

Human Trafficking in Brazil: Between crime-based and human rights-based governance

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Interview Summary

This interview with Ela Wiecko V. de Castilho, Vice-Prosecutor General of the Republic in Brazil, looks at the development of anti-trafficking law and agendas since Brazil's ratification of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Trafficking Protocol). Castilho looks at how the externally-imposed concept of anti-trafficking gained momentum in the country and details debates and tensions in the subsequent development of national policy. Brazilian criminal law has significant conceptual differences with the Trafficking Protocol, particularly around consent and internal trafficking. Castilho discusses unresolved issues on rights of sex workers and migrants and points to a data collection methodology that was recently established and will allow for analysis of whether victims' situations meet the international definition of human trafficking. If they do not, she suggests that this definition may not need to be maintained in Brazil.

Anti-Trafficking Review: How has the Brazilian government responded to human trafficking after signing the United Nations (UN) Convention against Transnational Organized Crime and its Trafficking Protocol?

Castilho: In 2000 Brazil signed the UN Convention and two of its Protocols—the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), as well as the Protocol Against the Smuggling of Migrants by Land, Sea and Air. The National Congress ratified the Convention in January 2004. Ten years later the Brazilian government has still not adapted its existing criminal legislation to international requirements. This has not prevented the government from publicly promoting an anti-trafficking agenda—a process which began in 2004 and was entirely driven by international rather than local demands.

Anti-Trafficking Review: You said that the adoption of the anti-trafficking agenda was not homegrown. How was the agenda introduced to Brazil?

Castilho: Early stimulus came from the United Nations Office on Drugs and Crime (UNODC), Organization of American States (OAS), International Labour Organization (ILO), and the United States (US) government, mostly likely influencing the National Congress' fast ratification of the UN Organized Crime Convention and the two Protocols in 2004.

In December 2001 UNODC began a pilot project with the Brazilian Ministry of Justice prioritising measures against trafficking of women for sexual exploitation. In 2002, an OAS-commissioned study ‘National Research on Trafficking in Children, Women and Adolescents for Commercial Sexual Exploitation’ (PESTRAF) had a large impact, claiming to have found 241 domestic and international trafficking routes.¹ It compelled the Brazilian Congress to set up a Mixed Parliamentary Committee of Inquiry² in 2003 to investigate networks of commercial sexual exploitation of children and adolescents.

This early period involved other international players concerned with Brazil’s anti-trafficking policy. In 2003, the US Consulate in São Paulo supported the Secretariat of Justice of São Paulo in establishing a Human Trafficking Prevention and Combat Office.³

The ILO supported efforts against both sexual and labour exploitation under one human trafficking umbrella. It also folded the issue of migration into discussions on trafficking. The ILO’s Combat Human Trafficking Project, operational from 2006-2009, had a budget of over three million dollars funded by the United States Agency for International Development (USAID).⁴

Anti-Trafficking Review: How did national policy begin to develop after this external influence?

Castilho: Direct assistance to trafficked persons was a key driver of State and federal engagement in anti-trafficking.⁵

Collaboration on direct service provision between non-governmental organisations (NGOs) and State actors also led to the first national public awareness campaign on trafficking for sexual exploitation. At the end of 2005, the government decided to establish a National Policy to Combat Human Trafficking (PNETP I), approved 26 October 2006, coordinated by the Ministry of Justice.⁶ Stakeholders in justice, public security and human rights, as well as victim assistance providers and sex worker representatives took part in this process. For the first time, efforts to implement the Trafficking Protocol included both experts on labour and sexual exploitation.

Between May and June 2006, civil society was invited to contribute to a broad public consultation process, characteristic of President Lula’s government, and one of the first topics of national discussion was whether under existing Brazilian legislation human trafficking constituted a crime. At the time, I declared that there were existing provisions in the Penal Code and in special laws that sanctioned conduct with characteristics of trafficking. While these give a response to trafficking, they are not systematised or coherent.

¹ M Leal, (coord.), ‘Pesquisa sobre Tráfico de Mulheres, Crianças e Adolescentes para fins de Exploração Sexual e Comercial—PESTRAF: Relatório Nacional—Brasil’, Brazil, CECRIA, 2002. PESTRAF has been critiqued for instance in: T G Blanchette & A P Silva, ‘On Bullshit and the Trafficking of Women: Moral entrepreneurs and the invention of trafficking of persons in Brazil’, *Dialectical Anthropology*, vol. 36, 2012, pp. 107-125.

² The committee is composed of congressmen and senators.

