

HUMAN TRAFFICKING, HUMAN FRAILTY, AND HUMAN VULNERABILITY: IS NULLIFICATION OF CONSENT AS A RELEVANT CONSIDERATION IN TRAFFICKING CASES JUSTIFIABLE UNDER INTERNATIONAL HUMAN RIGHTS LAW?

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Abstract

Because the central goal of international human rights law is to protect individual liberty and freedom, it would seem redundant to simultaneously characterize that same law as a constraint upon human freedom. Nevertheless, human rights law does, in fact, at least in a few instances, constrain human freedom. One of such instances, contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol), which is a human rights centered legal instrument, is the annulment of consent on the part of individuals being trafficked, including adults, as a relevant consideration in determining culpability. This is quite paradoxical and raises at least three critical questions. First, in nullifying consent as a defense to a charge of trafficking, is human rights law violating the principle of individual autonomy – itself a core human rights concept? If the response is positive, as this paper seeks to affirm, the next logical question becomes, can a legal action be instituted on the basis of the infraction? If not – and this is the third question – is the constraint upon freedom to consent to being trafficked justifiable? Responding to these perplexing paradoxes of international human rights law is the task of this paper.

Keywords: Human trafficking, consent, vulnerability, Palermo Protocol, human rights

Introduction

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol, 2003), which was adopted in 2001 and entered into force in 2003, stands out as one of the most widely ratified human rights centered treaties— 178 States Parties and regional organizations as of April 2021. The Protocol defines “trafficking in persons” as the recruitment, transportation, transfer, harboring or receipt of persons, *by means of*:

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- (a) the threat or use of force or other forms of coercion,
- (b) of abduction,
- (c) of fraud,
- (d) of deception,
- (e) of the abuse of power
- (f) or of a position of vulnerability
- (g) of the giving or receiving of payments or benefits to achieve the
- (h) consent of a person having control over another person for the purpose of exploitation. (Palermo Protocol, Art. 3(a) 2003).

Art. 3(b) stipulates that the consent of a victim of trafficking in persons to the intended exploitation set forth in Art. 3(a) shall be irrelevant where any of the means set forth in the latter provision has been used. The key term is “any of the means” specified in Art. 3(a), as it gives insight as to the circumstances warranting not paying attention to the consent that might have been obtained from the victim. As to the specific reason for discountenancing the consent of the affected individual, the United Nations Office on Drugs and Crime was quite explicit, explaining that although such victims may have initially given their consent, the “consent is rendered meaningless because of the abusive, coercive and deceptive means used by traffickers to gain it.” (UNODC, n.d.) In other words, as apparent from a reading of Art. 3(a), it is the threat or use of force or other forms of coercion, of abduction, et al that renders nugatory any consent that may have been given. It is this negation of consent, as the subsequent vignette demonstrates, that generates controversy.

Katrina, a ravishingly beautiful and voluptuous brunette, is increasingly becoming disenchanted with life in her native country, South Africa. One of the top performers in her high school class, she has sought employment for years but could not find any. Promises upon promises; yet, none of them yielded positive result. Five times, she was raped by people that promised her a job. And as if life wasn't hard enough, her mom suddenly fell sick and died. She was only 48. Just like that, Amahle, her closest companion, and the only one that seemed to have not lost faith in her, is no more. Katrina was devastated, unable to come to terms with the loss. Her dad was murdered years ago, shortly before she was born. Her only brother is serving a 20 year prison term. He had sold crack cocaine to an undercover cop, and was swiftly convicted and sentenced. Misfortune seems to follow her anywhere she goes. Unlike her friends, she did not drink or smoke. Singing in the church was the only thing that gave her a semblance of joy.

