

ARTICLE

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# Consent and vulnerability: some intersections between child sexual abuse and the trafficking in persons for sexual exploitation\*

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## Abstract

From the rapprochement between some aspects of the definition and management of the *child sexual abuse and trafficking in persons for purposes of sexual exploitation as social problems*, the present article argues that *consent* and *vulnerability* are complementary and key concepts for understanding the contemporary regimes of legal regulation of sexuality and of the social and political sensibilities which guide the perception of violence. By analyzing the assumptions of the concept of consent and its interrelations with the idea of individual autonomy, as well as the power and the ambiguities of the notion of vulnerability, understood as a category capable to deconstruct the central value of consent in the new sexual order oriented by liberal ideas and ideologies, I seek to illuminate some ethical and political dilemmas in the process of definition of violence and in the construction/deconstruction of the idea of victimization.

**Key Words:** Consent, Vulnerability, Autonomy, Violence, Victimization.

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*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.*

(Pateman, 1980:162)

The principles of autonomy of the will and individual freedom have decisively guided not only the legal regulation of sexuality in the contemporary Westernized transnational political context, based on the paradigm of human rights, but also social and political sensitivities towards violence. This new moral economy<sup>1</sup> of pleasures that is no longer concerned about regulating and condemning immorality, but violence and the violation of rights (Vigarello, 1998; Borrillo, 2009; Lowenkron, 2013, 2015) have its core element in the centrality assigned to *consent* in the definition of legality/illegality or legitimacy/illegitimacy of sexual behaviors.<sup>2</sup>

Originating in the Enlightenment Philosophy, this consent-based model of regulating sexuality gained momentum and political expression in the so-called Western societies from the decades of 1960 and 1970, with the activity of the feminist and gay movements, responsible for the displacement (or, at least, questioning) of the main criterion for ordering the hierarchies of legitimacy in the new sexual order: from the *heterosexual and reproductive sex* to *consensual and safe sex* (Lowenkron, 2015). As

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<sup>1</sup> I use the expression “moral economy” as proposed by por Fassin (2012:266, note 22), i.e., as “the production, dissemination, circulation and use of emotions and values, norms and obligations in the social space: they characterize a particular historical moment and in some cases a specific group”.

<sup>2</sup> Of course, other models of understanding and regulation of sexuality have not disappeared. Religious morality, for example, continues to operate as a model of intelligibility, control and hierarchy of sexualities even in centers of contemporary Western political arenas. However, it is possible to suggest that the language of *violence* and of the *rights* is today the discursive hegemonic regime for the legal regulation of sexuality in the international political context and the democratic Western regimes (or Westernized).

I argued in a previous text, such reordering produced (and continuously produces) its own residues<sup>3</sup>, i.e. sexualities that must be repeatedly excluded from the possibility of legitimation so that the so-called sexual liberalization – or, sexual diversity, according to more recent nomenclature in the political arena – could and can be politically feasible and, increasingly legally regulated.

The aim of this article is to explore **how** these residues are produced, analyzing them not as concessions to forces that oppose or resist the wave of liberalization, but as constituent elements of the regulatory regime of sexuality, itself built from liberal ideas and ideologies. I suggest, therefore, that apparently residual problem areas regarding the design and the liberation process, by tensioning the principles that define free and legitimate sex in accordance with the new sexual order based on the human rights paradigm, are heuristically privileged to discuss the issue that is usually taken as self-evident in this normative and discursive field around sexuality: the centrality of *consent*.<sup>4</sup>

To build this argument, I outline some connections and disconnections between two social problems revealed by this new sexual order *child sexual abuse* and the *trafficking in persons for sexual exploitation*, both marked by a particularly dramatic and emotional density in the contemporary political scene. It should be made clear, though, that as much as these social problems are not

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<sup>3</sup> “This new sexual order [based on the value of sexual democracy] also produced their own waste: their *responsible*, who do not take due care (of oneself and others) and, in the most extreme and monstrous limit, *pedophiles* or *abusers* of children, who flout the main criteria – responsibility, consent and equality – that define the free, secure, worthy and legitimate sex, according to the doctrine of human rights” (Lowenkron, 2015:62-63).

<sup>4</sup> Several authors have drawn attention to the centrality of consent in the regulation of sexuality both on contemporary political and legal arena (Vigarello, 1998; Lowenkron, 2007, 2015; Borrillo, 2009; Carrara, 2012) and in the micropolitical negotiations of boundaries between the legitimate and the spurious in the field of eroticism and sexual practices (Gregori, 2004; 2014; Zilli, 2009; Diaz-Benitez, 2012; Facchini and Axe, 2013).

so, or equally, recent<sup>5</sup>; their forms of understanding and moral questioning have been considerably reworded in recent decades. That is, they have both come to be defined and regulated in national and international legal instruments no longer as an immorality or an offense against family values, but as violence against the offended person and a serious violation of human rights.

What seems interesting to explore while approaching these two *social problems* is that, while they are constructed as some of the most serious violations of human rights – or violence that a person can be submitted to in the field of sexuality – *consent*, namely, the main criterion used at present to define sexual violence and offenses, loses all its importance and authority in the definition of both *child sexual abuse* and *trafficking in persons*. The central notion capable of dissolving the political, legal and symbolic value assigned to consent, in both cases, is the polysemous and slippery category of *vulnerability*.

