*. Nevertheless, it is important to highlight that the presence of migrant women in the service sector speaks about the deficiencies of welfare regimes in Europe, as well as the difficulties of conceiving care and domestic labour as tasks to be shared between women and men. The rapid increase of women in waged work has not been followed by a commensurate change in attitudes towards the traditional division of labour in the home. Therefore, it is necessary to look at the increasing presence of migrant women in the service sector investigating gendered and racial dynamics and also the weight of the colonial legacy on the organisation of the service sector.<sup>612</sup>

By paying attention to the complexity of female migrant experiences, many feminist scholars, such as Jacqueline Andall<sup>613</sup> and Bridget Anderson<sup>614</sup>, have made excellent studies on migrant women in the service sector, showing how in the daily interaction between employees and their employers exist certain tensions which concern the wider transformations of domestic and family roles and relations. At the same time, these studies have highlighted how the intertwining of feelings and labour relations in the service sector questions the extent to which an employer may exercise the power of direction. In fact, such as with domestic work, it is very difficult to draw a clear boundary for this power. As Andall illustrates, “the propensity to view domestic work as primarily an interdependent relationship between women tends to negate the hierarchical nature of the relationship”.<sup>615</sup> In this vein, Anderson notes that in the field of domestic work the relationship between worker and employer is “something other than a straightforward contractual one” even in the cases where a contract has been

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<sup>611</sup> B. Ehrenreich and A. R. Hochschild (2002).

<sup>612</sup> On this issue see E. G. Rodriguez (2010).

<sup>613</sup> J. Andall (2000).

<sup>614</sup> B. Anderson (2000).

<sup>615</sup> J. Andall, 2003, p. 51.

signed.<sup>616</sup>

Feminist sociologist Rachel Salazar Parreñas, in her research on Filipino domestic work in Rome and Los Angeles, has stressed the importance of seeing women's migrant experiences in relation to both the country of destination and their country of origins, showing how female migration both challenges and reproduces conditions of gender and class subordination.<sup>617</sup> This complex *interplay* reveals how dynamics of exclusion/inclusion and power relations characterised both destination and origin countries and, thus, migrant women “*leave and enter* gendered and stratified societies”.<sup>618</sup> In this interpretative light, women's migratory experiences appear as a constant process of *disintegration* and, at the same time, of *reconfiguration* and *transformation* of traditional role and systems of belonging.<sup>619</sup> This complex dynamic, as Sandro Mezzadra points out,

renders analytically and politically untenable the image of the migrant as it so often appears in the international literature: as a ‘traditional’ subject, completely *embedded* in family and community networks, and against whom the Western individual is posed (whether in search of comfort or as expression or resentment). Migrants can rather be defined as subjects in transition, once we make clear that the concept of transition is used here *without* implying any determined ‘telos’<sup>620</sup>

Women in transition move into a transnational space, characterised by various social, economic and affective networks.<sup>621</sup> In this transnational space, migrant women try to conciliate their desires and the external obligations set by both structural processes and familiar and social ties. In so doing, they constantly negotiate new meanings of *motherhood* and challenge traditional family roles and sexual, class and racial stereotypes. Crucial in this regard, is the research carried out by feminist scholar Umut Erel on the *life-stories* of ten migrant women ‘from Turkey’ in Germany and Britain. Considering both their experiences of ‘transnational mothering’ and their relationships with their children once united, Umut Erel explores the role of these

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<sup>616</sup> B. Anderson, 2003, p. 111.

<sup>617</sup> S. Parreñas (2001, 2009).

<sup>618</sup> N. Piper, 2008, p. 1 [my emphasis].

<sup>619</sup> S. Mezzadra (2011). See also A. Colombo and F. Decimo (2004); F. Decimo (2005); A. Phizaclea (2003).

<sup>620</sup> *Ivi* p. 134

<sup>621</sup> See in particular R. Salih (2010) and S. Cheng (2010).

women as ‘cultural workers’ in the validation of their children’s identities against racist and marginalizing environments.

In this scenario, money play a crucial role. Sending money home to the family becomes a way of strengthening transnational social networks and of reducing the physical, economic, social, cultural and emotional distances between country of origin and destination. Money, thus, may be a way to transfer feelings and to confirm the maintenance of affective relations. In her study Rutvica Andriasevic highlights that during the interview women emphasised that the money they earned through sex work was not for themselves but rather for supporting their parents or their children. Similarly, in her interesting work on the migratory process of Ukrainian women in Italy, Francesca Alice Vianello argues that migrations through circulation of money (in the forms of remittances) produces a process of commodification and de-commodification of both objects and social relations. According to Vianello, with respect to remittances two opposing movements can be identified. On one hand, the circulation of money leads to the weakening of traditional social ties. On the other hand, for migrants, it may have a strong relational and emotional value.

### **3.3 Feminist Studies on ‘Sex Trafficking’ from the Perspective of Migration and Labour**

The analysis conducted so far in this chapter has evidenced the difficulties of drafting a clear line between certain forms of labour exploitation and ‘free’ waged labour. At the same time, it has shown that the increasing presence of migrant women in the service sector has come about through a combination of economic, social and political factors and is mediated by residency and employment regulations in the destination States. Moving on these grounds, a good deal of feminist research in recent years has examined the issue of trafficking in women in the sex sector from the perspective of migration and labour, challenging the dominant discourse that configures ‘sex trafficking’ exclusively as a form of slavery and, consequently, questioning the assumed connection between ‘sex trafficking’ and organised crime. More precisely, building on feminist migration studies – in particular, feminist studies that have

contributed to revealing the migratory agency of women in the sex sector<sup>622</sup> – and on studies on the transformation of borders and citizenships,<sup>623</sup> feminist scholars have highlighted the complexity of the desires and decisions behind women’s experience of migration and labour in the sex industry and, at the same time, the responsibilities of European states in increasing the conditions that expose migrant women to high levels of vulnerability and labour exploitation.

### *Behind ‘Sexual Slavery’*

Challenging the image of trafficked women as victims of ‘sexual slavery’, many feminist studies have demonstrated that, although women might experience a great deal of coercion and abuse in the trafficking process, they may also be recruited without coercion, and may or may not find themselves in conditions of forced-labour as defined by the ILO. Moreover, they have shown that some women who contact traffickers for help in migrating were already working in their own domestic sex industry. The women who do not, *know* that they will work in the sex industry abroad.<sup>624</sup>

These feminist studies illustrate the degree of agency that migrant women exercise in the trafficking context as well as the different factors that lead women to migrate. Such factors are ascribable not only to economic hardships – even if these are crucial aspects of women’s mobility – but also to their desire to obtain economic and social mobility. Indeed, what is effectively demonstrated by this scholarship is that women’s decisions to migrate and take up sex work develop from a complex set of factors. These include: escape from a situation of intra-family violence, the search for financial independence, the desire to transform affective familiar ties and to achieve autonomy from the family and the desire for alternative life prospects<sup>625</sup> All of these more personal factors are as equally important as economic hardship in defining the reasons for which people migrate.

In this regard, the research done by feminist scholar Rutvica Andrijašević with Eastern European migrant sex workers in Italy is particularly striking. By highlighting the various desires and complex decisions behind women’s migratory projects, Rutvica Andrijašević reveals that in addition to economic factors, “the desire to develop new

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<sup>622</sup> See in particular L. Agustin (2007); R. Kapur, (2005b); N. Sharma (2003). See previous sections.

<sup>623</sup> R. Andrijašević (2010.); L. Malucelli (2001); M. Wijers and L. Lap-Chew (1997); J. Berman (2003); B. Anderson and J. O’Connell Davidson (2003); Mai N. and King R. (2009).

<sup>624</sup> R. Andrijašević, 2010; J. Berman, (2003). See also L. Malucelli, (2001) and C. Corso and A. Trifiró (2003).

<sup>625</sup> R. Andrijašević, 2010. See also L. Malucelli (2001); C. Corso and A. Trifiró (2003) and I. Laliotou (2007)

intimate relationship[s] and to move to a place where one can live one's emotional expectations more freely and fully is [...] a crucial aspect of women's mobility and of their subjective migratory histories".<sup>626</sup> In this interpretative light, the dominant discourse that configures trafficked women exclusively as victims does not do justice to the *complexities, contradictions and conflicts* that inform women's migratory experiences. Such experiences are characterised by a multiplicity of movements, feelings of belonging and histories that cannot be reducible to "forcefully imposed movement".<sup>627</sup>

By paying attention to the agency of women involved in the trafficking process, Andrijasevic's work as well as other feminist studies have demonstrated that strict immigration and visa regulations and border controls increase a migrant's vulnerability to abuse and exploitation and the involvement of third parties in facilitating travel and employment arrangements. Most of the time women are unable to provide the various documents required to obtain a tourist visa (these include: passport, an invitation letter from a citizen, a return ticket, accommodation, evidence of sufficient funds etc.). As a consequence, women contact third parties who arrange for undocumented travel. Other times, contrary to newspaper and media reports, women travel with visas – arranged through an agency with money borrowed from a third party – and become undocumented after having over-stayed the length of the granted visa.<sup>628</sup>

Another important issue that many feminist studies have raised is that once women cross the borders, they experience a situation of confinement that is not only ascribable to the control exercised by the third parties over women's lives. Rather, they experience a condition of *multiple* confinement which is characterised by the *overlap* of the control exercised by third parties and the control that States exercise over migrant's mobility and labour restrictive immigration and employment regulations.<sup>629</sup> As Andrijasevic writes "it is the fear of deportation and the impossibility to access other forms of work due to limits imposed by residency and employment laws that play a crucial role in confining migrant women to prostitution and, in turn, in increasing the women's dependency on a controlling third party".<sup>630</sup> Vulnerabilities for migrant sex workers, thus, are produced not simply by criminals, but also by a combination of legal and economic constraints.

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<sup>626</sup> R. Andrijasevic, 2010, p. 28.

<sup>627</sup> *Ivi.*

<sup>628</sup> R. Andrijasevic, 2010, p. 28; See also L. Malucelli, (2011).

<sup>629</sup> R. Andrijasevic, 2010; J. O'Connell Davidson (1998).

<sup>630</sup> R. Andrijasevic, 2010, p. 77.

However, women often generate *a set of resources* that allow them to leave controlled third parties and to work independently. Indeed, thanks to a variety of relationships (also with clients) and resources engendered, women often negotiate and modify their situation of confinement.<sup>631</sup> From this perspective, it is interesting to note that the relations between women and third party organisers are complex and differentiated. They are always *asymmetrical* power relationship but sometimes they may be open to negotiation.<sup>632</sup> Women often refer to ‘traffickers’ as “Madame” and/or “the man who brought me here”. As Maybritt Jill Alpes stresses, “looking at ‘traffickers’ also as people who facilitate or sponsor a migration process can help to explain certain dynamics within the narratives of the interviewed women”.<sup>633</sup>

### *Border Controls and Differential Inclusions*

By problematising the image of ‘trafficked’ women in the sex industry as victim and involuntary migrants, feminist studies that look at the issue of ‘sex trafficking’ from the perspective of migration do not want to suggest that third parties do not use force in order to pressure women to migrate and work in the sex industry or that women do not experience violence and abuse. Rather, they invite an investigation of the *complexities* of the issue of ‘sex trafficking’ highlighting the link between immigration regimes and migrant women’s vulnerability to abuse and exploitation. In this regard, these studies critically explore the correlation between anti-trafficking and anti-immigration policies arguing that the issue of ‘sex trafficking’ has been, and still is, predominantly used by States to legitimise repressive measures against migrants and sex workers rather than protect them from situations of violence and exploitation.<sup>634</sup>

The assumption that the phenomenon of ‘sex trafficking’ is orchestrated by criminal networks who manipulate young innocent women has lead many national States in Europe (but not only in Europe) to adopt stricter border controls and more restrictive immigration regulations. Yet, as Indian legal scholar Ratna Kapur argues, a “border cannot be impermeable” and as a consequence these measures have pushed migrants further into situations of violence and exploitation.<sup>635</sup> The reinforcing of border controls tends to reduce the possibilities for people to migrate legally into the EU

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<sup>631</sup> *Ivi*; See also L. Maluccelli (2011).

<sup>632</sup> L. Maluccelli (2001).

<sup>633</sup> M. J. Alpes, 2010, p. 125.

<sup>634</sup> K. Kempadoo, J. Sanghera and B. Pattanik (2005)

<sup>635</sup> R. Kapur, (2005a), p. 29.



and in turn push migrants toward irregular channels.<sup>636</sup> Thus, quite paradoxically, policies that aim at suppress trafficking through restrictive immigration policies actually work in favour of third parties.

In view of the results of her research on east-European sex workers in Italy, Andrijasevic argues that border regimes (border control, denial of entry, detention and deportation) do not function as mechanisms of exclusion, because they do not necessarily block migration movements. Rather, they cause a change in direction and prolong the duration of migration, thus increasing vulnerability. In this sense, the case that Andrijasevic discusses in her book is particularly interesting. She describes the story of a Moldovan woman who decided to migrate to Italy to work in the sex sector and used the service of an agency to organize her journey. After traversing Romania and Hungary by train, the woman was identified as a “victim of trafficking” while crossing the Austrian border on foot. She returned to Moldova and started searching for another way to get to Italy. Some months later, she paid another agency for a different route, and reached Italy by boat. This case complicates the picture of a simple restrictive model for migration control in Europe, and sheds light on a situation in which the logic of border policing sometimes allows for “spaces of circulation” and mobility of migrants, rather than putting them in a definitive conditions of immobility.<sup>637</sup>

In the same vein, feminist scholar Jacqueline Berman argues that the anti-trafficking rhetoric of ‘sexual slavery’ allows the State to stabilize control over borders and bodies through immigration and citizenship laws. In so doing, this narrative constructs a trafficked population that can be *managed* and it also “allows the management of this constructed population to perpetuate an economy of ‘irregular’ migration in the interests of global labour market rather than, as states would claim, helping to [...] assist trafficked persons”.<sup>638</sup>

Andrijasevic’s and Berman’s analyses are particularly interesting because they brings us to the contemporary transformations of state sovereignty and to the ‘proliferation’ of borders. While early studies on the process of globalization assumed the probable erosion of borders, more recent studies rather point out the ways in which borders have diffused and proliferated under globalization.<sup>639</sup> In this view, borders are considered as being discontinuous and porous spaces, and less as clear edges of the state

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<sup>636</sup> R. Andrijasevic (2010); M. Wijers and L. Lap-Chew (1997).

<sup>637</sup> R. Andrijasevic (2010).

<sup>638</sup> J. Berman (2010). Jacqueline Berman has conducted interesting research with east European migrant sex workers in Warsaw and Berlin.

<sup>639</sup> P. Cuttitta (2003).

that mark the distinction between ‘inside’ and ‘outside.’<sup>640</sup> Scholars describe this transformation by talking about the ‘proliferation’ of borders and the ‘delocalization of control’<sup>641</sup> referring to the fact that the control is now exercised by different means and from different locations. The proliferation of borders has profoundly transformed the concept of state sovereignty inasmuch as many authors talk about a regime of ‘shared sovereignty’<sup>642</sup> or ‘overlapping sovereignty’,<sup>643</sup> which entails the participation of non-state actors, and a public-private contractual network, in the government of migration.

From this standpoint, several scholars have highlighted that despite the fact that the most immediate effect of the politics of control is the strengthening of borders, contemporary regimes of migration management are not aimed at the total *exclusion* of migrants.<sup>644</sup> Rather, such regimes function through mechanisms that create the conditions for “an active process of inclusion of migrant labour through its illegalisation”.<sup>645</sup> As Sandro Mezzadra and Brett Neilson argue, this entails a process of *differential inclusion* – and accordingly a process of differential exclusion.<sup>646</sup> The result, as Mezzadra and Neilson point out, is the creation of:

[d]ifferent degrees of internality and externality, which substitute and blur the clear-cut distinction between inside and outside that was produced by the traditional border of the nation-state. These techniques and measures of externalization facilitate the processes of filtering and differential inclusion by creating waiting zones through which the timing and tempo of migration can be more precisely regulated. They also serve to channel migratory and refugee movements through holding zones and funnels, in which the procedure can be exercised, whether in entirely technocratic ways or through violent interventions<sup>647</sup>

This complex transformation of border controls, thus, produces *differentiation* and *stratification* of legal statutes and subjectivities making people more vulnerable to labour market forces. The fact or the fear of irregular migrants’ ‘deportability’ – rather

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<sup>640</sup> S. Mezzadra, and B. Neilson (2008).

<sup>641</sup> E. Rigo (2007).

<sup>642</sup> *Ivi*

<sup>643</sup> A. Ong (2006). See also N. Fraser (2009).

<sup>644</sup> S. Mezzadra and B. Neilson (2008).

<sup>645</sup> N. De Genova, 2002, p. 439.

<sup>646</sup> S. Mezzadra and B. Neilson (2012).

<sup>647</sup> *Ivi* p. 192.

their actual deportation – collocate them in a prolonged state of vulnerability with fewer rights such that they can be employed as cheap labour. In this dynamic, gender and sexuality play a key role.<sup>648</sup>

In view of these considerations, Andrijasevic points out that trafficking discourses and anti-trafficking policies appear to sustain and support the differential regime of mobility through which EU states organize access to the labour market and citizenship. In particular, Andrijasevic critically analyses anti-trafficking campaigns developed by the International Organisation for Migration (IOM) across eastern Europe, which intervene in migrants' countries of origin, supporting an image of trafficked women only as victims and suggesting that staying in their country is the *safest* option for them. In so doing, these campaigns seem to overlook the complex situation of trafficked women. They do not propose *alternative* and *realistic paths* for women. Rather, they communicate a stereotypical gendered representation of labour mobility of female non-EU nationals, which equates women's informal labour migration with forced prostitution.<sup>649</sup> As Andrijasevic notes “whereas EU citizens are encouraged to undertake greater labour mobility, anti-trafficking campaigns intervene upon the labour mobility of female non-EU nationals and encourage them to remain at home”.<sup>650</sup>

### 3.4 Conclusion

The analysis undertaken in this chapter has shown the need to look at ‘sex trafficking’ from a perspective that pays attention to the complexities of the issue of migration and labour in Europe. As argued, the idea of trafficking as a form of slavery has been developed in direct continuity with the rhetoric of ‘white slavery’ that characterised European and North American discourses during the second half of the nineteenth century. Such rhetoric emerged during a period of profound transformation caused in particular by the abolition of slavery, which prompted the recruitment of non-white workers from Asia and by the establishment of commerce within colonies, which prompted a demand for international prostitutes. These changes created anxieties about changing national identities and about women's independence and sexuality.

