

“Demand for ‘trafficked labour’”: individual and state responses
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As argued in the paper presented by Professor O’Connell Davidson, there is no specific demand from employers for trafficked people, only a demand for cheap and unprotected labour and services. This is important from the point of view of demand for labour. But it can also be applied to other aspects of demand: those concerned with ethical consumption do not distinguish between goods produced by forced labour of smuggled people and goods produced by forced labour of trafficked people. Neither do those who are subject to forced labour. As the EU Experts point out:

“From a human rights perspective, there is no reason to distinguish between forced labour involving ‘illegal migrants’, ‘smuggled persons’ or ‘victims of trafficking’”

Report of EU Experts Group on Trafficking in Human Beings, 26 October 2004

This is a challenge for those who are concerned with the human rights of trafficked victims, and particularly for states, which are often anxious to preserve these distinctions.

What does considering “demand” bring that is new to debates and efforts to combat trafficking and forced labour, and in particular what does it tell us about the key human rights concerns that need to be considered in States’ responses to demand factors in trafficking? Firstly, examining demand entails recognising that markets for products and for labour are not just “out there” as a given, but are social and political constructions framing relations between human beings and determined by human behaviour. This means acknowledging it is possible to eliminate or adjust markets and market behaviour, thereby emphasising the responsibilities of individuals, as consumers, employers of labour, suppliers of labour, etc to act as moral agents as well as promoters of efficiency. Secondly, examining demand focuses attention on the responsibilities of receiving states (Pearson 2006). These discussions often concentrate on the identification of victims of trafficking and what rights and services they should have extended to them. They are fraught with difficulty, not least because of the definitional and political issues attached. “Victim of trafficking” is both an *administrative category* entailing certain state protections and obligations towards individuals, and a *descriptive term* applied by NGOs and other civil society actors to people who have certain sets of experiences – though exactly what should constitute those sets of experiences is contested. Arguably this poses problems for the human rights perspective as expressed by the EU Experts Group. Those who fit the *descriptive term* do not necessarily fall into the *administrative category*, as the administrative category is often focussed on working out the illegal/legal, smuggled/trafficked distinctions, rather than determining whether a person has been subjected to forced labour. Examining demand from a human rights perspective entails an approach that concerns itself with forced labour which can bring us back to identification – who counts as a trafficked victim? According to whom? - highlighting not only the administrative/descriptive discrepancies, but also differences

between interest groups concerned with the issue – e.g. migrants’ organisations, trades unions, women’s organisations and the state.

But the responsibilities of receiving states should not be limited to identification and protection. It is also incumbent on those who are concerned to combat trafficking to consider the role of states in creating the context within which abuse and exploitation occurs. This needs to go far wider than debates over the impact of states’ legalisation or criminalisation of prostitution/sex work, and its impact on those who are trafficked into the sex industry. It requires a critical examination of the extent to which the state manages to balance the “demand for inexpensive labour and the possibilities of regular migration” (OSCE Action Plan).

It seems then that taking demand seriously can highlight important factors in understanding trafficking. But it is not without attendant dangers. It is easy to lapse into the overtly moralising, concentrating entirely on individual morality and culpability – the “evil gangmaster” diatribe, and ignoring structural economic and socio-cultural factors. This risks easy but popular responses to criminalise and demonise individuals as morally reprobate and avoids difficult questions such as how it is that they are in positions of power over other people, and does their intolerable behaviour have any relation to socially tolerated attitudes? Moreover one can find oneself advocating an expansion of state powers that might be undesirable for other means, even if they do stamp out trafficking. Many people would not feel comfortable with giving the state powers to enter and police private households as a response to the trafficking of domestic workers for example. And thirdly, debates on demand can ignore questions of supply, while in practise the two are intimately related (Anderson and O’Connell Davidson 2003).

In this paper I will firstly discuss the social construction of markets with a view to considering the possibilities and limitations of social and educational measures to address demand for trafficked person’s labour; and then go on to consider the role of states in creating conditions where trafficking can occur, raising I hope points for discussion about suitable responses.

