

Human trafficking: a historical approach to the concept

Tráfico de pessoas: uma história do conceito

Anamaria Marcon Venson*
Joana Maria Pedro**

RESUMO

A categoria tráfico de pessoas é uma proposição jurídica e não uma elaboração sociológica. Inventada no século XIX e retomada no final do século XX, tal categoria ganhou discursividade em jogo com saberes que constituíram a prostituição como um problema. A definição de tráfico disposta no atual Código Penal brasileiro se manifesta em relação necessária com a prostituição. O artigo analisa os modos como a discussão sobre o tráfico encontra lugar e efeito em jogo com a noção de que a prostituição deve ser combatida. A batalha discursiva para dizer o tráfico de pessoas e constituí-lo como um problema funciona como um reforço ao rechaço à prostituição, não protege as pessoas que se inserem voluntariamente no mercado do sexo e acaba, por vezes, sendo cúmplice de exigências internacionais de contenção migratória.

Palavras-chave: tráfico de pessoas; conceito; prostituição.

ABSTRACT

The concept of human trafficking was first introduced in juridical discourse in the nineteenth century and emerged again with great force in the late twentieth century. Initially the concept was used in discourses that saw prostitution as a problem. The current Brazilian penal code still manifests this construction. Focusing on the Brazilian context, this article discusses how the contemporary legal definition of trafficking fails to recognize the rights of people who voluntarily enter the transnational sex market, and is, sometimes, an accomplice to international demands for migration restraint.

Keywords: human trafficking; concept; prostitution.

* Doctoral Candidate, Capes Research Fellow. Universidade Federal de Santa Catarina (UFSC). Programa de Pós-Graduação Interdisciplinar em Ciências Humanas. Centro de Filosofia e Ciências Humanas. Campus Universitário. 88040-900 Florianópolis – SC – Brasil. anamariamarcon@yahoo.com.br

**Universidade Federal de Santa Catarina (USFC), Programa de Pós-Graduação Interdisciplinar em Ciências Humanas. Centro de Filosofia e Ciências Humanas. Campus Universitário. 88040-900 Florianópolis – SC – Brasil. joanamarca.pedro@gmail.com

The image of the trafficking of people has been prominent in the Brazilian media in recent years: four soap operas on the *Globo* television network using traffic for their social merchandising; anti-traffic campaigns; alterations in the Brazilian Penal Code with the intention of repressing the practice; public policies; police forces trained to prevent the trafficking of people have given numerous interviews seeking to explain the phenomenon. People trafficking is a legal concept invented in the nineteenth century which reappeared at the end of the twentieth. This article seeks to provide the concept of traffic used today with a historicity and to think about the political struggles and disputes of interests which have made this phenomenon once again visible and discussable.

In order to problematize the concept of human trafficking, we prefer to use the Foucauldian theoretical arsenal, which suggests the investigation of the discourse which gives visibility to a certain practice and makes it discussable. Applying this methodology to historical research, 'discourse' has a particular technical meaning. It does not mean *what is said*.¹ Discourse here is understood as practice, since it is practice that determines objects and not the contrary; and only what is determined exists, after all, things do not exist outside of practices.² From this perspective, human trafficking, prostitution, and exploitation are practices dated and dimensioned by relations of power, and are not in essence data. We understand relations of power as they appear in Foucault: unstable and subject to reversibility, disputes, conflicts, strategic games through which free people seek to lead and determine the behavior of others.³ According to Foucault, people are not only objects of disciplines, but are also subjects, effects of the modes of subjectification.⁴ We are, thus, dealing with discourses as a practice which forms the objects talked about, and not as set of signs submitted to a content or representation.⁵ It is, thus, not our intention to reveal an interpretation or discover a fundamental rule, but to establish a positivity, since we also produce the objects we focus on. From this perspective, we should note that just as our academic texts are produced within disputes, relations of power, and networks of knowledge, and are strategies, as is legal discourse.

Therefore, we are not concerned here with giving conclusive answers to the problematic we propose, to the contrary, we try to show how understandings of human trafficking are constantly redefined based on different

discourses which attribute them determined characteristics, invest the people involved with moral attributes, explained through social and cultural references, and highlight causes and consequences. Our intention is to show the mechanisms of power present in discursivities which have legitimated the concept of human trafficking stipulated in the penal code, show how knowledge and theories about this question were possible, what space of order constitutes knowledge of this, under what conditions it is possible to explain the motivations for combating this practice, and thinking about what elements of positivity can constitute ideas about trafficking and make it a rationality.

Human trafficking is not a sociological category. It is judicial category which was born within the discursivity of the need for the policing of transnational frontiers. The central theme of this article is historicizing this concept, which irradiates its effects within penal law, to show that it was not just a humanitarian dream which influences this category.

In the middle of the nineteenth century, opposition to the trafficking of black African slaves increased. Alongside this urgency, no more humanitarian than economic, there was added the concern with the *trafficking of white women* for prostitution. Although we can establish relations between these phenomena, it has to be made clear that they are distinct events, as they are motivated by various reasons. The preparation of a category of traffic of white women, in addition to involving a latent racism, was based on a concern with protecting the ideal of female purity.

Prostitution was invented at a time marked by eugenic and evolutionary theories. In the nineteenth century, a landmark in the creation of a sexual science, prostitution was treated as the object of medical knowledge, understood as a disease, as a social deviation. Prostitutes were pushed out of cities, seen as an impediment to civilization and morality. The crossing of borders by prostitution was already discussed at that time.⁶

Moral concerns produced in 1904, in the wake of the discussion about the slave trade in the Americas, the International Treaty for the Suppression of the White Slave Traffic. This was the first international instrument dealing with traffic for sexual exploitation. We found references to an English law from 1885, the *Criminal Law Amendment Act*, which mentioned the trafficking of women for prostitution, but this was not constituted as specific legislation for the problem in question.

