THE IMPOSSIBLE VICTIM

Judicial treatment of trafficked migrants and their unmet expectations

RAMONA VIJEYARASA

In a number of circles, including academic and political, as well as the popular press, human trafficking is framed as the result of involuntary movement by the victim, with stories of women who are lured or kidnapped against their will. This framework involves factually unsound statements that 'there are more slaves today than at any point in human history', and a tendency to conflate the experiences of a few women to all.[1] Elsewhere, trafficking is viewed as something that happens *to* women, as opposed to resulting from a concerted and legitimate attempt *by* women to change their lives. Attention is focussed on the figure of a young, naïve woman who is unwillingly and sometimes unknowingly sold by her family or husband into sex work.[2] In contrast to this framework, I argue that voluntariness is inherent in the majority of trafficking situations. This sits in contrast with the law's efforts to offer protection only for *in*voluntary situations, often denying assistance to 'willing victims'.[3] Any agency exercised by the individual is seen by courts, police and others as rendering their victimhood impossible.

Elsewhere, I have proposed an approach to trafficking remedies based on an analogy from the laws of contract.[4] When one enters into a contract to buy a house, or (to better parallel the nature of human trafficking) a labour contract to provide services as a waitress or construction worker, the contract may be rendered void if the conditions of work are misrepresented or if the potential employee is deceived as to the nature of the object of the contract. While the agreement may have *initially* been entered into voluntarily, the individual may be recognised as a victim of fraud or deception and entitled to compensation in some circumstances. In my view, trafficking should be analysed from a similar lens.

This 'contractual' approach to human trafficking has multiple advantages. We move beyond the current emphasis on criminal law enforcement, which is often aimed at identification and prosecution of traffickers, rather than support and redress for victims. We avoid other shortcomings in this criminal justice framework, which has also been misused to rescue, rehabilitate or criminalise non-trafficked, voluntary sex workers. Most importantly, the contractual approach provides us with the conceptual tools to recognise women's agency in situations of trafficking. Women do often migrate irregularly for economic betterment based on some process of rational decision-making and their expectations about opportunities away from home. I believe that evidence of such agency and voluntariness should not be a barrier to prosecuting traffickers.

In this article, I explore the analogies between contract law and human trafficking which are already emerging in Australian jurisprudence, with reference to the 2008 Australian High Court decision in *R v Tang*[5] and more detailed analysis of *R v Dobie*.[6] My aim is to highlight the voluntariness often present in situations of trafficking, and to argue for the right to redress even when a person makes a voluntary contribution to their own exploitation. I further argue for greater judicial recognition of the individual's unmet expectations when entering a situation that later becomes exploitative. Analysing trafficking cases from the perspective of the victim's expectations of future employment prior to leaving their home country, yields helpful benchmarks against which legal remedies may be assessed. Such an approach also has application beyond the trafficking framework and can form a suitable lens to consider the question of the exploitative labour conditions to which migrants, documented or otherwise, may be subjected.

In the first section of this article, I discuss the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Trafficking Protocol').[7] In particular, I consider the extent to which it recognises the voluntary decision-making of potential economic migrants and when it deems such 'consent' null and void. I then turn to the case of *Dobie,* the first and thus far only conviction under Australia's anti-trafficking provisions. In the final section, I consider other examples from abroad and argue that recognition of the initial voluntariness of victims can produce a more nuanced approach to the actual relationships that exist between human trafficking and the socio-economic inequalities which drive decision-making.

The Trafficking Protocol and the consenting victim

In December 2000, the global community met to negotiate the drafting of the Trafficking Protocol in Palermo. This gathering reached an international consensus on the following definition of trafficking:

> … 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

REFERENCES

1. Benjamin E Skinner, 'The New Slave Trade' 175(2) *Time Magazine*, 18 January 2010, 54–57.

2. See the story of Chamoli from Nepal in an otherwise useful article by Beverly Balos, 'The wrong way to equality: Privileging consent and the trafficking of women' (2004) 27 *Harvard Women's Law Journal* 137, 137.

3. Yu Kojima, 'What ails effective implementation of measures to counter trafficking in women and girls? A structural analysis based on examples from Thailand and Sri Lanka' in Yu Kojima (ed), *Women in the trafficking-migration continuum from the perspective of human rights and social justice* (2007) 151. See also Wendy Chapkis, 'Trafficking, migration and the law: Protecting innocents, punishing immigrants' (2003) 17(6) *Gender and Society* 923, 924–5, 930.

