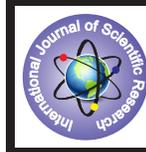


Legalising the Act of Trafficking in the South African Context



Law

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ABSTRACT

Trafficking in persons is today in most cases an organised business with linkages spread around the world and is often connected to organised crime, prostitution, slavery, smuggling and trafficking in children.

Trafficking of persons into the sex industry is a global problem and there is therefore a perceived link between trafficking, gender and prostitution. The underlying socio-economic and cultural factors that increase inequality and discrimination make women and children more vulnerable to become victims of trafficking.

1. Introduction

Legal systems differ as to whether those making use of services of victims of trafficking should be punished. An appropriate legal framework that is consistent with the relevant international law of instruments and standards should therefore be developed. The aim of this paper is to address trafficking in persons within the South African context by recommending effective and adequate legislative enforcement and non legislative measures in order to facilitate the effective prosecution of traffickers, the protection of victims of trafficking and the prevention of trafficking in persons.

2. Trafficking in persons versus smuggling in persons

It is important to distinguish between trafficking in persons form smuggling in persons. (Article 3 of the Protocol against the Smuggling of Migrants by land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime, 2000).

Trafficking means –

- the recruitment, sale, supply, procurement, capture, removal transportation, transfer, harbouring or receipt of persons, within or across this borders of the Republic –
- by any means, including, the use of threat, force, intimidation or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control or authority over another person; or
- by abusing vulnerability,
- for the purpose of exploitation; and
- includes the adoption of a child facilitated or secured through illegal means. (Children's Act clause 1)

Smuggling is the procurement of illegal entry of a person into a state of which that person is not a national or a permanent resident. (Guideline 2 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking). In this case the territorial integrity of the state is at stake. (German Law Journal 2004 5(9) 1018). The smuggler is usually paid a fee or other reward and his or her involvement with the smuggled person ends once illegal entry into the country has been secured. The intention of the smuggler is therefore not to exploit or otherwise subject the smuggled person to abuse of any kind while in trafficking involves the continued exploitation of the victim.

The distinction between trafficking in persons and smuggling in persons is not always clear. For example: A trafficking case may start off as smuggling, but once the person has been smuggled into the country of destination, the smuggler may then decide to force him or her to work in the sex industry or another exploitative practice.

3. Admission of trafficking in persons into the territory of South Africa as a country of destination, transit and origin

The Issue paper stated that South Africa is considered mainly as a country of destination for victims of trafficking. (Issue Paper 25: Trafficking in persons (Project 131) 2004 p.11). South Africa has become a lucrative market for traffickers because it serves as the economic heart of Africa and provide a market for the

services of victims of trafficking. Compounded with this is the fact that South Africa is regarded as one of the countries in the developing world whose citizens do not attempt to enter other countries illegally in destination countries. (Barnes-September et al: 2000) Trafficking in persons is currently not a criminal offence in South Africa.

4. Identification of victims of trafficking

Many countries have realised the need to identify the victims of trafficking as it forms an essential part of victim protection. It is very difficult to identify victims of trafficking as the crime in persons is a hidden phenomenon and the victims are in most of the cases of trafficking isolated and intimidated into secrecy and silence.

5. Purposes for which persons may be trafficked

Various purposes for which persons may be trafficked are in existence. These include: for purposes of sexual exploitation; forced labour or slavery or practices similar to slavery servitude and may include the trafficking of persons for purposes of subjecting them to exploitative domestic work, work within the agriculture or manufacturing business or using them as drug couriers. Other purposes include forced marriages, illegal adoptions or the removal of organs or other body parts.

• Trafficking of persons within South Africa

- This first purpose is for sexual exploitation. Parents sold some children whilst other was kidnapped (Molo Songololo: 2000).
- Despite great advances in medical science, the reproduction of human body parts has been unsuccessful. The limited number of available organs can no longer meet the high demand for organ transplants (Brits E; 2003).
- African traditional beliefs the use of human organs or other body parts increase the power of muti. Mozambican groups involved in the trafficking of human organs also supply South African witch doctors and they kill specifically for the purpose of extracting organs. (Gastrow P and Mosse M; 2002)

• Trafficking of persons to South Africa

- Women and children are being trafficked to South Africa for sexual exploitation.
- A substantial number of men are being brought to South Africa for purposes of forced labour (South African Law Reform Commission Issue Paper 25; 2004).
- It is no exception that trafficking in women and girls for purposes of forced marriages also become a world-wide phenomenon in South Africa (International Organisation for Migration; 2003).
- Trafficking in children for purposes of adoption is also another purpose.