In the preamble to the 1904 Treaty, their majesties from the principal empires and western dominions at the time made a commitment to protect women and children from the *White Slave Traffic*. The first article of this document states the fundamental intention of the treaty: governments were to bind themselves to fight the *pursuit of women and children for immoral objectives abroad*. The second article stipulated that each state was to be responsible for vigilance, especially in train stations, ports, and during journeys, of people accused of wanting to put women and children in an *immoral life*. This treaty was part of the specific context of the moral condemnation of prostitution, after all this activity was seen as an *immoral life*. At that time it did not make sense to differentiate the prostitution of women and children, because women had an infantilized social status.

At the turn of the nineteenth century, prostitution was considered a threat to the body, the family, marriage, work, and property, and was understood as a ‘disease’ and became the target of prophylaxis. Prostitutes were persecuted since they were considered obstacles to civilization, to the ‘moral cleanliness’ of the city, for which reason their circulation was to be controlled and their houses removed to confined spaces defined by urban reforms.⁷ Also dating from this time is the invention of the association between women and debility/disease. This notion was in play in the associations between disease and passivity.⁸

The discursiveness which made prostitution a problem was only possible due to the medicalization and the policing of sexuality, while traffic became interlaced with the medical and police discourses invested in the repulse of prostitution. Prostitution and human trafficking, in the form they are re-appropriated nowadays, are coincident inventions. Worries about these practices were not exactly an effect of humanitarian concerns, after all the concept of *human rights* only became discussable decades later.

Brazil signed the International Treaty for the Suppression of the White Slave Traffic and adapted its legislation to the content of this convention. In the original draft of the 1830 *Criminal Code of the Empire of Brazil*, prostitution was not constituted as a problem, though the disqualification of those who exercised the activity was visible. The only reference to this practice is in Article 222 on *rape*, where there is a differentiated punishment depending on whether the crime was committed against an *honest woman* or a *prostitute*. In

the middle of concerns with polygamy, adultery, abduction, offenses against morality and good customs, differentiations between honest, single and married women, the imperial code translate the idea of the prostitute as a public woman, a woman of all, a woman of the street, outside the standards of normative behavior and who do not deserve the same protection as others. However, there is no specific concern with this practice.

Nor in the original draft of the 1890 *Penal Code of the United States of Brazil* do the anxieties about traffic appear. This regulation, prepared at the peak of the Victorian period, maintains the differentiation between honest women and prostitutes, conceiving prostitutes as *public women*, referring to the virginity of the women (though not of men), and makes various references to women's civil status (though not men's).

In Section VIII, "*Crimes against the security of honor and the honesty of families and public outrages against decency*," Chapter III, "*Procuring*," with only two articles, trafficking is mentioned. Procuring was defined as anyone who exercised, favored, or facilitated the prostitution of someone "to satisfy the dishonest desires or lascivious passions" of someone. Next, Article 278 seems to deal with the exploitation of prostitution:

Art. 278. Induce women, whether abusing their weakness or misery, of forcing them through intimidation or threats, to employ themselves in the **traffic of prostitution**; provide them, at their own cost or of others, other their or others responsibility, with assistance, housing and help to derive, directly or indirectly, profits from this speculation:
Punishments – ...

In this article there is a direct association between 'women' and 'weakness,' an association which still has an echo in current legal instruments, as will be shown below. Despite the mention of the 'traffic of prostitution,' there is no definition of what this practice is. Looking through the text, it can be seen that it functions within a logic which conceives women as passive beings: they are excited by someone, educated by someone, guarded by someone, under marital power, induced, abused, weak, restrained, intimidated, threatened. There is nothing in the penal legislation of that time which escapes this logic, which means that to imagine women who voluntarily dedicate themselves to prostitution we must turn to other texts, and not this one.

In 1910, at the height of the moral panics about the trafficking of women, the anarcho-feminist Emma Goldman criticized moralistic legislation against traffic, which for her only served to divert an infantilized and apolitical public and to increase a particular class of state workers (whom she labeled as ‘parasites’) charged with the vigilance of public morality. She mounted her argument by locating prostitution as the fruit of exploitation, an exploitation which covers almost all the forms of labor available for the women of her time. Prostitution was not therefore, a decadent condition, an amoral activity or a case of slavery, but the result of an economic system which offered women few more advantageous options than this venture. She concluded that repressing prostitution would result in increased injustices.⁹ At that time there were already dissident discourses about the judicial pretension related to human trafficking. However, these discourses did not have the same visibility or effectiveness as the stipulations of the Penal Code.

In *Anotações teórico-práticas ao Código Penal do Brasil* by Antonio Bento de Faria, published in 1929, we can find the first concept of traffic in the Brazilian legislation. Before discussing the text of the code, the author explains that *white trafficking* had been studied by the French government, which had held an international conference in Paris, in which Brazil had participated. This conference, presided by the French minister of foreign affairs, resulted in the 1904 International Treaty for the Suppression of the White Slave Traffic, as mentioned above. He explains that the resolutions of this conference were administrative: international vigilance, the extradition of the guilty, and the repatriation of victims. At times the author refers to the intentions associated with what we can read today as a type of ‘humanitarianism:’

Brutal extortions practiced at night, when they demand from their victims the price of enjoying their bodies for the previous 24 hours ... they derive from the body of the woman prostitute the maximum revenue of the previously calculated probable profit which they can daily provide from the enjoyment of their bodies or beauty... women are imported like merchandise and subjected like slaves to the commerce of their own flesh ... they are attracted by promises of advantageous placements, dragged far away from their families, and generally outside of the country, and once they are given to the foreign captains, they are forced there to give themselves to prostitution.¹⁰

It is impossible not to panic reading such virtuous rhetoric. However, the author who speaks to us does not explain how he reached these conclusions. We do not know if it was from personal incursions into the sex market, based on the reports of newspapers, from the fiction of the time, or from a literary reverie eclipsing a private panic. What we do know is that the author is not writing a sociology of prostitution, but a seductive comment to a legal device he wishes to include in his *Annotations*.