Today, it is possible to observe similar anxieties. Indeed, as discussed above, the

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<sup>648</sup> E. Luibhéid (2002).

<sup>649</sup> R. Andrijasevic (2010).

<sup>650</sup> *Ivi* p. 9.

rhetoric of ‘sex trafficking’ as a new form of slavery has emerged in correspondence with the ongoing changes in the economic, cultural and political spheres in contemporary Europe. These changes have resulted in transformations in labour relations, new configurations of intimacy, kinship and family and changes in the working of the nation state and its modes.<sup>651</sup>

Drawing on feminist scholars theoretical texts and ethnographies, this chapter has examined the concept of slavery and exploitation by unpacking the complexities of these notions. More precisely, it has critically highlighted how the boundary between freedom and slavery, between volition and coercion has always been blurred. Questions about what constitutes exploitative employment practices are much disputed, due to the fact that freedom and slavery are not prior categories but are constructed categories. New forms of slavery are defined by considering where in different contexts ‘acceptable’ exploitation ends and ‘unacceptable’ exploitation begins. From this perspective, the lack of a global political consensus on minimum employment rights and of cross-national norms regarding employment relations, makes it highly difficult to define neutral and universal criteria to measure exploitation.

The definition of slavery proposed by anti-slavery activists constitutes an important contribution, but often it does not really capture the complexities and nuances of people’s experiences. In this light, it appears necessary to reframe the traditional notion of slavery, and consequently of exploitation, in order to consider and contemplate the different and less evident forms of exploitation that can occur within both regular and irregular systems of migration and employment.

Many feminist studies have demonstrated the need to interrogate the role of employment and immigration regulations in creating marginalised groups lacking access to the formal labour market and in producing deskilling, devalued, racialised and feminised forms of work. Such a perspective highlights how the issue of ‘trafficking’ is highly connected to the other forms of abuse and exploitation that migrant workers – migrant women – experience.

The regulations of citizenship and migration in many European countries strongly limits women’s access to employment and rights at work, the recognition of their skills and their family relationships. In the new global economy women are confined to the service sectors. This is particularly evident in countries such as Italy, that present a large

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<sup>651</sup> J. Berman (2003).

informal economy characterised by irregular employment and flexible labour force. This flexibility has increased labour market segmentation on the basis of age, gender and ethnic lines and has produced market niches – such as the sex industry – characterised by inexpensive forms of labour. The demand for low-wage labour in the service sectors, which is both *gendered* and *racialised* and concentrated in service and ‘informal’ economies such as the domestic, care and sex sectors, encourages women’s migration. At the same time, feminist studies have shown that the increasing mobility of women has brought significant transformations to family structures, gender roles and labour market relations.

In view of these considerations, feminist studies that look at the issue of ‘sex trafficking’ from the perspective of migration and labour, offer key insights for interpreting this phenomenon and reorienting the ‘sex trafficking’ debate. The innovative aspect of these studies is that of addressing ‘sex trafficking’ from within a broader framework which contemplates the issue of violence, but also the politics of sex, migrant labour and citizenship in Europe. In so doing, they have challenged the picture of trafficked women as victims of slavery that dominate the majority discourse and anti-trafficking interventions, highlighting how this picture tends to elide the complexities and the contradictions that characterise women’s experiences. Such a picture homogenizes the multiplicity of movements, histories and identities that inform contemporary women’s migrations by reducing them to the abstract image of victim.

By problematising the assumed connection between ‘sex trafficking’ and organised crime, these feminist studies, in particular the Andrijasevic’s work, have revealed that the term ‘sexual slavery’ is inadequate and might even be ineffective in terms of addressing the abuses that migrant women can experience. Indeed, this term obscures the ways in which the *interplay* of employment and immigration regulations strengthens the hands of third parties and make migrants vulnerable to abuse and labour exploitation. At the same time, the image of ‘sexual slavery’ conceals the agency that many ‘trafficked’ women exercise in planning and carrying out their migratory projects as well as the resources and the relationships that they procure despite their situation of confinement. In this regard, by stressing the link between anti-trafficking and anti-migration policies, Andrijasevic argues that the dominant rhetoric of ‘sex trafficking’ as a form of slavery tends to conceal the “restrictions that the EU imposes on migrants’ movement and the hierarchical organisation of access to its labour market and

citizenship, as well as the tensions and conflicts that arise from women's acting upon their desire for spatial, labour, affective and social mobility".<sup>652</sup>

However, by adopting this feminist perspective it is important to avoid both the risk of romanticizing migrant women as protagonists of contemporary migration flows and the risk of reading the notion of agency in terms of the resistance to the normative institutional structures – and consequently, the risk of not paying attention to the role that criminal networks play in the criminal scenario. While it is important to critically investigate and question dominant rhetoric of 'sex trafficking' as 'sexual slavery', it is also necessary not to dismiss the narratives of those who have experienced severe physical and psychological abuses. Indeed, there are many NGOs reports and readers that tell stories of *violence* and *suffering*. For instance, in 2011 Isoke Aikpitanyi<sup>653</sup> published the book, *500 Storie Vere. Sulla Tratta delle Ragazze Africane in Italia*, which talks about the biographies of hundreds of Nigerians girls that were forced into prostitution by deception in an alliance between the Italian Mafia and crime elements in Nigeria. One cannot simply deny the stories of severe exploitation and abuse and the pain suffered by many women. And at the same time, one cannot deny the experiences of those who see 'trafficking' as part of larger project of gaining economic autonomy and social and affective mobility. All these subjects' experiences are equally real and true.

In order to get past the dichotomy between 'victimised' subject and 'free' subject, capable of agency, I argue that women's agency should be considered referring to the different, contradictory, conflicting and often *painful* ways by which women negotiate or try to negotiate power relations.<sup>654</sup> This approach should do justice to the various and contradictories experiences of women involved in the trafficking scenario and to avoid any simplistic romantic vision, as the complex interplay of violence and autonomy that shape migrant women's experiences in the sex industry is always kept in mind.

Apart from these critical considerations, I believe that feminist studies which explore 'sex trafficking' from the perspective of migration and labour, offer an outstanding theoretical contribution to the existing body of feminist scholarship. Indeed, they reveal that the different experiences of migrant women in relation to cross-border

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<sup>652</sup> R. Andrijasevic, 2010, p. 143.

<sup>653</sup> 'Le Ragazze di Benin City' is an association created in Italy by 'trafficked' and 'ex-trafficked' women. See <http://www.inafrica.it/benincity/associazione.html>

<sup>654</sup> See chapter 2.

travel, labour arrangements in the sex industry and legal immigration regulations are indicative of the ongoing transformations of borders, labour and citizenship in Europe. This perspective invites us, on one hand, to look at the issue of ‘sex trafficking’ from a broader approach (and not only in terms of agency or lack thereof in prostitution/sex work) and, on the other hand, to consider trafficking in other sectors than the sex industry, such in the domestic sector.<sup>655</sup>

With this in mind, in the following chapter I shall examine the role of human rights and anti-trafficking interventions in Europe. More specifically, I will consider questions such as the following: What does it mean to adopt a human rights approach in dealing with the issue of ‘sex trafficking’? Why should feminists promote this approach? Who are the women involved with the human rights discourse on trafficking? To what extent does human rights discourse challenge the dominant and ‘depoliticized’ categories used in anti-trafficking discourse?

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<sup>655</sup> See B. Anderson and J. O’Connell Davidson (2003); Anderson and J. O’Connell Davidson (2003); K. Kempadoo, J. Sanghera and B. Pattanaik (2005); B. A. Ong (2006); S. Qayum and R. Ray (2010).





**‘SEX TRAFFICKING’, HUMAN RIGHTS  
AND THE ‘RESCUE’ OPERATIONS IN ANTI-TRAFFICKING  
INTERVENTIONS**

The human rights model in its global manifestation is a pseudo-criminalized system of surveillance and sanctions. At its most extreme [...] human rights policy can be used to justify military intervention. [...] Thus, it becomes imperative to ask in both a local and global context – How do policies designed to ‘protect’ women serve to reproduce violence?<sup>656</sup>

To have a right as a woman is not to be free of being designated and subordinated by gender<sup>657</sup>

The analysis developed in the previous chapter has shown how it is no longer possible to speak about ‘sex trafficking’ without posing at once the problem of

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<sup>656</sup> K. Bumiller, 2008, p. 136

<sup>657</sup> W. Brown (2002).

understanding the transformation of citizenship, labour and sexual labour, and the diversity of migrant sex workers' experiences. On the basis of these considerations, this chapter examines the issue of 'sex trafficking' from the perspective of human rights. Instruments designed to protect human rights are invoked from different approaches by feminist scholars and activists in order to enhance and defend the rights of women involved in the trafficking process. But, who are the legitimate subjects of women's human rights discourse and policy? How do some become worthy of protection and others of exclusion if not punishment? To what extent does human rights discourse challenge sex and gender hierarchies and racial discrimination? And, finally, who are the legitimate subjects who can claim rights in Europe? And which rights?

In order to respond to these questions, first of all it is necessary to look at the ways the notion of women's human rights has been developed. The first section of this chapter, thus, briefly maps the milestones that have marked the path to the recognition of women's rights as human rights. In so doing, I discuss the centrality of violence against women, and consequently of the vulnerable sexual self, to the notion of women's human rights. As many feminist scholars have highlighted, the focus on violence against women has in part constructed the terms on which women can claim and enjoy human rights. The second part of the chapter focuses on anti-trafficking interventions in European countries, arguing that by prioritizing the criminal and immigration aspect of trafficking, 'rescue operations' seriously compromise the human rights of migrant sex workers and, in general, of sex workers. The adoption of the 'rescue' model as anti-trafficking intervention reveals the strong influence of neo-abolitionist perspectives on anti-trafficking policies. The third part of the chapter is dedicated to the so-called 'saviours' and 'helpers' of trafficked women. Many feminist scholars have noted how in recent years the issue of trafficking in women in the sex industry has led neo-abolitionist feminists to reconfigure as 'saviours' those who would usually be considered as 'enemies' of feminism. In this sense, neo-abolitionist feminists have supported politics of rescue that seriously compromise the human rights of migrant sex workers. In this section, building on feminist ethnographic studies and reports, I also explore the limits of anti-trafficking empowering strategies advanced by social 'helpers' arguing that these strategies can also produce narratives of victimization of trafficked women. The final part of this chapter focuses on the rights claims of those – sex workers and migrant sex workers – who are addressed by anti-trafficking intervention, highlighting that their voices are often silenced and not heard. The

exclusion of sex workers and migrant sex workers from the development of policy that affects them, reveals a restrictive and reductive vision of ‘women’s human rights’ supported by anti-trafficking interventions.<sup>658</sup> Particular attention is paid to the rights claims advanced by sex workers activists during the 2005 European Conference on Sex Work, Human Rights, Labour and Migration.

## **4.1 Human Rights and Women’s Rights**

### **4.1.1 International Networking for Women’s Rights**

The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) adopted in 1979, constitutes the main normative legal code on women’s rights. The thirty Articles of this comprehensive document establish detailed norms on matters of equality and opportunity. Yet, they do not mention the issue of rape, domestic or sexual abuse, female genital mutilation or any other instance of violence against women.<sup>659</sup> The only exception is the Article 6 of the Convention that calls on governments to suppress traffic in women and exploitation of prostitution.<sup>660</sup> Despite being one of the most ratified Conventions by States (179 ratifications), the CEDAW has been subject to many reserves, defaults and violations.<sup>661</sup> As a consequence, the General Assembly has considered it necessary to adopt an Optional Protocol to the Convention. By ratifying the Optional Protocol, a State recognizes the competence of the Committee on the Elimination of Discrimination against Women<sup>662</sup> to receive and consider complaints from individuals or groups within its jurisdiction.<sup>663</sup>

Until the late 1980s, women’s issues or sexual harm as forms of violence were excluded by the human rights world. The three conferences – in Mexico City (International Women’s Year, 1975), Copenhagen (1980) and Nairobi (1985) – that spanned the United Nations Decade for Women served as locations to build and connect an international network of women’s rights. The Conference in Mexico City was particularly significant because it encouraged network formation and it also revealed the differences among women and among women’s organizations and different demands in

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<sup>658</sup> As explained below, anti-trafficking interventions tend to focus almost exclusively on trafficking in women in the sex industry.

<sup>659</sup> M. Keck and S. Kathryn (1998).

<sup>660</sup> See chapter 1.

<sup>661</sup> For an interesting analysis of CEDAW see R. L. Johnstone (2011).

<sup>662</sup> The Committee is the Body that monitors States parties compliance with the Convention.

<sup>663</sup> The Optional Protocol to the Convention in on force on December 2000. For more information see <http://www.un.org/womenwatch/daw/cedaw/protocol/>

relation to a broad array of issues. During the Nairobi conference, violence against women emerged as a major issue for women, but even so “it suffered marginalization as a ‘women issue’ in the gender-blind world of the UN’s human rights work”.<sup>664</sup>

However, in the late 1980s the increasing attention to human rights discourse led to an increasing global consciousness concerning women’s human rights and in particular about violence against women. At the same time, various events heightened the attention and stimulated action regarding violence against women: first of all, the role of rape in the armed conflicts in the former Yugoslavia and in Rwanda,<sup>665</sup> then the preparations for the World Conference on Human Rights to be held in Vienna in 1993;<sup>666</sup> and finally the crucial role played by the Global Campaign on Women’s Human Rights organized by the Center for Women Global Leadership (CWGL) at Rutgers.<sup>667</sup>

The Vienna World Conference on Human Rights in 1993 marked a significant and decisive step in the recognition of women’s rights as human rights. As Arianne Brunet said, at the Vienna World Conference on Human Rights “women’s human rights provided for the ‘mainstreaming of feminism’”.<sup>668</sup> The Vienna Conference constituted an important moment for both the international women’s rights movement and the human rights movement. States Parties in the conference officially recognised that women too were entitled to enjoy fundamental rights. In other words, for the first time, State Parties acknowledged that women were entitled to enjoy full and equal participation in political, civil, economic, social and cultural life, at national, regional and international levels. During the conference, hundreds of women from all parts of the world proclaimed that the human rights of women and girls are an inalienable, integral and indivisible part of universal human rights. The Article 18 of the Vienna Declaration provides that:

The human rights of women and of the girl-child are an inalienable,  
integral and indivisible part of universal human rights. The full and

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<sup>664</sup> A. Miller, 2004a, pp. 20-21.

<sup>665</sup> See C. Vitucci (2007).

<sup>666</sup> Preparations for the Vienna Conference increased the synergy of diverse national and international efforts on women’s issues and in particular on violence against women. See Ludwig Boltzmann Institute of Human Rights (1993).

<sup>667</sup> W. S. Hesford and W. Kozol, 2005, pp. 180-181. As Hesford and Kozol point out the CWGL played a crucial role “cementing the consciousness created by the existing groups into a single symbolic, visible campaign.”

<sup>668</sup> Arianne Brunet quoted in A. Miller, 2004a, p. 20.

equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community<sup>669</sup>

The Vienna Declaration exhorted States to withdraw the reservation to the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). More specifically, the Declaration called for the elimination of violence against women in public and private life, for the elimination of all forms of sexual harassment, for the elimination of trafficking in women and the elimination of gender bias in the administration of justice.<sup>670</sup>

After the Vienna Conference, The UN General Assembly adopted the Declaration on Violence Against Women<sup>671</sup> which includes forced prostitution and trafficking in women among the forms of violence against women.<sup>672</sup> The Declaration was adopted to strengthen the process of effective implementation of the CEDAW and it recognised that violence against women is “a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women”.<sup>673</sup> Moreover, the Declaration set the basis for the creation of a UN Special Rapporteur on Violence against Women.

The Vienna Conference took place at a time of many global changes, many of which were occasioned by the end of Cold war. As feminist scholar Alice Miller has highlighted, it was a moment of new alliances between and among nations and NGOs “were forged on key issues such as the indivisibility of economic, social and cultural rights with civil and political rights, indigenous people rights, children’s rights and so on”.<sup>674</sup> In this period, economic, social and cultural rights were often linked to gender and sexuality, in particular in the field of health.<sup>675</sup> The Vienna Conference, therefore, occurred in a time in which the predominant discourse on human rights was subject to

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<sup>669</sup> *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, UN GAOR, at 25, UN Doc A/CONF/157/23 (1993) Part I, Art 18.

<sup>670</sup> *Ivi* Article 38.

<sup>671</sup> Declaration on the Elimination of Violence Against Women, GA Res 104, UN GAOR, 48th Sess., 85th plen. mtg, Supp No 49, at 217-19, UN Doc A/48/49 (1993).

<sup>672</sup> See chapter 1.

<sup>673</sup> Declaration on the Elimination of Violence Against Women, Preamble.

<sup>674</sup> A. Miller, 2004, p. 24.

<sup>675</sup> For example, during the International Conference on Population and Development in Cairo in 1994, advances in health and human rights claims were made visible concerning sexual and reproductive health (see A. Miller 2004). At the same time, lesbian and gay activists were pushing sexual rights as the subject of human rights. See Amnesty International (1994).

many challenges.

The Vienna Conference was the culmination of years of efforts by women's movements, but also, and most importantly, it constituted a starting point for new developments in the field of international women's rights. In this view, mainstreaming women's rights throughout human rights theory and practice became an important challenge for the existing human rights framework and in particular for the work of the UN human rights' bodies.

Crucial in this regard was the Fourth UN World Conference on Women in Beijing in 1995. This conference further extended and solidified the international women's network. During the conference, women demanded to include violence against women as a human rights issue. The Beijing Declaration and Platform for Action (PFA) challenged the distinction between public and private spheres along which human rights discourses have traditionally operated and highlighted that power can act in different and multiple contexts.<sup>676</sup> Immediately after the Beijing Conference important legal and political changes took place in the international arena including the incorporation of gender crimes in the statutes/practice of the ad hoc War Crime Tribunals and the integration of gender into the definition of crimes and expertise of the judges for the international Criminal Court.<sup>677</sup>

The Beijing Declaration and Platform for Action was a milestone in the recognition of sexual and reproductive autonomy as central plank of women's human rights. The principal themes of the Beijing Declaration were the advancement and empowerment of women in relation to women's human rights, women and poverty, women and decision-making, violence against women and other areas of concern.<sup>678</sup> During the Beijing Conference the concept of women's empowerment was strongly emphasized and from then it became a keyword in the policies for the recognition of women's rights. However, as feminist scholars have highlighted, neither the Beijing Conference nor the Platform for Action provided concrete instruments through which individual subjects could undertake a process of 'empowerment'. And, unfortunately, the same thing happened at the following conferences Beijing + 5 and +10. Moreover, it is worth noting that sex workers' organisations were excluded from the official conference because no sex workers' organisations had consultative status at the UN and

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<sup>676</sup> United Nation, *The Beijing Declaration and the Platform for Action: Fourth World Conference on Women*, New York, UN Department of Public Information, 1996, p. 17.