Being good: markets and moral agents

There is a tendency to believe that traffickers and those subjected to trafficking are perpetrators and victims of physical violence. But the Palermo protocol has no reference to physical violence as a necessary condition of trafficking. One does not have to subject a worker to physical abuse to be a “trafficker”. Coercion may be at its most powerful when it is invisible. Employers and other market actors are not “good” because they do not beat their workers.

Once we acknowledge that markets are about relations between human beings rather than ineluctable forces, and therefore it is possible to act ethically or unethically within them, this raises the normative question of whether certain exchanges ought to take place across a market at all. Feminist abolitionists have for example argued that it is impossible to have an ethical market in prostitution. Sex should not be sold across a market. But the suitability of the market to mediate other exchanges has been provocatively proposed or challenged in with reference to other goods or services, for example whether one should be permitted to buy and sell across a market organs, votes, carbon emissions, babies or domestic labour

across a market. I will leave this question to one side, not because it is unimportant, but because it is at the moment unthinkable to eradicate markets in most of the sectors where forced labour or trafficking is believed to take place. If one pragmatically allows for the existence of most markets, how can one act ethically as an employer, worker or consumer? The fact that some people do want to act ethically is apparent in the concept of ethical consumption, where the consumer uses their market position to encourage traders and employers to act ethically. But consumers are not the only ones that may want to feel that they are acting ethically and employers, third parties and others in the chain linking demand and supply can be subjected to moral pressure to delimit acceptable practices.

Are there ways in which this concern with “being good” can be used to set limits to demand for exploitable labour and promote respect for basic human rights for vulnerable workers? Examining the demand for migrant domestic workers in private households serves as a useful case study. Domestic work has been recognised by national governments and by international agencies as being a sector within which workers are vulnerable to trafficking. Employers of domestic workers are in a relationship that shares some elements with an employment relation, even if they don't view themselves as an employer, but they are also consumers of a service, thereby having a relationship with the service provider. Moreover, for many citizens in Europe, contact with a domestic worker is one of the main ways in which they have a direct and sometimes personal relationship with a migrant.

Research we have conducted in a multi-country study on markets for sex and domestic work has found that there is a specific demand for *migrant* labour to work in private households because migrants were felt to be more “flexible”, more likely to work hard and with fewer options. Their advantages to employers are acknowledged by those employers as a consequence of their vulnerability and lack of choice:

They have a greater incentive to work because they desperately need the money.... She's dependent for money, so I think it's a circle that works well so that I can keep her
British housewife aged 53

As this quote suggests quitting is a source of tension between workers and employers, and not just in private households. Retention, as opposed to recruitment, has received relatively little attention in terms of understanding employment relations in sectors where employment is often not regulated by formal contract (this goes far wider than domestic work in private households of course). Since they are largely working in the informal sector these workers are theoretically free to leave at any time. Indeed the freedom to retract from an employment relation is one of the only means that workers have of limiting employers' powers over them, being not subject to statutory legislation and having limited opportunities to organise. Since this work is badly paid and often entails working for long hours, workers have every incentive to move frequently until they find the most rewarding job, though they must balance this with security – they want to determine when they leave and not be at the whim of the employer. On the other hand employers must balance ease of hiring and firing with wanting to hold on to workers for as long as they are needed – they want to determine when workers leave and not be at the whim of the worker. Migrant labour can be an important resource under such circumstances. To give an

example, agricultural employers in the UK used the Seasonal Agricultural Workers Scheme under which migrants were given short term permits to harvest crops when they knew that they would need workers for a fixed and relatively long period – say 2-4 months. They did not use this scheme for harvesting say Mother’s Day flowers, when workers are needed for only two or three days. For this, sub-contracted labour (usually migrant and often illegal) was more appropriate as it did not bind them into bureaucratic procedures and certain, if limited, responsibilities towards their workers. When there is a particular but non-sustainable demand in construction, such as that associated with big sporting events, migrant labour offers the kind of “flexibility” that employers require.