However, it appears that the question is more in the order of relations between states than concerns with possible victims of this practice. Furthermore, afflictions about disorder in the model of the nuclear family are much more evident than anxieties motivated by the idea of possible aggressions and violence which the women involved in this practice suffered, 'weak due to their sex,' as the author states. Nor is it considered that many of these women had entered the market voluntarily, since that would involve admitting that there were not victims about whom to a legal discussion could be rehearsed, since prostitutes were understood as offenders of the moral order and victims of their own abnormality. *Weak willed* was a stigmatizing mark applied to women in the nineteenth century. State concerns about traffic, 'a clumsy and shameful industry,' as the author of the comments on the republican code explains, are only justified because they made use of the idea of female weakness.

Law 2942, from 1915, amended articles 277 and 278 of the 1890 Penal Code and included for the first time in Brazilian legislation a type of definition of traffic (perhaps an echo of the 1904 treaty) in article 278, along with article 277. This stipulated that it was a crime "to induce anyone, by deceit, violence, threats, abuses of power, or any other means of coercion, to satisfy the dishonest desires or the lascivious passions of another. Excite, supply, or facilitate the prostitution of any other."

The explanatory comments in the article written by the renowned jurist explained that prostitution was necessarily the "delivery of the [female] body for payment and without choice." The same author, perhaps in a rhetorical slip, explained that "the victims do not accuse [the trader]." What we aim to show here is that these writings about traffic can only be understood if located in a time in which it was believed that women were weak, without any choice, without will; that they delivered themselves, that they did not even make any

denunciations, that they had to be protected by a father, husband, or the state, and that they were easily induced. Those who did not fit into this model of legitimate femininity were understood as abnormal, prostitutes. What was in place in these legislative writings was the security of the family order, eclipsed in the fight against prostitution. Article 278, about *cases of tolerance*, marked concerns with the movement of women to prostitution:

§1º Entice, attract, or misguide, to satisfy the lascivious passions of any other, any woman, whether a minor or not, **even with her consent**; Entice, attract, or misguide, to satisfy the lascivious passions of any other, any woman, whether a virgin or not, using for this purpose threats, violence, fraud, deceit, the abuse of power, or any other means of coercion; to restrain, by any of the means mentioned above, even due to debts, any woman, of age or minor, whether virgin or not, in cases of procurement, forcing her to deliver herself to prostitution:

Punishment – ...

§2º The crimes dealt with in art. 278 and §1º of the aforementioned article shall be punishable in Brazil, even if one or more of the acts resulting from the infractions stipulated have been practiced abroad.

As the commentator of the code explains: “Fortunately for us, we should say now: – the large majority of the exploiters and exploited are not Brazilian.” §2º functioned as a justification to expel foreign prostitutes from the country, the ‘French women,’ as they were usually called. Within the logic that a prostitute was always a victim, either of their moral and physical debility or of some perverse exploiter, any foreign woman who worked in prostitution, whether voluntarily or not and who was not well liked in her circles of sociability could be easily repatriated in compliance with the state function of ‘cleansing’ Brazilian capitals so that the country could finally be accepted in the list of civilized nations.

In 1940 a new Brazilian Penal Code was created by Decree-Law 2848, which entered into force in 1942. It was submitted to a review commission consisting of four jurists: Nelson Hungria, Vieira Braga, Narcélio de Queiróz and Roberto Lira. Section VI dealt with “*Crimes against customs*,” and consisted of six chapters: “*crimes against sexual liberty; the seduction and corruption of minors; kidnap; general dispositions; procurement and the trafficking of*

women; public outrages against decency.” For the first time traffic had gained a specific article.

Although this code did not penalize prostitution, it did have a prohibitory sense for this activity, since it stipulated as a crime *attracting* anyone to prostitution and *facilitating* prostitution (*caput* of article 228), increasing the penalty if this conduct involved violence, serious threats or fraud (§2º) or if there was the aim of making a profit (§3º). The same prohibitory logic appeared in article 229, about *houses of prostitution*, which stipulated as criminal behavior *keeping a place destined for libidinous purposes*, whether or not there was a *purpose to profit from or the direct mediation of the owner or manager*. With this text it is almost impossible to be a prostitute and act within the law. Coherent with the prohibitory logic of prostitution, article 230 invented a definition for *ruffianism*: *taking advantage of the prostitution of others, participating directly in its profits, or supporting oneself from it, in whole or in part, by those who exercise it*. Therefore, a person dedicated to the activities of prostitution was forbidden from making free use of their income: they could only use their money, goods, or benefits for their sole and exclusive subsistence. It is within this prohibitive sense of prostitution that the trafficking women gained for the first time in Brazilian legislation a definition or a concept:

Art. 231. Arranging or facilitating the entrance to the country of a woman who comes here to work in prostitution, or the departure of a woman who goes abroad to work in prostitution:

Punishment–reclusion of three to eight years...

If the victim was aged between 14 and 18, if the agent was a parent, grandparent or descendent, a husband, brother, tutor, guardian, or similar, if there was use of violence, a serious threat, or fraud, or if it was done to make a profit, the penalty was increased. The Portuguese language jokes with us in the arrangement of words. The only female word is *victim*, all the others are used in the masculine: agent, husband, father, legislator, reviser of the project and commentator on the code. The text of this article has some innovations, but the meanings are the same as those invented in the nineteenth century: women are taken and brought, as if they did not have their own will, their personal agency is denied, and no form of voluntarism is considered in these

questions. It does not matter if this or that woman crossed national border at her own will: according to the code, prostitution is not a possible choice for women. At those times it was very difficult for a woman to manage to travel alone, since the authorization of someone else was generally needed. This requirement for authorization was justified precisely because of the concept of female weakness. This trap led them to always need 'help' to cross frontiers.