Discussing the new interfaces between gender, violence and eroticism, Maria Filomena Gregori (2014:53) calls attention to what is at stake in the tension between these two terms: “on the assumption that the structure of the rights society in which we live is formed by the relationship between very unequal subjects (...), *consent* is certainly much more complex and difficult to be determined”. Suggesting that the contractual form of a relationship is not able to undo the social risks of sexual practices that play with power asymmetries, *consent* and *vulnerability* also appear in a complementary manner in the author’s argument, as a

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<sup>5</sup> While contemporary politics concerning *trafficking in persons*, represented as a paradigm of *modern slavery*, evoke the campaigns against so-called *white slave traffic* of the early 20th century (Pereira, 2005), the campaigns against child sexual abuse originate at the intersection of the fight against child abuse, led by American pediatricians in the 1960’s, and anti-rape and sexual domestic violence led by feminists, in the same period. These two movements came together in 1975, giving rise to a new political agenda around *child sexual abuse* (Hacking, 1992), which in the 1980’s was captured by conservative groups from the idea of *sexual perversion* or *pedophilia* (Jenkins, 1998).

contemporary analytical alternative to the pair *pleasure* and *danger*, which hitherto prevailed in her works about the so-called limits of sexuality.<sup>6</sup>

This argument is not distant from some feminist criticisms of the concept of *consent*, theoretically conceived as one of the main pillars of liberal democracy and its contradictions (Pateman, 1980). Comparing the arguments of the British political scientist Carole Pateman and the American jurist Catharine MacKinnon, Flávia Biroli (2013:130) synthesizes these criticisms in the following terms: “the question is whether there is genuine consent, autonomously defined, when preferences and choices are defined in asymmetric contexts, amidst relationships of oppression and domination”. It is in this concern that, despite apparently evident and clear, this notion, which has become a key concept in feminist debates at the end of the 20th century, is marred by opacities and ambiguities, as the French philosopher Geneviève Fraisse (2011) remarks. Analyzing the trajectory of the concept in the Western political and philosophical thinking, the author draws attention to the double meaning of the word *consent*: freedom, agreement, and compliance, on one side, but also subordination, acceptance, submission and acknowledgement of an established authority, on the other.

Throughout this article, I make an attempt to analyze the complementarity and tensions between the concepts of *consent* and *vulnerability* in the contemporary political and legal scenes, from the rapprochement of some aspects of the definition and management of *child sexual abuse* and *trafficking in person for sexual exploitation*. My premise is that these terms should not be understood and treated as self-evident, but as social and political constructs associated with distinct categories of subject, formulated in a specific historical and cultural context.

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<sup>6</sup> In the author’s words: “in an earlier time and within the framework of feminist contributions, pleasure and danger were a convention with a significant analytical profitability. Now a days, it is important to recognize the displacement to problematizations concerning consent and vulnerability” (Gregori, 2014:53).

In the next section I examine the prerequisites for *free consent* and, therefore valid, as well as the model of subject that corresponds to this notion. Then, I explore the ambiguities and the power of the concept of *vulnerability* and some ways in which it makes it possible to deconstruct the centrality of *consent* in social and legal regulation of sexuality and will in relationships traversed by inequalities of power. In the end, I intend to expose some political and ethical dilemmas that are at play in the definition of violence and the construction/deconstruction of the idea of victimization.

### **Consent and the autonomous subject of liberal thinking**

The definition of *consent* in liberal thinking can be understood as an act of will and, at the same time, as a competence to freely exercise one's will. Thus, the capacity to *consent* presupposes the idea of individual autonomy, of which self-control is a prerequisite, that is, a *self* that is free from coercions or constraints and able to rationally govern oneself. *Consent* can be defined, therefore, as a "decision of voluntary agreement taken by a subject endowed with the capacity of agency, reason and free will" (Lowenkron, 2007:735), and who corresponds to the idea and ideal of the autonomous subject of the liberal philosophy and ideology.

However, this modern subject is not born autonomous, it is necessary to make them so and, thus able to freely exercise their will. It is not my intention here to enter the broader field of philosophical and political discussion about the complex notion of autonomy.<sup>7</sup> However, it is worth noting that, according to Renault (1989:84), autonomy is linked to a self-imposed law, or self-determination, which, according to the author, is different from the idea of freedom without rule and opposes the heteronomy, that is, the law of the other. In other words, it is a conception of the

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<sup>7</sup> I thank Maria Filomena Gregori whose comments led me to include this caveat.

human agent as a source of his or her own rules and laws, such as “moral source”, in Taylor’s (2005) terms.

This means that the construction of the autonomous individual implies, first and foremost, the constitution of a moral subject, self-disciplined, in such a way that the rules do not oppose the will of the subject<sup>8</sup>, but, rather constitute it. To Foucault (1997:172), the individual is undoubtedly the fictional atom of an ideological representation of society; but the individual is also a reality made by this particular technology of power called “discipline”. In this sense, the paradox of modern subjectivity lies precisely on the fact that the liberal subject is constituted from a process of subjection to the norms (or standards) that define the subject as a free and autonomous individual. Freedom is normative to liberalism, as Mahmood (2006) asserts.

Hartman presents a paradigmatic example of this process of subjectivation/subjugation that produces the modern subject, describing “the forms of subjection engendered by the narrative of emancipation” (Hartman, 1997:130). The author shows how the abolition of slavery in the United States required the formulation of a disciplinary apparatus to help the newly free(d) subject in the transition from slavery to freedom or a condition of property of another to the condition of a self-possessed subject. That is, it was not enough to free them of the condition of slaves, it was necessary to teach them to exercise their freedom in accordance with the principles of liberal individualism and the ethics of capitalism. As the blacks had never worked in conditions of consent and contract, it was necessary to train them in accordance with the principles of self-discipline and responsibility that their new condition of “free workers” required.

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<sup>8</sup> Will and urges and desires should not be confused, since the latter should be dominated by the reason so that the will may be considered autonomous, as suggested by Taylor (2005), writing about Plato’s moral doctrine as presented in the Republic: “we are good when reason rules, and bad when we are dominated by our desires” (id.ib.:155); “what we gain through thought or reason is self-mastery. (...) To be master of oneself is to have the higher part of the soul rule over the lower, which means reason over the desires” (id.ib.:156).