Nothing else gave meaning or sense of direction to her life. Then last Christmas, her friend visited. Katrina has been friends with Martha since high school, although they have not seen or spoken with each other the last ten years. Resplendent in a flowing multicolored evening gown, Martha was visibly happy. An air of self-assurance marked every step she took. Her skin was delicately soft, nails polished and ornamented. Loosely hanging from her shoulders was a Hermes handcrafted bag and matching snakeskin shoes. Smitten with the opulence, Katrina longed to be like her. Katrina was later to learn that she lives in Dubai and was employed at a posh hotel in the center of the city. As the evening wore along, they decided to visit the mall. It was in one of the shops at the mall that Martha told her about Shadrack, "Mr. fix-it-all" – as he was known amongst Martha and other clients. It was Shadrack who would subsequently prepare travelling documents, including work permit, for Katrina. Martha arranged accommodation in the building where she lives. Nothing could have been better, Katrina mused to herself. She found Shadrack to be a kind-hearted gentleman, ever willing to help and answer her questions. Within two months, Katrina was in Dubai, working in the same hotel as Martha. She felt good. But not for long. Just three months after her arrival, the hotel was raided. She was arrested and, together with her colleagues on duty that night, detained at a nearby police station. Fortunately, the Consulate of South Africa, located just a few miles, moved swiftly to her rescue, one of three South Africans arrested that night. She was repatriated the next weekend. Subsequent investigations revealed the role Shadrack played in taking her to Dubai. Before the court, Shadrack as well as Katrina argued that no offense was committed since Katrina was an adult who, with full knowledge of the life that awaited her in Dubai, consented to travel to that city. But the judges were unpersuaded, holding that the consent given by Katrina was immaterial to a determination of guilt or otherwise of Shadrack. The court determined that Katrina was vulnerable, and her vulnerability was exploited by Shadrack. As Shadrack was being led away, Katrina fainted. She could not understand why her consent meant nothing to the court.

Not lettered in law meant inability to grasp the reason her consent meant nothing, leading Katrina to conclude that the court was "out to get Shadrack," a black man. But she was wrong; for in holding as the court did, the court acted in full compliance with the dictates of Palermo Protocol. Art. 3(b) was quite clear,

that where vulnerability triggered the trafficking, the law will disregard consent of the affected individual; therefore, having determined, based on evidence presented regarding Katrina's personal circumstances, came to the conclusion that her vulnerability was preyed upon by Shadrack, the court's decision is unassailable.

Although not a true story, this sketch illuminates an unexplored issue regarding protection of victims of human trafficking, the locus of consent as a legitimizing force in human affairs and the paradoxical nature of its application in trafficking cases. In law, the question of consent arises most prominently in contractual agreements, under the law of contract, although it features in law of tort as well. In tort, consent operates to defeat the claim of a plaintiff that the defendant is liable for the injury that the plaintiff sustained as a consequence of the action of the defendant. The well-known principle of *volenti non fit injuria* operates to prevent an individual who consents to an action or anyone claiming through him to complain if injury results from the action in respect to which the consent was expressed. Once consent on the part of the plaintiff to the action complained against is established, a finding of liability will not be made against the defendant. Same is true in law of contract. When both parties express consent to the subject matter of the transaction, the contract will withstand challenges before the court by the party alleging breach thereof. In both cases (tort and contract), however, where it is proven that the consent was obtained, as specified in Art. 3(a) of the Palermo Protocol, by using "threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power" and so forth, the consent will be null and void and of no effect.

A close assessment of the enumerated factors which render consent void reveals a commonality amongst them, namely, coercion (visible or veiled), the operation of insidious forces which made the individual to give consent. In other words, there is a clear evidence of absence of freewill on the part of the individual alleged to have given consent. In such cases, the court would have no difficulty in nullifying the so-called consent. Problem arises where the consent was obtained, as stipulated in Art. 3(a) of the Palermo Protocol, by means – "of a position of vulnerability." Vulnerability is usually associated with poverty, the reasoning being that circumstances arising from lack of means compelled the choice. Unlike other grounds for nullification of consent, which are indelibly etched in legal codes and court decisions, striking down consent on the basis of vulnerability or exploitation thereof is not independently recognized in law. Put differently, vulnerability generally does not nullify consent in law hence its inclusion in Palermo Protocol as legally permissible to negate a freely given

consent of a rational adult is problematic. This is the crux of the matter. It is the focus of this article.

The principle of individual autonomy and human rights

At the heart of the matter (whether consent should be immaterial to a finding of guilt or otherwise in trafficking cases) is the concept of individual autonomy, the liberty of individuals to do as they please without let or hindrance from a third party. An artifact of Greek civilization, the word "autonomy," was coined from two Greek words "autos" (self) and "nomos" (rule) and, in its original iteration, was used as a descriptive term for self-rule or self-governance of Greek city states. (Beauchamp and Childress, 2001). Over the years, however, the tentacles or reach of the term has been expanded to incorporate individuals, encapsulating concepts as diverse as "self-governance, liberty rights, privacy, individual choice, freedom of the will, causing one's own behavior, and being one's own person." (Beauchamp and Childress, 2001, p. 58) Strictly speaking, the principle of respect for individual autonomy projects the individual as the master of his or her own affairs. It is a rule-setting norm, mandating that so long as harm does not result to a third party, the individual is entitled to embark upon any action or decide against same or in any other manner pursue his notion of what he conceives as his good, and no other person or entity has a right to interfere or obstruct his pursuit of the action. (Hobbes, 1985) This principle has been immortalized in the writings of key thinkers of classical liberalism. As nineteenth century English philosopher and political economist John Stuart Mill affirms that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." (Mill, 2002, p. 8)