³ In 2003 the Ministry of Justice established the Human Trafficking Prevention and Combat Office in partnership with the governments of the states of Ceará, Goiás, Rio de Janeiro and São Paulo. The US Consulate supported the São Paulo office.

⁴ The Independent Project Evaluation Report in 2009 highlighted ‘the difficulty that the concept of human trafficking was necessary to bring together, on one hand, considerations on the subject of slavery and on the other, the sexual exploitation of idea. In Brazil, this difficulty reflected the existence of frameworks, policies and committees or previously established technical advice’. G M Dias, ‘Migração e Crime: desconstrução das políticas de segurança e tráfico de pessoas’, doctoral thesis, Campinas: Unicamp, 2014.

⁵ As the Ministry of Justice recognised in its 2003-2006 management report.

⁶ Secretaria Nacional de Justiça (SNJ), ‘Relatório Final de Execução do Plano Nacional de Enfrentamento ao Tráfico de Pessoas’, Ministério da Justiça, first edition, Brazil, 2010.

The absence of a systemised legal response to the crime of human trafficking in law did not prevent international legal cooperation nor did it violate the provisions of the Trafficking Protocol. However, in order for Brazil to join the global effort against trafficking, I argued that a systematising of criminal types, which observed proportionality of penalties, was desirable.⁷ This has not been a straightforward process, given the multiplicity of behaviours constituting human trafficking (e.g. enslavement, sexual exploitation of children and adolescents, removal and sale of parts of the human body) all of which constitute existing crimes. Establishment of the crime of human trafficking is currently being discussed by the National Congress, but no consensus has been reached.

Anti-Trafficking Review: What tensions did you see as the government tried to develop policy?

Castilho: Bringing together NGOs, social movements and governmental bodies, with separately developed plans—the National Plan for Combating Sexual Commercial Exploitation of Children and Adolescents (2000), the National Plan for Eradication of Slave Work (2003) and the National Plan for Eradication of Child Labour (2004)—was challenging. Reconciling a security and a human rights approach was difficult. The Brazilian government believes in a perspective that recognises and guarantees rights, while the Convention and its Protocols are primarily driven by security concerns rather than human rights.

Anti-Trafficking Review: How did people respond to these tensions between crime control and human rights frameworks?

Castilho: The presence of Brazilian women in the global sex industry affected the balance between human rights and security paradigms in Brazil. Research by Silva et al⁸ and Piscitelli⁹ showed that Brazilian women and transgender people working in the sex industry abroad were the object of prejudice, xenophobia and racism. Silva and Grupo Davida, a research group, claimed that most adult women in prostitution in Europe were workers rather than victims of trafficking.¹⁰ To treat them as victims was a violation of their right to work in the sex industry. By contrast, women and transgender migrants working in Brazil who did need protection as trafficking victims were not receiving due protection according to Brazilian law. They were simply detained and deported as immigrants with no documentation.

Anti-Trafficking Review: In addition to sex workers having problems with the introduction of an anti-trafficking framework, did labour rights activists who had previously been working under an anti-slavery framework perceive they would be negatively impacted? What about other groups?

Castilho: Since the 1980s the Comissão Pastoral da Terra (Pastoral Land Committee) had been publicising the issue of rural labour exploitation and the term ‘slave labour’, saw in PNETP a loss of space for public activism of the National Committee for Eradication of Slave Work (CONATRAE).

Groups working on the rights of migrant workers were also concerned about developments.

⁷ E W V de Castilho, ‘A legislação penal brasileira sobre tráfico de pessoas e imigração ilegal/irregular frente aos Protocolos Adicionais à Convenção de Palermo’, text presented at the First Luso-Brazilian conference on human trafficking and illegal immigration, Cascais, 2006.

⁸ A P Silva, Grupo Davida et al., *Prostitutas, “traficadas” e pânico morais; uma análise da produção de fatos em pesquisas sobre o “tráfico de seres humanos”*, Cadernos Pagu, Campinas, vol. 25, 2005, pp. 153–184.

⁹ A Piscitelli (coord.), ‘Pesquisas em tráfico de pessoas. Parte 2—Relatório indícios de tráfico de pessoas no universo de deportadas e não admitidas que regressam ao Brasil via aeroporto de Guarulhos’, SNJ/OIT, Brazil, 2006.

¹⁰ A P Silva, & Grupo Davida et al.

