

‘It’s About Survival’: Court constructions of socio-economic constraints on women offenders in Australian human trafficking for sexual exploitation cases

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Abstract

Women make up more than half of the offenders convicted for human trafficking for sexual exploitation in Australia since 2005. This article explores how courts construct the financial motivations for women’s offending to examine how gendered structural constraints are considered in Australian trafficking cases. We explore data from the sentencing remarks and appeal transcripts from the ten cases of women convicted for human trafficking and analyse the two most recent cases to explore how women’s financial considerations are underpinned by the gendered socio-economic pressure of supporting family members. Using data from interviews with Australian judges and anti-trafficking experts, we examine the relationship between structural constraints and women’s agency and the relative weight each of these factors are given in sentencing women trafficking offenders. In doing this, we explore the overlap between victimisation and offending and the tensions between structural constraints and agency, arguing that the former must be taken into consideration when sentencing women trafficking offenders.

Keywords: human trafficking for sexual exploitation, structural constraints, agency, choice, women offenders, victim-offender overlap, sentencing

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Introduction

In Australia, between 2005 (when it ratified the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*) and 2019, sixteen individuals have been charged with human trafficking-related offences

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involving sexual exploitation (HTSE).¹ Ten of these are women, meaning that 63 per cent of offenders convicted of HTSE in Australia are women. The United Nations Office on Drugs and Crime (UNODC) has consistently reported ‘that women feature highly among those prosecuted and convicted for offences related to trafficking of persons, especially when compared with other areas of crime’.² UNODC also notes that there is a strong link between previous involvement in the sex industry and future involvement in trafficking networks.³ As such, women traffickers are particularly prevalent in HTSE. The percentages of women trafficking offenders has remained consistently high over the past decade,⁴ and an increasing body of literature has recognised that women play a prominent role as both victims and offenders of HTSE.⁵ These statistics challenge traditional representations of traffickers as being male organised crime figures who prey on women as their vulnerable victims,⁶ as this data shows women are not *solely* the victim of these crimes, but also facilitators of trafficking, and often both. Consequently, it is important to understand the factors that drive both women’s victimisation and offending.

In this article, we examine the sentencing remarks and appeal transcripts of women convicted of HTSE offences in Australia, as well as data from interviews with key Australian judges and anti-trafficking experts, to explore how courts construct socio-economic structural factors in women’s lives. Specifically, we look at the gendered nature of these factors, considering the support of dependents and familial burden as key elements in women’s offending. To begin, we explore the

¹ A L A Baxter, ‘When the Line between Victimization and Criminalization Blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia’, *Journal of Human Trafficking*, vol. 6, issue 3, 2019, pp. 327–338, <https://doi.org/10.1080/23322705.2019.1578579>.

² I Chatzis *et al.*, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A case law analysis*, United Nations Office on Drugs and Crime, Vienna, 2020, retrieved 18 January 2022, https://www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf, p. 5.

³ *Ibid.*

⁴ See the *Global Report on Trafficking in Persons* from 2009 to 2018, <https://www.unodc.org/unodc/data-and-analysis/glotip.html>.

⁵ Chatzis *et al.*; E Veldhuizen-Ochodnicanova and E L Jeglic, ‘Of Madams, Mentors and Mistresses: Conceptualising the female sex trafficker in the United States’, *International Journal of Law, Crime and Justice*, vol. 64, 2021, pp. 1–13, <https://doi.org/10.1016/j.ijlcj.2020.100455>; M Wijkman and E Kleemans, ‘Female Offenders of Human Trafficking and Sexual Exploitation’, *Crime, Law and Social Change*, vol. 72, 2019, pp. 53–72, <https://doi.org/10.1007/s10611-019-09840-x>.

⁶ E O’Brien, ‘Human Trafficking Heroes and Villains: Representing the problem in anti-trafficking awareness campaigns’, *Social and Legal Studies*, vol. 25, no. 2, 2016, pp. 205–224, <https://doi.org/10.1177/0964663915593410>.

concepts of agency and structural constraints and outline the methodology for the project. We then collate the data from the ten women convicted of HTSE offences since 2005 and examine the tensions between structural constraints and agency in these cases. Finally, we analyse two recent Australian cases, *The Queen v Lay Foon Khoo* and *R v Kanbut*, both of which involve defendants who had familial responsibilities and financial burdens that underpinned their offending and victimisation. These cases demonstrate that the socio-economic disadvantage women face is often acknowledged during sentencing, but that underlying narratives of choice dominate court-constructed narratives (CCN) of women's offending. The overlap of victim/offender roles in HTSE indicates a need to re-examine conceptualisations of structural constraints and agency in women's pathways to both victimisation and offending. This discussion highlights that the complexity of this situation requires a rethinking of the structural constraints that contribute to women's offending, even in situations where they have not been identified as a victim of trafficking prior to their offending.