4. Ramona Vijeyarasa, 'Exploitation or expectations? Moving beyond consent in prostitution, trafficking and migration discourse' (2010) 7 *Women's Policy Journal of Harvard* 11.

5. *R v Tang* (2008) 237 CLR 1.

6. *R v Dobie* [2009] QCA 394, [4].

7. *United Nations protocol to prevent, suppress and punish trafficking in persons especially women and children, supplementing the United Nations convention against trans-national organized crime*, opened for signature 12 December 2000, G.A. Res. 55/25, art 3(a) (entered into force 25 December 2003). It is commonly referred to as the Palermo Protocol.

> of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[8]

This definition contributes to the perception of the victim as a passive individual, whose involuntary arrival in the destination country results from the 'recruitment, transportation, transfer, harbouring or receipt of persons' by the trafficker. By contrast, the trafficker is framed as an active individual. One might conjecture that this is no different from how a criminal prosecution treats a murdered individual as passive by focusing on the acts and intentions of the murderer. In this article, however, I elaborate on why this framing is problematic in the context of trafficking, and the shortcomings that result from overlooking the role and reasoning of the trafficked person. In particular, I argue that if we accord inadequate attention to the decision-making of the victim, we fall short of an in-depth exploration of the socio-economic vulnerabilities that often push potential migrants to engage in unsafe and risky migration where there are barriers to legal migration abroad. Moreover, at a representational level, we deny the possibility of a woman being simultaneously an agent and a victim.

The definition of trafficking in the Protocol effectively renders the individual's consent legally irrelevant if any of the means listed is used.[9] That is, for example, if there is evidence of coercion, force, deception or fraud, the victim's consent cannot be used in the trafficker's defence. While legally irrelevant, however, the consent of the victim is in my view central to understanding the drivers of trafficking from a socio-economic perspective. As research increasingly demonstrates,[10] modern-day trafficking rarely corresponds to the image of the kidnapped and naïve young woman, but more frequently involves the economic migrant, who may even know that the tourist visa on which they are travelling has been obtained without disclosure of the intention to work in the destination country.[11] A significant number of victims of trafficking, therefore, do consent to their initial entry into a situation in which they are at risk of exploitative conditions of work.

This approach, however, raises the question as to what extent the law will allow an individual to consent to their own exploitation. As John Stuart Mill said regarding slavery:

> In this and most other civilized countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion... The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act... The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.[12]

Mill argues that society should prioritise one's liberty and voluntary choices but only to a point. For Mill, slavery is that point. If initial voluntariness is inherent in the majority of cases of trafficking, where does the Trafficking Protocol draw the line? Coercion, fraud and deception are easy cases. If a person's consent is extracted by these means, it is rendered void. Similarly, the Trafficking Protocol will void such consent where the trafficker has taken advantage of the individual's vulnerability or where the individual has been made to believe the work will be less hazardous than it is in reality. What the Trafficking Protocol excludes, however, is the victim who fully consents to their own exploitation when the consent has not been achieved by such means as coercion, fraud or deception, where the individual is not considered vulnerable (what vulnerable means is discussed further below) and where the individual has full knowledge of the conditions and treatment they will face. This individual will not be deemed trafficked.

In Millsian philosophy, while we might want to respect the individual's choice, which for them is desirable or at least endurable, once an individual has sold their freedom, they have forgone 'any future use of it, beyond that single act'. Mill's reasoning continues, 'He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favor, that would be afforded by his voluntarily remaining in it'. To Mill, therefore, even full knowledge is not enough to allow a person to consent to their own exploitation.

I would argue that the Trafficking Protocol's scope is narrower than Mill's approach, leaving individuals who are not deemed vulnerable and who decide to sell themselves with full knowledge of the conditions they will face, unprotected by trafficking laws. Arguably, it is correct to exclude such victims from the reach of trafficking provisions. However, given the voluntariness often at play in the movement of irregular migrants, I argue that some law should exist to protect these victims who, having knowingly consented to being exploited, are not free anymore to be free. This in fact demonstrates the limitations of the concept and definition of trafficking.