While on the philosophical and ideological levels, the idea of an autonomous *self* has been defining the notion of person in modern western societies since the Enlightenment, on the sociological and political levels, though, it is important to realize the uneven distribution of capabilities that ensure the exercise of freedom in the liberal democratic societies, including the ability to *consent* – with sexual activities or any other activity (Waites, 2005). It is not by chance that several feminist theorists have criticized the liberal notion of autonomy<sup>9</sup>, according to Mahmood (2006). To the author, while the first criticisms drew attention to the masculinizing reasoning behind the ideal of autonomy, later reflections attacked this ideal because of its emphasis on the atomized, individualized and outlined characteristics of the *self* at the expense of its relational qualities.

Other theorists also denounced that rational thinking ensures its authority and universal coverage through the deletion of all that is physical, feminine, emotional, non-rational and intersubjective. Finally, a more radical attitude criticizes autonomy in the context of a broader challenge posed by the illusory character of the rationalist, autonomous and transcendental subject presupposed by the enlightened thinking, in general, and by the liberal tradition, in particular (Mahmood, 2006:130).

An interesting criticism is also presented by Priscilla Alderson (1992) exploring issues related to the *consent* of children in the field of health. As well as rejecting biological theories based on developmental psychology to invalidate the *consent* of children, she criticizes the autonomous subject of the Enlightenment philosophy, arguing that the characterization of a *rational autonomy* as socially decontextualized and impenetrable to emotions does not reflect the situated character of ethical decision-making (Alderson, 1992 *apud* Waites, 2005).

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<sup>9</sup> It is worth noting that the approaches about the notion of autonomy in feminist theory are quite heterogeneous. For a discussion of the topic in the field of political science, see Biroli (2013).



As we have seen, “in Western societies since the enlightenment, particular forms of competence associated with the intellectual capacity to reason and exercise of free will have been valued” (Waites, 2005:19). As regards *consent*, this capacity can be construed from the Platonic inheritance, being associated, at the same time, with the “a power to see things aright and a condition of self-possession. To be rational is truly to be master of oneself” (Taylor, 2005:157). According to Waites, “this context implies that the characteristics attributed to certain social groups have been systematically linked to the kind of action which consent has been imagined to be” (Waites, 2005:19).

### **Vulnerabilities and the deconstruction of the centrality of consent**

Based on the assumptions of the concept of *consent* stated above, it is possible to understand why some people will be considered capable to *consent* freely, while others will not. *Consent* is only considered truly free and, therefore, valid in relation to the subjects considered autonomous, that is, rational and masters of themselves. After this brief and general presentation of how the autonomous individual is constituted and defined in the liberal ideology, I now proceed to analyze two types of legal regulation of sexuality in which *consent* is not considered valid, and therefore irrelevant to define violence. Subsequently, I attempt to investigate different ways in which the notion of autonomy can be deconstructed and reconstructed inside this political and legal paradigm.

In sexual interactions with children up to a certain age, the violence is recognized regardless of the presence or absence of *consent*, as is the case in article 217 of the Brazilian Penal Code, which defines the crime of *rape of vulnerable* as “having carnal conjunction or practicing other libidinous act with a minor under 14 (fourteen)”. Here, it is worth mentioning that any sexual practice with a minor under the age of 14 corresponds to the crime of rape, i.e. sexual intercourse not consented and, therefore, to a

*sexual assault*. This means that up to a certain age, the minor is *objectified* and never accepted as a *subject* in a sexual intercourse (even if the specific age defined by law can be a matter of controversy). That is, a minor's will and agency are not considered legally valid and, therefore, are liable to tutelary guardianship. Important to note that the tutelary action is not taken as an oppression to will, but as a "tender loving government", as in Vianna (2002), whose legitimacy is extracted from the moral commitment to protect those who are not considered capable of self-government.

The first paragraph of the Article that defines *rape of vulnerable* also states that:

anyone who practices the actions described in the caput with someone who, due to illness or mental impairment, does not have the necessary **discernment** of the practice of a (sexual) intercourse or that for any other cause, cannot offer **resistance** incurs the same penalty (emphasis added).

Interesting to note that, in this criminal type, *vulnerability* is associated, in addition to minority, to mental illness or inability to offer resistance.

Thus, it is possible to suggest that *vulnerability* is understood both as a natural incapacity that hinders discernment (ability to reason), considered necessary for the decision of having a sexual intercourse, and as a relation of asymmetry that would lead to the contamination of the autonomy of will by reducing the capacity of agency, conceived in liberal thought exclusively from the idea of free will (Ahearn, 2001), or from the binomial dominance/resistance (Mahmood, 2006).<sup>10</sup>

Articulated in the same Article to these two other forms of *vulnerability*, minority can be understood simultaneously from the

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<sup>10</sup> The author draws attention to the fact that there is also agency in the submission or incorporation of norms. She suggests, that agency "is not simply a synonym for resistance to relations of domination, but (...)a capacity for action that specific relations of subordination create and enable" (Mahmood, 2006:123).

naturalized notion of childhood, considered as a phase of life associated with the notions of fragility, innocence, irrationality and pre-logicism (Ariès, 1981), and as a category of relational subordination which conjures majority as a counterpoint and emphasizes the position of these individuals in terms of the law or of authority (Vianna, 2002). It is worth noting that in other sexual conducts associated with the notion of *sexual exploitation*, such as prostitution and pornography, the *age of consent* in Brazil is higher (18 years). However, for the sake of the aim of the present paper, such differences shall not be discussed.

My interest is to point that *minority* is an important element to nullify *consent*, being represented as a form of *vulnerability* that serves to deconstruct the autonomy of will as a result of a biological and social immaturity (or cognitive and moral), and of a condition of social inequality (although transitory). In this sense, *minority* and *vulnerability* appear both as individual attributes or properties that imply the inability of discernment and as relational categories that evoke the idea of subordination and asymmetry.