Methods

The data collection was conducted by the primary author as part of a broader research project examining how courts construct the agency of women offenders in Australian HTSE cases. Initially, the primary author reviewed publicly available, Commonwealth prosecuted cases. To locate these cases, they undertook a search on the Commonwealth Department of Public Prosecutions (CDPP) website, as the CDPP acts as the prosecutorial body on all Australian Commonwealth cases. This search provided a list and summary of all Commonwealth human trafficking and slavery cases. From this list, they extracted those cases which fit the parameters of the research—cases involving women HTSE offenders. Once they identified these cases, they searched the sentencing remarks via a Google search, as these are publicly accessible documents. From the sentencing remarks, they identified the judges who sentenced these women. The primary author then conducted semi-structured qualitative interviews with six judges who were related to at least one of the identified cases. They further conducted interviews with five Australian anti-trafficking experts to supplement the interviews with the judges. Thematic content analysis (TCA) was undertaken by the primary author to identify and group different themes. During this process, the identified themes⁷ were thematically coded. A TCA was then undertaken to analyse the primary

⁷ The four main themes identified were: individual level, situational constraints in the women's lives; constraint imposed by judges; systemic-level constraints; and additional constraints imposed by judges due to systemic constraints. This article examines the first theme relating to structural constraints at the individual level as constructed by judges.

identified themes and their meaning.⁸ One of the main themes that emerged from this project relates to the key role that socio-economic constraints, underpinned by the need to support dependents, play in women's victimisation and their consequent offending. As such, for this article, we re-analysed the larger data set to focus on the aspect of financial motivations, in regard to the oft-cited driver of the financial burden of familial support. To explore how a woman's agency in relation to the constraint of familial financial burden is constructed by Australian courts in cases of HTSE in which women were identified as offenders, we analyse two recent cases in Australia.

The article seeks to explore how these factors are considered by courts through the lens of judges in relation to tensions between structural constraints and agency. Examining CCN is an important element in understanding how women trafficking offenders are sentenced and in improving responses to trafficking. However, we acknowledge that CCN represent a very small portion of trafficking cases in Australia, as many instances of trafficking are not detected and an even smaller proportion of detected cases reach the stage of prosecution and conviction.⁹ There have been criticisms of the framing of HTSE as a primarily criminal justice issue,¹⁰ and there are limitations to the heavy focus on prosecution in trafficking cases.¹¹ Acknowledging these limitations, it is still important to understand how women's agency and the structural constraints they face are represented and considered in the cases that do reach the stage of conviction.

Tensions between Structure and Agency in Trafficking for Sexual Exploitation

Agency and choice are key yet contested concepts in understandings of HTSE. The amount of agency and choice an actor is portrayed as having is determined by the role they play in the trafficking 'story'. Dominant trafficking narratives clearly

⁸ H Joffe and L Yardley, 'Content and Thematic Analysis', in D F Marks and L Yardley (eds.), *Research Methods for Clinical and Health Psychology*, SAGE Publications, London, 2004, pp. 56–68.

⁹ S Lyneham, C Dowling, and S Bricknell, 'Estimating the Dark Figure of Human Trafficking and Slavery Victimisation in Australia', *Australian Institution of Criminology Statistical Bulletin*, 2019, p. 16.

¹⁰ D Davy, 'Justice for Victims of Human Trafficking in Australia? Issues associated with Australia's criminal justice response to trafficking in persons', *Contemporary Justice Review*, vol. 20, issue 1, 2017, pp. 115–131, <https://doi.org/10.1080/10282580.2016.1262773>.

¹¹ M Segrave, S Milivojevic, and S Pickering, *Sex Trafficking and Modern Slavery: The Absence of Evidence*, Routledge, London, 2019.

delineate roles of ‘victims’, ‘villains’, and ‘heroes’,¹² and these archetypes dictate the amount of agency an individual is perceived to have in their experience of trafficking. As per Christie’s ‘ideal victim’ paradigm,¹³ victims are often constructed as having minimal, or constrained choice when it comes to their work in the sex industry and their cross-border migration. Indeed, radical and neo-abolitionist scholarship on trafficking argues that sex work is never a ‘choice’ under the patriarchal power structures that shape the global sex trade.¹⁴ In the context of victimhood, it is widely recognised that poverty and socio-economic pressures contribute to trafficking by creating the conditions under which vulnerable individuals are forced or coerced into migrating and working in the sex industry, making them susceptible to exploitation.¹⁵ Bales, for example, states ‘many if not most trafficking victims fall prey to this practice because they seek a better life or enhanced economic opportunities.’¹⁶

Within these constructions of trafficking, agency is often removed from the vocabulary of victimhood. This position emphasises the role of structural constraints, such as socio-economic disadvantage, in shaping a victim’s engagement in sex work or cross-border travel. An overreliance on these constraints limits the amount of agency afforded to victims in overarching trafficking narratives. However, evidence demonstrates that many women actively choose sex work and migration, or knowingly enter into situations where they are required to pay off large debts.¹⁷ Despite this, agency is often considered incompatible with understandings of victimhood and the ‘ideal victim’ in cases of HTSE.¹⁸ In addition, a focus on disadvantage in countries of origin can obscure the broader structures that contribute to vulnerabilities, such as harsh border regimes, unequal opportunities, and exploitative labour practices in both countries of origin and

¹² O’Brien.