Now I turn to the question of who the law considers to be so 'vulnerable' as to be unable to exercise autonomous consent — that is, if the potential migrant was living under such oppressive conditions that they were faced only with a number of unpalatable choices. Writing in the late 1980s in the context of marital rape, Carole Pateman has highlighted the paradox of an individual's consenting to their own exploitation:

> consent is central to liberal democracy, because it is essential to maintain individual freedom and equality; but it is a problem for liberal democracy, because individual freedom and equality is also a precondition for the practice of consent.[13]

Pateman argues that for an individual to be capable of consenting, they must be inherently free and equal as a starting point. This is a central concept that should be understood and accepted in cases of trafficking. The

8. Trafficking Protocol, art 3(a).

9. Ibid art 3(b).

10. See, eg, Upala Devi Banerjee, 'Migration and trafficking of women and girls: A brief review of some effective models in India and Thailand' in Karen Beeks and Amir Delila (eds), *Trafficking and the global sex industry* (2006) 3, 192–3; Chapkis, above n 3, 931–2.

11. See, eg, conflicting evidence in *Tang* concerning the extent of the knowledge of the five Thai women about how their visas were obtained: *R v Tang* [2007] 16 VR 454, [19]. See also Anne Dorevitch and Michelle Foster, 'Obstacles on the road to protection: Assessing the treatment of sex-trafficking victims under Australia's migration and refugee law' (2008) 9 *Melbourne Journal of International Law* 1, 9.

12. John Stuart Mill, *On Liberty* [1859], in *Collected Works*, vol 18: *Essays on Politics and Society*, ed JM Robson (1977), 299–300.

13. Carole Pateman, *The Sexual Contract* (1988) 83.

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idea that victims of trafficking for sexual and labour exploitation often make a voluntary decision to risk potentially exploitative working conditions abroad should lead us to question whether the socio-economic circumstances in which those individuals were living were oppressive to the point of rendering the consent invalid. That is, we must accord adequate attention to such drivers or underlying causes of trafficking, which may include gender inequality, poverty and barriers to full and equal participation in the local labour market.

The Trafficking Protocol can be seen as recognising in part that women are capable of becoming victims of trafficking through their own voluntary acts, given the definition's inclusion of the phrase 'abuse of power or of a position of vulnerability'. This phrase, which has elsewhere been criticised for adding confusion (since it is undefined),[14] was explained in part in the Trafficking Protocol's *travaux préparatoires*:

> The reference to abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved.[15]

We see in this explanation many of the questions shadowed by Pateman, and an allusion to the lack of alternative options available to many potential migrants which result in seemingly voluntary decision-makers seeking economic betterment abroad through unsafe means. What counts as a real and acceptable alternative, however, is left unclear, and the *travaux préparatoires* in fact fail to aid our understanding of the socio-economic conditions facing potential migrants.

Both Mill's and Pateman's expositions pose severe challenges for those seeking to increase the attention paid to women's agency and their decision-making in the migratory process. First, following Mill's approach, we are tempted to disregard altogether the consent of a woman. In the same way that Mill finds slavery an unacceptable abdication of liberty, I call for a broader approach to the Trafficking Protocol, to include both the voluntary and involuntary victim. Second, if we recognise the structural inequalities that Pateman calls to our attention, we are inevitably drawn to the lack of alternative choices available to the voluntary victim, as recognised in the Trafficking Protocol, and are tempted to disregard their agency. In this case, we are left questioning the autonomy or voluntariness of the individual's decision in the first place. As noted in the third section of this article, this poses particularly challenging questions for feminist debates and the divide between those theorists who see sex work and trafficking as intimately intertwined, with sex work an unacceptable example of a woman abdicating her liberty on the one hand, and others who reject the conflation of sex work to trafficking.[16] I return to these debates after discussing, in the following section, how the decision-making processes of victims of trafficking have been treated by Australian courts.