<sup>677</sup> W. S. Hesford and W. Kozol (2005).

<sup>678</sup> R. Copelon (1996).

because the Chinese government had been reluctant to provide sex workers with entry visas.<sup>679</sup>

Recent years have seen increasing attention given to women's rights. More precisely, particular attention has been dedicated to the issues of gender in standard-setting.<sup>680</sup> Going beyond just including 'women' in a list of 'vulnerable' groups, some international and regional human rights bodies have begun to incorporate gender perspective into recommendations for structural changes "needed to bring about full enjoyment of human rights by women and girls."<sup>681</sup> An early example is the General Recommendation on 'Gender-related dimension of racial discrimination'. Adopted in 2000 by the Committee on the Elimination of Racial Discrimination (CERD), this Recommendation has highlighted the *intersectional* dimension of race and gender discrimination by explicitly arguing that racial discrimination does not always affect women and men equally or in the same way. The *multiple* discrimination women experience has been also recognized by the Committee on Economic, Social and Cultural Rights (CESCR) in its general comment on the equal rights of men and women to the enjoyment of all economic, social and cultural rights.<sup>682</sup>

Gender-based rights violations have also been addressed in the Committee against Torture's recent general comment n. 2 (2008) on the implementation of the Convention against Torture. Among gender-based rights violations, the comment explicitly includes rape, domestic violence, female genital mutilation and trafficking. In this light, the Committee highlights state responsibility to protect victims from these and other gender-based violence by non-state actors. Moreover, the Convention on the Rights of Person with Disabilities, which entered into force in March 2008, states that women and girls with disabilities are subject to multiple discrimination and often at greater risk of violence, abuse and exploitation.<sup>683</sup> In recent years increasing attention has also been paid to the rights of lesbian, gay, bisexual, transgender people (LGBT).

Furthermore, it is worth mentioning that on April 2011 the Committee of Ministers of the Council of Europe adopted a new Convention on preventing and

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<sup>679</sup> However, some sex workers managed to participate as NGO members of *Anti-Slavery International*.

<sup>680</sup> S. Fariior (2009).

<sup>681</sup> *Ivi* p. 84

<sup>682</sup> General Comment n. 16, 2005. Also, in 2008, CESCR issued a general comment on the right to social security with provisions on both 'Non-discrimination and equality' and 'Gender equality'. See also article of R. L. Johnstone (2011).

<sup>683</sup> Preamble and Article 6.

combating violence against women and domestic violence.<sup>684</sup> This Convention constitutes a comprehensive legal framework to prevent violence, to protect victims and to end impunity for perpetrators. It defines and criminalises various forms of violence against women (including forced marriage, stalking, sexual violence and physical and psychological violence). Also, it foresees the creation of an international group of independent experts to monitor its implementation at a national level. The Convention was opened for signature in Istanbul on May 2011 and by December 2011 had been signed by 13 countries.

Despite this progress, women's rights are still very far from a satisfactory recognition and realization. Today we see persistent and ever increasing and varying forms of women's rights violations. As discussed above, state and non-state actors are responsible for gender-based rights violations in the workplace, in housing, education, political life, health, care and labour mobility. Women's access to justice and citizenships rights continues to be highly hindered showing how gender, sexual and racial discrimination are still strongly present. In this scenario, migrant sex workers appear particularly vulnerable.

#### **4.1.2 The 'Suffering' Subjects of Rights**

Although the discrimination frame was extremely important in the debate over women's rights started in the late 1980s, the women's rights campaign focused primarily on the issue of violence against women, in particular on the abuses suffered by third world women.<sup>685</sup> This has led to the centrality of violence against women and in particular sexual violence to the notion of women's human rights. A centrality that is still very present.

The issue of violence against women emerged as a 'common advocacy position' within the women's human rights movement. The term violence against women encompassed a range of different practices occurring in both private and public sphere, from wife battery, incest, rape, to genital mutilation, violence from states security forces and trafficking for forced prostitution.<sup>686</sup> However, as Alice Miller rightly points out,

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<sup>684</sup> For the text of the Convention see <https://wcd.coe.int/ViewDoc.jsp?id=1772191>

<sup>685</sup> G. Soderlund (2005).

<sup>686</sup> The first official definition of the term 'violence against women' was developed in the Organization of American States (OAS) which adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. According to Baritono "la frase violenza contro le donne fu usata per la prima volta dall'Organizzazione degli stati americani che nel 1994 all'indomani della



the focus on violence worked in *progressive* and *regressive* ways simultaneously. It reaffirmed both progressive and regressive ideas about women and sexuality and many of the regressive aspects have been amplified by the engagement with human rights.<sup>687</sup>

The issue of violence against women as a claim to rights worked in a progressive way because it embodied a horror that, as Charlotte Bunch stressed, could not be ignored.<sup>688</sup> By situating the topic of violence against women on the local, national and global agendas of governments and civil society, women activists have named and described the realities of women's lives. In this sense, the frame of violence against women has had extremely important and beneficial consequences for the progress of women's human rights movements. It has translated very specific violations experienced by individual women into human rights discourse<sup>689</sup> and consequently to build bridges internationally and initiate global campaigns. Thus, considering violence against women as something that women have in common, though in different forms, has made it possible to give attention to this issue at an international level in terms of visibility, laws, justice and human rights.

At the same time, the focus on the issue of violence against women, in particular sexual violence, made it possible to build alliances with mainstream human rights and health policy organizations. As feminist scholars Margaret Keck and Kathryn Sikkink note, the frame of violence against women "helped women's groups attract new allies by situating them within the larger 'master frames' or 'meta-narratives' of violence and rights". From this perspective, the focus on violence led human rights groups to rethink and transform their agenda by forcing them to set legal standards and change policy.<sup>690</sup>

In order to make violence against women a rights issue, women's rights advocates emphasised and made visible the experiences of women and their real and hidden suffering. Crucial in this regard was the "Women's Rights are Human Rights Tribunal" hosted by the Center for Women's Global Leadership in Vienna during the 1993 World Conference on Human Rights. Presenting their personal experiences in public tribunals, women talked about their stories of sexual harm, incest, rape in marriage, trafficking for forced prostitution or rape in armed conflict. Through these stories, women's rights

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conferenza di Vienna che sancisce che i diritti delle donne sono diritti umani, approva la International American Convention on the Prevention, Punishment and Eradication of Violence against Women, punto culminante di anni di lavoro delle reti di attiviste e delle associazioni femministe" (Baritono, 2010, p. 200)

<sup>687</sup> A. Miller (2004).

<sup>688</sup> C. Bunch (1990).

<sup>689</sup> R. Kapur, 2005, p. 98.

<sup>690</sup> M. E. Keck and K. Sikkink (1998).

advocates persuaded audiences to remember, to establish historical consciousness, and to encourage institutions and non-institutional organizations to act. In so doing, they highlighted the need to put violence against women on the map as a global human rights problems.

As Alice Miller illustrates, the issue of violence against women played a crucial role in bringing human rights, international humanitarian law and international criminal law more closely together. This process has contributed enormously to getting the issue of violence against women on the core of the women's human rights debate.<sup>691</sup> At the same time, the attempts to bring the issues of violence against women into women's human rights discourse intersected – at domestic and international levels – with the aim of getting the public health and medical establishment to consider violence against women as a health issue. More precisely, women's rights advocates put the emphasis on the health consequences of violence against women and asked that services “be both a right and an element of compensation”.<sup>692</sup>

In view of these considerations, it might be argued that the campaign on violence against women has been extremely important for women because it made violence and abuses visible that until that moment had remained invisible and hidden in human rights discourse. Yet, as legal scholar Angela Harris points out:

Bridges between woman and woman are built, not found. The discovery of a shared condition of suffering is more illusory than real; what will truly bring and keeps us together is the use of effort and imagination to root out and examine our differences, for only the recognition of women's differences can ultimately bring the feminist movement to strength<sup>693</sup>

The construction of women through the lens of violence and, consequently, the reinforcement of a victim subject partly deflect from and frustrate the goal of empowerment and agency that are required to transform the context in which episodes of violence occur. Indeed, an exclusive reliance on the issue of violence against women

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<sup>691</sup> A. Miller (2004a).

<sup>692</sup> A. Miller, 2004a, p. 26. Miller highlights how the early reports from the World Health Organization (WHO) on violence against women contributed to getting the issue onto the policy agenda of national governments, even if as the scholars argues “in some instances it was a rhetorical maneuver”. A. Miller, (2004).

<sup>693</sup> A. Harris, 1990, p. 615.

– and on the victim subject to make claims of rights and for women’s – tends to epitomize what made gender violence visibly *gendered*.<sup>694</sup> As discussed above, many feminist scholars, in particular black and postcolonialist feminist scholars<sup>695</sup>, have highlighted that the articulation of the victim subject is often based on *gender essentialism* that assumes that “women have a coherent group identity within different cultures [...] prior to the entry in social relations.”<sup>696</sup> This generalization does not pay attention to the differences between women and it tends to represent the problems of privileged women, who are often white, Western, middle class and heterosexual women. From this perspective, the victim subject relies on a universal subject that reproduces the abstract categories of the liberal discourse.<sup>697</sup> It is a subject that does not contemplate the complexity and the diversity of women experiences.

At same time, as postcolonial feminist scholars have argued, the campaign on violence against women and the connected representation of female as victim subject are often based on a *cultural essentialism*.<sup>698</sup> ‘Third World’ women are often portrayed as victims of their culture, which reinforces cultural stereotypes and racist representations. As Indian legal scholar Ratna Kapur notes, “[i]n the end, the focus on the victim subject reinforces the deception of women in the postcolonial world as perpetually marginalised and underprivileged, and has serious implications for the strategies subsequently adopted to remedy the harms that women experience.”<sup>699</sup>

Therefore, although the campaign on violence against women has had the undeniable merit of drawing attention to ‘women’s point of view’, it has not brought about the political transformation that initially inspired the women’s human rights movement. The emphasise on violence against women and the victim-centred approach have led to a *proliferation of rights* for women, but have not challenged the relations of power in society. As Kapur rightly points out, “the rights claims by victims of sexual violence have in part constructed the terms on which women can claim and enjoy human rights: through reinforcing gender and cultural essentialism and without disrupting the normative assumptions about gender, sexuality and culture that inform these claims.”<sup>700</sup>

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<sup>694</sup> A. Miller (2004a).

<sup>695</sup> See chapter 2

<sup>696</sup> C. T. Mohanty, 1991, p. 70.

<sup>697</sup> See chapter 2.

<sup>698</sup> R. Kapur (2005).

<sup>699</sup> *Ivi* p. 99.

<sup>700</sup> *Ivi* p. 134.

An exclusive focus on violence against women, thus, leads us to (re-)affirm the image of women (in particular Southern women) as *suffering subjects* without power and in need only of protection by the law and the states, rather than as subjects deserving of positive rights. This protective approach tends to reproduce a binary gender understanding, in which women belong to the private/domestic sphere and men are their protectors.<sup>701</sup> Consequently, it reinforces the notion that “women primarily need rights that support them as mothers and wives, which endorses the protective discourse that links women’s enjoying of ‘rights’ to their associations with protecting men”.<sup>702</sup> In this scenario, the issue of women’s rights becomes relevant when certain rights of women (as mothers or as wives) are violated but it does not receive the same attention when women claim for recognition and or assert other rights (such as the right to sexual self-determination).

On the basis of these considerations, it is worth noting how the topic of violence against women reveals the tensions within rights between highlighting suffering and violence on the hand and identifying conditions for participation and agency on the other.<sup>703</sup> This leads to the question of whether rights serve only as mere remedies or whether they should be seen also as potentially transformative, in challenging the broader relations of social and economic power that frame sexual and gender politics.

By exploring the complex relationship between human rights, violence and sexuality, Miller rightly argues “the distance that must be travelled to see a male torture victim as a reconstituted citizen/subject holder of rights is shorter than the distance that must be travelled to see a raped woman as a citizen/rights holder”.<sup>704</sup> Indeed, she notes, “for men, the distance is shortest if the torture victim represents an already recognizable, respectable male citizen; i.e. he is of the right race [...] But for persons gendered as female, notions of citizenship are attenuated by cultural/political norms around female sexuality to begin with”.<sup>705</sup>

Exemplary in this regard is the situation of women who are involved in trafficking. Most of the time in human rights discourse, trafficked women are mainly considered as victims of violence but not as claimants of rights themselves. The

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<sup>701</sup> S. Cheng (2010).

<sup>702</sup> D. Otto, 2005, p. 128.

<sup>703</sup> A. Miller, 2004a, p. 25.

<sup>704</sup> *Ivi* p. 29.

<sup>705</sup> *Ibidem*. Miller also highlights the health responses to sexual harm tended to echo the focus on the body as the site of harm and also tended to dis-empower ‘treated’ persons, “moving them from citizen to patient”. A. Miller, 2005, p. 40.

suffering and “injured”<sup>706</sup> subject constitutes the only subject position from which rights claims can be made for women. In this light, the right of victims to be protected is counterposed to the rights of women “to control their body, life, work, and especially migrate, to decide for themselves whether they want or not to work in prostitution, to be free from coercion and violence”.<sup>707</sup> As Claudia Aradau argues,

The humanitarian solution to shift the focus from seeing trafficked persons as a category of migrants or prostitutes to ‘understanding them as people bearing human rights’, acts as a strategy of identification/dis-identification. Trafficked women are dis-identified from categories of migrants, criminals or prostitutes by the emphasis on suffering. Therefore, women who are trafficked into prostitution should not be deprived of their rights on grounds that they are undocumented migrants. Yes, these rights are only the rights of the victim, an identification achieved through a mode of suffering and a feeling of pain.<sup>708</sup>

Mainstream human rights discourse tends to recognize women only as victims of social structures and not as agents that interact dynamically. Such an approach ‘depoliticizes’ women’s rights claims, reducing them to a single request: “*the right to be rescued*”.<sup>709</sup> According to Wendy Brown ‘depoliticization’ “involves removing a political phenomenon from comprehension of its historical emergence and from a recognition of the powers that produce and contour it”.<sup>710</sup> Dominant discourse that aims to protect the human rights of the victims of trafficking tends to address the violence and abuses experienced by women removing the global political and economic inequalities and the immigration regimes that make some legal as well as some irregular migrants vulnerable to exploitation.<sup>711</sup> In this light, it is not surprising that, as Sealing Cheng reveals in her research on sex workers in South Korea, sex workers proclaim that rather than “*useless women’s human rights*’, they demand the recognition of their “right to live on an everyday basis”.<sup>712</sup>

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<sup>706</sup> W. Brown (1995).

<sup>707</sup> M. Wijers and L. Lap-Chew, 1997, p. 246.

<sup>708</sup> C. Aradau, 2008, p. 34.

<sup>709</sup> C. Vance, 2010, p. 139 [my emphasis].

<sup>710</sup> W. Brown, 2006, p. 15.

<sup>711</sup> See chapter 3.

<sup>712</sup> S. Cheng, 2011, p. 493 [my emphasis].

## 4.2 Rescue and Rehabilitation Operations in Anti-Trafficking Interventions

In most European countries, anti-trafficking interventions tend to focus almost exclusively on the context of trafficking in women in the sex industry and pay no attention to the fact that trafficking exists also in other sectors (such as agriculture and domestic work) and that also applies to men and transgender people.<sup>713</sup> Moreover, anti-trafficking state interventions typically address victims of trafficking through ‘rescue operations’, which are often based on raids on brothels and other places. ‘Rescue operations’ usually lead to arbitrary arrests and the detention of sex workers and the massive deportation of migrant sex workers with an irregular immigration status. In this regard, it is necessary to underline that in all EU countries, even in the Netherlands<sup>714</sup> and Germany, which are more advanced in recognizing the rights of sex-workers, there is no opportunity for migrants who are not European citizens to work legally in the sex industry.<sup>715</sup> Also, in many European countries working in the sex industry is often a reason for which women can lose their residence permit.<sup>716</sup>

As many reports suggest, raids result in the large scale detainment and deportation of people with irregular immigration statuses.<sup>717</sup> In this sense, an interesting piece of research on the human rights impact of anti-trafficking policy in the UK conducted by x-talk – a sex workers’ co-operative in London<sup>718</sup> – points out that the raids have the effect of eroding the relationship between the police and the sex workers, regardless of their migration status. Furthermore, raids often fuel a climate of fear among migrant sex workers: “the raids have created a climate where some migrants are too afraid to access basic health and other services. Actual raids, or simply the fear of raids, within the

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<sup>713</sup> See N. Mai (2009)

<sup>714</sup> Also, it is interesting to highlight that in Netherlands there is not even the possibility for migrants non-European citizens to work legally in domestic work. See S. Marchetti (2010).

<sup>715</sup> D. Danna (2003).

<sup>716</sup> *Ivi*

<sup>717</sup> See for example UK Home Office Report at <http://www.homeoffice.gov.uk/>

<sup>718</sup> X:Talk is a co-operative created in 2006 in London to provide English language classes for sex workers by sex workers. Through providing this service, x:talk aims to challenge the stigma and the isolation attached to those who work in the sex industry. In addition to providing free English classes to migrant sex workers, x-talk supports critical interventions around the issues of sexuality, gender, race, migration and labour. For more information about x: talk see [http://www.xtalkproject.net/?page\\_id=2](http://www.xtalkproject.net/?page_id=2)

heightened climate of criminalisation have pushed migrant sex workers further underground where they are more vulnerable to exploitation and coercion”.<sup>719</sup>

Most people during ‘rescue operations’, as feminist scholar Giulia Garofalo argues, refuse to give evidence against their traffickers or to declare themselves victims of trafficking and, consequently, are subject to arrest and put in detention<sup>720</sup> with a view to deportation.<sup>721</sup> From this perspective, ‘rescue’ operations are *de facto* criminalisation measures,<sup>722</sup> migrant women are detained and deported without protecting them against their traffickers and without possibilities to seek legal and psychological assistance, long term residence and work. In this regard, it is important to mention the case in Spain of a Nigerian woman identified by NGOs, the UN High Commissioner for Refugees (UNHCR) and the Ombudsman Office as presumed victim of trafficking but that was deported although there were strong indicators and a reflection period was formally requested. According to the Spanish state officials, the woman did not “state that she was obliged to prostitute [...] not she said somebody was forcing her to prostitute”.<sup>723</sup> On that occasion, there were many requests by NGOs, UNHCR and the Ombudsman Office, in order to stop the forced return of the woman but there was no positive answer and the woman was forcibly returned.