¹³ N Christie, ‘The Ideal Victim’, in E A Fattah (ed.), *From Crime Policy to Victim Policy: Reorienting the justice system*, Palgrave Macmillan, London, 1986, pp. 17–30.

¹⁴ L Gerassi, ‘A Heated Debate: Theoretical perspectives of sexual exploitation and sex work’, *Journal of Sociology and Social Welfare*, vol. 42, issue 4, 2015, pp. 79–100.

¹⁵ J R Barner, D Okech and M A Camp, ‘Socio-Economic Inequality, Human Trafficking and the Global Slave Trade’, *Societies*, vol. 4, no. 2, 2014, pp. 148–160, <https://doi.org/10.3390/soc4020148>.

¹⁶ K Bales, ‘What Predicts Human Trafficking?’, *International Journal of Comparative and Applied Criminal Justice*, vol. 31, issue 2, 2007, pp. 269–279, p. 269, <https://doi.org/10.1080/01924036.2007.9678771>.

¹⁷ L M Agustín, ‘The Disappearing of a Migration Category: Migrants who sell sex’, *Journal of Ethnic and Migration Studies*, vol. 32, issue 1, 2006, pp. 29–47, <https://doi.org/10.1080/13691830500335325>.

¹⁸ M Wijers, ‘Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol’, *Anti-Trafficking Review*, issue 4, 2015, pp. 56–79, <https://doi.org/10.14197/atr.20121544>.

destination.¹⁹ This focus facilitates the construction of destination countries as the ‘heroes’ or ‘saviours’ of the trafficking story, a trope that is strengthened through the framing of trafficking as a criminal justice issue which destination countries must fight with prosecutions and punishments for trafficking offenders and through stricter migration policies.²⁰

The result of these narratives is that, from a victimological perspective, women’s backgrounds and socio-economic constraints are considered important factors in understanding trafficking victimisation. However, when it comes to offending, structural factors are discarded in favour of agent-centric explanations. As agency is often seen as incompatible with victimhood, so too are structural constraints incompatible with offending. One example is the market-based, organised crime perspective, which applies rational choice theory to trafficking offences to explain how offenders weigh up the costs and benefits of trafficking in a detached and calculated way with a purely profit-driven approach. For example, Bales states, ‘many traffickers are involved in other transnational crimes. Criminal groups choose to traffic in persons, in part, because it is high-profit and often low-risk, because unlike other “commodities”, people can be used repeatedly, and because trafficking in persons does not require a large capital investment’.²¹ This approach aligns with the proliferation of rhetoric of trafficking as a transnational crime, and the consequent focus on pursuing prosecution as a priority in countries such as Australia.²²

Depictions of offenders who choose to exploit vulnerable victims sustain the overarching trafficking discourse and popular imagery associated with anti-trafficking campaigns.²³ This fits with the ‘female villains and exploited agents’ narrative identified by Maciotti *et al.*²⁴ However, as Ajzenstadt highlights, relying too heavily on agency to explain offending minimises the role of structural constraints in shaping an offender’s worldview and consequent choices.²⁵ A dichotomous approach to agency (i.e., an offender has unconstrained agency while the victim has no or minimal agency) does not reflect the realities of

¹⁹ Segrave, Milivojevic and Pickering.

²⁰ *Ibid.*

²¹ Bales, p. 269.

²² Segrave, Milivojevic and Pickering.

²³ O’Brien.

²⁴ P G Maciotti *et al.*, ‘Framing the Mother Tac: The racialised, sexualised and gendered politics of modern slavery in Australia’, *Social Sciences*, vol. 9, issue 11, 2020, pp. 192–219, <https://doi.org/10.3390/socsci9110192>.

²⁵ M Ajzenstadt, ‘The Relative Autonomy of Women Offenders’ Decision Making’, *Theoretical Criminology*, vol. 13, issue 2, 2009, pp. 201–225, <https://doi.org/10.1177/1362480609102879>.

trafficking victimisation and offending. Recent research has demonstrated that the line between victimisation and offending in trafficking is often blurred.²⁶ In Australia, for example, five of the ten women convicted of HTSE offences were prior victims of human trafficking. Viewed through this lens, it is apparent that more nuanced understandings of agentic and structural factors are required.