Mill's submission is consistent with that of philosopher and physician John Locke, recognized as one of the most influential of the Enlightenment period thinkers and Father of Liberalism: "all men are naturally in . . . a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit . . . without asking leave, or depending upon the will of any other man." (Hirschmann, 2009, p. 79). This Lockean reformulation of the precepts of autonomy, which was subsequently endorsed by Mill, holds that as rational agents, human beings are endowed with the right to organize and conduct themselves in a manner they deem worthwhile, partake in actions or associations they consider promotive of their interests, without let or hindrance by another person, to the extent that the manner in

which they elect to exercise the right does not deleteriously affect the rights of others. (*Lochner v. New York*, 1905)

The principle of individual autonomy is not only a canon of moral and political philosophy; it is also rule of human rights law, forbidding the state and any anyone else from intrusion into the life and affairs of the citizenry in absence of a legally recognized justifiable cause. The idea of autonomous man provides an explanatory rationale for a wide spectrum of individual rights, most prominently the rights life, personal liberty, freedom of expression, right to self-determination, respect for human dignity, right to privacy, right to assembly/association, and so forth, making autonomy or liberty of the person the bedrock of human rights. The closest expression of individual autonomy in human rights law is right to personal liberty or self-determination – that is, “liberty” or “freedom” (to think, believe and act as one chooses), which historian and political philosopher Thomas Hobbes describes as absence of opposition or external impediments to action. (Hobbes, 1985) The centrality of freedom (to do as one pleases) to human rights law is captured in this supplication by Patrick Henry (regarded as one of the most influential of the founding fathers of the United States) in 1788: “Liberty the greatest of all earthly blessings – give us that precious jewel, and you may take everything else.” (Ketcham, 2003, p. 199 - 200) Patrick Henry’s rejection of anything else but freedom brings to the fore the value of human rights as non-negotiable and supremely inalienable: “The liberty to independently direct one’s own actions makes it possible for human beings to be valued, in the Kantian sense, as ends in themselves, and not merely as means to another’s end. And this is so whether we are talking about collective or individually-directed courses of action, or in the political realm or one’s private life. . . . When we say that a person has a right to this or that, we mean, in essence, that the person has liberty to do anything he chooses.” (Nnamuchi, 2003, p. 106)

Deducible from the foregoing, therefore, is the idea that liberty to direct one’s actions, to enjoy the widest latitude of freedom and liberty possible, unconstrained by external forces, is the central goal of human rights. Actualizing this goal is the reason for the imposition of the tripartite duty that has been recognized as part of customary international law, namely, the obligation upon states to respect, protect and fulfil (RESPROFIL) human rights. (Inter-Parliamentary Union & OHCHR, 2016) The obligation is applicable to civil and political (CIPO) rights as well as economic, social, and cultural (ECOSOC) rights, to ensure that all human rights are respected, protected, and fulfilled. The “obligation to respect” requires States to refrain from interfering in the

enjoyment of rights by individuals and groups. The “obligation to protect” mandates States to protect individuals against abuses by third parties, namely, non-State actors. The duty imposed upon States under the “obligation to fulfil” is to take positive action to ensure the realization of human rights. (Inter-Parliamentary Union & OHCHR, 2016)

The RESPROFIL obligation is all-encompassing, designed to ensure complete protection of individuals against invasion of their rights, a tight-knit mechanism designed to ensure security of everyone as they embark upon the pursuit of their goals. Do vulnerable persons enjoy the same latitude of freedom as others who might wish to embark upon risky activities? Does nullification of consent as a relevant consideration in trafficking cases conflict with the RESPROFIL obligation? In seeking to protect the vulnerable, is human rights law violating the rights of the very people it targets for protection? Paradoxes no doubt, but as the next section demonstrates, these seemingly irreconcilable paradoxes are indeed reconcilable.