It is also important to note that, on the one hand, the *age of consent* (or *sexual minority*) defined in legal text is relatively stable, that is, the age criterion is defined as a fixed component for the presumption of inferiority of power and inability of discernment and, therefore, of valid *sexual consent*, on the other hand, Falk Moore (1978) emphasizes, the legal order should be seen as an active process and not as a fixed system. Hence the importance of analyzing how the legal codes are handled and converted into decision making in the face of specific cases. On this level, what appears in law as an absolute criterion—the *vulnerability* and the inability of those under 14 years to *consent* to sex—is sometimes relativized based on different arguments (Lowenkron, 2007; Ferreira, 2015). In a previous article, analyzing a judgment of the Supreme Court (1996 *apud* Lowenkron, 2007) of a case of rape with alleged

violence of a 12-year old youth<sup>11</sup>, or “*rape of vulnerable*” in today’s jargon, I suggested:

The sexual minority does not depend exclusively on the chronological age - based on a system of dating (Debert, 1998) – to be constructed and deconstructed. Instead, it is associated with a complex of matching factors, including the examination of the behavior and personality of the actants, the assessment of the kind of relationship and social distance between the “minor” and the “adult” involved in the sexual act, and the analysis of the context in which the relation happened (Lowenkron, 2007:739-740).

In the case examined, the magistrates who voted for the acquittal of the accused emphasized either the mature appearance and early sexual experience of the young girl –“that who, considered devoid of innocence, was referred to as a 12-year-old woman” (Lowenkron, 2007:738) –, or the absence of other asymmetries besides age that could configure intimidation and the contamination of the will.<sup>12</sup> Once again, *vulnerability* is represented, on the one hand, as individual attribute, in this case, less cognitive than moral (purity and innocence), and on the other, as a relational category (asymmetry).

Having had her purity, innocence and fragility mischaracterized, the minor was devoid of the attributes associated

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<sup>11</sup> Before the Law 12.015 of 2009, the Criminal Code prescribed that violence be presumed in rape against a minor of 14. The rule was object of criticism by some scholars who argued the unconstitutionality of the presumption as well as jurisprudential divergence regarding the absolute or relative character of presumption. The legislative amendment, however, did not drive away the controversy, because now the debate is about the relative or absolute character of vulnerability, especially in cases of adolescents between 12 and 14 years” (Castilho, 2013:138).

<sup>12</sup> “According to Resek [a Minister of the Brazilian Supreme Court, in his decision]: *in a different situation it might be possible to interpret that there was some sort of intimidation [...] were not the defendant a young laborer as simple as the victim in all respects except for her minority*” (Rezek, 1996 *apud* Lowenkron, 2007:737).

with the modern ideal of childhood. However, what is being negotiated in this process of relativization of the law that defines the *age of consent* is not the idea that children are unable to consent to sex with adults, but the delimitation of an age from which early childhood ends, as well as the classification of specific subjects as children. There is a moral requirement to match the ideal of childhood to be legally recognized and protected as a child.

In the case of minors, the inability to *consent* and the consequent legal guardianship of will seem to be easily justified and naturalized according to the “peculiar condition of children and adolescents as persons in development” (article 6 of the Statute of the Child and Adolescent). As for behaviors involving adults, the invalidation of *consent* appears to be even more controversial. Still, there are cases where, even if it is not possible to claim a “natural” incapacity, like that of children and the mentally ill, the *consent* of an adult can be considered “vitiating” and therefore invalid.

The Article 171 of the Brazilian Civil Code (2002) provides some hypotheses of *vitiating of consent* that might annul a legal business, such as: error (deceit), fraud (error intentionally provoked), duress (physical or moral constraint), state of danger (overly onerous obligation assumed by the need to save oneself or a member of one’s family from serious damage known by the other party), and injury (disproportionality of benefits of the contract at the expense of the inferiority – extreme necessity<sup>13</sup> or inexperience – of the injured party<sup>14</sup>). Let us consider, however, how the idea of *vitiating consent* is also present, in some way, on the legal regulation of will under the criminal law.

In Brazilian law, *consent* is not taken into account in the characterization of the offence of *international trafficking in persons for sexual exploitation*, defined in art. 231 of the Penal

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<sup>13</sup> “The need must be related to impossibility to avoid the contract, which is independent of the financial situation of the victim” (Nevarés, 2003:287).

<sup>14</sup> There is also the “fraud against creditors”, not applicable here.

Code as – “promoting or facilitating the entry in the national territory, of someone who will engage in prostitution or other form of sexual exploitation, or the exit of someone who will exercise prostitution abroad” – nor in *domestic trafficking in persons for sexual exploitation* (art. 231-A), which refers to displacements within the national territory. Inability of discernment and constraint appear just as aggravation, since the penalty is increased by half if the victim is under 18 years or someone who, due to illness or mental disability, does not have the necessary discernment into the practice of the sexual intercourse; if the agent has a relationship of authority and/or intimacy that produces legal and/or moral obligations of care and protection in relation to the victim<sup>15</sup>; or if there is use of violence, serious threat or fraud.

The articles in the Brazilian penal code that define national and international trafficking in persons have been widely criticized both because they do not include other activities in which people can be exploited besides prostitution – or other forms of sexual exploitation – and the fact that the *free consent* of those moving out or within the national territory to work in prostitution does not exclude the crime.<sup>16</sup>

More generally, one can say that these criminal types are criticized for not following the more “modern” definition of *trafficking in persons* established in the Protocol supplementing the United Nations Convention against Transnational Organized Crime concerning the Prevention, Suppression and Punishment of Trafficking in Persons, especially Women and Children, known as the Palermo Protocol, which was ratified by the Brazilian

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<sup>15</sup> I am referring here to the item III of art. 231 of Criminal Law: “If the agent is ascendant, stepfather, stepmother, stepson, brother, spouse, companion, tutor or curator, legal guardian or employer of the victim, or if there is, by law or otherwise, obligation of care, protection or surveillance”.