Literature on offending women highlights the need to explore familial burden as considerable structural constraint in offenders' lives that forms part of a wider background defined by broad socio-political constraints. As Hindelang, Gottredson and Garofalo highlight, structural constraints pose limitations on an individual's behaviour and level of choice.²⁷ They can shape an individual's daily life, including decisions to engage in criminal or deviant behaviours or responses to victimisation.²⁸ Oppressive structures reshape and confine women's goals.²⁹ A lack of viable economic opportunities resulting in a lack of financial security, coupled with a financial burden to support family, fuels the migration of women in search of better work opportunities. This process, combined with societal and cultural norms, which act to reinforce gender inequalities, render them vulnerable to the trafficking process, both victimisation and offending.³⁰

Socio-Economic Constraints of Women Defendants in Australian HTSE Cases

Examining the ten women convicted of HTSE in Australia, eight sentencing remarks discussed the socio-economic constraints and financial factors associated with the women's backgrounds and offending. The two remaining cases did not explicitly mention socio-economic factors and provided scant information on the offenders' backgrounds. These cases were some of the earliest HTSE convictions in Australia and less was known about the patterns of offending

²⁶ Baxter.

²⁷ M J Hindelang, M R Gottredson and J Garofalo, *Victims of Personal Crime: An empirical foundation for a theory of personal victimization*, Ballinger, Cambridge, 1978.

²⁸ J J Turanovic, T C Pratt and A R Piquero, 'Structural Constraints, Risky Lifestyles, and Repeat Victimization', *Journal of Quantitative Criminology*, vol. 34, 2016, pp. 251–274, <https://doi.org/10.1007/s10940-016-9334-5>.

²⁹ D T Meyers, 'Feminism and Sex Trafficking: Rethinking some aspects of autonomy and paternalism', *Ethical Theory and Moral Practice*, vol. 17, no. 3, 2014, pp. 427–441, <https://doi.org/10.1007/s10677-013-9452-1>.

³⁰ W M Konstantopoulos *et al.*, 'An International Comparative Public Health Analysis of Sex Trafficking of Women and Girls in Eight Cities: Achieving a more effective health sector response', *Journal of Urban Health: Bulletin of the New York Academy of Medicine*, vol. 90, no. 6, 2013, pp. 1194–1204, <https://doi.org/10.1007/s11524-013-9837-4>.

relevant to prosecution and sentencing. Overall, 60 per cent of sentencing remarks discussed a woman's financial burden to support family members, combined with economic disadvantages in the context of their offending, as indicated in Table 1 below. Table 1 provides the legal citation for the sentencing remarks pertaining to each woman offender and highlights whether the narrative within the sentencing remarks stated she was a prior victim of HTSE, and whether she experienced an economically disadvantaged background and a financial burden to support her family.

Table 1: Key facts relating to the ten convictions involving women HTSE offenders in Australia.

Woman Offender	Case Citation	Prior Victim of HTSE	Economically Disadvantaged Background	Financial Burden to Support Family
DS	The Queen v DS [2005] VCC (NB: judgment not available)	Yes	Unknown	Unknown
Wei TANG	R v Tang, Wei [2006] VCC 637	No	Yes	Unknown
Somsri YOTCHOMCHIN	R v Sieders & R v Yotchomchin [2006] NSWDC 184	No	Yes	Yes
Sarisa LEECH	DPP (Cth) v Ho & Leech [2009] VSC 495	Yes	Unknown	Unknown
Kanokporn TANUCHIT	R v McIvor and Tanuchit [2010] NSWDC 310	Yes	Yes	Unknown
Namthip NETTHIP	R v Netthip [2010] NSWDC 159	No	Yes	Yes
Watcharaporn NANTAHKHUM	R v Watcharaporn Nantakhum SCC149 of 2010	Yes	Yes	Yes
Chee Mei WONG	R v Chee Mei Wong	No	Yes	Yes
Lay Foon KHOO	The Queen v Lay Foon KHOO [2017] 2105 of 2016	Yes	Yes	Yes
Rungnapha KANBUT	R v Kanbut [2019] NSWDC 931	No	Yes	Yes

Poverty and disadvantage were specifically discussed in six of the cases, as identified in the table above. One anti-trafficking expert interviewed suggested many women who were trafficked, ‘were trying to make money, save money and send it home to siblings or children. That’s where they transferred their power to ... saving other people in their family’.³¹ Reflected in the sentencing remarks, financial burdens formed structural socio-economic constraints that shaped offending. As another anti-trafficking expert stated:

*Women are forced to make money to survive, or sometimes, they are forced to stay with violent partners who are continuing to exploit them, even using them to engage other women to be able to exploit them, for financial reasons.*³²

In considering these structural constraints, it is important not to deny women agency. Outside the court, these offenders were survivors, using the tools and knowledge they possessed to improve their lives after experiencing significant constraints. One expert with experience with cases of HTSE concluded during an interview that in these cases ‘it’s about survival ... it was about a need to provide money for family members [and] extended families.’³³