Trafficking is placed here as a modality of procurement. Prostitution in itself is not always penalized, nor those who buy this service, but any help or facilitation is discouraged. This confusing disposition of authorizations and prohibitions seems strategic to satisfy the same contradictory demands of the twenty-first century: while prostitution is an affront to civilization, at the same time it serves as an outlet for unstoppable instincts and sustains the honor of families, thus it has to be tolerated. In the present day this understanding has little space in studies about sexualities. Instincts or impulses are no longer talked about, but rather a call to order in gender relations; not even sexual violence, but gender violence.¹¹

Nelson Hungria, reviser of the code and renowned jurist, tells us in 1948 in passionate language that the penal repression of procurement goes back to Antiquity. The talented writer used this discursive ruse to praise the code he himself had helped to write. The way he conceived prostitution is very much in tune with the usual refrain that sees prostitution as "the oldest of professions," a cultural artifice which naturalizes the activity. Hungria repeats to us, in the 1950s, that "prostitution is a necessary evil" and paraphrases St. Thomas Aquinas, who compared prostitution to the latrine in the palace, "remove it and it becomes a fetid and impure place," talks about "fallen recklessness," in the "carnal market," "an inextirpable evil," that "it is useless trying to extinguish it," and "immoral conduct." He explains:

While prostitution is a deplorable evil, it does not stop being, up to a certain point, notwithstanding moral theorists, *necessary*. Although it must be sought to reduce it to the minimum possible, its incrimination would be mistaken. Without wanting to praise it, it should be recognized that it performs a preventive function in the running of the social machine: it is an escape valve for pressure from a irrecusable instinct which is never appeased in the social formula of monogamy, and demands satisfaction even before man reaches the civil age allowed for marriage or has a sufficient aptitude to assume the duties of forming a

home. Annulling the meretricious, if this were possible, would unquestionably orientate immorality to the recess of homes and have the libido reheated for the practice of all social crimes.¹²

Nothing is between the lines, everything is said and can be read. What we are seeking to understand is in what space of order knowledge of human trafficking was constituted, how a constitutive rationality of the phenomenon was formed and under what conditions this rationality presents its motives. The normative choices of which we are talking do not take into account the women, either prostitutes or non-prostitutes, but only the users of the activity who can, after all, sleep the sleep of the just (and learned) knowing that the perverse pimps are condemned. At this time 'female agency' could not be considered, unlike today, nor 'the right to one's own body,' the demand of the feminist movements of the 1960s, since women who dedicated themselves to these activities were simply ignored in the judicial discourse. Not only did they not have permission to participate in this debate, they were not even considered as subjects. If we are talking about the 'objectification' of people, women (trafficked and non-trafficked), it cannot be denied: in questions of objectification the jurist beat the pimp.

In 1949 an echo of the creation of the UN resulted in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, consolidating other previous international agreements. This was adopted by the General Assembly and declared that the enslaving of women and children for prostitution was incompatible with the dignity and fundamental rights of human beings. In this context the anxieties were different from those at the beginning of the century, since *human beings* were talked about instead of women and children, and the *exploitation of prostitution* instead of enslaving. There were different target and objectives which produced different subjects. Marjan Wijers has explained that in common between the 1949 Convention and that of the beginning of the century was that both were predominantly based on the abolitionist system, aimed at the elimination of prostitution. On one hand, working as a prostitute was not punishable, however the involvement of other persons was, whether they were the administrator of a brothel or a friend, irrespective of the consent of the woman, or whether or not she was exploited. Despite having proposed to

eliminate the traffic and exploitation of prostitution, and not prostitution itself, the 1949 law did not leave clear definitions of what either one was.¹³

After the adoption of the 1949 Convention, international debates about the trafficking of women decreased for a while. Many authors have mentioned that it was in the middle of the 1980s, during a new wave of feminist campaigns and discussions about child pornography and sexual tourism, that the question of the trafficking of women returned to the international agenda.¹⁴ These discussions were certainly linked to the demands of the right to the body and to pleasure raised in the discourse by the Second Wave of Feminism,¹⁵ a daring movement which emerged in the 1960s. Along with the Second Wave, during the 1980s there began to emerge what we now call the Third Wave of Feminism, which brought new perspectives about sexuality and prostitution. The Third Wave dismantled the concept of *patriarchy* and constituted new fields of knowledge that mobilized profound transformations of feminist policy proposals about sexuality and the commerce of sex: the preparation of the gender category as a tool of analysis came to undermine the attribution of the universality of the categories of *woman* and *women*, completely confusing biologicalizing concepts of sexuality; feminist post-colonial critiques pointed to racism and elitism in western feminist discursivities; sex worker movements raised new demands which were added to the feminist agenda. These two waves coexisted in the 1980s (and still do) and help us see that the feminist movement is not and never was univocal. Another consideration is that in recent decades feminist organizations have achieved more places for discourse and more power of influence on public policies, but this does not signify that there was an absolutely motivating consensus about its practices, nor that these organizations have the same prestige as other groupings of knowledge/power.

In this context the 1949 Convention came to be harshly criticized for ignoring other forms of traffic (domestic service, mail-order brides, working in the textile industry and in agriculture), for not taking into account traffic within the same country, and for not considering cruelties in other forms of labor. In 1979 the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) obliged signatory countries to adopt appropriate measures to eliminate all forms of traffic and exploitation of prostitution of women. Various other international legislative propositions

about what is conventionally called 'traffic' were produced during the twentieth century, but none had any relevant effectiveness.¹⁶

The idea that prostitution is violence against women was represented in international laws during the twentieth century. In 1996, in response to feminist demands, traffic came to be understood by the United Nations as the commerce and exploitation of labor in migratory processes under conditions of coercion and force. Instead of defining prostitution itself as an inherent violence against women, it was the living and working conditions in which women could be found in sexual labor, and the violence and terror surrounding this work in an informal and underground sector, which were seen as the violators of the rights of women and therefore considered as 'traffic.'¹⁷ For the first time in a century, the abolitionist perspective stopped being the point of view represented in the international discourse about prostitution. The 1990s was a place of intense disputes over the definition of the 'trafficking of women,' and this dispute was motivated by positions regarding prostitution and the best way to deal with it legally. Therefore, thinking about what we now understand as 'human trafficking,' it is necessary to understand how this discussion developed in relation to the positions taken towards prostitution.