<sup>16</sup> “If a Brazilian woman working in prostitution abroad has the help of someone to purchase her ticket, she does not commit a crime, but the one who lends the money, knowing the purpose, commits the crime of trafficking. The free consent does not rule out the crime” (Piscitelli, 2010:373).

Government in 2004.<sup>17</sup> Therefore, it is interesting to analyze more carefully this other definition that is more widely accepted and valued in political and academic discussions about the topic and that has guided the Policy and the National Plan for Confronting of Trafficking in Persons since 2006. According to the Protocol (UN, 2000), for *trafficking in persons* shall mean:

The recruitment, transportation, transfer, lodging or the accommodation of persons resorting to threat or use of force or other forms of coercion, abduction, fraud, deception, **abuse of authority or the situation of vulnerability** or the delivery or acceptance of payments or benefits to achieve the consent of a person having authority over another **for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation**, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs; (art. 3, emphasis added).

The Protocol also provides for, in the 3<sup>rd</sup> art., that: "the *consent* given by the victim of trafficking in persons for the purpose of any kind of exploitation described in subparagraph (a) of this article **shall be considered as irrelevant if it has used any of the means referred to in subparagraph (a)**" (art. 3, b, emphasis added), or if the crime is practiced against minors under 18 years, whose consent is always considered invalid as has already been

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<sup>17</sup> However, as Castillo points out (2008:118), "adapting our law the parameters of Palermo can be a solution to discourage the pursuit of prostitution, but it can also be a reinforcement for the anti-migration policy adopted by the target countries and the reduction of protection for people who go abroad to work in prostitution. It means to decriminalize the recruitment of people older than 18 years who, validly, consent to engage in prostitution abroad. The Brazilian authorities will not consider them possible victims of the crime of trafficking and, if they are held in foreign countries, they will not count with the assistance and protection provided for in art. 6 of the Protocol, with the possibility to remain in foreign territory temporarily or permanently. In many cases, they will be considered smuggled migrants".

discussed. It is observed that the *consent* is invalidated in the Protocol in cases where it is not considered truly **free**, approaching the chances of *vitiated consent* for acts of civilian life exposed above (coercion, error, fraud, state of danger and injury). Thus, in comparison with the Criminal Code, in addition to the diversification of the activities in which the trafficked people can be exploited, the Palermo Protocol shifts the focus of moral condemnation of prostitution itself to the broader theme of violence or coercion.

After all, to characterize the *trafficking in persons* in accordance with the Palermo Protocol, in addition to the different acts mentioned (recruitment, transportation, transfer, lodging or accommodation of people), it is necessary that other two criteria are met: the **means** and the **end**. That is, there must be the use of some kind of *coercion* capable of preventing or contaminating the free exercise of the will of the person who is displaced and that the shift aimed at some form of exploitation of that person. However, as highlights Piscitelli (2010:368), “the notion of exploitation seems to have sharper edges when it comes to activities outside prostitution because it is associated with the idea of forced labor, slavery, servitude”. According to the author:

The Palermo Protocol assumes a position of apparent neutrality as regards the debate about prostitution, obtained at the expense of the lack of precision regarding the terms of crucial importance to delimit trafficking situations. (...) The lack of precision would be effect of the lack of agreement of the Government delegates, who lined up in one or the other position (Piscitelli, 2010:368).

The author refers to positions that define the commercial use of sex as an activity essentially degrading and a form of exploitation per se (abolitionist perspective), and others who argue that the exploitation depends on the conditions in which this activity is carried out. Consequently, *sexual exploitation* is an expression on which there is no agreement in the debate, opening gaps for diverse interpretations. In this context,



the issue of *consent*, that is, the question if trafficking should be defined by the nature of the work or the use of deception and coercion, represents, then, the controversial element crucial in the negotiations (Ausserer, 2007:43).

The definition of *coercion* is also controversial, since it includes not only the use of physical force or threats, but also the *abuse of authority or of a position of vulnerability*. The ambiguities in relation to notions of *vulnerability* and *abuse of power* acquire particular relevance in approaches concerned with the vision of people from poor regions of the world, particularly women (Piscitelli, 2010:369), because it makes young women from third world countries, by articulating different *vulnerability factors* (gender, age, social class and nationality), be construed as privileged locus of “passivity” and therefore the “victimization”.

From an evaluation in which important concepts of the Palermo Protocol were too ambiguous and might not be understood and used properly by the operators of that instrument in the States – parties, the United Nations Office on drugs and Crimes (UNODC)<sup>18</sup> recently released two documents to assist the application of the concept of *abuse of a position of vulnerability*: a paper and a guidance note on the subject (UNODC, 2013 and 2012). The first is a more complete study and, second, a practical guide. In the most comprehensive article, which refers to the history of the drafting of the Protocol, it is claimed that the concept was included at the last minute, and that informal sources suggest that the goal was to ensure that all resources, including the more subtle ones, by which an individual can be displaced, placed or kept in a situation of exploitation could be captured. In addition, the inclusion of the term would have served to make a consensus

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<sup>18</sup> UNODC is the custodian of the United Nations Convention against transnational organized crime and its supplementary protocols (trafficking in persons and smuggling of migrants), being tasked to support States parties in the implementation of these (UNODC, 2013:9).

about how the question of prostitution would be treated in the Protocol.

Based on documents formulated during the drafting of the Protocol, the study states that the official guidance about the use of this concept defined that *abuse of a position of vulnerability* should be understood as “any situation in which the person involved has no real and acceptable alternative to not be subject to abuse in question” (UNODC, 2013:3). It is possible to suggest, therefore, that the concept of *vulnerability* is linked here less to an the intrinsic attribute of persons and groups than to a **situation** that contextually makes a person offer resistance to the abuse or exploration – which, as mentioned above, is the only recognizable mode of agency, in liberal thought, for those who occupy a position of subordination or inferiority.