During an interview, one judge considered poverty a large motivating force for the victims choosing to undertake sex work in the cases analysed. This judge suggested that a woman’s decision to come to Australia under contract was ‘the impact of poverty on people. They willingly came to earn money’.³⁴ This judge could also see the impact of poverty on the offenders and their decision to exploit others, rather than be the one exploited:

*[People] become the trafficker just out of economic necessity ... A person comes over here as a slave, she then works very hard and builds up money, and I suppose she opens a brothel herself and says, well, I’ll do the same thing. I’m sure that’s how it has happened. She’s realised that she’s been able to make her way, **not the normal recommended way** but ... **when you’ve come from a place of poverty that’s what happens, isn’t it** [emphasis added].³⁵*

This judge, therefore, thought poverty and disadvantage largely motivated both the victims and offenders in a similar way as they were often from the same geographical area and experienced similar constraints. Consequently, interviews

³¹ Interview, Participant Three, Melbourne, 29 August 2018.

³² Interview, Participant Four, Melbourne, 18 June 2018.

³³ Interview, Participant One, Melbourne, 1 March 2018.

³⁴ Interview, Judge Three, Melbourne, 5 April 2018.

³⁵ *Ibid.*

with the judges, including the extracts above, illuminate a strong understanding of the victim-offender cycle in these cases and, in interviews, attention is given to the relative force of structural constraints and women's agency.

However, while an offender's socioeconomic background gives context to offending in court, a nuanced understanding of the centrality of constraining structures is absent in sentencing. For example, the author of the pre-sentencing report tendered in *Namthip Netthip's* sentencing stated:

The offender presented as a person who has chosen to earn a living on the fringe of society, appearing to take an amoral view of her profession [sex work] as the best available means to provide for her family. She appears to have few external resources, but for years has displayed an apparently consistent level of internal fortitude ...

She has displayed a lifelong commitment to her birth family, and has, by her account, been driven by the need to financially support her parents and later her daughter.³⁶

Here, although the financial burden Netthip faced is acknowledged, her choices are prioritised over this constraint. In addition, an offender's previous experience of victimisation tended to heighten her culpability with some judges. For example, when interviewed, one judge stated:

You reckon a person who has been through it wouldn't then subject others to it. I'm not saying that it's aggravated by the fact that they've been previously [a victim], but it's certainly not a factor that is going to reduce a matter ... you would ask yourself, if you had been in slavery yourself, why would you impose it on anyone else?³⁷

Similarly, another judge stated:

She had experienced that herself and then to put that on somebody else is, is more serious, is more culpable. So, on the one hand, her experiences justified some sympathy but on the other hand those experiences should have led her to reject that imposition on others [emphasis added].³⁸

Given the enduring prominence of 'choice' as an explanation for offending, offenders' social and economic constraints and their burdens for supporting

³⁶ *R v Netthip* [2010] NSWDC 159, para. 21.

³⁷ *Ibid.*

³⁸ Interview, Judge Six, Canberra, 20 March 2020.

dependents rarely mitigated sentences. The key mitigating factors for sentencing in these cases were an offender's compliance with police and their level of remorse. For example, the appellate judges who re-sentenced DS stated there were significant mitigating circumstances that operated in her favour. These included '... [her] plea of guilty, her remorse and contrition, and the obviously significant help that she has provided to the police and immigration authorities'.³⁹ These acts entitled DS to a 50 per cent reduction in her sentence. In addition, despite often experiencing socio-economic disadvantage and familial burden, women may be constructed as more culpable as they should have known better. This construction corresponds with Maciotti *et al.*'s study which found that 'white Australian male partners involved in the exploitation of sex workers in several slavery cases in Australia (including Queen vs. Wei Tang, Somsri, and Tanuchit) received more lenient sentences than their spouses'.⁴⁰

Case Studies: Women offenders and socio-economic constraints

Lay Foon KHOO

Lay Foon Khoo was born and grew up in Malaysia. She was charged with one count of organising or facilitating the entry of Ms Lai into Australia, involving deception about the fact that Ms Lai would be required to provide sexual services. Hardship was a prominent element of Lay Foon Khoo's life from the moment she was born. During sentencing, the judge described Khoo's harsh upbringing:

*Your background has been a very distressing one and it's been a very hard life you have led. You were born in prison because of your parents being imprisoned for drug trafficking. You've spent the first three years of your life in that environment.*⁴¹

After she moved out of this environment, Khoo lived with her older sister, uncle, aunt, and grandmother, who raised her. However, her life did not improve. Khoo's family treated her badly due to the circumstances of her birth. Khoo was beaten and because her mother worked in the sex industry, she was bullied at school.⁴²

In addition to the abuse Khoo suffered as a child, the sentencing judge stated all three of Khoo's primary relationships were abusive. Her first husband gambled, cheated on her, and was violent towards her. Her second husband was also abusive,

³⁹ *R v DS* [2005] VSCA 99, p. 8.