In the domestic sector this is particularly the case for those who are looking for paid carers, or who have particularly precise requirements in the doing of household work. There is a disadvantage to having workers so flexible that they can leave at any time. An employee who knows how the household “works”, or who has established a relationship with a child or elderly person in the home for all the work being “unskilled”, can be extremely difficult to replace. The complaint of 19th century British north American colonies continue to have some resonance:

“In the slave states... the affairs of the household are generally conducted with more regularity and order than they possibly can be where there is a continual change of domestics”

Graves 1843, cited Ryan 2006

While Harriet Beecher Stowe claimed

“I have heard more than one lady declare... that she didn’t care if it was unjust, she should like to have slaves rather than be plagued with servants who had so much liberty”.

Some immigration statuses give an employer direct control over a workers’ visa renewal (that given to a domestic worker accompanying their employer to the UK for instance) giving employers state enforceable means of controlling migrant workers’ retention and indeed to dispose of them when their labour is no longer required. This is a power not available to them to exercise to the same degree over citizens. Even if the migrants’ status is dependent on them working in the particular sector, rather than for a particular employer, this is perceived as an advantage by employers. It is one reason that host families give for opting for au pairs as childcare for instance (Anderson, Ruhs et al 2006).

Workers do not have to be legally tied to their employer to give employers confidence regarding retention. Those who are working illegally may be considered to have fewer options, again giving employers a reason for hiring migrants rather than those with citizenship or residence status.

“especially with the illegal, they’re so desperate for work, they’re not looking to get fired, they’re looking to keep their job, so if you respect them and just let them get on with it the loyalty that comes back to you and the hard work that comes back to you more than pays off... believe me, especially if they’re migrant workers, they’re so frightened of getting kicked out that they’re not going to pull any stunts”

Brit/American housewife

These kinds of comments suggest that requirements for workers whom one can both control and retain mean that one cannot simply distinguish demand for “trafficked” labour, from the demand for exploitable labour. The speaker, who was not selected as a particularly “bad” employer, claims to “respect” her employees, but she clearly acknowledges the power she has over a certain group of people, “illegal” migrant workers. It is up to her to decide whether she will help her worker, or whether she will subject her to forced labour. As another employer put it:

It's [*domestic work*] totally de-regulated, so they [*migrants*] rely on trust.
British piano teacher

In private households the demand for exploitable labour is mediated by the need to feel comfortable that someone is performing such services for you. Employers of domestic workers, in common with consumers of most services, typically wish to feel that those who serve them actively wish to do so, at the same time as they acknowledge and wield power and control over an employee they recognise as vulnerable. The trick seems to be to frame employment as a means of “helping” poor, culturally disadvantaged women. This was important to employers who often made comments like “I really feel strongly that it's [*employment in a household*] is a positive thing you can do for somebody”, “I really feel like we're doing a favour to them” etc. Interestingly, there are suggestions from other research that some employers who deal directly with labour in agriculture, construction and hospitality also use the mechanism of “work as opportunity/favour” to feel comfortable with their market actions as employers (Anderson, Ruhs et al 2006). Very few people want to think of themselves as callous exploiters, rather we prefer to imagine ourselves as practical people dealing pragmatically with practical situations.

Peer pressure does seem to have some impact then on limiting – or indeed facilitating – exploitative practises. The concept of the “going rate” was important in determining pay and conditions for domestic workers. Expatriate interviewees offered much poorer working conditions to domestic workers when they were abroad than when they lived in the UK. They justified imposing what one of them even described as ‘slavery-like’ conditions on the grounds that local employers did worse and there were no laws to prevent them from doing so. On the other hand this meant they were prepared to improve conditions on return to the UK:

You can't transfer the relationship you have ... back to the UK. She would have to have much more of an independent life. ..When visitors come and see what a helper's room looks like, ..they are generally horrified that your helper lives in that room....You'd be embarrassed you'd be too embarrassed.... Because that's what everybody does here you sort of excuse yourself on that ground, but you'd be ashamed to do that in the UK.
British lawyer living in Hong Kong.