In other cases, when a woman demonstrates that she did not originally consent to work in prostitution and when her story clearly corresponds to the ‘official’ definition of trafficking,<sup>724</sup> women are granted a reflection period or resident permit and are entitled

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<sup>719</sup> X:Talk, 2010, p. 27. In reference to raids, the report mentions this event: “A maid in Soho described a raid in a flat where she and a sex worker were held by immigration officials for one and a half hours, impeded from going to the toilet unaccompanied or from looking in their bags for cigarettes. She described how she had seen officials tormenting and upsetting sex workers, leaving them ‘shaking and crying’. During the raid, one sex worker was taken into a room on her own for questioning and, despite requests from both the maid and the sex worker, the maid was not permitted to accompany her to provide support, despite the fact this non-English speaking sex worker was interrogated in English. The maid explained that it had appeared the woman could not understand what was being asked by immigration officials and was therefore replying ‘yes’ to all their questions. The authorities would not provide a translator, nor allow the maid to attempt to calm the woman down or help her to understand what was being said. The sex worker was taken to Charing Cross Police Station, where she was detained. When the maid tried to visit her, she was denied access. The maid was unable to find out the worker’s fate as she never returned to the flat to collect her belongings or wages” X: Talk, 2010, p. 26.

<sup>720</sup> This has led to an increase in the incarceration of women, thus further weakening existing prison infrastructure.

<sup>721</sup> M. Wijers and L. Lap-Chew, 2010, p. 6.

<sup>722</sup> G. Garofalo, 2010, p. 233.

<sup>723</sup> Comparecencia de la Secretaria General de Políticas de Igualdad ante la Comisión de Igualdad, Congreso de los Diputados Núm. 552 de 19/05/2010, Martínez Lozano, Señora Secretaria General de Políticas de Igualdad in Spain.

<sup>724</sup> By official definition I mean a tightly - and commonly adopted by national authorities - definition of trafficking with trafficking known only by the presence of all three of the key elements (movement, coercion and exploitation). When a presumed trafficked person wishes to be recognised as ‘trafficked’ but the authorities refuse to do so because their story do not contain all key elements of trafficking, in

to different forms of assistance.<sup>725</sup> In some countries the process to determine if a person is trafficked and to refer them to support service, can be long and complicated – such as in the UK. And, as the anti-trafficking Monitoring Group (ATMG)<sup>726</sup> suggests in its report on the UK anti-trafficking measures, the differential in the identification of people depending on their countries of origin or immigrations status could point towards discrimination.<sup>727</sup>

In most European legal systems, those who have been identified as ‘victims’ of trafficking receive a specific treatment which consists of a coordinated intervention of state and international agencies, police, immigration and non-governmental organizations and associations – such as Association On the Road<sup>728</sup> in Italy and La Strada International in the countries of Eastern Europe<sup>729</sup> – which provide shelter and rehabilitation to support migrant for several months.<sup>730</sup> The rehabilitation program provides ‘empowerment strategies’ including legal advice, health care, education, vocational training (language training) and psychological follow up. During this time, victims are not allowed to work and they are encouraged, and often forced, to collaborate with the authorities and to denounce their traffickers. In fact, in many

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some countries they are entitled to challenge the decision through a formal appeal (or review process). In other countries, this opportunity does not exist. See European NGOs Observatory on Trafficking, Exploitation and Slavery (2010).

<sup>725</sup> As seen in chapter 1, the Council of Europe Convention specifies that persons reasonably believed to have been trafficked are to be granted at least 30 days to reflect and recover in the country where they have been identified (Article 13), during which time they are to be offered assistance and protection and may not, if they have no legal right to be in the country concerned, be expelled – regardless of whether they agree to participate in any proceedings the authorities may decide to pursue against those responsible for trafficking or exploiting them (report e-notes p.87). Moreover, the European Council Directive 2004/81/EC on the *Residence permit issued to third country nationals victims of trafficking in human beings or to third country nationals who have been subjects of an action to facilitate illegal immigration and who cooperate with the competent authorities* provides for reflection delays to be granted to both trafficked and smuggled persons.

<sup>726</sup> Anti-Trafficking Monitoring Groups is made up of NGOs including Anti-Slavery UK, Amnesty International, and ECAPT UK (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purpose).

<sup>727</sup> Anti-Trafficking Monitoring Group reveals that the National Referral Mechanism (NRM) – the UK system of identification of cases of trafficked persons – appears to be putting more emphasis on the immigration status of the presumed trafficked persons, “rather than the alleged crime committed against them”. In view of the results of their request, the Anti-Trafficking Monitoring Group reports that of the 477 people referred to the NRM, only 91 were granted positive conclusive decisions (i.e. deemed trafficked) and that “The UK citizens referred were speedily identified as having been trafficked with a rate of 76 per cent of cases positively identified as trafficking, in contrast with the rate of cases positively identified as trafficked as a whole of 19 per cent. The rate of nationals from other EU states identified as trafficked was 29.2 per cent, while that of nationals from countries outside the EU was only 11.9 per cent”. See Anti-Trafficking Monitoring Group 2010, p. 9. The complicated issue of identification is examined in the next pages.

<sup>728</sup> For more information about the association On the Road see <http://www.ontheroadonlus.it/>

<sup>729</sup> For more information about the international organisation La Strada International see <http://lastradainternational.org/?main=home>

<sup>730</sup> Associazione on the Road (2002).



countries the provision of assistance and protection is linked to the victims' cooperation with law enforcement.<sup>731</sup> For example, in UK the Poppy Project<sup>732</sup> is the only service for women trafficked in sexual exploitation funded by the government. The project provides accommodation as well as legal support, interpretative assistance and health services within London, Sheffield and Cardiff. However, under the terms of a funding agreement between Home Office and Poppy Project, trafficked women can obtain assistance and protection only if they collaborate with the authorities in gathering information about the traffickers.<sup>733</sup> In other words, assistance and support is predicated on cooperation with police operations.<sup>734</sup> This approach seems to presume that the pursuit of criminal prosecutions has the priority over the help and assistance for trafficked women. Moreover, it fails to respect Article 12.6 of the Council of Europe Convention, which requires States to take action "to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness".<sup>735</sup>

During the rehabilitation program, women, in the name of protection, are often confined in public or private shelters or 'rehabilitation centres' under conditions that, as feminist activists Marjan Wijers and Lin Lap-Chew argue, are often not different from detention. This leads to a direct violations of the right to life, liberty, security and freedom of movement of these women.<sup>736</sup> From this perspective, the rehabilitation process becomes itself a punitive form of imprisonment. Anna Gallagher and Elaine Pearson have highlighted that routine detention of actual or suspected victims of trafficking potentially violated several of fundamental principles of international law.<sup>737</sup> Furthermore, it is worth noting that often assistance and rehabilitation programs are not sufficiently funded and resourced to offer adequate structures and develop adequate strategies of empowerment.<sup>738</sup>

After the period of rehabilitation, 'trafficked victims' are offered so called 'voluntary' repatriation. In other words, they are *deported back* to their countries of

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<sup>731</sup> It might be interesting to note that in some countries, such as Romania, the provision of assistance and protection is ensured irrespective of cooperation with law enforcement only for national trafficked people. See European NGOs Observatory on Trafficking, Exploitation and Slavery (2010).

<sup>732</sup> It is important to say that the Poppy Project has started to accept a small number of people trafficked into domestic work. However, the project does not accept men or transgender people.

<sup>733</sup> X:Talk (2010).

<sup>734</sup> This approach is also adopted by countries, such as Poland, that are countries of origin, transit and destination for trafficked persons. See European NGOs Observatory on Trafficking, Exploitation and Slavery (2010).

<sup>735</sup> See chapter 1.

<sup>736</sup> M. Wijers and L. Lap-Chew, 2010, p. 6.

<sup>737</sup> A. Gallagher and E. Pearson, 2008, p. 22.

<sup>738</sup> IOM (2010).

origin.<sup>739</sup> The term ‘voluntary’ refers to the fact that if a trafficked person is required to leave a country where they have been identified as traffickers, the Council of Europe Convention affirms that the departure should be ‘preferably voluntary’ and their return to the country of origin should be “with due regard” for their “rights, safety and dignity” (Article 16), meaning that the authorities have an obligation to assess the potential risks associated with returning and to stop it if there exist significant risks. However, most of the time States make no effort to meet the requirements of Article 16 of the Council of Europe Convention. One way for States to minimise the possibility of the fact that returnees could be subject to abuses is for them to agree to formal procedures or protocol bilaterally with other Members States or third countries.<sup>740</sup> However, as the European NGOs Observatory on Trafficking, Exploitation and Slavery (E-notes) demonstrates, getting relevant information about the circumstances in which the return has been carried out is fairly difficult.<sup>741</sup> Also, there are quite different criteria in each country for deciding on whether to return a presumed trafficked person and the number of returns is not always proportional to the number of trafficked persons identified.<sup>742</sup>

Some European countries, such as Belgium and Spain, grant a work and residence permit to trafficked victims if they decide to collaborate with law enforcement.<sup>743</sup> Normally such permits are granted for a period of one year and are renewable (the duration usually varies on the cooperation of the person with the authorities, the criminal actions and the situation of the person). Although these policies can seem innovative, they continue to differentiate those who give evidence against their traffickers and those who do not, repatriating those who refuse. Moreover, because the visa permit granted to persons that collaborate are contingent upon the duration of the prosecution, trafficked persons are in the “undesirable position of being returned to the place from which they wanted to escape as well as being vulnerable to the criminals who initially trafficked them”.<sup>744</sup> In this scenario, Article 18 of *Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*, D.LGS. n. 286/1998, 25/07/1998 (“Consolidation Act on provision

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<sup>739</sup> G. Garofalo (2010).

<sup>740</sup> Six countries have formal agreement with other EU Member States or third countries: France, Greece (concerning children from Albania, but not adults), Latvia, Portugal, Spain and the UK. However, individual trafficked adults have the right to say that they do not wish to be identified to their own countries’ authorities (as having been trafficked) and wish to return outside the framework of such bilateral agreements.

<sup>741</sup> European NGOs Observatory on Trafficking, Exploitation and Slavery (2010).

<sup>742</sup> *Ivi* p. 29.

<sup>743</sup> *Ivi* p. 115 and 203. See also E. Pearson, 2002, pp. 56-59.

<sup>744</sup> J. Bernman, 2010, p. 96.

concerning immigration discipline and rule on the foreigner condition”<sup>745</sup>) is an *important exception* because it grants assistance and a renewable temporary residence and work permit to trafficked persons regardless of their cooperation with the law enforcement authorities. Yet, as illustrated below, the enforcement of Article 18 is often inadequate, arbitrary and differing across Italy.

It is necessary to note that, as many reports and researches reveal, the desire not to return home is unanimous among trafficked women. And this is due to several reasons.<sup>746</sup> Many women are afraid of the fact that their family and people of their community could know that they worked as prostitutes and this would stigmatize them. The fear of stigmatization and of its social consequence – like being excluded from their community of origin – is always present in women’s narratives.<sup>747</sup> In her analysis on the connections between imaginary community and prostitution, Julia O’Connell Davidson points out the importance of the political dimension of sexuality and its investment in the creation of community and in safeguarding the hierarchies within those communities along the lines of class, race, sex, gender, age and social class. Those, such as prostitutes, who break these boundaries of the community become outsiders and are prevented from returning to their communities.<sup>748</sup>

As Rutvica Andrijasevic highlights, “[p]rostitution *and* failed migration [...] are not separate but rather mutually reinforce each other in producing stigmatization”.<sup>749</sup> Being deported means returning home without money and often with a debt to pay up. In many cases, women borrow money to pay for their migration project. They may have contracted a debt with their recruiters or with their family. Often, family relies on women’s income. As undocumented migrant women explains in an interview conducted by x:talk, “if they deport me I’ll be left with a debt of £80,000 that I owe for a loan I got in my country to come here, buy a passport and rebuild my mother’s house that was destroyed by floods”.<sup>750</sup>

Furthermore, in a number of cases, after program of rehabilitation women are still subject to continuing control by their traffickers. This may consist in situations in which they are strongly threatened by traffickers.<sup>751</sup> Threats may include threats of violence against women and their family members. Last but not least, for many women returning

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<sup>745</sup> Associazione On the Road, 2002, p. 18.

<sup>746</sup> See in particular C. Corso and A. Trifiró, (2003); IOM (2010).

<sup>747</sup> C. Corso and A. Trifiró (2003); R. Andrijasevic (2010).

<sup>748</sup> J. O’Connell Davidson (1998).

<sup>749</sup> R. Andrijasevic, 2010, p. 103.

<sup>750</sup> X:Talk, 2010, p. 26.

<sup>751</sup> IOM (2010); M. Wijers (1998).

home means renouncing their original desire to move and their will to change their lives.

From this perspective, it is not surprising that most ‘repatriated’ women try to come back to Europe, even if they have suffered heavy abuse and exploitation.<sup>752</sup> Therefore, although they are aware of the risks due to their past trafficking experiences, they look to start their migration process again, searching for other ‘facilitators.’ However, as ‘ex-trafficked’ women, they often find more restrictions in their visa procedures, making their travel more difficult and dangerous.<sup>753</sup>

The question of the identification of victims is particularly problematic. Why and on what basis do some women fall in the category of victim and consequently have access to protection, while others do not? As seen above, the Council of Europe Convention requires States Parties to guarantee the necessary legal framework and the availability of competent personnel for the identification process (Article 10).<sup>754</sup> Nevertheless, the Convention does not provide a blueprint for the identification process. In this sense, it is worth noting that the European NGOs Observatory on Trafficking, Exploitation and Slavery (E-notes) has highlighted the substantial weakness of the identification process in European countries, arguing that both identification processes and criteria for assessing whether a particular person has been trafficked vary highly among the countries of the European Union. More precisely, it reports that “in 11 out of 27 Member States there is a single government agency or structure responsible for making a formal identification of anyone who is presumed to have been trafficked, where 16 do not”. Also, “six of the countries where there is no national-level process for identification do not have any standard procedure used throughout the country for

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<sup>752</sup> IOM (2010).

<sup>753</sup> *Ivi.*

<sup>754</sup> See chapter 1. It is worth noting that in 2007 the European Commission published a draft paper on the identification process – *Recommendations on Identification and Referral to Services of Victims of Trafficking in Human Beings*, October 2007. This draft states that: “a human rights centred approach requires early identification and assistance to victims of trafficking in human beings. Identification is crucial to ensure both the protection of the rights of trafficked persons, and successful prosecution of the traffickers. Due to the complexity of the trafficking phenomenon, the final identification of victims might require a prolonged and ongoing process. Failure in identifying victims at an early stage can result in insufficient protection of victims and violation of their rights” Thus, “A presumed trafficked person shall be considered and treated as a victim as soon as the competent authorities have the slightest indication that she/he has been subject to the crime of trafficking. During the identification process the presumed trafficked person shall have access to assistance and support, regardless of whether she/he is able or willing to testify. No expulsion order shall be enforced until the identification process has been completed by the competent authorities”. For the full text of the draft see

<http://lastradainternational.org/lsidocs/330%20Draft%20EU%20recommendations%20on%20identification%20and%20referral.pdf>

formally identifying someone who is presumed to have been trafficked (Austria, Bulgaria, France, Germany, Italy and Malta)”.<sup>755</sup>

In most European countries anti-trafficking interventions are aimed at ‘rescuing’ those who fall into a narrow category of ‘victim of trafficking’ which does not do justice to the complexity of the trafficking context and relies on involuntariness and physical violence as the crucial and distinguishing features of trafficking.<sup>756</sup> Often the systems of identification of victims of trafficking tend to put more emphasis on the immigration status of the presumed trafficked persons, rather than on the violations committed against them. In this view, those who are not identified as victims are not able to receive assistance and support which would empower them to guard against exploitative conditions. From this perspective, as Indian legal scholar Ratan Kapur argues, the dualism ‘victim/innocent’ victim versus ‘criminal/guilty’ appears to be the only possible frame provided by anti-trafficking interventions. Innocent victims deserve of protection and help and, after being ‘rehabilitated’, have to be repatriated home. The others, although subject to forms of exploitation, are treated as criminals and considered as a threat and dangerous to the nation-state and if they are undocumented they are deported.<sup>757</sup> The latter can be women who are voluntarily decide to work in the sex industry or women who, though abused, do not want or are not able to report to the authorities.

This approach adopted in anti-trafficking interventions seems to consider trafficking ‘victims’ as “a small ‘group of exceptionally exploited workers’”<sup>758</sup> that need to be protected, denying protection to a large group of exploited and vulnerable workers who do not fall in the strict definition of victims of trafficking. Many NGOs which work with migrants – in particular women – who are exploited but not trafficked have many problems and difficulties in accessing rights and protection. As feminist scholar Claudia Aradau rightly argues, “while anti-trafficking responses are attentive to the rights of trafficked persons, similar attention needs to be given to the unintended consequences that these responses might have upon other categories”.<sup>759</sup>

At the same time, as discussed above, assistance and protection for those who are identified as ‘victims’ are predicated on collaboration with police operations and

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<sup>755</sup> European NGOs Observatory on Trafficking, Exploitation and Slavery, 2010, p. 67.

<sup>756</sup> C. Hoyle, M. Bosworth and M. Dempsey (2011).

<sup>757</sup> R. Kapur 2005, pp. 25-42.

<sup>758</sup> D. Coghlan and G. Wylie, 2011, p 1520.

<sup>759</sup> C. Aradau, 2005, pp. 138-139.

possible resident and work permits are contingent upon the duration of the prosecution. Thus, the focus seems to be on contrasting organised criminal network and illegal immigrations rather than on the recognition, strengthening and protection of the rights of trafficked persons. In this light, as Elaine Pearson argues, trafficked persons appear to be nothing more than “tool[s] for the prosecutions”.<sup>760</sup>

Furthermore, by advancing an abolitionist perspective, most anti-trafficking systems grant assistance and support only to women who agree to exit the sex industry. In this sense, anti-trafficking measures aim to rehabilitate women out of sex work, rather than improve the conditions of people work in it. Infringing the right to free choice of employment by forcing women to leave sex work if they wish to obtain help, anti-trafficking measures prevent migrant and non-migrant people working in the sex industry from asserting fundamental rights.