For them the Smuggling Protocol (the second protocol that Brazil signed alongside the Trafficking Protocol) posed a direct threat to the rights of migrant workers because it increased State resolve to collaborate internationally on border enforcement. Any benefits that might accrue to workers from the Trafficking Protocol would, in their view, be better protected by encouraging the Brazilian government to sign and ratify the 1990 International Convention concerning the Protection of the Human Rights of all the Migrant Workers and their Families. In short, several key constituencies opposed the priorities and language of the anti-trafficking framework.

The words of Sprandel¹¹ describe anti-trafficking work in the Brazilian context perfectly: Everything has become trafficking, for evil: I refer mainly to prostitution of women and transvestites... A sort of moral panic has come to the fore in relation to prostitution, such like I have not seen for a long while... Debates sometimes take on tones of good and evil that really have little to do with the reality of the people that we intend to protect...

Everything has become trafficking, for good: In these twenty years of passionate struggle for the benefit of migrants, with no real advancement in the issue, the human trafficking agenda arrived with full force and was rapidly incorporated by our Government and by all of us, with more or less resistance... To a certain extent we put many of our expectations related to migration policies into the policies for combating human trafficking.¹²

Anti-Trafficking Review: Does the Brazilian National Policy diverge from concepts in the Trafficking Protocol?

Castilho: A first difference is that human trafficking in the Protocol is understood as a transnational crime associated with criminal organisations. In Brazil, the National Policy created a category of internal trafficking, with the same elements defining international trafficking.

Second, under Brazilian law the consent of any victim, whether under or over eighteen years, is irrelevant provided the other elements of the crime are present. The intent here is to protect not only child victims of trafficking (as in international law) but also grant protection to a broader category of adults, specifically migrant Brazilians working abroad. People who qualify as trafficked victims will receive special protection they would otherwise be ineligible for if they are only considered as undocumented migrants.

Anti-Trafficking Review: Tell us more about consent.

Castilho: In order to do that I need to tell you about a significant change to the Penal Code. A law introduced in 2009 equated prostitution to sexual exploitation, a change with many implications for the concept of consent.¹³

As a crime, human trafficking in Brazilian law is characterised by the irrelevance of the consent of the passive subject, as per Penal Code, Article 231.

It is a crime, not only to facilitate entrance to and exit from Brazil, but also to help anyone who intends to enter or leave Brazil in order to enter in the sex industry. Thus

¹¹ M A Sprandel, 'Conceito de Tráfico e Migrações', lecture given at the Second National Meeting of Fight Network to Combat Human Trafficking, Recife, 2011.

¹² Ibid.

¹³ As per Law number 12,015, dated 7 August 2009. That law also broadened the scope of concern to include internal trafficking. The Penal Code was also changed in 2005: in law number 11,106, the word 'women' was replaced by the word 'people'.

even an adult voluntarily engaged in prostitution is considered by law a victim in need of assistance. Where there is violence, serious threat or fraud—in other words, where consent is invalidated—the penalty is higher.

By contrast, under the Trafficking Protocol consent is irrelevant only for persons under eighteen and a person engaged voluntarily in prostitution is not necessarily a victim.¹⁴

The Trafficking Protocol points to prohibited ‘purposes’, including the ‘exploitation of the prostitution of another person or other forms of sexual exploitation.’ However, the articles in the Brazilian Penal Code criminalise the ‘exercise of prostitution or another form of sexual exploitation.’ There is a big difference here.

The Brazilian Penal Code equates the autonomous exercise of prostitution to sexual exploitation and makes it an illicit activity, even if the person who is exercising the act cannot be denounced as a trafficker. With these two semantic changes, Brazilian legislation, without the extensive discussion that preceded creation of the Trafficking Protocol, strengthened the abolitionist approach to prostitution and with it the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the stance of organisations such as the Coalition Against Trafficking in Women (CATW).¹⁵

The result is a ‘system of repression of dissident female sexual activities and of restriction of international mobility for sex professionals’.¹⁶

‘Consent’, like the term ‘abuse of the situation of vulnerability,’ reveals ambiguity in the Trafficking Protocol. Individual governments, like that of Brazil, can translate the concept of consent into law in a way that is a de facto response of repression, rather than protection. Interpretation of ‘consent’ determines whether the government’s response is one of protection or repression.

Anti-Trafficking Review: Changing topic, do you think that enough is known about trafficking in Brazil to be able to develop responsive policy?

Castilho: Without doubt, speculative and inconclusive statistics about the scale of trafficking in Brazil ensured prompt acceptance of the anti-trafficking agenda in Brazil.