Trafficking and Australian jurisprudence

In this section, I consider two Australian cases addressing questions of slavery and trafficking. Prior to 2010, no individual had been successfully prosecuted for crimes of trafficking in Australia. There had, however, been some prominent jurisprudential consideration of criminal provisions related to slavery and sexual servitude. In 2008, the High Court considered charges against Melbourne brothel owner Ms Wei Tang under the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth), which criminalises slavery (Division 270). The High Court determined that, between 10 August 2002 and 31 May 2003, Ms Tang possessed as slaves five women of Thai nationality, who had come to work in Australia in the sex industry. I have elsewhere contended that the High Court's judgment in *Tang* was erroneous, since the Court failed to use provisions in the international slavery conventions to aid their interpretation of the domestic slavery provisions and inappropriately labelled a situation of labour exploitation as akin to slavery.[17]

The 2010 decision of the Queensland Court of Appeal in a case against Keith William Dobie dealt with the first — and thus far the only — conviction for offences relating to trafficking in persons, and deserves further attention. Dobie was charged with two counts of trafficking in persons pursuant to the *Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005* (Cth), provisions which were introduced into Australian law in July 2005 (Division 271). He was also charged with four counts of presenting false information to an immigration officer,[18] and one count of dealing in the proceeds of crime.[19] Dobie's appeal was dismissed by the Court of Appeal on 26 February 2010.[20]

In light of the reforms legalising certain types of prostitution in Victoria[21] and decriminalising prostitution in New South Wales,[22] the federal provisions under which Dobie was charged were drafted using language that clearly recognises that a migrant sex worker may voluntarily enter into a contract to provide sexual services in Australia. Pursuant to section 271.2(2B) of the Commonwealth *Criminal Code*, such a voluntary

14. Adriana Piscitelli, 'Entre as "máfias" ea "ajuda": a construção de conhecimento sobre tráfico de pessoas' (2008) 31 *Cadernos Pagu* 29, 46; Vijeyarasa, above n 4.

15. United Nations Office on Drugs and Crime ('UNODC'), *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) <unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf> at 8 March 2010.

16. See generally Vijeyarasa, above n 4.

17. Ramona Vijeyarasa and José-Miguel Bello y Villarino, 'Determining the difference between trafficking and slavery: Revisiting *R v Tang* in light of new European jurisprudence' (2010) (forthcoming).

18. *Migration Act 1958* (Cth) s 234(1)(a).

19. *Criminal Code* (Cth) s 400.6(1).

20. *Dobie* [2009] QCA 394.

21. *Prostitution Control Act 1994* (Vic).

22. *Summary Offences Act 1988* (NSW) Pt 3.

arrangement will be deemed an offence of trafficking if there are any indications of deceit, specifically deceit as to the nature of the sexual services to be provided, the extent to which the sex worker will be free to leave their place of work or residence and the size of the debt owed or claimed to be owed by the sex worker.

The judgment of the Supreme Court of Queensland recognises the two victims' voluntary negotiations with Dobie and their later unmet expectations. Dobie had organised the entry into Australia of two Thai women to provide sexual services. He was charged with trafficking offences in relation to the first woman for the period 13 November 2005 to 23 January 2006, and to the second woman, from 11 February 2006 to 17 April 2006. He deceived the first woman about how much work she would have to perform in Australia, and the second woman about her work schedule. The Supreme Court of Queensland determined that Dobie 'intended to pressure them to provide sexual services on demand, that is to say, whenever a customer called and on any day of the week'.[23]

The first woman saw up to five customers per day and worked between 10 to 18 days in the period she was in Australia; she was threatened by Dobie with arrest if she left. Dobie received up to $1000 per day, while he paid the woman a daily amount of approximately $20 and, upon her urging, sent approximately $640 to Thailand for her family. Dobie treated the second woman in a similar fashion, having previously sent her a text message and later an email in which he stated that she would work on Tuesday, Wednesday, Friday, and Saturday, and have Sunday and Monday as days off. The Supreme Court noted that Dobie deceived her as to his true intention of not giving her time off: 'if customers rang on any day of the week she had to work'.[24] The woman saw on average three to four customers per day, and up to five customers per day, and was pressured to work even when she was menstruating. Dobie told her that he had paid for her travel, passport and accommodation and that she had to work and could not leave because he was her immigration sponsor.[25] These facts clearly demonstrate Dobie's disregard for the terms and conditions which had been negotiated with the women for their work in Australia, and were the basis of the Supreme Court's finding that the women had been trafficked by Dobie.

As in *Tang*, the Supreme Court of Queensland in *Dobie* noted several facts that alluded to the applicants' socio-economic vulnerability, including their limited English language skills, their disadvantaged backgrounds, the fact that they had never travelled outside of Thailand before and were in Australia illegally. Of note, however, is the Supreme Court's finding that Dobie knew that the two women's work experience in the sex industry in Thailand '[w]as such as to allow them to choose when and how often they worked and the number of customers each would expect to see'.[26] This can also be seen as an instance where the Court is reflecting on their expectations of their working conditions in Australia.