This suggests that there is a role for social and educational measures to discourage demand that fosters exploitation, but that its possibilities are limited and one necessary element would have to be to challenge the notion of employment as favour. Exploitative employers are unlikely to identify any continuity between their practises and those of “traffickers”. Indeed they are likely to focus on physical violence which is wrongly thought to be a defining feature of trafficking, rather than coercion and exploitation. Educational measures should combat the tendency to justify certain practises because they do not involve physical abuse along the lines of

“I only hold my worker’s passport, I don’t lock them in”, but also to put the experiences of those who have been abused and exploited into hierarchies, such that those who have been subjected to forced labour for example, are not as deserving, or are somehow “lucky” because they have not been raped or physically assaulted. Our research found UK employers in particular to associate “trafficking” with prostitution, and therefore to be of no relevance to their employment of migrant domestic workers let alone relevant to other sectors. Given the heavy focus on prostitution in debates on trafficking, this is likely to be a difficulty in other countries. The key limitations however are that education does not in itself redress the power imbalances that allow callous and greedy profiteers to exploit and abuse other human beings and that it ignores economic and other pressures to maximise profits from and to control labour. We are left relying on the goodwill of those in positions of power over others to use that power to help them rather than harm. While they may resolve certain individual’s difficulties, it does not in itself address the source of the problem.

Putting the state back in

To deal with these broader, less personalisable concerns we must consider the role of the state. This is not simply a question of states “addressing the problem of unprotected, informal and often illegal labour”, but of examining how states themselves contribute to creating spaces in labour markets where abuses can occur with relative general understood expansively as any act that fosters any form of exploitation that, in turn, leads to trafficking” some states may, through their actions or inactions, be deeply implicated in trafficking. Demand is politically as well as socially constructed, and powerfully shaped by policy developments. Exactly how this works in practise obviously will vary according to states and sectors though general policy approaches can also be relevant. Some European states for example have been accused of fostering a climate where precarious work flourishes. This is characterised by atypical employment relations, low pay, long hours, temporariness, insecurity, and labour standards inapplicable or difficult to implement. That is, work where employers struggle to balance ease of hire and fire with need to retain workers, creating a demand for a flexible yet controllable workforce where migrant labour often enjoys particular advantages. In the UK since the 1980s sub-contracting in various forms has become ever more prevalent. While some might argue that this has contributed to the success of the UK’s flexible labour market, migrants in particular often find themselves at the end of long sub-contracting chains resulting in serious ambiguities in the employment relationship – it can often be not at all clear who is the real employer, where responsibility lies for employment conditions, basic health and safety provisions or even wage payment. Long subcontracting chains mean many different intermediaries seeking to make a profit on the labour of the individual at the end of them, and this worker is often subject to a highly personalised relationship and dependence on the person above them in the chain. It is in these kinds of contexts that forced labour can occur. Issues around sub-contracting in the UK and the impact of certain types of arrangements on migrants, came to the fore with the death of over 20 Chinese migrants who were harvesting shellfish in Morecambe Bay in 2004, and coalesced around the Gangmasters Licensing Act. This Act creates a compulsory licensing system for gangmasters and employment agencies in particular sectors. Its purpose is ‘to curb the exploitative activities of agricultural gangmasters’. It was welcomed by trades unions as a challenge to criminals and exploitative employers – “With effective enforcement we can banish this modern-

day slavery for good.” So legislation (and as the quote emphasises, *enforcement*) on an issue not ostensibly to do with migration or trafficking, nevertheless can play a part in protecting the rights of some of the most vulnerable workers working for criminals, many of whom are migrants, though importantly only in particular sectors.