⁴⁰ Maciotti *et al.*, p. 9.

⁴¹ *The Queen v Lay Foon KHOO* [2017] 2105 of 2016, p. 438.

⁴² *Ibid.*, p. 439.

and her partner at the time of sentencing was reportedly abusive as well. The sentencing judge acknowledged the burden of care placed upon Khoo during her relationship with her second husband:

*This was also an abusive relationship and you were forced to support your second husband's former wife and two children as well as your family and assist him with business dealings.*⁴³

When Khoo's second marriage ended, she was left with no money and attempted to sell her jewellery to raise the funds to travel to Australia.⁴⁴ This would indicate Khoo had endeavoured to come to Australia prior to meeting Kathy Wong, the woman who eventually arranged her travel. These circumstances, however, left her vulnerable to those who recruited her to work in Australia: Kathy Wong and Danny Cai.

While in Malaysia, Khoo commenced a friendship with Danny Cai and Kathy Wong, who informed Khoo of the prospect of coming to Australia to earn money as a sex worker. Danny Cai was a relation of Ms Cai, for whom Khoo worked once in Australia. Wong told Khoo she could earn a good income in Australia and offered to organise her travel and work arrangements. When Khoo told Wong she did not know anything about sex work, Wong told her that she would teach her. As Khoo needed to earn money to support her family financially, she agreed to come to Australia to work in the sex industry. However, she was not informed of the requirement to pay back fees associated with her travel costs and visa until after she arrived in Perth, nor was she aware she would not be able to retain possession of her passport.⁴⁵ Khoo's legal representation argued her choice was made in desperation:

*When Ms Khoo was setting herself up to come to Perth to work as a prostitute, that wasn't an easy choice for her to make. It wasn't something that she wanted to do, but she was in a desperate situation. She had the good fortune to have her husband able to look after the children back in Malaysia, but she needed to earn money.*⁴⁶

This illustrates the impact of the financial burden placed upon Khoo, which resulted in her accepting work in the sex industry, so she could earn the income she needed to support her family.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 430.

⁴⁶ *Ibid.*

Shortly after Khoo arrived in Australia, she began working for Ms Cai in her brothel. The sentencing judge suggested Ms Cai provided great assistance to Khoo, such as accommodation, clothing, and hygiene products, among other things. After Khoo ceased working at the brothel, she reportedly felt an obligation to Ms Cai. Using the term ‘pay back’, Khoo allegedly felt that she needed to repay Ms Cai’s favour by recruiting Ms Lai to work at Ms Cai’s brothel.⁴⁷ Upon her arrival, Khoo and her partner picked Ms Lai up from the airport and bought her a sim card, groceries, and some personal hygiene products before taking her to the brothel where she was to work. This was like the treatment Khoo received from Ms Cai after she arrived in Australia. Ms Lai worked at the brothel for seven days before contacting the police.

The sentencing judge accepted there may have been a degree of pressure on Khoo by Ms Cai when she first arrived in Australia. Nonetheless, the judge further suggested that this pressure no longer existed as the fact Khoo was arranging for women to come from Asia to work for her demonstrated the friendship that now existed.⁴⁸ However, this view does not take into account the power imbalance between Khoo and Ms Cai considering Khoo worked for Ms Cai in a situation where she was required to repay the costs associated with her travel and her passport had been taken from her. Khoo referred to Ms Cai as the Lady Boss throughout the arrangements for Ms Lai to come to Australia. The judge’s belief that a friendship now existed between Khoo and Ms Cai aligns with the ‘choice’ narrative and does not consider the coercive elements stemming from Khoo’s own victimisation by Ms Cai.

Khoo did not plead guilty, nor did she personally give evidence at the trial. The judge referred to a psychological report tendered during sentencing that suggested Khoo was ‘unable to acknowledge wrongdoing and unable to demonstrate an understanding of how [her] conduct [had] harmed the victim...’. The sentencing judge stated: ‘I accept that that’s in part because of the harsh treatment that you’ve received throughout your life and the circumstances of how you came to be working at the brothel in Australia ...’.⁴⁹ Khoo was therefore sentenced to a total of four years imprisonment. Khoo’s sentence could be considered especially harsh considering this case involved only one victim, who was exploited for six or seven days, in conjunction with Khoo’s own experiences as a trafficking victim and the socio-economic constraints she faced, which were both acknowledged by the judge.

⁴⁷ *Ibid.*, p. 426.

⁴⁸ *Ibid.*, p. 435.

⁴⁹ *Ibid.*, p. 439.