Therefore, far from really addressing the needs, the choice and agency of women involved in ‘sex trafficking’, anti-trafficking rescue and rehabilitation operations tend to overlook women’s claims to rights to migrate and to work safely, and to citizenship. In this view, anti-trafficking measures provide States with an occasion to implement stringent anti-immigration procedures, driving trafficking further underground and increasing the dangers faced by those who wish to migrate. In so doing, they leave unaddressed the different and complex factors that, as argued in chapter 3, lead women to be involved in the trafficking scenario.

#### **4.2.1 The Italian ‘Exceptional’ Model**

According to Barbara Limanowska, special consultant for trafficking to the United Nations, “[t]he Italian model is exceptional in Europe. It’s more humane, but also more productive. There is better assistance to the victims, but also a lot of work done on the prosecution of traffickers.”<sup>761</sup> This section analyses the progressive aspects of the Italian anti-trafficking model and examines also its limits.

In Italy, trafficking in human beings is a distinct penal offence which carries penalties for all forms of the crime – Article 601 of the criminal code related to Article

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<sup>760</sup> E. Pearson 2002b, p. 56.

<sup>761</sup> Barbara Limanowska quoted in P. Willan (2002).

600 criminal code<sup>762</sup> – and crossing of national borders is not a necessary prerequisite for the offence of trafficking. In 2003, the Italian government adopted Law n.228/2003 “Measures against trafficking in person” which inserts into the Penal Code, for the first time, a specific crime of trafficking in persons. The law also provides for the compulsory confiscation of profits deriving from trafficking and the funding of a special assistance programme (“Article 13 Programme”<sup>763</sup>).

The innovative feature of the Italian anti-trafficking framework is the above mentioned Article 18 of the D.LGS. n. 286/1998, which provides victims of trafficking with a residence permit for humanitarian reasons. Article 18 applies to EU and non EU citizens in situations of abuse or severe exploitation where their personal safety is considered to be endangered as a consequence of attempts to escape from criminal organisations or as a result of pursuing criminal actions against the traffickers.<sup>764</sup> It provides two separate ways of obtaining the residence permit: a judicial procedure (so called ‘judicial path’) and a social procedure (so called ‘social path’). The progressive nature of Article 18 resides in the fact that it grants assistance and a temporary residence to a trafficked person in virtue of their being a victim alone, independently of their collaboration with law enforcement and immigration investigations and prosecutions, as it often requires in other countries’ legislation.

As the judge Mariagrazia Giammarinaro points out, the objectives of Article 18 are twofold: “offering the victims of trafficking the actual opportunity to escape subjugation and improve the quality of the results of the criminal repression of trafficking. The originality in the approach of Article 18 is that both objectives are placed on the same level, by not considering social protection of trafficked persons as a mere tool of criminal action and by considering the protection of the victims’ rights as a priority, at the same level of importance, for the State, as the punishment of those who have committed such horrible crimes as trafficking in human beings”.<sup>765</sup> Thus, the main idea behind this provision is the need to support the victim’s ability to make decision for herself/himself, enabling them to exit situations of abuse and obtain a legal status in

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<sup>762</sup> It is important to note that Article 602 provides a penalty for the cases other than the ones referred to in the Article 601, which involves the purchases or sales of a person in condition of slavery.

<sup>763</sup> Article 13 programme is a short programme of three months that, when applicable, may be extended for a further three months. This programme offers a series of protection and initial support measures to Italian, European community and foreign victims of servitude and trafficking. It provides accommodation, social assistance and health care services. Once the programme is over, the victims can continue to be helped under the Article 18 Programme.

<sup>764</sup> *Ivi* p. 166.

<sup>765</sup> M. Giammarino, 2003, p. 60.

Italy.<sup>766</sup> The Article 18 programme (“Social assistance an integration programme”) provides for access to social services and educational institutions and access to employment. Indeed, the final aim is to support the social and labour inclusion of assisted persons.

From this perspective, Article 18 offers trafficked persons the opportunity to regularise their positions in Italy. Indeed, the residence permit granted under Article 18 is renewable and can be converted into a work or study permit. Consequently, the person does not need to go back country of origin once the assistance programme is finished. If she/he gets a regular job, she/he can stay in Italy accordingly to the work contract conditions and can eventually apply for residence in conformity with the immigration rules in force.

It is necessary to underline that the protection of trafficked persons has become more difficult with the introduction of the ‘Security Package’ (Act. no. 94/2009) which provides the crime of illegal entry and stay on the State’s territory. The protection envisaged by Article 18 can be neutralized by the new dispositions. Given the fact that most of the trafficked persons are illegal residents on the Italian territory, it is easy to think that whether these people risk to be arrested or expelled, their demand for support and assistance drastically drops.<sup>767</sup>

Despite its innovative nature, however, Article 18 presents some significant limitations. One of main limitations is the fact that it identifies trafficking with particular forms of violence and consequently penalise those women whose situation does not fit in these patterns. Andrijasevic’s research reveals how many women have been denied the request for a residence permit on the basis of the Article 18 because there were no concrete threats for the safety of the claimant.<sup>768</sup> In other words, there was no evidence that the claimant was trying to escape organisation that exploit prostitution. Proving to be a ‘victim’, then, is necessary in order to participate in the program of assistance and social protection prescribed by the Article 18. In this interpretative light, Article 18 seems to reaffirm the above described dichotomy between legal recognised (pure) victims entitled to protection and no legally recognised victims who are treated as criminals. The latter who fall out of this framework have no possibility of receiving assistance or help.

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<sup>766</sup> In this sense, it provides support and assistance to the victims on the conditions that they themselves make the request.

<sup>767</sup> Piattaforma “30 anni CEDAW – Lavori in corsa” (2011).

<sup>768</sup> R. Andrijasevic, 2010, p. 111.



Many Italian anti-trafficking NGOs have declared that the options offered by the Article 18 are no longer proposed to the people who are found to be exercising street prostitution.<sup>769</sup> Moreover, although Article 18 provides that granting of the residence permit is legally not tied to a person's willingness to give evidence against their traffickers, it is quite exceptional to obtain the residence permit without taking part in legal proceeding against the third parties. In fact, most of the police headquarters of the national territory denies residence permit to women who ask for protection without testifying against third party.<sup>770</sup> Feminist lawyer Esohe Aghatise mentions that "if the women and girls do not collaborate with the police, refusing to reveal or give comprehensive information about their exploiters, they may be picked up by the police along the roadsides and deported to their countries of origin".<sup>771</sup>

At the same time, when the residence permit is granted, the actual release of the permit requires sometimes an extremely long lapse of time. Such a waiting period risks to turn into an 'empty' time for women given the fact that in order to participate to professional training course, women require the possession of a residence permit.<sup>772</sup> As feminist legal scholar Enrica Rigo highlights, *temporal* barriers constantly multiplies and renews the *spatial* borders that limit migrant's access to rights.

Another crucial and problematic aspect of Article 18 is that it grants victims residency and work permits on the condition they agree to leave prostitution definitely. By conflating trafficking with prostitution, this provision curtails and denies the possibility that women can consent to sex work and decide to work in the sex industry. It equally ignores women's self-determination and autonomy. As discussed above, many women base their migratory projects on the difficult decision to work in the sex industry because it appears to be the fastest way of realising their projects. By insisting that women renounce sex work definitively but not offering *efficacious* programmes of inclusion into the labour market, Article 18 seems to overlook the complexity of migrant women's experiences. As argued above, many studies demonstrate that the majority of trafficked women who have exited sex work and subsequently entered waged work, constitute a poll of cheap, flexible and precarious labourers.<sup>773</sup>

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<sup>769</sup> Moreover, they have denounced the absence of a national anti-trafficking plan and the insufficient number of shelter houses for women victims of trafficking available at national level as well as insufficient amounts of funds allocated for their maintenance. See Piattaforma "30 anni CEDAW – Lavori in corsa", *Rapporto Ombra sulla attuazione della CEDAW in Italia*, cit., p. 34.

<sup>770</sup> Piattaforma "30 anni CEDAW – Lavori in corsa", 2011, p. 34.

<sup>771</sup> E. Aghatise, 2004, p. 16.

<sup>772</sup> *Ivi* p. 35.

<sup>773</sup> See chapter 3.

In this light, a notable aspect is that social assistance programs enacted under Article 18 can considerably vary, depending on the ideological approaches and aims that social services give to the programme itself.<sup>774</sup> Some institutions – with the limitations that are discussed below<sup>775</sup> – aim to implement empowering strategies giving women the power and instruments that they need to change their situation, to speak up for their own rights, to take control of their lives and reconstruct their autonomy, with autonomy meaning not necessarily abandoning prostitution. Other institutions tend to see the program as an opportunity for ‘saving’ women educating them to shape their life according to a more ‘proper’ behaviour. Thus, as sociologist Franco Prina argues, the scope of the programme is “the woman’s reconstruction, which regards not only her self-esteem and social and relational skills but also her morality”.<sup>776</sup> In this view, some institutions often impose strict discipline and place restriction on women’s movement and activities, producing situations that women cannot tolerate and from which they want to escape.<sup>777</sup> As feminist scholar Lorenza Maluccelli illustrates, in this context of social isolation, control and surveillance and discipline, assistance programs can paradoxically reproduce relationships similar to the one that characterized third party-controlled prostitution.<sup>778</sup>

It is also important to note that despite the intention of Article 18 to enable women to exit situations of abuse and obtain a legal status, in practice, as much research demonstrates, most trafficked women end up in Centres for Identification and Expulsion (CIE) and are deported before contacting social protection programmes.<sup>779</sup> In deportation centres, women are subject to extensive abuse and violations of their fundamental rights.<sup>780</sup>

In addition to all these considerations, it is worth highlighting that regardless of this legal framework, there is in Italy no National Action Plan on trafficking in human beings and there is no national co-ordination structure as foreseen by the Council of Europe Convention. Nevertheless, in 1999 the Presidency of the Council of Ministries–Department for Equal Opportunities created the Inter-ministerial Committee for the

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<sup>774</sup> I. Crowhurst (2007).

<sup>775</sup> For the limits of empowering strategies see section 4.3.2

<sup>776</sup> F. Prina (2002).

<sup>777</sup> L. Maluccelli (2001)

<sup>778</sup> *Ivi* p. 78.

<sup>779</sup> See E. Pearson, (2002); F. Sossi (2002).

<sup>780</sup> In August 2011, three women including a woman victim of trafficking were severely beaten by guards at the Centre for Identification and Expulsion of Bologna. For detailed information see [http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe\\_16.html](http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html)

implementation of article 18 D.LGS. n. 286/1998 (*Commissione inter-ministeriale articolo 18*). In 2007 this Committee was renamed as the ‘Inter-ministerial Committee for the support of victims of trafficking, violence and exploitation’ (*Commissione interministeriale per il sostegno alle vittime di tratta, violenza e grave sfruttamento*). The responsibility of this body is to co-ordinate the various protection programmes aimed at trafficked persons.<sup>781</sup>

Moreover, in Italy no formal identification procedures or defined set of indicators exists to identify cases of trafficking. In fact, if law enforcement authorities identify a trafficked person, they will address her/him to organisations or other relevant actors running assistance programmes for trafficked women. When the trafficked person first gets in touch with an NGO, the latter will contact the police or other state authorities when the person decides to join the protection programme.<sup>782</sup>

### 4.3 Helpers and Saviours

Save us from our Saviours.

We’re tired of being saved.<sup>783</sup>

#### 4.3.1 ‘Militarized Humanitarianism and Carceral Feminism’

In recent years feminist studies of the transnational women’s human rights movement have warned against delimiting the scope of women’s human rights and against reproducing state powers by looking at the State, in its various modes of governance, as the protector and as the remedy for particular suffering women.<sup>784</sup> More precisely, many feminist scholars have expressed their concern about the tendency of some feminist groups to turn towards the State for protection – rather than examining

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<sup>781</sup> This Programme are Article 13 Programme and Article 18 Programme (see below). The main task of the Committee is to direct, plan and supervise the funds for assistance and protection projects. Each year the Department for Equal Opportunities launches a call for proposal to fund the projects. Regional, local authorities and NGOs can submit a project proposal.

<sup>782</sup> European NGOs Observatory on Trafficking, Exploitation and Slavery, 2010, p. 165.

<sup>783</sup> Slogan of VAMP, a sex workers’ collective in India. M. Seshu and N. Bandhopadhyay, 2009, p. 14.

<sup>784</sup> See W. Brown (1998); J. Halley (2006).

the ways through which State uses its power – and to invoke criminal law as a primary instrument of reform. In this regard, political philosopher Wendy Brown argues:

Historically, the argument that women require protection by and from men has been critical in legitimating women's exclusion from some spheres of human endeavour and confinement within others. Operating simultaneously to link 'femininity' to privileged races and classes [...] protection codes are thus key technologies in regulating privileged women as well as intensifying the vulnerability and degradation of those on the unprotected side of the constructed divide between light and dark, wives and prostitutes, good girls and bad ones<sup>785</sup>

It is worth noting that since the 1990s, feminism has moved “off the street and into the state”, thus becoming substantially and “sufficiently institutionalised”.<sup>786</sup> Legal scholar Janet Halley has coined the term ‘governance feminism’ to describe the way through which feminism and feminist ideas have become ‘installed’ in legal-institutional power – for instance, most notably in the development of international criminal law aimed at prosecuting sexual violence. In so doing, feminists have learned how to participate in the new practices of governance which increasingly rely on a coalition of state and non-state actors rather than on the state itself.<sup>787</sup>

Feminist involvement in the law and policy against trafficking in women constitutes a perfect example of what Janet Halley calls ‘governance feminism’. Halley recognises that governance feminism has been, in manifold ways, extremely important and productive in giving visibility to the reality of violence and discrimination that women suffer. However, she argues that governance feminism has lost certain powers of *critical thinking* that characterizes feminism as a theoretical and political movement and, consequently it has lost the clarity of vision that would allow it to critically focus on what law and institutional power really do in a complex society.<sup>788</sup> According to Halley, the distinguishing features of governance feminism seem to be a reliance on criminal law as the preferred vehicle for reform and enforcement, an uncritical reliance on state-centred forms of power and often a promotion of a structuralist understanding

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<sup>785</sup> W. Brown, 1995, p. 165.

<sup>786</sup> J. Halley, 2006, p. 20.

<sup>787</sup> It is worth noting Not all feminism activism today is governance feminism. Indeed, there are different forms of feminism activism in various locations and around the world A. Basu (2010).

<sup>788</sup> J. Halley (2006).

of female subordination and male domination – the view that the subordination of women is coextensive with male/female relations.<sup>789</sup>

In her interesting book, *In a Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence*, political science scholar Kristin Bumiller provides an compelling analysis of the troubling consequences of the alliance between feminist groups and state apparatus arguing that feminist focus on the criminalisation of rape and domestic violence during the 1990s contrasted with the early second-wave feminist positions about women’s social and economic empowerment. Bumiller highlights that neoliberalism has had a strong impact on the ways feminist engagement with sexual violence has been framed. At the same time, as Bumiller points out, once feminism became influenced by neoliberal strategies of social control and criminalisation, it could also serve as an effective inspiration for broader campaigns for criminalisation. Indeed, by the early 2000s, in the U.S. the sexual violence agenda of feminism has been increasingly exported as part of government’s human rights policy, solidifying criminalisation measures.<sup>790</sup>

Following this perspective, sociologist Julia O’Connell Davidson argues that in recent years the issue of trafficking has led neo-abolitionist feminists to collaborate with those who would usually be considered as “‘enemies’ of feminism and other progressive social movements”.<sup>791</sup> Similarly, sociologist Elizabeth Bernstein, in her research on new abolitionism in US, reveals that ‘carceral’ politics and a securitized states apparatus are the main anti-trafficking feminists’ political remedies. Following the line of other scholars that have shown that humanitarianism action today is always deeply *ambiguous*,<sup>792</sup> Bernstein points out that the neo-abolitionist campaign promotes a ‘militarized humanitarianism’ and a ‘carceral feminism’ in its pursuit of social goals.<sup>793</sup> In particular, building on an extensive participant-observation field work, Bernstein highlights the creation of a coalition against ‘sex trafficking’ between feminists organised as what Halley calls ‘governance feminism’, on one hand, and religious

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<sup>789</sup> For the analysis of structuralist feminism see chapter 2, in particular C. MacKinnon and K. Barry.

<sup>790</sup> K. Bumiller (2008).

<sup>791</sup> J. O’Connell Davidson (2003).

<sup>792</sup> See I. Grewal (2005); M. Agier (2011).

<sup>793</sup> Inderpal Grewal has used the term ‘military humanitarianism’ to describe the Bush Administration’s policy of using women’s human rights to justify U.S. military interventions in Afghanistan and elsewhere See I. Grewal (2005). Bernstein use the term ‘militarized humanitarianism’ in a more expansive sense, including not only state-sanctioned military interventions but also activists’ own application of carceral politics to the global states.

conservatism, on the other.<sup>794</sup> She terms the resulting feminist engagement with positive law, ‘carceral feminism’ to indicate “the commitment of abolitionist feminist activists to a law and order agenda and [...] a drift from the welfare state to carceral state as the enforcement apparatus for feminist goals”.<sup>795</sup> Thus, “the masculinist institutions of big business, the state, and the police are reconfigured as allies and saviours, rather than enemies of unskilled migrant workers”.<sup>796</sup> From this perspective, the neo-abolitionist approach suggests a border and crime control agenda by framing trafficking as a humanitarian issue that the ‘privileged’ can contrast through supporting efforts to ‘rescue’ and ‘restore’ its victims, and to punish deviant individuals who perpetuate abuse and violence.

Although Bernstein’s analysis focuses on the US context, the ‘carceral strategies’ that the scholar describes are becoming common in many European countries. Indeed, it is important to note that today in Europe the feminism that has become institutionalised is strongly abolitionist and the anti-trafficking campaigns proposed by institutionalised feminist groups are characterised by a reliance on strategy on criminalisation as their primary tool in the struggle for women’s human rights and justice. This is evident in the action of Women’s European Lobby in Brussels;<sup>797</sup> in the case of Sweden, where the popular neo-prohibitionist law on prostitution was largely supported by female members of parliament; and in the influential role that feminists inside and outside the Labour Party have played in the passage of the *Policing and Crime Act* in the U.K. – which is aimed at protecting sex workers and those trafficked into sexual exploitation and it provides for criminalising clients who pay for sexual services from a person who is being subject to ‘exploitative conduct’ by a third party.<sup>798</sup> As explained above, current interpretations of trafficking proposed by this neo-abolitionist feminism often offer a reductive narrative of trafficking that simplistically depicts trafficking as organised crime endangering innocent women. Accordingly, these interpretations leave relatively untouched the structures and policies that generate gendered disadvantages, the capitalist exploitation of migrant labour, restrictive immigrations policies and the lack of effective measures for the protection of human rights.<sup>799</sup>

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<sup>794</sup> For an interesting analysis on the relationship between feminism and evangelicalism in the USA see Fraser 2009, pp. 110-112.