Autonomy, structural violence, and human rights

Since the centrality of the principle of individual autonomy to human rights was firmly established in the previous section, no further discussion of the subject is warranted, except in so far as is necessary to accentuate its interface with structural violence, the latter a key focus of this section. How then does structural violence relate to autonomy? To respond to this question, we need a clear understanding of the meaning of the term itself, its insidious nature and particularly how it constrains human agency. The term “structural violence,” coined by Johan Galtung, Norwegian sociologist, mathematician, and the founder of the discipline of peace and conflict studies, describes a situation where decision-making is not sufficiently reflective but compelled by a combination of forces – which may be legal, political, economic and so forth – circumstances over which the person lacks any form of control. (Galtung, 1969) Another terminology popularized by liberation theologian Rebecca Chopp is “institutionalized violence” – a nomenclature that is aimed at emphasizing its peculiar features, as the “violence of the rich against the poor institutionalized in structures, systems and world views.” (Chopp, 2007, p. 15) This dovetails with the definition put forward by psychiatrist Bandy Lee, “Structural violence refers to the avoidable limitations that society places on groups of people that constrain them from meeting their basic needs and achieving the quality of life that would otherwise be possible. These limitations, which can be political,

economic, religious, cultural, or legal in nature, usually originate in institutions that exercise power over particular subjects.” (Lee, 2019, p. 123)

More pointedly, Paul Farmer and colleagues describe the phenomena as “social arrangements that put individuals and populations in harm’s way.” (Farmer, 2006, p. 3) The arrangements are deemed “structural” because they are systemic, built into the structure of the society and manifested as unequal power and consequently as unequal life chances. They are violent because they are harmful to people (the powerless). (Farmer, 2006) Structural violence is “the cause of the difference between the potential and the actual, between what could have been and what is.” (Galtung, 1969, p. 168) It harms people by preventing them from reaching their full potential. Starkly different from traditional understanding of violence (as those involving the use of weapons), this is violence of a different genre and, as elucidated by Galtung, consists of avoidable human suffering such as starvation and other deprivations in countries where resources to achieve a different result are available. (Galtung, 1969) It is noteworthy that starvation and other forms of deprivations or deficits in fundamental human needs are products of poverty. It is the poor who bear the scars of structural violence, not the privileged, as this summation by Chopp affirms, “[t]he horror of suffering is not only its immensity but the faces of the anonymous victims who have little voice, let alone rights . . . Oppressed, impoverished and marginalized,” they are “the victims of history.” (Chopp, 2007, p.2)

As to the portrait of the poor, those whose very existence is held captive and frustrated by decisions made by others, Scheper-Hughes, who has studied poverty and oppression for over two decades, cites the following examples, namely, debtors, ex-prisoners, peasants, junk dealers, refugees, Afro-Brazilians living in squalor, in the slums of northeast Brazil and Andean Indians. (Scheper-Hughes, 2014) To this list may be added the unemployed or underemployed and other similarly disadvantaged persons spread across the globe, particularly in Africa and Southeast Asia – two regions perennially lampooned as poverty centers of the world. These are the people who, as a consequence of events engineered by others, suffer the brunt of injustice and damage to their persons and dignity. They are the same people who, quite predictably, would eventually have a rendezvous with human traffickers. They are those whose consents are defined by Art. 3(a) of the Palermo Protocol to be irrelevant in trafficking cases. This (repudiation of consent as an exculpatory factor in determination of wrongfulness of an action) is controversial in the sense that it challenges not only a core tenant of moral philosophy but also law, the entitlement of rational

adults to pursue the goals they set for themselves without interference from a third party – that is, autonomy. The controversy regarding consent in trafficking cases is like the one generated by the prohibition placed upon sale of human organs or body parts.

Similar to cases involving human trafficking, there is a blanket repudiation of consent as legitimizing sale of organs. The 1991 WHO Guiding Principles on Human Organ Transplantation proscribes giving and receiving money for human body or its part (WHO, 1991), regardless of consent on the part of the person parting with the organ. This prohibitory framework remains the norm globally, with the notable exception of Iran – the only country to allow organ commodification. Like the Palermo Protocol, which identifies vulnerable position of the victims of trafficking as a basis for disregarding of his consent, the WHO prohibitory regime's position on consent is predicated on the need to "prevent the exploitation of human distress, particularly in . . . vulnerable groups." (WHO, 1989, Prmb.). This raises the question whether vulnerability is a legitimate basis to nullify freely expressed consent of mature individuals when their mental capacity is not in any way impaired? Phrased, differently, is it not a violation of autonomy to deny such individuals the right to satisfy a basic need (to obtain money for food or healthcare, for instance) simply on account of penurious circumstances (the most visible manifestation of vulnerability)? On this question, opinions are sharply divided.