Rungnapha KANBUT

Rungnapha Kanbut was born and grew up in Southern Thailand. The court did not consider Kanbut to be a victim of trafficking. However, the sentencing remarks reveal that her significant socio-economic constraints were considered during sentencing. The sentencing judge referred to a psychiatric report in which Kanbut stated ‘her family suffered significant financial challenges and often did not have enough money for food’.⁵⁰ The judge stated during sentencing that after Kanbut was born, her family moved into their maternal grandmother’s small house where they lived with three aunts and one uncle, as her mother was unable to care for both Kanbut and her sister. Kanbut left school when she was 7 years old to help her mother care for her newborn sibling. When Kanbut was 13 or 14 years old, she began gruelling work as a farm hand, during which time she got up at 4 am to walk to the rubber plantation to begin work.⁵¹ Kanbut migrated to Australia because she wanted to provide a better life for her two older children, whom she had with her first partner in Thailand. Her actions in relation to her children were like those regarding her family when she was young; she did all she could for them to ensure they had the best life possible. However, Kanbut found the cultural differences between Thailand and Australia difficult to negotiate at times. A particular aspect of Thai culture, as noted in the sentencing remarks, is the practice of families relying on and helping each other when required. After Kanbut immigrated to Australia, four members of her family also came: her two children, her cousin, and her sister. All four depended heavily on Kanbut and, continuing her Thai cultural practice, she did everything she could to ensure each were cared for.

Kanbut’s daughter provided the first of six character references in support of Kanbut. In summarising this, the sentencing judge suggested Kanbut ‘found it difficult living in Australia compared to Thailand principally because of the lack of family support’,⁵² as in Thai culture, ‘the community supports each other very much’.⁵³ Ms Barton, the daughter of Kanbut’s ex-partner, was another of the six people who provided the court a reference in support of Kanbut. In summarising this reference, the sentencing judge stated Kanbut ‘was a hard worker and had always been focused on providing for her family’.⁵⁴ Furthermore, Kanbut ‘had a strong work ethic that is driven by wanting to provide for her family’.⁵⁵ Ms Barton could not believe Kanbut had been found guilty of the charges, suggesting ‘it

⁵⁰ *R v Kanbut* [2019] NSWDC 931 para. 76.

⁵¹ *Ibid.*, para. 77.

⁵² *Ibid.*

⁵³ *Ibid.*, para. 110.

⁵⁴ *Ibid.*, para. 120.

⁵⁵ *Ibid.*, para. 125.

is relevant to think of the cultural differences and difficulty for some people immigrating to Australia'.⁵⁶ Dr Bloomfield, Kanbut's youngest son's paediatrician, provided a report detailing some of her son's medical issues. From this report, the sentencing judge summarised Kanbut's ex-partner and father of her youngest son, 'has experienced difficulties financially with employment and his health [and] has a limited capacity to provide continuous care... [As a result], this has increased the demands on [Kanbut] who is effectively his sole carer...'.⁵⁷ Kanbut's daughter stated (as summarised by the sentencing judge) that her mother had had a very tough life:

*She had sacrificed her education so that her sister who had health problems could go to school. [Kanbut] worked in any way she could to help the family survive. She would find fruit and vegetables to sell at the markets, cook and do housework, cleaning and washing clothes. When it came to her own children she applied this same selflessness and did everything she could to give her children the best life and education possible.*⁵⁸

Each character reference from Kanbut's friends and family highlights that Kanbut felt the burden of supporting her family financially, even when she was young.

Regarding Kanbut's offending, she was one person participating in a larger organisation that operated between Australia and Thailand. Unlike Khoo, Kanbut was not involved in the recruitment of the two victims. However, she did manage the victims once they arrived in Australia. Kanbut explained where, when, and how each would work and organised their transport to and from the brothel. She was therefore charged with two counts of intentionally possessing a slave and two counts of exercising over a slave any powers attaching to the right of ownership, namely the power to use, in relation to two victims.⁵⁹ Kanbut's legal representation argued she had 'provide[d] the victims with somewhere to live and provide[d] them with items for work'.⁶⁰ Additionally, while they agreed that she had a hands-on role in the operation, they argued further that 'she was not without compassion for the victims',⁶¹ with which the sentencing judge agreed.⁶² These claims support the victims referring to Kanbut as 'mother tac', which translates into someone who looks after the contracted women.

⁵⁶ *Ibid.*, para. 126.

⁵⁷ *Ibid.*, para. 161.

⁵⁸ *Ibid.*, para. 106.

⁵⁹ *Ibid.*, para. 2.

⁶⁰ *Ibid.*, para. 213.

⁶¹ *Ibid.*, para. 218.

⁶² *Ibid.*, para. 272.