<sup>795</sup> E. Bernstein, 2007, p. 143.

<sup>796</sup> *Ivi* p. 96.

<sup>797</sup> See chapter 3 on the most recent campaign of the Women’s European Lobby.

<sup>798</sup> Section 14 of the *Policing and Crime Act* 2009. The *Policing and Crime Act* 2009 came into the force on 1 April 2010.

<sup>799</sup> G. Garofalo, 2010, p. 231.

Moreover, the approach adopted by this strand of feminism often lends legitimacy to certain policies and analyses of migration that support racist, xenophobic discourse, defining migrants as second-class citizens. In recent years in France, for instance, the main campaigns of institutionalised feminists have aimed at the elimination of prostitution, in particular migrant prostitution, and at the banning of Muslim women's headscarves from public spaces.<sup>800</sup> In Sweden, the passage of the law on prostitution – which criminalises the purchase but not the sale of sex – was supported by the desire to promote gender equality but it was also a response to Sweden's entry into the European Union, aiming at defining cultural and geopolitical borders. As Bernstein stresses:

The Swedish law has served to assuage anxieties about national identity through a series of symbolic substitutions. Anxieties about slippery national borders are deflected onto anxieties about slippery moral borders, which affix themselves onto the bodies of female street prostitutes. The removal of these women from public street can thereby pave the way for real estate developers, while bolstering Swedish national identity in the process<sup>801</sup>

#### **4.3.2 The Contradictions of 'Helping' and Empowerment Strategies**

In recent years, with the rise of humanitarian efforts and a rapidly transnationalizing of the NGO sector, a great deal of feminist research has critically examined the role of social 'helpers' in the sex industry, highlighting that there is a tendency to reproduce the image of trafficked persons as 'weak' subjects or 'victims' in need only of protection. Such an approach tends to disempower sex workers.<sup>802</sup>

Crucial in this regard is the research carried out by the feminist scholar and activist Laura Agustín. Building on her ethnographic work among those working in the social sector in contemporary Madrid, Agustín argues that most of the so called 'social agents' – a group that includes non-governmental organisation workers, counsellors, activists, policymakers, researchers and academics – tend to treat migrant sex workers

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<sup>800</sup> See C. Raissiguier (2010).

<sup>801</sup> E. Bernstein, 2005, p. 157.

<sup>802</sup> See in particular L. Agustín (2005, 2007); C. Aradau (2008); L. Ihme (2008).

as passive subjects that only need to be assisted.<sup>803</sup> According to Agustín, social agents “consistently deny the agency of large numbers of working-class migrants, in a range of theoretical and practical moves whose object is management and control”, and perpetuate the discourse on prostitution that justifies their actions. In this regard, she claims that:

Helping discourses describe objects needing help: the poor, the disadvantage, victims, undocumented migrants, the socially excluded. Some social agents refer to offering service, other to saving and rescue, still others to empowerment. Whether related to HIV/AIDS prevention, rescue or rights, these projects are widely considered rational and benign, and those who carry them out as charitable and solidarity. Most of them [helping practices] reproduce the ‘prostitute’ discourse and perpetuate the divide between helpers and helped, giving primacy to their own roles<sup>804</sup>

At the core of Agustín’s analysis resides the idea that helpers are often benefiting themselves with their projects, rather than the less privileged persons that need to be ‘rescued’. Indeed, ‘social agents’ have a strong interest in the rescue industry that has developed to save the victims of trafficking and also have an interest in propagating a discourse that considers migrant women as passive and incapable of self-government and agency. The machinery of intervention on prostitution and trafficking is mainly oriented to the self-maintenance of the social sector. Thus, according to Agustín, the issue of trafficking has become big business for middle class professionals. In this view, the social sector aims at perpetuating itself rather than improving conditions in the sex industry: “the social sector expands and diversifies while the supposed aim, social inclusion for people who sell sex, does not succeed”.<sup>805</sup>

It is palpably untrue that *all* social agents consistently deny the agency of migrants. Social agents are not a homogenous group. However, although Agustín’s analysis might seem highly radical, it can be argued that it constitutes an important and remarkable contribution because it invites us to denaturalize the assumptions of helpers who often are tasked with shaping policies and with issues that they do not understand

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<sup>803</sup> L. Agustín, 2007, p. 192.

<sup>804</sup> *Ivi* p. 186.

<sup>805</sup> *Ivi* p. 187.



or know. As Agustín points out, the real problem is that “the power to define problems, terms and solutions rests with social agents who debate how to get Others to behave differently”<sup>806</sup> and who are too certain about the fact that they know the ‘best’ as well as insufficiently reflexive about their role.<sup>807</sup>

From this perspective, Agustín’s work draws attention to some concepts that are central to the anti-trafficking interventions. One of these is the notion of *empowerment*, which is one of the main concerns when addressing human rights. Opposing assistance strategies, empowering strategies, used primarily by NGOs and international organisations<sup>808</sup>, aim at helping people “to speak up for themselves and strengthening their rights”.<sup>809</sup> Empowerment can be defined as the process aimed at constituting active and participatory citizens.<sup>810</sup> Scholar Ruth Alsop *et al.* define empowerment as the “process of enhancing an individual’s or group’s capacity to make purposive choices and to transform these choices into desired actions and outcomes”.<sup>811</sup> Therefore, empowering strategies and policies seek to get the subjects equipped with:

The right to have rights, to be a subject by right [...] to belong to a body politic in which [they have] a place of residence, or the right to be actively involved – in other words the rights to give a sense and a meaning to [their] action, words and existence<sup>812</sup>

Women’s empowerment was strongly and enthusiastically promoted by non-Western women during the 1995 Fourth World Conference on Women held in Beijing.<sup>813</sup> Since then, empowerment has become the keyword to highlight the fact that the power of women and their right to be independent, to have choice in life, to own property and to decide and participate in the decision-making process are necessary for

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<sup>806</sup> *Ivi* p. 194.

<sup>807</sup> *Ivi* p. 187.

<sup>808</sup> See for example IOM (2009).

<sup>809</sup> M. Wijers and L. Lap-Chew, 2010, p. 13. It need to say that the concept of empowerment has been introduced by American political science studies of the 50s and 60s, in reference to action for civil and social rights of minorities and women’s rights. In the 70s, it joined the socio-political literature in the ‘modern’ theory of democracy and civil rights movements in the development of third world women’s movements and minorities.

<sup>810</sup> L. Agustín (2000).

<sup>811</sup> R. Alsop *et al.*, 2005, p. 120.

<sup>812</sup> B. Cruikshank quoted in L. Agustín, 2007, p. 158.

<sup>813</sup> The Platform of Action adopted by consensus during the Beijing Conference of 2005 states: “The objective of the Platform for Action, which is in full conformity with the purposes and principles of the Charter of the United Nations and international law, is the empowerment of all women. The full realization of all human rights and fundamental freedoms of all women is essential for the empowerment of women”.

the achievement of equality and the development of society.

However, the issue of ‘women’s empowerment’ raises many questions: What does empowerment come to mean in the lives of diverse women whose experiences of power, of oppression, of liberty, of pleasure and of discrimination and violence, are highly different? How is empowerment conceived by women themselves?<sup>814</sup>

Dominant narratives of empowerment tend to evoke a positive image of women taking power and dealing with all constraints. Nevertheless, if we look more closely at empowerment strategies, a more problematic picture emerges. Indeed, by criticizing the common idea that empowerment is necessarily linked to something progressive and beneficial, many feminist scholars have argued that, despite the good intentions of ‘helpers’, mechanisms aimed at enhancing women’s empowerment may often reproduce ‘victim’ discourses and turn them into unwanted *impositions*.<sup>815</sup> ‘Helpers’ and those who receive help/care often stand in a asymmetrical/hierarchical relationship.<sup>816</sup> Sometimes ‘helpers’ fill the term empowerment with their own meanings and use it as a means of pursuing their own projects, neglecting what women are doing for and by themselves to change their own lives.

What is experienced as empowering by one woman is not necessarily going to be the same for every woman; empowerment for some women can be *disempowerment* for others.<sup>817</sup> Often what women actually want does not coincide with the paths identified by the ‘helpers’. For instance, many anti-trafficking interventions do not contemplate the pleasure of leisure as an empowering strategy.<sup>818</sup> Moreover, programmes usually focus on individual women’s trajectories of self improvement ignoring the importance that affective and supportive relationships have in the pathways of empowerment.<sup>819</sup>

Women’s desires, pleasure and ability to exercise control over their own bodies in relation to sexuality, are often unaddressed by mainstream women’s empowerment policies and programmes. In her research on NGOs that work with trafficked women in Germany, Loretta Ihme points out that “some decisions by NGOs are even made against the explicit and implicit wishes of victims, a behaviour that, in some cases at least,

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<sup>814</sup> For an interesting analysis of some of the dimensions and dilemmas concerning women's empowerment see A. Cornwall and N. A. Anyidoho (2010).

<sup>815</sup> L. Agustín (2000, 2007), L. Ihme, (2008), S. Cheng (2008), C. M. Jacobsen and D. Stenvoll (2010).

<sup>816</sup> C. M. Jacobsen and D. Stenvoll (2010).

<sup>817</sup> A. Cornwall and J. Edwards (2010).

<sup>818</sup> As discussed above many feminist scholars (see R. Andrijasevic (2010) and L. Maluccelli (2001)) highlight that during the rehabilitation programme women cannot freely go out and are effectively imprisoned in private shelters.

<sup>819</sup> C. M. B. Sardenberg (2010).

could be considered true violence against women”.<sup>820</sup>

Moreover, it is helpful to highlight that the way in which women are portrayed also affects how they are considered and treated. Some reports of NGOs or other international organisations present women’s biographies as already predisposed to trauma and victimization. For example, it is often said that women frequently experience episodes of violence at home or in general in their countries.<sup>821</sup> In this light, psychological rehabilitation and recovery are considered as the main methods for the assistance and reintegration of victims.<sup>822</sup> As feminist scholar Claudia Aradau argues, most of the time trafficked women are not “seen as speaking or acting politically, but only clinically”.<sup>823</sup> Thus, they require merely to be *rescued* and not also to achieve *justice*.

Offering an interesting critique of mainstream empowerment strategies, and stressing the complexity of women’s experiences stripped away from the dominant empowering approaches, scholars and activists of the international network Pathways of Women’s Empowerment, highlight that empowerment should be conceived as a *journey* rather than a product.<sup>824</sup> Empowerment is a journey where the rules cannot be imposed and where it is not possible to identify a *linear sequence* of inputs and outcomes. It is a journey that involves a constant and complex process of negotiation, with uncertain outcomes. From this perspective, women’s own voices, analyses, experiences and solutions should be central in the development and implementation of any strategy aimed at giving them the power and the access they need to change their situation and to speak up for their own rights.

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<sup>820</sup> L. Ihme, 2008, p. 172.

<sup>821</sup> See C. Aradau (2008).

<sup>822</sup> See in particular C. Aradau (2008). Aradau provides some interesting material on the practices of NGOs that work on trafficked women.

<sup>823</sup> C. Aradau, 2008, p. 113.

<sup>824</sup> Pathways of Women’s Empowerment is an international research and communication program established in 2006 which links academics with activists to explore what empowerment means in the everyday lives of women in different situations and conditions and to find out what works to enhance women’s empowerment. Pathways is funded by the UK Department for International Development, the Norwegian Ministry of Foreign Affairs and the Swedish Ministry for Foreign Affairs. The Programme supports research into women’s empowerment in Afghanistan, Bangladesh, Brazil, Egypt, Ghana, India, Nigeria, Pakistan, Palestine, Sierra Leone, Sudan and in global policy spaces. For more information about the programme see <http://www.pathwaysofempowerment.org/index.html>

#### 4.4 Claiming Rights

“We come from many different countries and many different backgrounds, but we have discovered that we face many of same problems in our work and in our life”<sup>825</sup>

The analysis developed so far in this chapter has highlighted the centrality of violence against women – and consequently of the vulnerable sexual self – to the notion of human rights, arguing that this focus has partly led to an affirmation of the image of women as suffering subjects in need only of protection and rescue, and not also as claimants of rights. At the same time, it has demonstrated how building on the rescue model that aims to protect those who fall into the official category of victim of trafficking, anti-trafficking interventions do not address the different and complex factors that lead women to be involved in the trafficking process. In this light, anti-trafficking operations do not offer substantial and realistic alternatives to trafficked women. Also, they often affect, to varying degrees, the human rights of trafficked persons, irregular migrants, migrant sex workers and workers in the sex industry. However, as explained, these operations are strongly supported by neo-abolitionist feminists.

On the basis of all these considerations, it is worth noting that those who are addressed by anti-trafficking measures, have rarely been invited to participate in the development of anti-trafficking policy and legislation. Their rights claims have rarely been heard and have rarely received significant institutional recognition as a form of legitimate political claim. Exemplary in this regard, are the rights claims advanced by

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<sup>825</sup> ICRSE, 2005b, p. 1.

sex workers during the European Conference on Sex Work, Human Rights, Labour and Migration which was held in Brussels in 2005. The most important outcome of the Conference was the production of two documents: the Sex Workers in Europe Manifesto<sup>826</sup> and the Declaration of the Rights of Sex Workers in Europe.<sup>827</sup> Thanks to the invitation of the Green/European Free Alliance, the participants had the opportunity to present the Declaration, the Manifesto and a series of Recommendation for policy makers in the European Parliament in the presence of several members of parliament. However, the mobilisation and the claim-making of sex workers did not receive any significant institutional recognition. Only one member of the European Parliament, Vittorio Agnoletto, signed and endorsed the Declaration.

The 2005 European Conference on Sex Work, Human Rights, Labour and Migration aimed to create a movement led by sex workers and capable of challenging the issue of trafficking from a perspective of human rights and labour and migration rights.<sup>828</sup> The original idea of organising the conference was advanced by a small group of sex workers and sex work activists in the Netherlands in response to increasingly repressive legislation and policies across Europe. The initiative was subsequently supported by many activists across Europe and an organising committee was created. As the Declaration states “the committee decided it wanted the conference not only to give sex workers a voice but to create tools that sex workers could use in defending their rights across Europe and to create alliances with human rights, labour and migrants organisations”.<sup>829</sup> The members of the committee came from different experiences and backgrounds. Some of the members identified as sex workers; others were allies from feminist, anti-trafficking or migrants associations and movements; and others were activists involved the international sex work politics – such as Licia Brussa from the TAMPET International Foundation – or had been playing an important role in the sex work debate in Europe – such as Laura Agustin and Marjan Wijers from the Netherlands.<sup>830</sup> Within the group, an International Committee on the Rights of Sex Workers in Europe (ICRSE) was created to raise funds and host the conference.

One of the main concerns of the organising committee was to have a variety of sex workers in terms of country of origin, working context, gender and migration experiences. As Giulia Garofalo highlights, “variety is central to the value of the debate

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<sup>826</sup> ICRSE (2005b).

<sup>827</sup> ICRSE (2005a).

<sup>828</sup> For an interesting analysis of the Conference see G. Garofalo (2010).

<sup>829</sup> ICRSE, 2005a, p. 13.

<sup>830</sup> For a list of the organizing committee members see G. Garofalo (2010).

on sex work, and to the creation of political legitimacy too often denied to sex workers who speak out publicly [...] – whereas sex workers who are ready (or forced) to present themselves as victims and who ask for help to change work become accepted as ‘real prostitutes’<sup>831</sup>. In this view, the committee extended the invitation to sex workers’ activists and organisations from outside the EU. At the same time, particular attention was dedicated to involving participants from countries where sex workers’ rights groups have no possibility of visibly claiming and struggling for their rights, in particular in Eastern Europe.<sup>832</sup> Moreover, the organizers solicited the participation of associations, organizations, institutions and individuals dedicated to promoting human, labour and migrants’ rights<sup>833</sup>. The intention was to strengthen existing alliances and to build new ones,<sup>834</sup> not based on ‘rescue’ model but on *political reciprocity*.

Both the Declaration of the Rights of Sex Works and the Manifesto were the result of a long process that involved sex workers (female, male and transgenders) and sex workers’ rights organisations. The Manifesto formulates a demand for rights that do not exist in international law or exist only in a restricted form.<sup>835</sup> In this regard, the Manifesto asserts the intention to present a “vision of changes that are needed to create a more equitable society in which sex workers, their rights and labour are acknowledged and valued”.<sup>836</sup> The Declaration presents a list of the rights that “all individuals within Europe, including sex workers, enjoy under international human rights law”,<sup>837</sup> highlighting that although these rights apply to all human beings, the rights of sex workers are not respected, promoted and protected on the basis of equality with other nationals. As feminist activist Marjan Wijers argues:

The Declaration is the first document that systematically and consistently translates existing and accepted human rights into what it means for sex workers. We have accepted the concept of human rights

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<sup>831</sup> *Ivi* p. 223.

<sup>832</sup> In many East European countries, sex workers do not have autonomous organizations and their mobilization for sex workers’ rights are organized mainly through gay and lesbian organisations, health organisations or anti-trafficking projects.

<sup>833</sup> As Garofalo argues these groups included Comisiones Obreras (Spain), the European Trade Union Federation (ETUC), and Global Labour Institute (Switzerland); and migrants’ rights initiatives like GISTI (Groupe d’information et soutien des immigrés, in France) and Indymedia Estracho in Spain. G. Garofalo, 2010, p. 224.

<sup>834</sup> In this sense, it is interesting to note that today sex workers political practices differ from those that were realized during the 80s. Indeed, the Second World Whores Congress held in Brussels in 1986 the principal aim was to give a voice to sex workers and not to build new alliances.

<sup>835</sup> See G. Garofalo (2010).

<sup>836</sup> ICRSE, 2005b, ‘Incipit’.