However, the inability of resistance, according to this definition of *abuse of a position of vulnerability*, seems to derive less from an asymmetry between the agent and the victim than the absence of “real” and “acceptable” alternatives. Thus, the invalidation of the victim’s *consent* seems to be linked, according to this definition, to the alleged impossibility of exercising the *free will* (since there are no real alternatives of choice allowing the person to act in some other way), one of the fundamental conditions for the recognition of the *autonomy of the will*. A matter that is open in this definition is: from whose point of view should the alternatives be “real” and “acceptable”? From the person’s subjected to abuse, from the bureaucrat’s who evaluates the situation, or from the point of view of the regulatory parameters defined in international human rights instruments or national laws that incorporate these guidelines?<sup>19</sup>

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<sup>19</sup> When defining the crime of *reducing someone to condition analogous to slavery* not only for forced labor or for limiting the freedom of locomotion of the worker (through debt, appropriation of documents or overt surveillance), but also by extensive working hours and degrading working conditions, article 149 of the Penal Code defining the parameters of “unacceptable” and, therefore, of what is not part of the official range of alternatives that would make up the notion of freedom of choice. The activity of prostitution is in an ambiguous condition

Analyzing unofficial documents produced about this concept, the UNODC's work group that elaborated the study considered that the previous researches and guides were more concerned with diagnosing the *vulnerability factors* than providing guidance about how to check if there was in fact an abuse of a characteristic or particular situation of the victim as a means to engage her for the purpose of exploitation. However, this study, like the previous ones, proposes a list of *vulnerability factors*, which are understood as attributes that make it possible to identify those who may be at risk so as to intervene preventively and pedagogically – often from a “political pedagogy of fear” (Lowenkron, 2015).

As Castilho (2013) recalls, the Protocol itself will indicate (in article 9, item 4), some factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and inequality of opportunities. Mapped *vulnerabilities* in the study conducted by UNODC, in turn, are: age (youth and, to a lesser extent, old age), irregular migratory status (including threats to report this information to the authorities), poverty, insecurity, illness or physical and mental disabilities, gender (usually feminine, but also transgender), sexuality, religious and cultural beliefs (especially, juju and voodoo), linguistic isolation, absence of social networks, dependency (in relation to the employer, family member etc), threatening to reveal information about the victim to family or other people, and abuse of emotional/romantic relationships (UNODC, 2013:16).

From a tautological argument and a methodological individualism, it is as if, when mapping the different attributes of individuals identified in situations recognized as *trafficking in persons*, it was possible to diagnose, predict and generalize *vulnerability factors* that intrinsically favor this strange provision to

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between the acceptable and the unacceptable, both in national legislation (in which prostitution is officially recognized as an autonomous profession, but one cannot exploit prostitution) and the international legal instrument that defines the “trafficking in persons”.

submit to an “exploitation”, or that define those who supposedly would be at greater risk of victimization. However, as authors who defend analytical approaches and/or intersectional policies (Brah, 2006; Piscitelli, 2008b; Cho, Crenshaw; McCall, 2013)<sup>20</sup>, you have to realize that these attributes only acquire meaning in social, situational, and specific relational contexts, which are not restricted to dyadic criminal/victim relationships or exploiter/exploited, on which anti-trafficking policies focus their intervention efforts.

Let’s see how the concept of *vulnerability* was developed, however, in more sophisticated ways than in the Protocol and the UNODC documents, by authors who claim that this is a central notion within the human rights paradigm. In the legal field, Abramovay *et al* (2002:29-30) suggest that three elements are articulated in the formation of *situations of vulnerability* of individuals and groups: i) symbolic or material resources (also called active); ii) the structures of social, economic and cultural opportunities offered by market, State and society; iii) and the strategies of use of assets. In the area of health, Ayres *et al* (2012)<sup>21</sup>, writing about on the emergence of this concept – which was developed as an alternative critic of the idea of “risk groups” in the context of HIV/Aids policies formed around the idea of citizenship and human rights paradigm – suggest differentiate three dimensions of *vulnerability*:

- i) *individual*, always as intersubjectivity, namely, as personal identity permanently built in interactions I-other; ii) *social* always as **interaction context**, i.e. how the spaces of concrete experience of intersubjectivity, traversed by norms and social powers based on political organization, economic structure, cultural traditions, religious beliefs, gender relations, race relations, generational relations etc; iii) *programmatic* as forms of institutionalized interaction, that is, as a set of policies, services and actions organized

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<sup>20</sup> I am grateful to Regina Facchini for the suggestion to incorporate the discussions about intersectionality into the reflection about vulnerability.

<sup>21</sup> I am grateful to Laura Murray for suggesting this reading.

and made available in accordance with the political processes of the various social contexts, **citizenship** standards effectively operating (Ayres *et al.*, 2012:13, italics added and emphasis in the original).

These models of conceptualization allow you to re-think the *vulnerability factors* often associated with the *trafficking in persons* from a different perspective than the way in which it appears in the Palermo Protocol, in the UNODC orientation and in the design of various actors that manage the political-administrative anti-trafficking actions. Shifting the focus from individual attributes to the relational dynamics, the social context and the material institutional and symbolic supports, these analytical perspectives allow you to understand *vulnerability* associated with an irregular migratory situation, for example, not as a factor *per se*, but as an effect of repressive migration policies and the absence or weakening of economic and social and economic support networks to these immigrants. The same occurs with gender and race/ethnicity, which only become *situations of vulnerability* in sexist and racist contexts, as in Castilho (2013).