Currently we can identify two central positions towards prostitution in the anti-traffic debate. One position defends an abolitionist perspective, seeing all prostitution as forced, and is defended by the Coalition Against Trafficking in Women (CATW). Another, defended by the Global Alliance Against Trafficking in Women (GAATW), based in Thailand, recognizes that it is not the exercise of prostitution in itself which is abusive, but the bad conditions of work. The fundamental point which distinguishes these understandings is the divergence over the question of consent. While the abolitionists argue that a person does not choose this activity, since they are always forced by some circumstance, the other rejects the notion that sex workers in migratory processes are only submissive and passive, recognizing their subjectivity and personal agency. Moreover, there are modulations and intersections between these two perspectives, while there are also many variants of them.

In the 1990s these two positions appeared in a contradictory form in the international legislation, often within the same documents (Doezema, 1998). A significant change in this situation occurred in 1996, when the UN commissioned GAATW to write an important report, leaving to one side the

abolitionist perspective of CATW (Kempadoo, 2005). The distinction between 'voluntary' prostitution and 'forced' prostitution was recognized.

Jo Doezema explains that this distinction was very important, because it surpassed the abolitionist model in the international discourse about prostitution, although it also was problematic. In 1998 she called attention to the fact that, despite this change, international agreements did not enforce the rights of prostitutes at the same intensity that they condemned forced prostitution. There is no international agreement condemning the abuses committed against the human rights of women working in prostitution who were not 'forced,' she argued, and it was precisely because there was no agreement about 'voluntary' prostitution that the consensus of 'forced' prostitution gained discursivity. Another problem is that this distinction implied that it was the 'innocence' of the victim which determined the side of the dichotomy to which she would be submitted. She recommended that the utility of the 'choice' *versus* 'force' dichotomy be reconsidered as the explanatory model of the experiences of these women (Doezema, 1998). Alison Murray, talking about the place of a sex worker in Australia and in the south of Asia, also points to problems in this distinction. She fought for the distinction between forced and voluntary prostitution in the UN Beijing Conference (1995), but perceived errors in this position. In 1998 she criticized anti-traffic campaigns in the Beijing Conference for ignoring the perspectives of the people involved and because they reproduced the stereotype of the Asian woman as sick and passive. Clearly inspired by the post-colonial feminist Chandra Mohanty, she showed how the supposed dichotomy between forced and voluntary prostitution created false divisions among the women involved in prostitution. The 'voluntary' prostitute she explained, was understood as the western sex worker, from the developed world, seen as capable of deciding voluntarily whether or not to sell sexual services, while the sex worker in an undeveloped or developing country was considered incapable of making the same choice: she was passive, naïve and easy prey for traffickers.¹⁸

All this discussion, added to other demands and interests, produced a new definition of traffic. The most recent supra-national definition was contained in the Palermo Protocol, which Brazil has accepted. The text of the Protocol was negotiated during a general assembly of the UN in 2000, held to discuss forms of fighting translational organized crime. In this assembly three

additional treaties were discussed: one about human trafficking, especially women and children; another about the smuggling of people, to deal with people who crossed national frontiers without documentation; and the last about the trafficking of weapons and munitions.

The supplement which deals with human trafficking defines it as

the recruitment, transport, transfer, housing, or welcoming of people, resorting to threats or the use of force, or other forms of coercion, kidnapping, fraud, deceit, abuse of authority, or situation of vulnerability, or the delivery or acceptance of payments or benefits to obtain the consent of a person who has authority over any other, for the purposes of exploitation. (Third article)

Exploitation is understood as “exploitation of the prostitution of others or other forms of sexual exploitation or forced services, slavery, or practices similar to slavery, servitude, or the removal of organs.”

Before thinking about any practical implications of this definition, it is fundamental to consider that it was originally conceived in a context of concern with the control of national frontiers. We are talking of a definition of traffic aimed at combating organized crime and not encouraging human rights. Admittedly there are humanitarian interests in fighting human trafficking, but it should not be lost sight of that we are starting from a text which first thinks of *traffic* (or people and weapons) and afterwards of *people* (supplement). The actual fact of containing in the same legislation such distinct phenomena is problematic, since it favors confusions and simplistic relations between irregular migration, human trafficking, and trafficking of weapons. Even though it covers humanitarian interests, the Palermo Protocol is not exactly an instrument that promotes human rights, but one whose intention is combating organized crime.

Having made this first observation, we can map many other problems contained in this definition. The definition of traffic stipulated in the Protocol is the effect of a heated discursive battle far from being resolved. One advantage of the Protocol in relation to the previous legislation is that ‘traffic’ is not summarized in a coercive practice, or in the favoring of prostitution, since other forms of work in conditions of exploitation were dealt with; however, many other problems were identified. For Bridget Anderson and Julia O’Connell Davidson (2002), the problems of the term ‘*traffic*’ were

not resolved in the definition adopted by the UN, since this erred by leaving undefined, due to lack of consensus, terms such as *exploitation of prostitution of others* and *sexual exploitation*, and other terms such as *vulnerability* and *coercion*, making it impossible to specify who is *trafficked* for the sex trade without avoiding the general debate loaded with emotion about *the rights and wrongs of prostitution*.¹⁹ Another problem of the Protocol is that, despite speaking about human trafficking, women are placed alongside children as people who need special protection, officializing the old notion of female vulnerability.²⁰

Another problematic point was the decision about 'consent.' As discussed above, while this question may have been strategically placed to avoid the dichotomy between 'force' and 'voluntarism,' it also emerges in a problematic point since it does not protect the rights of women who migrate with the intention of entering the sex market. According to the text of the Protocol, 'consent' is a strategic point in the configuration of a case of traffic, since the text leaves open the possibility of a wide-ranging interpretation of the existence of forced consent. The Protocol textually contains the intention of being easily adapted by the greatest number of countries possible, irrespective of how they deal with prostitution. The idea is that human trafficking can be used in countries that do not penalize the exercise of the use of prostitution, as well as in countries which recognize sexual work, but which criminalize the clientele and procuring. The Brazilian Penal Code, as will be discussed later, does not penalize the exercise of prostitution, but includes a negative sense in relation to the activity.