<sup>837</sup> ICRSE, 2005a, p. 7.

and the idea of them being universal, so that means that sex workers can claim them and nobody can say: you are not entitled to it.<sup>838</sup>

The Declaration also denounces the violations that sex workers and sex worker migrants from EU and non EU countries suffer all over Europe.<sup>839</sup> Stressing the limits of the applications of the human rights framework, sex worker feminists and activists aimed at challenging the dominant discourses that identify them as victims who only need to be rescued or as criminals who need to be punished. In contrast to this view, they presented themselves as subjects capable of agency. This does not mean that the rights claims of sex workers are based on a conception of the individual as free, autonomous and self-possessed. Rather, their rights claims should be viewed as revealing the individual vulnerability, interdependency, as well as her/his need of protection. From this perspective, thus, the concepts of relationality, contextuality, subjectivity and diversity are fundamental.

The Declaration extends the rights to all sex workers living and working in Europe rather than limiting its scope of application to EU citizens. In particular, it exhorted national governments to acknowledge to sex workers the right to free choice of employment, which also entails that governments recognise sex work as a legitimate form of work; the right to just and fair working conditions; the right to be protected against violence and the right to equal protection of the law. The right to free choice of employment goes hand with hand with the issue of mobility and the right of freedom of movement. More precisely, the Declaration states, “No restrictions should be placed on the free movement of individuals between states on the grounds of their engagement in sex work”.<sup>840</sup> In this vein, the Manifesto explicitly stressed the importance to claim for the right to migrate and the right to remain: “We demand that sex work is recognized as gainful employment, enabling migrants to apply for work and residence permits and that both documented and undocumented migrants be entitled to full labour rights”.<sup>841</sup>

During the conference, the issue of mobility and the complexity of labour migration received a special attention and the reasons that lead migrant women to work in the sex industry were critically examined. As Garofalo points out, a clear link between sex workers’ and migrants rights was made.<sup>842</sup> Sex workers activists and the

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<sup>838</sup> M. Wijers, quoted in R. Andrijasevic *et al.* (2011).

<sup>839</sup> R. Andrijasevic *et al.*, 2011, p. 13.

<sup>840</sup> ICRSE, 2005a, p. 9.

<sup>841</sup> ICRSE, 2005b, ‘Our Labour’.

<sup>842</sup> Garofalo, 2010, p. 232.

other groups put an emphasis on the connections between migration policies and anti-trafficking policies, highlighting how anti-trafficking measures are implicated in a programme of border controls and consequently the negative impact on the living and working conditions of young migrants, through deportation and further restriction of their mobility. At the same time, sex worker activists argued that as a consequence of anti-trafficking measures, the mobility of EU sex workers has been restricted to particular areas and zone in the European cities.<sup>843</sup>

During the conference, the intention to face the issues that often divide sex workers and migrant sex workers was highly emphasised. From this perspective, particular attention was given to the way through which anti-trafficking discourses have strongly influenced the divide between sex workers and migrant sex workers. In particular, anti-trafficking rhetoric has furthered the imagine of third world and migrant women as innocent, passive and powerless subjects.<sup>844</sup> Through the Declaration and the Manifesto, sex workers' rights activists had sought to make themselves visible by making claims as subjects with "the right to have rights"<sup>845</sup> and presenting the Declaration, the Manifesto and a series of Recommendation for policy makers in the European Parliament.<sup>846</sup> In this regard, it is worth noting that for sex workers who are not EU citizens their possibility of accessing the institutions in which they can enact their limited rights claims is often severely limited by means of immigration controls and criminalisation of sex work.

By making claims as subjects with "the right to have rights", sex workers' rights activists performed what Engin Isin called an *act of citizenship* "through which 'actors' claim to transform themselves (and others) from subjects into citizens as claimants of rights".<sup>847</sup> Sex workers activists created a collective subject able to contain and respect differences and to translate them into rights claims. As Alice Miller argues,

What [the Declaration] tried to do was to hold together the tensions along and across diversity within sex workers, in term of all the different structures and organising forms as well as migrants and citizens and across genders. And that was very hard, the effort to put those in, because the human rights system as a formal matter tends to

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<sup>843</sup> See chapter 2.

<sup>844</sup> See chapter 2 on this issue.

<sup>845</sup> H. Arendt (1951).

<sup>846</sup> R. Andrijasevic *et al.* (2011).

<sup>847</sup> E. F. Isin (2009).



divide rights categories, not exactly divide the rights, but divide the structures that apply them, which in some cases divided the rights. It was incredibly interesting and I thought innovative and difficult for the Declaration to hold out to that diversity while using the rights claims<sup>848</sup>

In this light, sex workers' rights claims are not simply claims of extending rights to them but they are an attempt to *intensify* the universality implied in human rights defined as the constitution of a common humanity that "exclude exclusions, forbids the denial of citizenship in the name of determination of conditions, status or nature".<sup>849</sup> Sex workers demanded a recognition of their rights as workers and citizens.

Today much emphasis is placed in Europe on citizen's participation and engagement and on strengthening the communication between citizens and the EU institutions. The European Commission, the European Parliament and the Council of Europe continue to stress the importance of active citizen participation in order to overcome the EU's democratic deficit and stimulate democratic renewal. This focus is evident in the Lisbon Treaty, which states that: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and closely as possible to the citizen" (Article 10).

However, despite the fact that European institutions are increasingly concerned with the lack of citizen participation, sex workers' rights claims did not receive any significant attention. It can be argued that, unfortunately, in the European scenario, sex workers and migrant sex workers are still considered as marginal subjects and are often denied political relevance. Their mobilisation for rights did not fit into the legitimate form of citizens action and democratic participation. From this perspective, as Andrijasevic *et al.* argue, sex workers' rights claims of 2005 "challenged the distinctions inscribed in the active citizenship agenda between what counts as political action and participation and what is not recognised as such, and between who counts as political actor and who does not".<sup>850</sup> At the same time, they also revealed the restrictive vision of human rights supported by anti-trafficking interventions. Indeed, despite the aim of anti-trafficking interventions seeming to be to protect human rights, those who are supposed to suffer a violation are rarely listened to.

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<sup>848</sup> A. Miller quoted in R. Andrijasevic *et al.* 2011, p. 28.

<sup>849</sup> E. Balibar, 2004, p. 312.

<sup>850</sup> R. Andrijasevic *et al.* 2011, p. 34



## CONCLUSION

### *Unpacking 'Sex trafficking'*

The question of trafficking in women in the sex sector is a complex phenomenon, subject to continuous development and irreducible to sensationalistic interpretations. The aim of the present research has been to explore how the issue of 'sex trafficking' is conceptualized and addressed by feminist scholars and activists. More specifically, the research has investigated how feminist interpretations and responses to trafficking shift in response to broader cultural and political interests. At the same time, this work has explored whether feminist scholars can offer a framework of analysis capable of grasping the phenomenon in its full complexity. In so doing, it has also critically examined anti-trafficking policies in Europe.

The first chapter of this research has been dedicated to a critical analysis of the UN Trafficking Protocol and European legal instruments against trafficking. The UN Trafficking Protocol undoubtedly represents a significant contribution in the fight against the phenomenon of trafficking. The Trafficking Protocol provides a set of new and existing rights for trafficked persons and clarifies the obligations of State Parties to support these rights. Nevertheless, it provides for no solid obligation upon States to assist and protect trafficked persons. As feminist scholars have rightly pointed out, the UN Trafficking Protocol seems to constitute an instrument designed to make the cooperation and collaboration between States to combat organised crime easier rather than protect the victims of those crimes. Despite the fact that States are encouraged to protect, assist and help trafficked persons, the protection and assistance provisions are weak. In fact, the UN Protocol contains few protection and assistance provisions that are all *discretionary* and not mandatory: it *recommends* that States provide services to victims but it does not *require* them to do so.

From this standpoint, the Council of Europe Convention constitutes an important instrument in the international legal framework on trafficking, as it in part supplements the meagre protection provisions of the UN Protocol and develops the standards established by the Protocol. The Convention explicitly recognizes trafficking as a human rights violation and as an offence to the dignity and integrity of a human being. States Parties are required to provide basic assistance to all those who have been identified as victims of trafficking within their territory. These provisions cannot be reserved only for those agreeing to act as witness or otherwise agreeing to cooperate in criminal proceedings. States Parties are required to provide all protection and support measures on a non-discriminatory, consensual and informed basis. As illustrated above, the protection of victims is an important theme of the Convention and “States Parties are required to take due account of the victim’s safety and protection needs” (Article 12.2). The Convention recognizes that protection needs are likely to increase when victims cooperate with criminal justice authorities (Article 28).

The new EU Directive (2011/36/EU) on trafficking also pays particular attention to the issues of assistance and protection for trafficked persons. However, it is insufficient in addressing the rights and needs of trafficked persons since protection is reserved only to the context of criminal justice proceedings. For trafficked persons the decision to cooperate is not easy; such an act can expose them to further risks. Some women may be afraid of traffickers, others might be unable to trust the authorities and still others might be too traumatised to go through what could add up to a secondary victimisation. Directive 2011/36/EU, thus, appears not to capture the complexity of the trafficking context and, in so doing, it effectively penalizes individuals who do not cooperate with the authorities. Furthermore, Directive 2011/36/EU provides insufficient guarantees concerning a possible right to remain in the territory following the completion of national proceedings. This, on one hand, leads victims to be reluctant to give evidence and, on the other hand, reveals that there is no attention given to supporting strategies for the empowerment of victims. In this light, it can be argued that despite the important steps forward in human rights and international cooperation, the issue of trafficking remains strongly linked to the question of national security and the fight against illegal immigration. The difficulty of engaging a human rights agenda within a securitarian framework renders EU interventions on human trafficking contradictory.

The analysis undertaken in this research has also emphasized the problems arising

from the attempts at a definition of trafficking. The UN Trafficking Protocol has offered a broad definition of trafficking – adopted by the Council of Europe Convention and EU legal instruments – which covers all forms of trafficking (and not only trafficking for the sex industry). Moreover, such a definition allows States to adopt different policies on prostitution. Nevertheless, this definition clearly does not define many of the constituent elements of trafficking: terms such as “sexual exploitation”, “exploitation”, “coercion” and so on, are not explicitly specified. At the same time, it seems to rely upon the idea that there is a neat distinction between involuntary and non-consensual (trafficking) and voluntary and consensual (smuggling) processes of migration. But, unfortunately, as illustrated in this work, the boundaries of these processes are often blurred. In fact, they frequently overlap.

This lack of definitional clarity makes it extremely difficult to deal with the question of trafficking of women in the sex sector without considering the more general – and highly emotive – feminist debate about the rights and the wrongs of prostitution/sex work – which is the debate between neo-abolitionist feminists and sex workers’ rights feminists. According to neo-abolitionist feminists, prostitution is *always* a form of violence and exploitation against women and it is the main cause of trafficking in women. Indeed, ‘sex trafficking’ is a problem of *supply* and *demand*: it is due to the low status of women and it is supported by the demand of clients. Therefore, prostitution should, according to this view, be abolished and never consented. As illustrated in chapter 2, despite the fact that neo-abolitionist feminists have offered an important critique of liberal notions of freedom and consent in the context of prostitution – which presume autonomous individuals negotiating consent in absence of power relations – their perspective presents several serious limitations.

Firstly, by viewing prostitution and trafficking as indistinguishable and as a ‘foundation’ of a global system of male dominance, neo-abolitionist feminists do not consider the differences between women and their different narratives regarding the meaning of prostitution, and of sexuality. In so doing, they negate any possibility of a woman’s autonomy and agency in relation to prostitution: since men dominate and all women (and in particular prostitutes) are oppressed, there is no room for power negotiations within the context of the sex sector. Furthermore, this approach reinforces the stereotypical idea of ‘third world women’ as ignorant, infantilized and incapable of exercising choice and agency. Equating choice with wealth and a Western context, and coercion with poverty and a non-Western context, neo-abolitionist feminism overlooks

the choices that women make when confronted with few economic opportunities. In this regard, many feminist scholars rightly emphasize that the universalizing and generalizing visions exported by neo-abolitionist feminists demonstrate the *epistemologic* privilege of a social group that has the power to create and impose new meanings about social realities (chapter 2).

In addition to not recognizing any possibility of a woman's agency in the context of prostitution and trafficking, the neo-abolitionist feminist perspective has favoured the development of a reductive narrative of 'sex trafficking' and of the phenomenon of trafficking in general. Depicting 'sex trafficking' exclusively as involving poor women and girls forced into 'sexual slavery' by 'bad men', neo-abolitionist feminists do not take into consideration the subtle structural, social and economic factors that lead to the phenomenon of trafficking in women in the sex sector. On the other hand, by focusing solely on 'sex trafficking' they ignore other manifestations of trafficking - such as for domestic work, agriculture, construction and other sectors that involve women, men and transgender people.

The present research has illustrated that this reductive narrative, supported by neo-abolitionist feminists, has several adverse consequences. As explained in chapter 2 and 4, neo-abolitionist feminism has had an increasingly powerful influence on national, European and international anti-trafficking policies insomuch as in USA and in many countries in Europe anti-trafficking campaigns have mainly transformed into anti-prostitution campaigns. This deflects attention from the inadequacy of migration policies and the continuing exploitation of migrant labour, issues that are crucial in the trafficking scenario.

It is also worth noting that the neo-abolitionist view of trafficking implicitly reinforces gender stereotypes. The exclusive focus on women and children in trafficking tends to support gender-biased visions, in particular with regard to women's vulnerability in the context of migration. Indeed, despite the fact that women have always been present in migration flows and, that, in ever-increasing numbers since the 1970s they are becoming the main income-earners for their families (chapter 3), traditional familial/gender roles (men as 'breadwinners', in the public sphere, women as 'child raisers' and domestic workers pertaining to the private sphere) – have made female migration less socially acceptable than male migration. In the former, women are assumed to be passive and powerless agents, whereas in the latter men are assumed to be active subjects with control over their lives. Accordingly, exploited migrant women

are commonly deemed to be 'trafficked' while exploited migrant men are viewed as irregular migrants.

This gender-biased vision, thus, relies upon the assumption that women are particularly susceptible to victimization and consequently it leads to the conflation of female migration with trafficking. In this light, the concern for the safety of vulnerable women often becomes a good reason/excuse for States of origin and States of destination to adopt restrictive immigration measures in the name of protecting women from trafficking – in chapter 2 it was mentioned that in Western Asia and northern Africa female migration is subject to many official restrictions. Migration restriction measures can be motivated by a paternalistic attitude or by an anti-migration agenda and are seen as better solutions to protect migrant women from coercive and abusive practices. Overlooking the capacity of migrant women to exercise agency and to have control over their lives, this approach ignores and denies the central role that women today play as the main protagonists in migration flow (chapter 3). In turn, this obstructs the possibility to critically investigate the presence of migrant women in informal sectors, and then examine how restrictions on migration flows lead women to contact third parties to facilitate their migration, thus increasing their risk of abuse.

At the same time this gender-biased vision both makes the identification of cases of trafficking in men particularly difficult and renders trafficked men reluctant to recognize themselves as victims – and consequently to accept assistance. This is because 'victimhood' is viewed as something related to disempowerment and so in contrast to the image of men as self-sufficient and providers. Furthermore, it is worth noting that associating victimhood to gender can obscure other aspects of an individual's identity – race, age, nationality, religion and class – that also play a central role in increasing his or her vulnerability to fraud and violence.

The idea that men are less 'identifiable' as victims of trafficking has led many anti-trafficking interventions and programs to focus exclusively on women. As discussed in chapter 4, the majority of anti-trafficking interventions address solely women and in particular women involved in 'sex trafficking'. In recent years in UK, for instance, the Poppy Project has started to accept a smaller number of women trafficked into domestic work. Yet, it still does not accept men or transgender people. Few trafficking interventions are aimed at assisting and helping men (chapter 4).

In their 'crusade' against prostitution and trafficking in women, neo-abolitionist feminists focus mainly on repressive measures, such as stronger border controls,

increased penalisation and stronger effective prosecution. According to them, ‘sex trafficking’ is primarily a problem of (male) social deviance which necessitates aggressive criminal justice responses. It is in this sense, as seen in chapter 3, that sociologist Elizabeth Bernstein argues that neo-abolitionist feminists tend to promote a “carceral feminism” in its pursuit of social remedies. This justifies states’ claims to stronger border-protection and crime-control measures.

For neo-abolitionists, the Swedish law on prostitution is deemed to be the best model to follow.<sup>851</sup> Yet, as explained in chapter 2, this law has had a questionable impact on prostitution and trafficking. As many studies have demonstrated, rather than leading to a decrease in prostitution, the Swedish law pushes prostitution underground and thus creates even more dangerous conditions for women who choose to work in the sex industry or who are forced into it. Much research has also suggested that prostitution in Sweden is changing form: sex workers rely on the internet and cell phones to find clients. The decreased visibility of prostitution has rendered it more difficult for social assistants to help and support sex workers. At the same time, Swedish police have declared that it has become more difficult to investigate cases of trafficking.

Moreover, as feminist sociologists emphasize, many trafficking activities are to some extent being diverted from Sweden to neighbouring countries. In this regard, it is important to highlight that the Swedish law on prostitution was meant not only to promote gender equality but also, as discussed in chapter 4, to stabilise “cultural and geopolitical boundaries” after the entry of Sweden into the European Union. In fact, the potential entry of migrant sex workers was a motivating concern because it was seen as a potential threat to the national borders of the country.

In view of all these considerations, it can be argued that neo-abolitionist feminism overlooks the importance of situating effective strategies to deal with sex industry and trafficking within a broader political framework. In so doing, this feminism – which today is strongly institutionalized and particularly powerful in many European countries – lends legitimacy to certain policies and analyses on migration that support racist and xenophobic visions and consider migrants as second-class citizens (chapter 4).

In addition, it is worth noting that the neo-abolitionist approach has also shown questionable effectiveness in the field of HIV/AIDS prevention. Indeed, adopting an

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<sup>851</sup> As said in chapter 2, the 1998 Swedish law criminalises the purchase (but not the sale) of sex.



explicitly anti-prostitution approach undermines the ‘non-judgemental attitude’ which is needed for making contact with stigmatized and vulnerable people such as sex workers (chapter 2). In this respect, this thesis has mentioned that in the United States, under the Global AIDS Act, recipients of US HIV/AIDS funds must adopt a policy explicitly opposing prostitution. Rather than reducing prostitution activity and combating trafficking, these funding restrictions have further marginalized sex workers, increasing for them the potential likelihood of episodes of violence and abuse.

Criticizing this measure, sex workers’ rights feminists have argued that empowerment strategies and the organization of sex workers can be effective tools to prevent and contrast HIV, and to reduce the incidence of other forms of harm suffered by sex workers, such as sexual violence, unwanted pregnancies and police harassment. From this perspective, the Sonagachi Project – a community-based sex-worker union in Calcutta, India – constitutes a good example of a nongovernmental group that actively promotes empowerment and prevents the exploitation of underage girls (chapter 2).