However, the prosecution argued that Kanbut's 'conduct was planned and premeditated'.⁶³ Further, she exploited the freedoms of two vulnerable women for her own financial gain. Similarly, the sentencing judge in *R v Watcharaporn Nantabkhum* suggested that '...the offence [in this case] was primarily committed for greed'.⁶⁴ This judge, like the judge sentencing Kanbut, prioritised greed as the motivation for their actions, rather than framing their actions as a response to the socio-economic constraints they experienced, as discussed throughout the sentencing remarks. This aligns with the 'choice' narrative often applied to offenders. As Kanbut did not cooperate with law enforcement, nor show any remorse for her actions, she was not entitled to any reduction of her sentence. As a result, she was sentenced to eight years imprisonment.

Maciotti *et al.* suggest, '[a]ccording to Rung's⁶⁵ defence counsel, Mr Clarke, the whole case was "a-washed with consent." Instead, for the prosecution the victims' consent to the slavery-like conditions was to be found irrelevant in the determination of whether they had been enslaved, a definition which was then accepted by the judge'.⁶⁶ This highlights a difference between the way agency is viewed in relation to victims and offenders. Because the victim's consent cannot be pointed to as a defence by the offender, the victim's agency is denied, and the offenders' agency is heightened. Similar to Khoo's sentence, 'Rung's eight-year long sentence [...] could be seen as harsh in comparison to these when taking into account the number of victims involved'.⁶⁷

Conclusion

Narratives that depict trafficking in terms of clearly defined victims and villains reinforce the division between those who have agency (offenders) and those who do not (victims). This dichotomous view of the victim/offender, structural constraint/agency divide does not reflect the realities of trafficking for sexual exploitation. As this analysis has shown, a large proportion of women offenders have also been victims of HTSE (50 per cent of Australian cases), and many women have experienced significant socio-economic constraints and familial burdens that have shaped their pathways to both victimisation and offending. While many judges are aware of the constraints women face, the narrative of choice and agency dominates sentencing. One judge explained the reason behind this:

⁶³ *Ibid.*, para. 192.

⁶⁴ *R v Watcharaporn Nantabkhum* SCC149 of 2010, p. 10.

⁶⁵ Rung is short for Rungnapha Kanbut.

⁶⁶ Maciotti *et al.*, p. 11.

⁶⁷ *Ibid.*, p. 8.

What quite often happens in the sentencing process, you'll get perhaps a psychologist's report or a pre-sentence report from community corrections, which will give you either in great detail, or not so much detail, information about the person's background and life. In a lot of cases, you never hear from the defendant/the perpetrator. So, you're going on second-hand information given to these other people.⁶⁸

This highlights the need for offenders' voices to be included during trials and sentencing. Offending women's voices and experiences are notably absent in trafficking case adjudications, which leads to narrative tropes and imagery of victims and villains that misrepresent the complex socio-economic constraints and financial burdens women experience. While these constraints can influence women's offending, this does not mean women's agency has been removed. Therefore, the inclusion of women's own narratives can improve the understanding of the ways they exercise agency despite the powerful ability of these constraints to structure their offending. Considering this, these socio-economic constraints should be viewed as mitigating elements in the women's sentencing.⁶⁹ To facilitate a greater understanding of the impact of socio-economic structural constraints and previous victimisation in HTSE cases, judges need specific training on the complexities of the lives of women who have been identified as offenders. This is a scenario which needs to be openly addressed as part of the training, such as professional development programmes for judges and other criminal justice actors.⁷⁰

In acknowledging the role that structural constraints, such as familial financial burden, play in shaping women's offending, it is also important to avoid removing women's agency altogether. For both victims and offenders, recognising that women make considered choices to better their circumstances is key to understanding the complexities of human trafficking. Doing so will shed light on the structural forces and global inequalities that contribute to trafficking while also incorporating nuanced understandings of gendered structural constraints when

⁶⁸ Interview, Judge Two, Sydney, 26 June 2018.

⁶⁹ This article discusses women's offending and the socio-economic constraints they face, as discussed during sentencing. This is not to say that male offenders do not face a similar financial burden to support their families, but further research is required in this area. If this was shown to be the case, this should similarly be considered by judges during sentencing.

⁷⁰ It is important to note that the socio-economic constraints discussed within the sentencing remarks originated in the offender's country of origin and therefore, to alleviate these, greater economic opportunities need to be provided to women in these countries. However, as this article speaks specifically to the way that Australian judges construct these elements, the recommendations have centred around judges and the sentencing process.

exploring women's offending in HTSE. This point is supported by criminologists such as Ajzenstadt who argues that 'women's involvement in crime should be further analysed with the context of their gendered social positioning, which produces the framework for their individual decisions and their attempts to exercise control over their behaviour.'⁷¹ As this analysis has shown, women do have agency in shaping their lives. However, they make choices within socio-economic constraints, influenced by structural factors at both a micro and macro level that lead them to become both victims and offenders of trafficking for sexual exploitation.

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⁷¹ Ajzenstadt, p. 202.