A politically strategic form of (re)essentialization of the term, however, can be observed in the work of the American philosopher Judith Butler (2010). The idea of *vulnerability* appears articulated with concept of *precariousness*, but it is not used to refer to an attribute of particular subjects, constituted from any kind of relationship of inequality and opposition to a human being supposedly generic (male, rational, adult and autonomous). Reversing the idealized image of the generic man of the human rights, formed in accordance with the liberal paradigm, the author suggests that the *vulnerability* is what defines the human condition itself, because we are social beings and due to the open, relational and (inter) dependent character of our bodies, what makes us exposed and susceptible to the action of others.

Once individuals depend on the support of institutions and of a social world to exercise their self-determination (Butler, 2006:21) and as life requires affective and material conditions to

become livable, some individual and collective bodies can become (historically and situationally) more vulnerable and precarious than others. Therefore, for this author, *vulnerability* and *precariousness* are not understood as essential properties of some bodies, but as intrinsic properties of any bodies, that can be maximized when these bodies are subjected to a “politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence [including arbitrary State violence] and death” (Butler, 2010:46).

On the other hand, the UNODC study, more concerned with the identification of criteria that serve as a basis for the criminalization than with the understanding and prevention of social vulnerabilities, insists on socially isolating the exploiter/victim dyad.<sup>22</sup> Thus, it suggests separating the *vulnerability factors* that are “intrinsic” to the victims (such as age, gender, disease and poverty) and others that can be created by the exploiter in order to increase control over the victim (such as isolation, dependence and irregular legal status). The study also stresses that it is important to differentiate the *vulnerability factors* that make a person more susceptible to the trafficking situation in which there was in fact an abuse of this situation of *vulnerability* as a means to practice the crime. In the criminal prosecution, proving the existence of the vulnerability would not suffice, but also proving that there was an intentional abuse of this condition by the agent.

The guidance note prepared by UNODC stated that the abuse of the *situation of vulnerability* must be serious enough to invalidate the *consent* of the victim (UNODC, 2012:4). It highlights that the existence of a *situation of vulnerability* could be an indication that there has been an abuse, but it is not sufficient to characterize the crime. For a *situation of vulnerability* to invalidate

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<sup>22</sup> As Varela highlights, “the paradigm of victimization maintains a debt with the logic of the penal system whose risk is always a translation of a social situation that articulates several conditions of subordination to a single and rigid relationship between victim and aggressor, understood as subjects endowed with precise intentions” (Id, 2013:280, author’s translation).

the *consent* of the victim, it is necessary to prove that the perpetrator took advantage of this vulnerability intentionally, so as to traffic that person for the purpose of exploitation.

The characterization of *abuse of a situation of vulnerability* also requires, according to the UNODC's guidance note, that the vulnerable person believed that submitting to the will of the offender was the only real and acceptable alternative available, and to be reasonable that she/he believed that in the light of the situation, taking into account its characteristics and personal circumstances. Note, therefore, that, despite being based on the orientation of policy makers of the Protocol, in this new formulation, the delimitation of the existence of "real" and "acceptable" alternatives is based largely on the vulnerable person's own beliefs and values. However, it is up to the operators of the norm to judge if that person's belief was *reasonable*, taking into account characteristics and personal circumstances. Since the *abuse of a position of vulnerability* can serve to nullify the *consent* of the victim, even when this is not recognized as such, one of the risks of the concept pointed by the UNODC study (2013) is that, in the countries in which any form of prostitution is understood as "exploitation", this criterion can be used to categorize all the people working in the sex industry as victims of trafficking and all those involved in this business (pimps, owners and managers of brothels, etc.) as traffickers. The effect of that, according to the study, can be either to decrease the agency of supposedly *vulnerable people* or to exclude from the condition of victim people who are not supposedly *vulnerable*.

In my fieldwork within the Brazilian Federal Police, from the analysis of how the officers define *trafficking in persons*, it is possible to recognize these two movements concomitantly. On the one hand, in police investigations, those who are involved in the process of the recruitment, transport and accommodation of people who go abroad to work in prostitution are considered criminals. Therefore, people who are recruited and displaced (almost always young women and transsexuals over the age of 18) are formally considered to be *victims* of the crime of *trafficking in*

persons, regardless of *consent* or working conditions, even if, they do not recognize themselves as such (as often occurs). Because of that, people with little or no possibilities of access to certain material and symbolic goods may have their geographical, social and imaginative mobility hindered (Togni, 2013), and their will immobilized – whether in the search for a better remunerated activity, or the possibility to travel and know the world, or, even, the chance to find a husband abroad in the transnational sex markets (Piscitelli, 2013).

On the other hand, in the officers' discourse, *trafficking in persons*, in the sense of a violence and a violation of human rights<sup>23</sup>, does not exist, because, they say, the trafficked person is neither forced nor cheated, and they go because they want and they know they are going for the purpose of prostitution. "They are, in a way, accomplice to the crime", summed up a commissioner, suggesting that the alleged victims actively contribute to both the practice of the typical fact (the displacement for the purpose of prostitution) and the impunity of the criminals. However, when the *agency* of the person formally considered "trafficked" is recognized, elements such as the collection of large debts leading to curtailment of freedom, and the intimidation suffered are no longer understood as situations of exploitation and violence. Therefore, they become not only unimportant for the configuration or not of the crime, but also insufficient to awaken feelings of compassion that ensures the privileged access to protection by law, for example, to obtain humanitarian visas<sup>24</sup> (Fassin, 2002).

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<sup>23</sup> Piscitelli (2008) highlights the importance of distinguishing the notions of crime, violence and violation of human rights to understand the different conceptions of *trafficking in persons*, resuming an article by Guita Grin Debert and Maria Filomena Gregori (2008), in which the authors reflect on the difference between the first two terms. For an analysis of these distinctions in the police context, see Lowenkron (in press).