6. Problems in prosecuting traffickers

Trafficking in persons is not a crime in South Africa at present. Traffickers are being charged with common law offences such as kidnapping (which applies to men, women and children) (S v

Levy 1967 (1) SA 353(W) and abduction (Burchell J and Milton J;1997). Abduction is the unlawful taking of a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor. The Children's Bill also regulates international child abduction. Traffickers may also be charged in terms of existing statutory laws. They may for instance be charged in terms of the Immigration Act (13 of 2002) for bringing persons into the country without the necessary documentation, and in terms of the Sexual Offences Act (23 of 1957) if they have subjected their victims to sexual abuse. Where a trafficker has neither subjected his or her victim to abuse during the trafficking process nor has entered the country illegally, the charge will usually be kidnapping only.

7. Criminalising the act of trafficking in persons by persons

The crime of trafficking in persons should be made a Schedule 5 offence in terms of the Criminal Procedure Act. This will mean that where an accused is charged with the offence of trafficking in persons, the court would have order that he or she be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interest of justice permits his or her release.

Participating as an accomplice in an offence is a common law offence. An accomplice is a person who takes part in the commission of an offence, but who is not a perpetrator or co-perpetrator. An accomplice is not a perpetrator as he lacks the actus reus of a perpetrator, but he knowingly affords the perpetrator or co-perpetrator the opportunity, means or the information which furthers the commission of the crime. (Du Toit et al; 2004)

8. Providing victims of trafficking with immunity against prosecution

Victims' first deal with the trauma of being trafficked and also faced with arrest and prosecution for offences committed as a direct result of their situation as victims of trafficking. In South Africa this is no exception when it comes to the arrest and prosecution of these victims.

In the Netherlands, Italy, Belgium and Austria if the victim agrees to co-operate with law enforcement and judicial authorities. The residence permit and services are extended for the du-

ration of the criminal proceedings. The victim is also entitled to shelter, legal, financial and medical assistance. (The fourth Report on the Implementation of the Agenda for Action adopted at the First World Congress against Commercial Exploitation of Children in Stockholm, Sweden, 28 August 1996.)

The proposed trafficking legislation should provide for a non-renewable 90 day reflection delay period. Once a person has been identified as a victim of trafficking, he or she should immediately be informed of his or her right to a reflection delay period. An offer of a reflection delay should not be conditional upon the willingness of victims of trafficking to assist with the investigation of or the prosecution of traffickers. (Anti-Slavery International, "Human traffic, Human Rights: Redefining victim Protection" London 2002. p 41-47).

A reflection delay period has proven benefits to law enforcement.

- At the conclusion of the reflection delay period, victims may be provided with temporary residence permits if they are:
- Willing to assist with the investigation and/or prosecution of their traffickers, or Can establish that they face a real risk of reprisals, prosecution or re-trafficking upon return to their countries of origin.

8. Conclusion

Victims of trafficking, especially those trafficked for purposes of sexual exploitation, face various problems. These include physical abuse, emotional trauma, health problems such as HIV/Aids, the effects of forced and unsafe abortions, social isolation, drug and alcohol abuse, injuries from assault and post-traumatic stress disorders. These victims also experienced intense feelings such as guilt, fear, anger, betrayal, depression, low self-esteem, disorientation and lack of trust in others, including those offering assistance. Victims of trafficking therefore need to be treated sensitively and with the necessary understanding in order to help them pick up the threads of their lives when they return home. South Africa lacks a proper system in terms of which assistance can be provided to victims of trafficking.

Victims of trafficking, particularly those who have been subjected to sexual exploitation, are often in need of medical care.

REFERENCE

- Article 3 of the Protocol against the Smuggling of Migrants by land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime, 2000. | | Musacchio Vincenzo "Migration, Prostitution and Trafficking in Women: An Overview" German Law Journal (2004) 5(9) 1018. | | South African Law Reform Commission, Issue Paper 25: Trafficking in Persons (Project 131) 2004. | | Barnes-September et al Child victims of prostitution in the Western Cape 2000. | Molo Songololo The Trafficking of children for purposes of sexual exploitation in South Africa 2000. | | International Organisation for Migration Trafficking in Women and Children for sexual Exploitation in Southern Africa 2003. | Brits E Mense in mediese beroep glo ook orgaansmouse Beeld 9 December 2003. | | Gastrow P and Mosse M Mozambique: threats posed by the penetration of criminal networks Institute for Security Studies Regional Seminar 18 and 19 April 2002. | | Hopkins J annual Human Rights Report 2002 University Protection Project. | | South African Law Reform Commission Issue Paper 25: Trafficking in Persons (Project 131) 2004. | | Burchell J and Milton J principles of criminal law (second edition) Landsdowne: Juta 1997. | | Du Toit et al Commentary on the Criminal Procedure Act Cape Town Juta 2004. |