However, at the same time as the state is put “back in” to regulate certain types of relation, it may be withdrawing from others. Take for example the expansion in several European states of forms of care delivery called “cash payments for care”. Under these systems care users receive an allowance from the state (at local or national level) rather than care services and then use this cash to pay people to provide them with care. One of the arguments for this is that it transforms care users from passive beneficiaries into agents actively involved in their own care. It has also been found to foster the development of an informal market for care in which migrants, and particularly undocumented migrants, are regarded as desirable workers (Ungerson 2003). It implies the state withdrawing from direct oversight of and responsibility for care provision. Our research has found that in domestic work, as with sex work, the invisibility of the state effectively unleashes a radically free ‘free market’, such that the relation between employer and domestic worker becomes so highly individualised that it is viewed as a private matter, one that can be arranged to ‘suit’ both parties rather than be constrained by state oversight, though, as discussed above, potentially subject to some social policing. Where radically free markets for labour flourish, and where retention/ease of hire and firing are required by employers or consumers, labour is highly vulnerable.

If ‘sellers’ and ‘buyers’ were to meet on anything like a level playing field, this radical freedom would not necessarily benefit the buyers (as we have seen for instance with employers’ concerns around retention). However, other actions taken by the state help to create categories of ‘sellers’ who are vastly unequal in relation to ‘buyers’. This is particularly clear with immigration law. Certain immigration statuses create marginalized groups without access to the formal labour market, or any of the protections usually offered by states to citizens and workers. Importantly we should not ignore the ways in which some migrants who enter and work legally are tied to their employers, and how this constrains their possibilities for action

“We suffer in silence because of our status. If we had permanent status we would have courage to say no. the problem is we are tied. It is clearly written I the front page of the work permit”.

Filipino nurse working in the UK

In all these ways, the state contributes towards a supply of labour and equips employers with labour control and retention mechanisms that would not otherwise be available to them, at the same time as being invisible in terms of policing employers and setting minimum standards in certain sectors and types of employment relation. These processes can be mutually reinforcing. So in the UK at the same time as helping to create a demand for domestic workers in private households through promoting cash for care schemes under social policy, possibilities for non EU nationals to affect legal entry as a domestic worker are rendered nearly impossible.

Indeed the situation for domestic workers is about to worsen significantly. Currently migrant domestic workers who enter the UK accompanying their employer can

leave that employer if they are abused or exploited. This gives them vital protection against violence, mistreatment and exploitation and was cited by the UK government as an example of good practice in the ILO Multilateral Framework on Labour Migration (annex point 82). However the UK Home Office now intends to restrict domestic workers accompanying their employers to a maximum of 6 months, with no right to change employers even in cases of abuse. Kalayaan, a campaign group working with migrant domestic workers, finds that 34% of its clients are subjected to physical abuse by their employers, and these people, despite being legal entrants, would not be permitted to leave such abusive situations without breaching their conditions of entry. Kalayaan claim that “This will make it virtually impossible to challenge any maltreatment or abuse, and indeed will encourage it.” Given that effectively employers who bring domestic workers to the UK for the purposes of exploitation will be able to perpetrate such exploitation with workers having no practical means of redress because of their dependent immigration status there is some merit to Kalayaan’s assertion that ‘This is in direct contravention to the Home Office stated policy to protect victims of trafficking and to stop trafficking “at source”’, and further that it is effectively “legalising trafficking” (Kalayaan 2006). This is at the same time as the UK government acknowledges in its recent consultation exercise on trafficking, and in its trafficking toolkit, that domestic work is a sector where workers are liable to trafficking and that particular protective mechanisms may be required. It points to the need for a more integrated approach to pre-empt and to manage unintended consequences.

Conclusions

In order to address demand factors in trafficking, there is a need to consider how states are implicated in the creation of radically free markets, and what mechanisms there are to protect the human rights of all workers who are operating in such markets and to facilitate workers leaving these markets should they wish to do so. Particular attention should be paid to the vulnerabilities of migrant workers in these markets. Prominence needs to be given to forced labour as a serious violation of a fundamental human right as well as a violation of labour rights. In this respect greater attention needs to be paid to the question of how mechanisms of labour retention may breach human rights and in particular how these mechanisms may be directly and indirectly related to immigration legislation. Dealing with *demand* for vulnerable labour means that the focus of the trafficking offence should be on forced labour and employment related aspects rather than simply the immigration aspect. Crucially, care must be taken that trafficking legislation is not used to further restrict the basic human rights of migrants, particularly those with irregular status.

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