<sup>24</sup> According to article 7 of the Palermo Protocol, about the "status of victims of trafficking in persons in the host States", "(...) each State party shall consider the possibility of adopting legislative or other appropriate measures that permit



Thus, when the passivity and the innocence of the victims of *trafficking in persons for sexual exploitation* cannot be characterized, these people are deprived of the moral attributes associated with the notion of *vulnerability* that embodies the ideal and idealized victim of this crime. This suggestion meets Doezema's critics (1998)<sup>25</sup>, in which the exaggerated emphasis on the dichotomy between "forced" and "voluntary" prostitution, so important politically to assert the right to self-determination of sex workers, more recently has served to create a division among morally innocent and guilty prostitutes – the "Madonna" and the "Whore". In the context of the contemporary global policies concerning *trafficking in persons*, she suggests that, in order to claim the status of *victim* and, thus, have access to guaranteed protection by human rights policies, a woman must prove her *innocence*, that is, that she was deceived or economically forced into prostitution.

The author shows that this type of discrimination and moral hierarchy among sex workers is wickedly associated with the liberal paradigm that emphasized the distinction between "voluntary vs forced" prostitution as a means to combat conservative policies based on the abolitionist model. It is possible to suggest that in the contemporary grammar of human rights the concepts of *consent* and *vulnerability* constitute the new guise of

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victims of trafficking in persons to remain in its territory, temporarily or permanently, if appropriate". The second paragraph complements: "when executing the provisions of paragraph 1 of this article, each State party shall have due regard to humanitarian and personal factors". In Brazil, this guidance was incorporated not from legislation, but from the normative resolution n° 93 of December 21, 2010, the national immigration Council, which provides that "the foreigner who is in Brazil in situation of vulnerability, or the crime of trafficking in persons, may be granted permanent visa or residence pursuant to art. 16 of law n° 6,815, of August 19, 1980, that will be conditioned for one year. From the granting of the visa referred to in the caput, the foreigner will be allowed to stay in Brazil and may decide voluntarily to cooperate with any investigation or criminal proceeding in progress".

<sup>25</sup> I thank Adriana Piscitelli for recommending the text and for the suggestion of comparison.

the dichotomy between voluntary and forced prostitution in the current model of government of *trafficking in persons*. The first term can be associated with the liberal facet of human rights and the second, to its tutelary dimension.

Although it is not a condition for the formal characterization of the offence of *trafficking in persons* according to the Brazilian Penal Code, the notion of *vulnerability* seems to be the implicit element in the deconstruction of the violence and the severity of the problem on the part of the police officers, to the extent that they emphasize the almost always consensual and valid character of the informal contracts or “deals” (Piscitelli, 2013) established between the “recruiter” and the “recruited”, or between *criminals* and *victims*. *Vulnerability* acquires meaning in this context as a phantasmatic presence. The idea of vulnerable person here appears less as a social disadvantage that limits access to certain material and symbolic goods and, with it, restrains the possibility of choice, than as a moral requirement to correspond to an idealized victim – which often intersects with the prescription of certain gender models<sup>26</sup> – to be truly understood and treated as such.

### **Final Concerns**

Throughout this article I have shown how the fluid category of *vulnerability* has the capacity to deconstruct the centrality of *consent* in the legal regulation of sexuality and will, and in the definition of *violence* (understood as an act which violates not only

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<sup>26</sup> I am referring here to frequent articulation in anti-trafficking policies and campaigns between femininity, vulnerability, innocence, passivity and victimization. Under Kempadoo, “victim, trafficked person and woman become categories that intersect, but are also shuffled” (Kempadoo, 2005:xxiv, author’s translation). Castilho (2008), by analyzing 23 rulings on *trafficking in women* (denomination used in article 231 of the Penal Code until 2005), also suggests that these judgments are guided not only by the pre-established regulatory codes, but also by moral values crossed by traditional conventions of gender and sexuality. In the author’s terms: “the analysis of judicial decisions reveals the subsistence of the conception of women as the weaker sex, and from its traditional role in the family context” (Castilho, 2008:121).

the body, but the interiority of the subject and his/her personal freedom). This capacity is due to the fact that the notion of vulnerability challenges the main elements that characterize the concept of *autonomy*, such as rationality, self-control, free will and responsibility.

A privileged element for the production of the Other of the autonomous subject of the liberal thinking, *vulnerability* is constructed in different ways. It can be understood as individual attribute related to a “natural” incapacity of discernment/rationality, or as a relational category that evokes the notions of asymmetry or inequality of power, articulated to the impossibility of offering resistance, and sometimes as a moral construct associated with the ideal of passivity and innocence as opposed to the ideas of agency, responsibility and guilt.

Considering that *vulnerability* is associated with social inequalities whereas *consent* is linked to the liberal notion of *autonomy*, the major challenges singled out by this analysis, in my opinion, are: how can the notion of *vulnerability* be used as a means to annul the *consent* without, inadvertently, reducing the agency of vulnerable persons who seek options to improve their living conditions? (UNODC, 2013:79). On the other hand, to what extent would a bet on the centrality of *consent* for the definition of *violence* result ultimately in the reification of the ideal of a free subject and master of him/herself, assumed in the notion of *autonomy of will*, of the liberal thought? And would this reification promote, in the last instance, the excessive accountability of those who accept or even contribute actively to the creation and maintenance of their own subordination and exploitation?

In other words, it is possible to recognize *vulnerability* without presuming the ideas of irrationality, innocence and/or passivity as well as imagine the possibility of *agency* without immediately associating it to the liberal political ideal of autonomy or resistance or to legal notions of responsibility and guilt (as suggested by the term “accomplice” used by a commissioner). The main dilemma seems to be, therefore, the difficulty of reconciling the apparently dichotomous rights to freedom and protection of

subjects – like minors considered overly sexualized, or women and transsexuals circulating in the transnational sex markets – who supposedly refuse both things or, at least, do not share the hegemonic meanings assigned to these two terms in official speeches, or in the tutelary forms of government of the so-called *vulnerable* individuals and groups.

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