For Oxford University philosopher and bioethicist Julian Savulescu, the question could be rephrased this way: "If we should be allowed to sell our labour, why not sell the means to that labour? If we should be allowed to risk damaging our body for pleasure (by smoking or skiing), why not for money which we will use to realise other goods in life?" (Savulescu, 2003, p.139) To hold otherwise, he argues, is "paradoxically, to constrain what people can do with their own lives." (Savulescu, 2003, p.139) To drive home his point, Prof. Savulescu paints two scenarios involving making decisions that exposes the decision-makers to great risks. In each case, the decision was driven by the need to obtain money to be used in satisfying what each of them considers to be an important need. In the first example, a couple decides to settle in a bad neighborhood, thereby exposing their children to great danger. The sole reason for the decision was that they wanted to save money to be used in paying for private education for their children. The second scenario involves a diver who gets employed as a deep sea diver at a considerable higher pay than he could have gotten otherwise. He gets paid more because the job poses greater risk to his life and health, and he accepts the risk because he needs the money to pay

for holidays in expensive destinations. Similar argument could be made regarding logging and fishing workers, two of the most dangerous jobs in the United States. (Braverman, 2019) Notice a common feature in all these cases: competent rational adults chose to do the jobs despite inherently high risk – on account of money. “They judge that the benefits for their own lives or their family’s outweigh the risks. To prevent them making these decisions is to judge that they are unable to make a decision about what is best for their own lives. It is paternalism in its worst form.” (Savulescu, 2003, p.139)

Paternalism is, of course, a moral wrong in that it supplants the will of a rational agent with that of a third party, which is precisely what nullification of consent in traffic cases achieves. Nevertheless, what is important, cautions Savulescu, is that regardless of the circumstances, “people need to be fully informed and . . . give their consent freely.” (Savulescu, 2003, p.139) As to what the term “freely” connotes, he postulates that people should not be in “a situation which is itself wrong or unacceptable.” (Savulescu, 2003, p.139) This point is critical, for as he further explains, “[p]overty which is acceptable to a society should not be a circumstance which prevents a person [from] taking on a risk or harm to escape that poverty.” (Savulescu, 2003, p.139) In other words, if, in a particular society, poverty is accepted as a normal state of affairs, that society cannot prevent members who are poor from exercising the same rights which are available to others. A contrary arrangement amounts to discrimination against the disenfranchised class on the basis of socioeconomic status, explaining this lamentation by Savulescu: it is “double injustice to say to a poor person: ‘You can’t have what most other people have and we are not going to let you do what you want to have those things.’” (Savulescu, 2003, p.139) This, in the contemplation of Savulescu, is morally unjustifiable. But this view is contested.

Quite often missed in this type of formulation is what is really at stake, the marked differences in the nature of circumstances driving human decisions – the voluntariness of the consent. The consents obtained in such circumstance are “at best an expression of constrained or distorted freedom,” which is, “quite distinct from *de jure* and *de facto* freedom prescribed by human rights” (Nnamuchi, 2018, p.172). As to the applicability of this strand of reasoning to human trafficking, the relationship between those victimized by organ sale, on one hand, and human trafficking, on the other, Farmer argues, “[w]hat these victims, past and present, share are not personal or psychological attributes—they do not share culture, language, or race;” instead, “what they share is the

experience of occupying the bottom rung of the social ladder in inegalitarian societies." (Farmer, 2009, p.11)

Special attention needs to be paid to the demographic involved, the class of persons that are more likely than others to be victims of trafficking. This is critical. Although the law relating to human rights has a cosmopolitan mandate, to advance the welfare of all human beings regardless of position or status, it has a primary constituency, namely, the poor and vulnerable, individuals suffocating under the yoke of distorted choices, under which they are perennially trapped (Nnamuchi, 2018). It is a common knowledge that life is a daily struggle in countries where human trafficking thrives. People wake up every morning, worrying about what to eat and drink. Hunger and starvation are rife. Night darkness brings a different challenge – fear of attack by armed robbers and neighborhood hoodlums, just as there is worry about bandits and kidnappers prowling the streets, highways and even farms. With no money anywhere, learning beyond primary education, which is free, is a luxury. Those that managed to advance beyond basic education entertain no hope of employment. Mired in hopelessness and despair, their existence is all but forgotten by the powers that control their lives. They are victims of powerlessness and pillage by the powerful. Poverty does not respect race, sex, gender, or geography. Wherever institutionalized violence consigns human life to misery, victims are left with the same story and experience. Disease, hunger and neighborhood violence are all too familiar in their lived experiences, regardless of location. The experiences of the poor black man in Africa are the same as those endured by the white man without means in Europe. It is a fate of being forgotten in the scheme of things, in the design as well as implementation of policies that create economic freedom and improve lives.