However, the problems of prostitution and traffic are not only related to these questions. Bridget Anderson and Julia O'Connell Davidson argued in 2003 that understanding traffic as a type of illegal migration takes advantage of the overly simplistic distinction between 'legal migration' and 'illegal migration,' which cannot take into account the complexity of migratory processes. If those 'trafficked' frequently enter countries legally, the authors explain, the focus of the discussion should be the exploitation and violence which occur both in illegal and legal immigration systems and not the difference between traffic and illegal immigration.²¹

The supra-national definition human trafficking is an effect of the product of interests and the control of national frontiers represented in the

Palermo Convention, of derangements between national logics in the middle of the divergences of the feminist debate, which gained strength in the final decades of the twentieth century. All this discursiveness is in confrontation and related, invoking and being supported by each other, and at the same time, each fighting the other, formulating rationalities about traffic, making them discussable again and giving them visibility.

In 2005 the code was adapted to supra-national legislation. The *international traffic of people* took the place of the former *international traffic of women*, while the existence of internal traffic was recognized. However the code maintained the connection between traffic and prostitution, unlike the protocol, which placed prostitution alongside other practices.

In 2009, due to Law 12015/2009 (which amongst other things eliminated references to the honesty of women), new changes followed. Article 231 came to deal with the *international trafficking of the person* – in the singular – *for purposes of sexual exploitation*, with a single victim (or none in the cases of attempts) being enough to operationalize the concept.

Furthermore, the Penal Code came to deal with the trafficking of people for “prostitution or other forms of sexual exploitation,” equaling prostitution to exploitation, perhaps seeking to adapt it a little further to the form exploitation was seen in the Protocol, which talks of “the exploitation of prostitution of others or other forms of sexual exploitation.” The same law which altered this definition also altered article 288, which previously had penalized anyone “who induced or attracted someone to prostitution, facilitated them, or prevented someone from leaving it,” and now stated the *favoring of prostitution or other form of sexual exploitation* and penalizing anyone who “induced or attracted someone to prostitution or other form of sexual exploitation, facilitated it, or hindered someone for leaving it.”

Even though the code did not penalize the exercise of prostitution, it still contained a sense of prohibition of the activity. Certainly this game of concepts is strategic for people to understand that someone involved in traffic, appearing in the position of ‘victim’ (in the legal sense), cannot be treated as breaking a law. However, this strategy has another complication, as serious as the most evident assigning of guilt. These concepts leave very little space for the understanding that prostitution can be a considered activity, negotiated and chosen from a range of possible actions. By equaling prostitution to

sexual exploitation, the personal agency of the people involved in this activity is denied, and the discussion of the rights of the people who voluntarily dedicate themselves to it is boycotted.

According to the *caput* of article 231 of the Code, someone commits the crime of the international trafficking of people when they encourage or facilitate the entrance into Brazil of someone coming here to exercise prostitution, or the departure of someone who is going to carry out this activity abroad. The use of violence, serious threats, or fraud with the intention of making a profit, central aspects of the concept of traffic in the Protocol, are assigned additional penalties by the Penal Code (paragraph 2, section IV and paragraph 3), but they are not aspects used here to define the international trafficking of people. It is defined in the code as follows:

International Trafficking of people for sexual exploitation

Art. 231. Encouraging or facilitating the entrance into Brazil of someone who is coming here to exercise prostitution or other form of sexual exploitation, or the departure of someone who is going to do this abroad.

Punishment – reclusion of 3 (three) to 8 (eight) years.

§ 1 This penalty shall be incurred by those who procure, entice, or purchase the person trafficked, or who having knowledge of this condition, transport them, transfer them, or giving them accommodation.

§ 2 The penalty shall be increased by 50% if:

- I – the victim is a minor less than 18 years of age;
- II – the victim, due to illness or mental deficiency, does not have the necessary discernment for the act practiced;
- III – if the agent is a parent or grandparent, stepfather, stepmother, brother or sister, brother or sister in law, spouse, partner, tutor or guardian, teacher or employer of the victim, or if in accordance with the law, they have assumed some other form of care, protection, or vigilance; or
- IV – there is use of violence, serious threats, or fraud.

§ 3 If the crime is committed in order to obtain an economic advantage, a fine shall also be applied.

There are other articles referring to human trafficking and related crimes in the Brazilian legislation, as well as articles in the Penal Code which do not deal directly with traffic, but where ‘similar crimes’ or related to this practice appear.²² However, in Brazilian law, human trafficking is manifested in a

necessary relationship with prostitution, unlike the Protocol, which places prostitution alongside other practices in the configuration of a case of traffic. However, what drives the general debate about the international trafficking of people in Brazil, in addition to the international requirements for fighting organized crime, is essentially the generalized feeling that prostitution should be avoided.

In accordance with this logic, the discussion of prostitution should come before the discussion of trafficking. The terms we have today oblige us to do this. However, this is not what happens. The discussion of human trafficking claims to be technical and avoids the question of what invents its substance, which is the question of prostitution. It is prostitution, after all, which is the crucial point in relation to traffic in Brazil, and it is against this activity and based on it that the fight against human trafficking is directed.

In addition to the discrepancies between the Protocol and the Code, various anthropological studies of international migration have produced results which have shown a lack of harmony between the definitions given by these regulations. Much research has shown women to have participated actively in migratory processes at the turn of the twentieth century to the twenty-first.²³ There is a consensus in the Human Sciences that migratory networks are established through a type of informal aid to leave a country and enter another one. Often people voluntarily migrate to enter the sex market using the same help networks as other migrants.²⁴ According to article 231, this help can be understood as traffic.