The Supreme Court's attention to the question of deception and the victims' expectations, against the background of the facts in the case, is a positive contribution to trafficking jurisprudence. First, the Court recognises the figure of the voluntary victim and that the voluntary victim is nonetheless entitled to redress and that the trafficker should be deemed guilty despite this voluntariness. The sentencing judge in particular noted,

> It was in stark contrast to her work in the Basa Pattaya where she had come from. You knew the conditions from which you brought her and to get her here, to get Ms Aunthso here, you had promised her that she would be able to work as little as she liked. Yet once you got her here, you intimidated her into working when she did not want too [sic].[27]

Similarly, attention is given to the socio-economic circumstances that render the consent doubtful. For instance, the sentencing judge noted, 'She was a single mother, struggling for some financial security for her young children.'[28]

Thus, the women's rights to redress as victims of trafficking are not negated by their clearly consensual and voluntary decision to leave Thailand to work as sex workers in Australia. To the contrary, the expected conditions on which they based their voluntary decisions to move to Australia are central to the judgment. Most importantly, the Court's analysis can similarly be applied to prosecution of employers for abuse of Australia's migrant worker regime to cover the broad range of exploitative relationships where migrants who had entered into negotiations prior to their departure face poor working conditions in Australia that run counter to their expectations.

In the following section, I consider the difficulties which may arise if courts do pay attention to victims' negotiations and their expectations concerning work abroad. I address these in the context of the

23. *Dobie* [2009] QCA 394 [4].
24. Ibid [15].
25. Ibid [16].
26. Ibid.
27. Ibid [37].
28. Ibid.

... modern-day trafficking rarely corresponds to the image of the kidnapped and naïve young woman, but more frequently involves the economic migrant who may even know the tourist visa on which they are travelling has been obtained without disclosure of the intention to work in the destination country.

philosophical treatment of the limits of consent proposed by Mill and Pateman.

Recognising autonomy and the drivers of decision-making

Anti-trafficking measures around the world frequently deny redress to the victim who has exercised choice and agency in establishing their relationship with the trafficker. Leading feminist theorist, Janice Raymond, who is known for her opposition to the sex industry, has documented cases where women's initially voluntary migration to the United States negates their later action for trafficking after they were subsequently forced to work in brothels in New York's Chinatown.[29] When testifying against the alleged traffickers, some of these women admitted that they had known they would later work in the sex industry. Although the police in those cases acknowledged that the women expected 'to be free to come and go and not be confined under constant guard', the women's initial consent was the basis of police decisions not to take action against the traffickers.[30] The police dismissed these cases despite the evident unmet expectations of the women involved. Raymond further notes the case of a Malawian woman trafficked to the Netherlands, where the woman's previous engagement with sex work in Malawi led the court to deny her victimhood. Referring to the Malawian woman, Raymond argues that 'a woman's past experience in prostitution is frequently equated with a presumption of consent'.[31] Such a presumption of consent is often broadened to encompass whatever conditions the woman labours under in the host country.

Throughout this article, I have argued for the need to accord adequate attention to evidence of a woman's consent to what ends in trafficking-like conditions. This approach to trafficking would better reflect the realities of its causes and patterns. In contrast, the image of the kidnapped victim deflects attention from the situation of economic migrants who face barriers, particularly legal, to documented regular migration. I also contend that even if consent is found to exist, such consent to exploitation should not be a barrier to legal redress. Failure to allow space for this more realistic image of voluntary trafficking victims, whether in law, policy or in the media, makes it harder for victims to self-identify and for others to recognise the prevalence of trafficking in Australia and elsewhere around the world. For example, the image of the kidnapped young woman as the quintessential trafficked person also hinders the identification of male victims of trafficking.