"Poverty is an evil, a scandalous condition," philosopher and theologian Gustavo Gutiérrez assured us nearly fifty years; "[it] is not caused by fate; [instead] it is caused by the actions of [others] . . . There are poor because some people are victims of others" (Gutiérrez, 1973, p. 292 – 293). They are "the oppressed one, the one [marginalized] from society, the member of the proletariat struggling for his most basic rights; he is the exploited and plundered social class" (Gutiérrez, 1973, p. 301). More important, as Paul Farmer forcefully elucidates, the "afflictions" suffered by the poor and discarded of society "are not the result of accident or a *force majeure*, they are the consequences, direct or indirect, of human agency" (Farmer, 2003, p.40). Indeed, the chain of events that combine to wreak havoc in the lives of these people are deliberate, *well-thought-out*, often overt, carefully orchestrated, and

indifferent as to the impact upon their victims. Marginalized, exploited, and pauperized, they are left to their fate, far removed from the sight and attention of those responsible for their misery. Seen this way, as the end product of injustice and exploitation, *Gutiérrez*, 1973) calls into action the transformative and healing power of human rights, to restore the equilibrium in human ecology heretofore distorted by forces of evil.

The action needed and its operationalization are already encoded in the RESPROFIL obligations of States Parties to human rights regimes. What remains is greater commitment on the part of States Parties to the imperatives of the Palermo Protocol, to retrace footsteps from policies that make fantasies associated with human trafficking, particularly freedom from want, irresistibly alluring to the poor. The end result is certain, *to wit*, flourishing for all, positioning the individual in a situation of perfect freedom or some realizable form of it. There must be, as urged in the conclusion, a rebuilding of the socioeconomic architecture of each country in a way that elevates to center stage the interests of “the wretched of the earth” (Fanon, 2005) – individuals at the mercy of debilitating, strangulating and irrepressibly asphyxiating circumstances, the effect of which has been to make it impossible for them to satisfy basic needs (food, water and shelter).

Conclusion – paternalism and human rights

In claiming, as he did, that purportedly seeking to protect the poor by disallowing them from consenting to agreements that exploit their vulnerability amounts to “paternalism in its worst form,” Prof. Savulescu seems to be right. (Savulescu, 2003, p.139) After all, not many reasonable people would support disenfranchising individuals solely on the basis of poverty. Yet, when fully examined, particularly through the prisms of human rights and liberation theology, it would become obvious that Savulescu’s conclusion is, at best, superficial. The converse – the position stipulated in Art. 3(b) of the Palermo Protocol, disallowing consent, when expressed from a vulnerable position – is indeed correct and defensible.

The word “paternalism,” derived from the Latin “pater,” meaning “father” (or acting “fatherly”), speaks to the origin of the practice – as when a father acts without deference to the child’s wishes, on the basis that he knows what is in the child’s best interest. Most people would not quarrel with this position, considering that children lack decision-making capacity and must be protected by their parents. Difficulty arises, however, with regards to adults who, although of sound faculties, are denied decision-making powers on

account of fear of exploitation. Although autonomy purists would readily deem the denial to be paternalistic and an infringement on personal autonomy even if the intent is beneficent or protective, they are wrong.

The error in the reasoning arises from inadequate attention to the unobservable. Quite often inordinate concern is lavished upon observable manifestations of competence, in the sense that individuals are adjudged as having capacity to contract on mutually beneficial terms so long as there is no discernible evidence of mental impairment. Yet, beneath the surface, the superficiality of the discernible, lie factors which distort the reasoning process of the party asked to give consent – invisible insidious forces propelling the hands of the individual to partake of an act that harbors grave consequences. There is a thin line between total incompetence, the kind that automatically attracts protection by society, and partial incompetence – the genre propelled by poverty, which creates and sustains vulnerability. These (the latter) are the people in respect to whom various large-scale forces combine to impose varied shades of suffering and tragedies upon their lives. Extreme suffering places severe constraints on the capacity of its victims to autonomously guard against being used merely as a means to the ends of another. As expounded in the previous sections, inability to act autonomously, which typically arises when the bond of solidarity (which ought to unite humanity) is eviscerated by the excesses of a privileged few, triggers the intervention of human rights law. It is this intervention that is represented in Art. 3(b) of the Palermo Protocol.

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