Obviously the deceit, the 'intention to exploit,' has to be considered, but the fact is that neither the Protocol nor the Code define what 'exploitation' is, can possibly make police officers responsible for deciding what traffic is and is not, leaving the judiciary the 'complementary' function of measuring the seriousness of the situation, which was previously judged as traffic by the police.²⁵ This fact necessarily throws us into a systematic dysfunction in the operation of penal law. Reinforcing this problem, are the reiterated accusations made by sex professionals' movements about police violence.

In accordance to the current text of article 231, it would be perfectly convincing if someone interpreted that there was a stipulated punishment for anyone who helped someone dedicated to commercial sexual activities cross a national frontier. By conceiving prostitution as exploitation and including

in the concept of traffic the conduct of ‘facilitating’ the departure of anyone who will work in prostitution abroad, stipulating fines in cases where economic advantage is obtained and increasing the punishments in cases where there is violence, threats or fraud, the Code opens space for this discursivity. This understanding has serious practical implications, as it functions as an impeditive for poor women involved in the sex market to have opportunities to migrate like other people, even though they have projects to migrate to countries where prostitution is regulated.²⁶ Everything is further complicated when there is a possibility of punishment for the attempted crime.²⁷

To operationalize the definition of human trafficking we currently have, we are obliged to obey a prohibitory meaning of prostitution. The discussion of human trafficking has been led by questions which are said to be technical, and for this reason, supposedly have an implicit idea of neutrality and stability. Along with this, values are proclaimed encompassed by the discursiveness of human rights (liberty, non-violence, etc.), values estimated by their universality and non-negotiability. However, this structuration is superimposed and supported by the notion that prostitution is violence in itself, that prostitution is what should not be. There is nothing technical or universal in this arrangement. The creation of the notion of prostitution as violence has a history and can be dated and located, and is full of conflicts and tensions. In the nineteenth century human trafficking gained discursiveness associated with panics in relation to the international migrations of women involved in prostitution. More than a century later, it seems that we still have not managed to differentiate these categories.

NOTES

¹ VEYNE, Paul. *Como se escreve a História / Foucault revoluciona a história*. Brasília: Ed. UnB, 1982.

² FOUCAULT, Michel. *A ordem do discurso*. São Paulo: Loyola, 1996.

³ FOUCAULT, Michel. *A vontade de saber [1976]*. 14.ed. Rio de Janeiro: Graal, 1988. (História da sexualidade 1).

⁴ In relation to processes of subjectivation, see: FOUCAULT, [1976]; _____. *O uso dos prazeres [1984]*. 9.ed. Rio de Janeiro: Graal, 1984. (História da sexualidade 2); _____. *O cuidado de si [1984]*. Rio de Janeiro: Graal, 1985. (História da sexualidade 3); _____. *A hermenêutica do sujeito* (1981-1982). São Paulo: Martins Fontes, 2011; _____. *O governo*

de si e dos outros (1982-1983). São Paulo: Martins Fontes, 2010; _____. *A coragem da verdade: o governo de si e dos outros II* (1983-1984). São Paulo: Martins Fontes, 2011.

⁵ FOUCAULT, Michel. *Arqueologia do saber*. Rio de Janeiro: Forense Universitária, 1986.

⁶ RAGO, Margareth. *Os prazeres da noite: prostituição e códigos da sexualidade feminina em São Paulo (1890-1930)*. Rio de Janeiro: Paz e Terra, 1991; MENEZES, Lená Medeiros de. *Os estrangeiros e o comércio do prazer nas ruas do Rio (1890-1930)*. Rio de Janeiro: Arquivo Nacional, 1992; KUSHNIR, Beatriz. *Baile de máscaras: mulheres judias e prostituição. As polacas e suas associações de ajuda mútua*. Rio de Janeiro: Imago, 1996.

⁷ In relation to these questions, see: PEDRO, Joana Maria. *Mulheres Honestas e Mulheres Faladas: uma questão de classe*. Florianópolis: Ed. UFSC, 1994; RAGO, 1991; ENGEL, Magali. *Meretrizes e doutores*. São Paulo: Brasiliense, 1989; PEREIRA, Ivonete. “As decaídas”: prostituição em Florianópolis (1890-1940). Florianópolis: Ed. UFSC, 2004.

⁸ SONTAG, Susan. *A doença como metáfora*. Trad. Mário Ramalho. São Paulo: Graal, 2002.

⁹ BLANCHETTE, Thaddeus. Emma Vermelha e o espectro do “tráfico de mulheres”. *Cadernos Pagu*, Campinas (SP), n.37, p.287-297, jul.-dez. 2011.

¹⁰ FARIA, Antonio Bento de. *Anotações teórico-práticas ao Código Penal do Brasil*. 4.ed. Rio de Janeiro: Jacintho Ribeiro dos Santos, 1929. (v.I). Coleção de Obras Raras da Biblioteca Central da Universidade Federal de Santa Catarina.

¹¹ See: BOZON, Michel. *Sociologia da sexualidade*. Rio de Janeiro: Ed. FGV, 2004; GAGNON, John. *Uma interpretação do desejo: ensaios sobre o estudo da sexualidade*. Rio de Janeiro: Garamond, 2006.

¹² HUNGRIA, Nelson; LACERDA, Romão Côrtes. *Comentários ao Código Penal*. Rio de Janeiro: Forense, 1948. p.246-248.

¹³ WIJERS, Marjan. Women, Labor, and Migration. The position of trafficked women and strategies for support. In: KEMPADOO, Kamala; DOEZEMA, Jo (Org.). *Global sex workers: rights, resistance, and redefinition*. New York & London: Routledge, 1998.

¹⁴ DOEZEMA, Jo. Forced to choose: beyond the voluntary v. forced prostitution dichotomy. In: KEMPADOO, Kamala; DOEZEMA (Org.), 1998; ALEXANDER, Priscilla. Feminism, sex workers, and human rights. In: NAGLE, Gil (Org.). *Whores and other feminists*. New York & London: Routledge, 1997. p.89-90; GUIMARÃES, Kátia; MERCHÁN-HAMANN, Edgar. Comercializando fantasias: a representação social da prostituição, dilemas da profissão e a construção da cidadania. *Estudos Feministas*, Florianópolis, v.13, n.3, p.540-543, set.-dez. 2005, entre várias outras.