However, the extent to which we recognise this agency is limited in two key ways. First, a position of inequality means a potential migrant may not have been 'free' to make the decision to migrate unsafely in the first place. Second, if we follow Mill's reasoning, it would be impossible in some instances for a liberal society to accept the decision as valid, based on the unacceptability of the slave-like conditions to which the person supposedly consents. Three considerations are therefore essential to any analysis undertaken by a court in trafficking cases. First, evidence of a victim's voluntary decision to travel and work which ultimately results in exploitation should not prevent their identification as a 'victim' or their legal redress. Second, courts must utilise evidence of victims' negotiations with their traffickers and their expectations concerning work and living conditions in destination countries as a benchmark against which to assess the quantum of the victim's redress and in their determinations regarding a traffickers' guilt. Finally, recognition of such consent must be tempered by the court's assessment of whether it is acceptable under the law for an individual to use their free agency to seemingly abdicate their freedom, that is, to consent to trafficking or trafficking-like conditions.

This of course raises the question of what conditions should be considered so unacceptable as to render consent null and void. Such a determination should be, and is often, made by parliament. This is particularly so since the legality of sex work remains an area of significant debate in a number of states around Australia, and at present there is a lack of legal consistency in relation to sex work laws from state to state. There are dangers inherent in allowing courts to determine when a person should be understood to have improperly abdicated their liberty. This might result, for example, in the courts' taking free rein to make moral determinations on issues like sex work 'based upon [a judge's] individual repugnance towards [certain] adult sexual behaviour'.[32] While blatant cases of slavery, such as an individual being sold against their will by their family, leave little to discuss, Mill's approach continues to pose challenges, particularly for feminist theorists debating about whether and when a woman is free to decide if and how she will sell her body.

Finally, we must return to the concept of trafficking and assess its utility. How are we to situate trafficking within a broader migration spectrum? What would be

29. Janice G Raymond, 'The new UN Trafficking Protocol' (2002) 25(5) *Women's Studies International Forum* 491, 494.

30. Ibid.

31. Ibid 495.

32. *Tang* (2008) 237 CLR 1, [121] (Kirby J).

required for trafficked people to be understood (in law, policy and popular press) as potential migrants who failed in this endeavour and ended up being exploited? This is a challenging undertaking, given governments are unlikely to support a framework that condones irregular migration. However, at the very least, we must rid the conceptual framework of 'trafficking' of its frequent association with kidnapping and abduction and disempowered, naïve, duped women. This in turn would allow us to focus instead on the voluntary migration that is often the starting point for what are later classified as cases of trafficking.

Conclusion

Trafficking involves a broad spectrum of experiences. These range from rare cases of kidnapping or abduction to voluntary migration, where the person's undocumented status creates or exacerbates vulnerability to threats, coercion and violence. Wherever an individual is placed on this spectrum, common experiences include arduous journeys, low wages, hazardous working environments and unsanitary living. Regardless of the choices made by those who find themselves facing exploitation, the law should reconcile the individual's voluntary movement with their status as a victim deserving redress. To be simultaneously a victim and an agent of one's destiny should not be impossible under the law. A contractual approach to human trafficking requires assessing the 'unmet expectations' of the victim based on their negotiations prior to departure. This is a useful tool to analyse situations involving victims of trafficking as well as undocumented migrants, including migrant sex workers, who may be unexpectedly subject to exploitative and deceptive labour conditions. These negotiations also provide a benchmark against which courts can calculate a victim's redress. Furthermore, the law must recognise that irregular migrants cannot easily be categorised as consenting or coerced and that their experiences may fluctuate from one to the other.

However, this contractual approach to analysing a victim's consent remains limited in two ways. First, once we accord weight to the disparate types of disadvantage that can drive the decision to travel and can lead to unsafe migration, we are left in some doubt as to whether this vitiates the victim's ability to consent. The contractual analogy here is that the victim entered the negotiations with unequal bargaining power. Secondly, where does society draw the line on the conditions to which one is able to consent? We are left with the difficult task of balancing an individual's desire for a better life and the opportunities that work abroad may offer, with society's intolerance of exploitative labour and the risk of trafficking-like conditions. Arguably, the Trafficking Protocol and many domestic laws provide that moving anyone under conditions of coercion specifically for the purpose of exploitation is the line. However, so long as poverty and inequality remain, irregular migrants will continue to accept the risk of being exploited, albeit without necessarily appreciating the gravity of that potential exploitation. Clearly, therefore, without addressing the underlying drivers of trafficking, combating these trafficking-like situations will be impossible.

RAMONA VIJEYARASA is a PhD candidate at the University of New South Wales, undertaking a comparative study of trafficking from Ghana, Ukraine and Vietnam.

email: rvijeyarasa@gmail.com