As discussed in chapter 2, the sex workers’ rights feminist perspective, in some formulations, can run both the risk of being as totalizing and essentialist as the neo-abolitionist approach and the risk of promoting a liberal notion of autonomy which presumes autonomous individuals abstracted from relations of power. However, it is important to note that by paying attention to the different experiences of women in the sex industry, many sex workers’ rights feminist analyses give attention to the differences between women, (and consequently to the different ways they live sexuality) stressing the diversity and the specificities of concrete contexts. In this interpretative light, far from suggesting an abstract idea of individual autonomy but rather following the path blazed by postcolonial feminism, many sex workers’ rights feminists propose a concept of women’s agency which takes into consideration the different – often contradictory and conflicting – ways through in women may respond, negotiate, or try to negotiate power relations and power.

Sex workers’ rights feminists challenge the dominant anti-trafficking discourse that considers all migrant women working in prostitution as victims and argue that many of migrant women in prostitution are migrant sex workers. From this perspective, by viewing prostitution as labour, sex workers’ rights feminists shift the terms of analysis from sexual exploitation to *labour abuse* in sex work. This does not mean that they negate the *violence* involved in the sex industry but they point out that it is the lack of protection for workers in the sex industry, rather than the existence of a market for

commercial sex in itself, that leads to forms of exploitation and abuse (chapter 2).

According to sex workers' rights feminists, the dominant discourse on trafficking has generated a 'moral crusade' that legitimizes the increasingly restrictive immigration policies and more criminalization and also masks the role of the State in increasing the vulnerability of migrants – in particular migrant women – by reducing legal migrants' mobility and impeding sex workers from working safely. Thus, they highlight that many dominant anti-trafficking discourses tend to obscure the fact that many trafficked women are first and foremost migrants and that often are recruited without coercion.

Although sex workers' rights feminists present a challenging perspective, it needs to be underlined that many migrant sex workers do not consider sex work to be like any other job. Rather they view it as a temporary financial measure or one of the more profitable job options. From this perspective, sex workers' campaigns for the decriminalization and legalization of prostitution has to take into account the practical obstacles that most migrant women have in exercising their agency as a result of their irregular status. As clearly emerged during the 2005 European Conference of sex workers, regulating the sex sector is not in itself a guarantee of improvement in the conditions of migrant sex workers (chapter 4). If not supported by a more integrated process of inclusion and empowerment which relies upon principles of social justice and cultural citizenship, regulation itself does not preclude social stigma, abusive power relations and discrimination. In this regard, it is worth mentioning, as discussed in chapter 2, that in the Netherlands, despite the fact that prostitution is legal, there is no possibility for migrants who are not European citizens to work legally in the sex industry. This creates the marginalization of many migrant sex workers and leads many migrant women to contact criminal networks to obtain fake identification documents. Therefore, opposite approaches – such as the Swedish approach and the Dutch approach – can ultimately have similar effects on the ground.

In view of these considerations, despite supporting sex workers' rights feminist perspectives and their struggle, the present research has emphasized how the issue of 'sex trafficking' in Europe cannot be framed only in terms of victimhood and agency regarding prostitution/sex work. Rather, it is necessary to look at the complexity of the migration aspect of 'sex trafficking' in Europe, investigating the relationship between 'sex trafficking' and the process of *re-bordering* Europe. In this respect, this research has highlighted how feminist scholars that look at the phenomenon of trafficking in

women in the sex industry from the perspective of migration and labour have offered significant theoretical contributions to feminist debate on ‘sex trafficking’ (chapter 4). These feminist researchers have demonstrated that it is no longer possible to talk about ‘sex trafficking’ without posing at once the problem of understanding the transformations of citizenship, labour and sexual labour, and the diversity of migrant sex workers’ experiences. Bringing together feminist migration studies (in particular, feminist studies that have contributed to revealing the migratory agency of women in the sex sector) and studies on the transformations of borders and citizenship, these scholars have pointed out that the issue of ‘sex trafficking’ – and more broadly the issue of trafficking – is intrinsically related to the *reorganization* of European citizenship and to its ongoing process of stratification of the rights of migrants through their differential access to labour market. In this process, gender and sexuality play a crucial role.

The dominant rhetoric on ‘sex trafficking’ as a form of ‘slavery’ could bring about a focus of attention onto a group of ‘exceptional’ exploited migrants that need only to be protected and rescued. This, in turn, not only tends to conceal the agency that migrant women exercise in a trafficking context but also inspires and legitimates the division between victims of trafficking who deserve assistance and ‘undeserving’ undocumented migrants. From this perspective, many vulnerable and exploited workers who do not fall into the strict definition of victims of trafficking (which identifies involuntariness and physical violence as crucial and distinguishing features) are excluded from state protection and are in danger of being deported (chapter 4).

The vagueness of the notion of coercion and exploitation creates an oversimplified demarcation between voluntary and involuntary processes of migration, and between exploited and kidnapped individuals on one hand, and free and happy individuals on the other. As illustrated in chapters 1 and 3, the complexity of people’s migration experiences makes it impossible to identify clear boundaries between trafficking, smuggling and the legal systems of migration. Indeed, there are cases in which trafficked persons enter States legally, for instances women enter with tourist permits and then start to work in the sex industry. There are also situations in which legal employment agencies have legally recruited and transported women through deceptive means. Other situations in which women contact agencies that charge fees to organize work permits and arrange their transportation to and then once they are in the country of destination they have to work for an other agency that orchestrates their labour. Also, as many studies demonstrate, there are numerous cases of exploitation,

and violation of the rights of migrant workers who are legally present in countries under various work permit schemes.

Episodes of coercion, deception and exploitation can also occur in voluntary and legally regulated systems of migration and employment. As argued in chapter 3, there is no a clear division between free migrants who enjoy total choices over their lives and individuals who have been forced to labour in dangerous conditions. People are on a continuum of exploitation between slave-like conditions at one end and freely chosen work at the other. Between these two poles, there are different types of employment relationship in which people can experience discrimination, powerlessness and abuse.

For migrant workers, in particular for the undocumented ones, the boundary between free and exploited labour is always *blurred*. Restricted labour mobility and lack of employment opportunities lead to the acceptance of unsafe conditions and low wages. Considering the fact that in the EU most national legislations bind the authorization to enter and reside in a territory to the holding of a work contract, for many migrant workers their legality is dependant on the permits held by employers and this renders them highly vulnerable. In fact, the fear of deportation leads many migrants not to complain about exploitative situations or other forms of abuse and discrimination.

The regulations of citizenship and migration in many European countries constrain women's access to employment and rights at work, the recognition of their skills and their family relationships. As illustrated in this work, the labour mobility of migrant women is strongly limited to the lowest levels of the employment hierarchy in the service industry. This is particularly common in countries such as Italy, which present a large informal economy characterized by irregular employment and flexible labour force. The demand for low-wage labour in the service sector is highly concentrated in informal economies such as domestic, caring and sex work and is both *gendered* and *racialised*. Indeed, gender and racial stereotypes often impinge on the recruitment of migrant workers, establishing differential rights and access to social advancements (chapter 3).

This research has highlighted that many women experience the phenomenon of *deskilling*: many skilled women become less skilled migrant workers because there are no job opportunities for them or simply because their titles are not recognized in the country of destination. Many migrant women feel *trapped* in their low-paid jobs since it is difficult for them progress in the occupational ladder (chapter 3). Often, women who leave sex work find work as domestic or care workers and vice versa. This dynamic

occurs equally in cases where migrant women have legal status or EU citizenship. This is due to limitations caused by the segmentation of the labour market on the basis of gender, age, race and nationality in many EU countries. In this scenario, prostitution is often considered the most profitable type of employment.

At the same time, as explained in chapter 3, the increasing mobility of women has brought about significant *transformations* to family structures and consequently has led to a *reconfiguration* of traditional gender roles. Migrant women move into a transnational space characterized by social, economic and affective networks. In this transnational context, women try to conciliate their desires and external and familiar obligations. In so doing, for instance, they constantly negotiate new meanings of *motherhood* (such as *transnational motherhood*) and challenge familiar roles and gender, class and racial stereotypes.

Building on these considerations, feminist scholars that look at the issue of trafficking in women from the perspective of labour and migration have pointed to the need to investigate ‘sex trafficking’ along with the other forms of discrimination and exploitation to which migrant workers – and in particular migrant women workers – are subjected. From this standpoint, these feminist studies unpack the dominant discourse of ‘sex trafficking’ as a form of slavery arguing that it obscures States’ responsibilities in making migrant women vulnerable to abuse and labour discrimination. In other words, the idea that ‘sex trafficking’ is mainly a problem of patriarchal violence and organised crime conceals the ways in which the *interplay* of employment, immigration and welfare regulations can facilitate the actions of third parties and increase the risk of danger for migrant women. At the same time, it tends to ignore the agency that women exercise in planning their migratory projects as well as the social and affective resources that they produce despite their situation of *multiple confinement*.

These feminist studies have demonstrated that though women might experience a great deal of coercion in the trafficking context, they may also be recruited without coercion, and may not find themselves in conditions of forced labour. Furthermore, they have revealed that many women who contact traffickers for help in migrating, know that they will work in the sex industry abroad. From this perspective, such studies do not suggest that organized crime does not use force in order to pressure women to migrate or work in the sex industry, neither do they argue that women do not experience *violence* and *pain* in the trafficking scenario. Rather, their main point is that the dominant discourse of trafficking tends to divert attention from the restrictions that

European States impose on migrant movement and the hierarchical organisation of access to its labour market and citizenship, from the tensions and conflicts that migrant women undergo in their desire for spatial, labour, affective and social mobility and also from the States' responsibilities in preventing sex workers from working safely and organizing for their rights. In this sense, the focus solely on bad men exploiting poor women is inadequate and, often, counter-productive in addressing the forms of abuse and discrimination that migrant women can suffer (chapter 3).

In adopting this perspective, the risk of romanticizing the agency of migrant women is always around the corner. However, such a risk might be avoided paying attention to women's real lives and, then, to the different, contradictory, conflicting and often *painful* ways by which women negotiate – or try to negotiate – power relations. In this light, feminist studies that examine 'sex trafficking' from the perspective of migration and labour can offer useful theoretical tools to investigate the complex factors that are behind not only the issue of trafficking of women in the sex sector (and not only in terms of agency or lack thereof in prostitution/sex work) but also behind the phenomenon of trafficking for jobs outside the sex industry, such as in the domestic sector.

In the majority of European countries, anti-trafficking interventions seem to overlook the complexity of the problem of 'sex trafficking' and of trafficking more generally. As the present research illustrated in chapter 4, most of the interventions primarily focus on the trafficking of women in the sex industry leaving the other forms of trafficking, which involve not only women but also men and transgender people, unaddressed. At same time, building on a narrow definition of victims of trafficking, most of these interventions often exclude from their protection and assistance many vulnerable and exploited migrants who do not fit this definition. Many NGOs report that they face strong difficulties in accessing rights or protection for those who are exploited but not trafficked. Relying upon this narrow definition, many anti-trafficking interventions can deny justice to many migrants whose rights and dignity are violated.

On the other hand, those who are identified as victims of trafficking are often seen as *suffering* individuals who only need to be protected. No attention is paid to their rights claims; or better said, their rights claims are often reduced to the right to be rescued. In this regard, as discussed in chapter 4, it is important to consider the centrality of the issue of violence against women in the notion of women's human rights. Emphasizing sufferance and pain, the focus on violence against women has in

part contributed to (re)affirming the image of women (and in particular non-Western women) as powerless and fragile subjects in need only of protection and not also as claimants of rights themselves (chapter 4).

A human rights based approach should be about more than protecting the rights of those who suffer a violation. It should also aim at strengthening the ability of vulnerable persons to exercise their human rights and supporting their organisation and self-representation. Thus, a cross-cutting principle should be the *participation* of individuals in the development and realization of these measures which affect their own human rights. In this respect, it is worth noting that those – such as migrant women, migrant sex workers, sex workers – who are addressed by anti-trafficking interventions have rarely been invited to participate in the development, implementation and evaluation of policies and measures that affect their human rights. Indeed, despite the fact that anti-trafficking interventions aim to protect the human rights of trafficked persons, those who are supposed to suffer violations are rarely listened to. Exemplary is the little institutional recognition that the rights claims advanced by sex workers in 2005 in Brussels have received (chapter 4). This lack of attention and participation constitutes a big obstacle for the development of *effective* change strategies.

In most European countries, those who are identified as victims of trafficking get specific treatment that consists of a coordinated intervention of state and international agencies, police, immigration and non governmental organizations which can provide migrants with shelter and rehabilitation support (such as legal advice, health care etc.) for several months. As explained in chapter 4, in the ‘rehabilitation centres’ women often live in conditions that are not different from detention. This leads to a direct violation of their right to life, security and freedom of movement. Sometimes, assistance programs create contexts of social isolation, control and discipline and, thereby, paradoxically reproduce relationships similar to the one that characterized third-party controlled prostitution. Under these conditions, it is not surprising that some women decide to escape from the rehabilitation centres (chapter 4).

In contrast to these kinds of program, this research has emphasized that rehabilitation interventions should be more focused on strategies of empowerment. By avoiding the peril of being new forms of imposition, these strategies should address women’s desires, needs and experiences and should aim at giving women the power and the access they need to change their situations and to speak up for their own rights (such as the right to sexual self-determination). In order to do this, it is necessary – as the

Council of Europe Convention states (Article 12) – to separate the assistance and protection of victims from the collaboration with law enforcement and to provide *efficacious* programmes aimed at the social and labour inclusion of trafficked people but not in an *inferior* or *unprotected* position.

In the majority of European countries protection and support for those who are identified as ‘victims’ are predicated only in collaboration with police operations and possible resident and work permits are contingent upon the duration of the prosecution. From this perspective, anti-trafficking interventions seem to focus more on contrasting organised criminal networks and illegal immigration rather than on the recognition and protection of the rights of trafficked persons. In this scenario, Article 18 of the Italian Immigration Law (D.LGS. 286/1998) is a *important exception* because it grants assistance and renewable temporary residence and work permits to trafficked persons regardless of their cooperation with law enforcement authorities. Article 18 is extremely progressive and oriented primarily towards victim’s protection. Yet, unfortunately, the enforcement of Article 18 is often inadequate, arbitrary and differently applied across Italy (chapter 4).

In general, it might be said that in the majority of European countries, once out of the condition of ‘trafficked’, women become *invisible* to social welfare systems.

### *New Challenges*

The present research has pointed to the need to look at the topic of ‘sex trafficking’ – and more broadly the topic of trafficking – from a perspective which pays attention to the complexity of the issues of migration and labour in Europe. Adopting this perspective does not mean excluding an analysis of the specificities of sex work itself and neither does it imply a celebration of migrant revolutionary agents, since the *ambivalence*, *contradictions* and *pain* of subjective experiences are kept in mind. Rather, it shows how, today, issues related to sex work acquire particular *meanings* in relation to gendered mobility and borders. In parallel to this, such an approach reveals that the experiences of migrant women in relation to sex and other sectors and to legal immigration regulations, reveal contemporary changes in borders, labour and citizenship in Europe (chapter 3).

From this view, the issue of ‘sex trafficking’ and that of trafficking more generally, are strongly intertwined with other forms of discrimination and exploitation to which migrant workers – and in particular migrant women workers – are subjected.



This prompts the question of whether it would be more useful and effective in terms of strategies for change to give priority to a discursive and legal focus on migrant workers' rights more generally, rather than on the category of trafficking. In response to such a question, I would argue that the trafficking legislation should not be abandoned because may be necessary in helping a certain group of people. However, following the recommendation of the EU Experts Group on trafficking in Human Beings, I point out that it may be more important and efficacious to focus on the issue of exploitation itself rather than on how people come to find themselves in an exploitative or abusive situation.<sup>852</sup> Given the complexity of people's migration stories, from a human rights perspective the main concern should be to contrast the exploitation of human beings regardless of whether this exploitation involves a trafficked person, a smuggled person, an irregular or regular migrant. Therefore, a human rights approach to trafficking should place the question of exploitation at the centre, finding new ways of helping all those on the continuum of exploitation.

Shifting the attention towards exploitation is not without problems. As discussed in this research, the lack of a global political consensus on minimum labour standards across sectors and cross-nationally, makes it highly difficult to focus on exploitation. The challenge, thus, is to reframe the concept of exploitation in order to consider and tackle the different and less evident forms of exploitation that occur within both regular and irregular systems of migration and employment. The 1930 *ILO Forced Labour Convention*, the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* and the *U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, can be useful instruments here. The definition of 'forced labour' developed by ILO places emphasis on the *involuntariness* of the work or service relationship. Yet, as explained in chapter 3, the line between coerced and non-coerced exploitation is very thin and cannot be drawn through reference only to the voluntariness with which the labour is performed. It is also necessary to investigate the conditions and factors that permit certain individuals to exploit and profit from others and how violations and abuse are facilitated by structural, legislative and cultural issues.

In this scenario, the challenge for feminist scholars is to critically rethink the notion of gender justice, taking distance from an highly emotional approach and devising a new theoretical framework capable of grasping the mechanisms of *differentiation* and *stratification* of legal status and citizenship in Europe, and

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<sup>852</sup> EU Experts Group (2004).

consequent social *inequalities* and *injustices* in which differences along intersecting axes of gender, sex, class and race are crucial. By problematizing the politics of framing, political scientist Nancy Fraser has stressed the necessity of mapping “scales”<sup>853</sup> of justice and struggles for justice in the contemporary world. In this vein, Fraser has argued that today feminists who operate in transnational space have made a third dimension of gender justice visible, beyond redistribution and recognition, which is representation. “Representation is not only a matter of ensuring equal political voice for women in already constituted political communities; in addition, it requires reframing disputes about justice that cannot be properly contained within established polities”.<sup>854</sup> In this light, it is necessary that feminists in Europe develop new terminology and concepts that offer a more nuanced reading of how – through the practices and strategies of their everyday lives and in their claims against injustice – migrant women are *internal to*, and *agents of*, important political transformation.

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<sup>853</sup> For Fraser the term ‘scales’ evokes two images: the balance and the map. As she argues, “In the case of balance, the challenge stems from competing views of the ‘what’ of justice [...] In the case of the map, the trouble arises from conflicting framings of the ‘who’”. N. Fraser, 2009, p. 5.

<sup>854</sup> N. Fraser, 2009, p. 114.



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