¹⁵ The suffragette movements are conventionally called the First Wave of Feminism.

¹⁶ Ela W. Castilho lists other lesser works in the text: CASTILHO, Ela Wiecko de. Tráfico de pessoas: da Convenção de Genebra ao Protocolo de Palermo. In: BRASIL. Ministério da Justiça. *Política Nacional de enfrentamento ao tráfico de pessoas*. Brasília, 2007.

¹⁷ KEMPADOO, Kamala. Mudando o debate sobre o tráfico de mulheres (Shifting the debate on the traffic of women). *Cadernos Pagu*, Campinas (SP), n.25, jul.-dez. 2005.

¹⁸ MURRAY, Alison. Debt bondage and trafficking: don't believe the hype. In: KEMPADOO; DOEZEMA (Org.), 1998.

¹⁹ ANDERSON, Bridget; O'CONNELL DAVIDSON, Julia. *Trafficking: a demand led problem? Save the children*: Stockholm, 2002. p.8-13.

²⁰ Other authors have noted the same question in their research: ANDERSON; O'CONNELL DAVIDSON, 2002, p.13-14; JULIANO, Dolores. *Excluidas y marginales*. 2.ed. (1.ed. 2004). Universitat de València: Instituto de la mujer, 2006 (especialmente p.125, 184).

²¹ ANDERSON, Bridget; O'CONNELL DAVIDSON, Julia. *Is trafficking in human beings a demand driven? A multi-country pilot study*. International Organization for Migration (IOM), 2003. p.7-9. We can think, for example, of cases in which Brazilians travel to Spain as tourists, remain there for the three months they are legally allowed, then return to Brazil, later travelling back to Spain, repeating the practice in cycles. It seems that they legally enter Spain through the international airports, but since they have tourist visas they are not authorized to work formally and enter the sex market, an informal sector. However, while their situation is not covered by the legislation against the irregular movement of migrants, it is covered by the anti-traffic legislation. These legal artifices have created much conceptual confusion about the traffic of persons.

²² Related crimes: articles 231-A and 232 about *internal trafficking of people for the purposes of sexual exploitation*; article 206 about *enticement for the purposes of emigration*; article 207 *enticement of workers from one place to another within Brazil*; and article 149 about the *reduction to a slave like condition*, all from the Penal Code. There is also a set of legislation about the trafficking of children and organs. Related crimes: article 147 about *threats*; 148 about *kidnapping and private imprisonment*; 297 about the *falsification of public documents*; 298 about the *falsification of private documents*; 299 about *misrepresentation*; 277 about *mediation to serve the lust of others*; 229 about “establishments where sexual exploitation occurs;” 230 and *ruffianism* (which means: “taking advantage of the prostitution of others, participating directly in its profits, or drawing sustenance from, in whole or in part, from who exercises it;”) and 288 about the fostering of prostitution or other forms of sexual exploitation.

²³ GIL, Carmen Gregorio. Trabajando honestamente en casa de familia: entre ladomesticidad y la hipersexualización. *Estudios Feministas*, Florianópolis, v.15, n.3, p.699-716, 2007; PISCITELLI, Adriana. Sexo tropical em um país europeu: migração de brasileiras para a Itália no marco do “turismo sexual” internacional. *Estudios Feministas*, Florianópolis, v.15, n.3, p.717-744, 2007; ASSIS, Gláucia de Oliveira. Mulheres migrantes no passado e no presente: gênero, redes sociais e migração internacional. *Estudios Feministas*, Florianópolis, v.15, n.3, p.745-772, 2007; KOSMINSKY, Ethel V. Por uma etnografia feminista das migrações internacionais: dos estudos de aculturação para os estudos de gênero. *Estudios Feministas*, Florianópolis, v.15, n.3, p.773-814, 2007; LISBOA, Teresa Kleba. Fluxos migratórios de mulheres para o trabalho reprodutivo: a globalização da assistência. *Estudios Feministas*, Florianópolis, v.15, n.3, p.815-821, 2007; etc.

²⁴ KEMPADOO; DOEZEMA (Org.), 1998; THORBEEK, Susanne; PATTANAIK, Bandana (Org.). *Transnational prostitution: changing global patterns*. London & New York: Zed Books, 2002; BLANCHETTE, Thaddeus; SILVA, Ana Paula da. “Nossa Senhora da Help”: sexo, turismo e deslocamento transnacional em Copacabana. *Cadernos Pagu*, Campinas (SP), n.25, p.249-280, 2005; PISCITELLI, Adriana. Entre as “máfias” e a “ajuda”: a construção de conhecimento sobre tráfico de pessoas. *Cadernos Pagu*, Campinas (SP), n.31, dez. 2008; etc.

²⁵ I support this finding based on my ongoing doctoral research, whose theme is thinking about understanding about international migrations found in criminal law cases involving the judicial category of the trafficking of people.

²⁶ We can suppose that a woman migrates to Switzerland, a country where prostitution is regulated, and that to do this she receives the assistance of the owner of a Swiss house of prostitution, on the condition that she signs a labor contract. According to the *caput* of article 231, a crime has occurred and the owner of the Swiss establishment can be prosecuted under Brazilian law, even if she has never been in Brazil. If there has been violence, the penalty can be increased in the event of a condemnation, but it is not the violence which defines the crime. Nor can real violence, by itself alone, committed against a Brazilian in that country, in any other case not considered traffic, lead to a prosecution in Brazil.

²⁷ We can suppose the case in which a woman decides to travel abroad to work with commercial sexual activities and borrows money to buy the air tickets from a close friend. Even if she never leaves Brazil and never exercises the activity, her friend, knowing of the intention to travel and obtaining some profit from the loan, is incurring the crime of traffic. These examples are extreme and weird, but absurdly possible in the perspective of the Penal Code, in theory at least.