One of the strong arguments justifying the anti-trafficking agenda has always been the large profits gained from human trafficking. It is sometimes asserted that traffickers make around USD 32 billion per year,¹⁷ and trafficking is the third most lucrative crime in the world, coming only behind drugs and arms.¹⁸ These declarations have never been supported by sufficient evidence, but they have been appropriated by the representatives of the countries that are signatory to the Convention Against Transnational Organised Crime and continuously reproduced.

After this rationale for anti-trafficking efforts, the next justification typically used is that anti-trafficking efforts must be undertaken even though research is difficult and offers little evidence of the problem. The fact that victims are in a state of total submission and

¹⁴ UNODC, ‘The Role of “Consent” in the Trafficking in Persons Protocol’, UNODC Issue Paper, 2014, retrieved 29 January 2015, http://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

¹⁵ The penal code suggests abolitionism, even if current national policy does not.

¹⁶ M X L de Medeiros, ‘A Criminalização da Migração Internacional das Trabalhadoras do Sexo e o seu Tratamento como Vítimas do Tráfico de Pessoas: o Papel do Livre Consentimento’, Master’s dissertation, João Pessoa: UFPB, 2013.

¹⁷ ILO, ‘ILO Action Against Trafficking in Human Beings’, ILO, 2008, retrieved 29 January 2015, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf

¹⁸ UNODC, ‘Prevention of Human Trafficking’, UNODC, 2009, retrieved 29 January 2015, <http://www.unodc.org/southasia/en/topics/frontpage/2009/preventin-of-human-trafficking.html>

concealment is a justification for the low number of studies conducted.

Similarly, the low number of cases taken to court is interpreted as impunity—not as evidence that there is not much trafficking happening.

According to Brazilian data from 2005 to 2011, the Federal Police conducted 514 trafficking-related investigations. Of those, 157 were for international trafficking, 13 for internal trafficking and 344 for slave labour. There is no data available from State Police departments, but the State Police have no means to verify international trafficking, or slave labour.

This information contradicts the idea that trafficking is a large problem and that it demands priority and arguably disproportionately high investment, to the detriment of other issues such as domestic violence and the current high number of deaths of Afro-Descendent people.

Anti-Trafficking Review: Has meaningful research been done into trafficking trends following the early commitment from the government to prioritise research?

Castilho: The first national plan, PNETP I, in operation from 2008 to 2010 included research priorities. An evaluation by the government, civil society and ILO recommended a thorough revision of it based on complexities seen.

The evaluation partly showed that research activities in PNETP I had generated little meaningful information. The second phase, PNETP II, has also prioritised research on trafficking.¹⁹

Promisingly, PNETP II includes the creation of a computerised, integrated and multidisciplinary data system to be continuously updated by its creators. After a participatory process, in 2013 the Brazilian government introduced the Integrated Methodology for Collection and Analysis of Data and Information about Human Trafficking. One of the advantages of this methodology is that identification of the cases of human trafficking does not depend on a particularised enumeration of specific trafficking-related crimes. Data related to all penal types related to trafficking will be correlated, allowing for production of statistics that show us what human trafficking looks like in Brazil.

Anti-Trafficking Review: What does the future hold? What developments and debates are on the horizon in Brazil?

Castilho: Disputes on whether to situate anti-trafficking in security or human rights arenas will continue. Further, contradictory agendas regarding the sexual commercial exploitation of children and adolescents, slave labour, sex workers' rights and migrants' rights have still not been effectively integrated into the overarching anti-trafficking framework.

Has the Protocol been appropriate for Brazil? Brazil's Penal Code certainly differs from the Protocol in not insignificant ways, particularly around prostitution. The government's position is that prostitution by an adult person is not a civil disturbance or criminal act. However, the structure necessary to protect sex workers is precarious and vulnerable, and various barriers exist to the realisation of their rights.

In seminars about human trafficking, government officials have publically admitted the need for discussion around prostitution, but the government does not seem in a rush to act

¹⁹ SNJ, 'II Plano Nacional de Enfrentamento ao Tráfico de Pessoas', Ministério da Justiça, Brazil, 2013.

on this. So much so that in the two recent changes to the law, no effective effort was made to remove the equation of prostitution to sexual exploitation, or to approve legislation protecting sex workers' rights.

The debate and the political decisions on human trafficking, at national and international levels, are based on estimates, and alarming numbers continue to be propagated. In Brazil, a methodology for data collection has just been established. This will hopefully allow us to understand what trafficking looks like in Brazil, and whether the social phenomena we have here actually meet the Trafficking Protocol's definition of trafficking. I hope this sheds light on whether the definition should subsist, and whether it accurately reflects realities on the ground.

We are waiting to see whether crime or rights-based governance of human trafficking will carry the day.

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