

Human Trafficking – The Role of Indian Judiciary

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Abstract

Judiciary plays a very vital role in preserving the principles of governance of democracy. Judiciary enjoys the privilege of interpreting the provisions of constitution. In democratic set up it assumes a significant and special importance. Securing the just society is one of the aims of democracy. In achieving this aim, the contribution of Indian judiciary occupies a very important place. Trafficking in persons is a multidimensional problem which demands a multifaceted response. Trafficking in person is a composite and evolving issue that cannot be reduced merely through a set of definition, these definitions are helpful in defining the actual scope of the problem. The definitions also help in setting the expectations for necessary action and acquiring consistent data about the trafficking. The definition helps only in understanding of the term trafficking, but there is a need to examine the trafficking in detail in its actual context. Since from the last decade the degree of human trafficking in India has increased to such an extent that result in third largest form of global illegal trade after arms and drugs. One of the main objectives of such trafficking is the commercial exploitation of women and children. Trafficking involves one of worst forms of abuse of human rights from the perspective of emotional, physical and sexual violence with bleak of possibilities of rescue or reintegration. The causes of global trafficking are varied and complex, but notably include poverty, lack of opportunities, the economic gains to be made through the exploitation of women and children, entrenched gender discrimination and discriminatory/harmful cultural practices.

KEYWORDS: Women, Trafficking, Reasons, Rights, Judiciary.

Introduction

History reveals the fact that the human trafficking is prevail in ancient time and has its existence in various forms in all civilization and cultures. It is considered as a trade that exploits the weakness of human beings especially the women and children and results in violation of their human rights completely. Because of human trafficking human beings are considered as an object of financial transaction for various purposes. Human beings become victim of human trafficking because of force, pressure or deceitfulness, commercial sexual exploitation and for exploitative labour.

Victim of trafficking are from such section of the society those are highly marginalized by caste, tribal discrimination and socio-economic deprivation. The problem of human trafficking is not only existed in India, but also traced in our neighboring countries like Nepal and Bangladesh. In human trafficking around about more than 80% are women and girls. Nearly more than 50% are minors. The main reason for trafficking is sexual abuse, forced labour and exploitation particularly for commercial

purpose. Men, women and children are becoming the victim of such trafficking.¹ Human trafficking is known to socially aware person, it is not a new fact. It can be identified in many forms such as trade in men, slavery, debt bondage, serfdom, forced or compulsory labour. In the context of globalization, it has acquired new dimensions. It is a complicated, versatile phenomenon involving numerous stakeholders at the institutional and commercial level. It is a global business with a huge market for cheap labour and commercial sex.² Trafficking in human beings is a very sensitive issue as it is at the very intersection of contemporary anxieties concerning the global political economy, population growth, gender and ethnic stratification, transnational or organized crime and human rights abuses and the ability of states, groups of states and international agencies to control any of these effectively.

Many causes have been attributed to the growth in trafficking in persons and in children, including poverty, lack of sustainable livelihoods, structural inequities in society, gender discrimination, war and armed conflict, and other forms of natural or constructed disasters. However it is critical to understand that these factors are not in themselves the causes of trafficking; they merely exacerbate the vulnerability of marginalized and disadvantaged groups and render them increasingly more amenable to a variety of harms.

India has a number of laws relating to prohibition of activities connected with trafficking, but it continues very faster year after year and seemingly unabated. The Indian legal framework with regard to trafficking is found to not be very effective in protecting the victims and punishing offenders. There is a need of recent action on part of the government and judiciary to rectify these outages.³ The Indian Supreme Court, known throughout the world for its judicial activism, could address this problem more effectively by adopting a less biased attitude than it has shown to date. It could play a pivotal role in preventing this large-scale atrocity, as it could develop helpful solutions to the problem by interpreting international and domestic laws objectively and applying them accordingly.⁴

Trafficking - Definition

The development of modern definition of trafficking is necessary in order to develop strategies which would also work towards real enhancement of the rights of the people involved, and be effective in preventing trafficking. But before coming to the Human Rights Definition of Trafficking let us trace the series of events that led to the evolving of the aforementioned definition. Trafficking in the dictionary is described as

¹ Human Trafficking In India Must End-

<http://www.mapsofindia.com/my-india/society/human-trafficking-in-india-must-end>

² Mohafiz Khan, *Human Trafficking is a Crime Against Humanity*

<https://www.scribd.com/document/351249988/Human-Trafficking-is-a-Crime-Against-Humanity#>

³ Sadika Hameed, Sandile Hlatshwayo, Evan Tanner, Meltem Türker, & Jungwon Yang, Background Information on Human Trafficking in India A Supplement to the “*Human Trafficking in India: Dynamics, Current Efforts, and Intervention Opportunities for the Asia Foundation*” Report, Prepared for: Masters in Public Policy/International Policy Studies Practicum, March 12, 2010.

⁴ KUMAR REGMI, *TRAFFICKING INTO PROSTITUTION IN INDIA AND THE INDIAN JUDICIARY*, INTERCULTURAL HUMAN RIGHTS LAW REVIEW, Vol. 1, 2006, p. no. 374-375.

“an illegal trade in a commodity” in the case of trafficking in persons, the commodity is human beings.

Article 1 the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949* defines trafficking within the context of prostitution.⁵ As this definition was limited to exploitation for the purpose of prostitution it was expanded by **Article 6** of the *Convention on the Elimination of All Forms of Discrimination Against Women 1979*, to include other forms of exploitation of women such as deception of migrant women and mail-order brides or false marriages, and the new forms of sexual exploitation such as sex tourism and forced domestic labour recruited from developing countries to developed countries. This view has been further widened to include forced labour, clandestine employment and false adoption by General Assembly Resolution 48 /166.

The *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000*, supplementing the UN Convention against Transnational Organized Crime defines Trafficking in Article 3.⁶ The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has given one such definition. In her report, she elaborated the need for new and unambiguous definition of trafficking that is based on respect and defense of the human rights of all persons.

The proposed definition of trafficking, which should have following elements:

- i) the lack of consent;
- ii) the brokering of human beings;
- iii) the transport; and
- iv) the exploitative or servile conditions of the work or relationship

The definition is given in Human Rights Standards for Treatment of Trafficked Persons (HRS) in: -

⁵ The Parties to the present Convention agree to punish any person who, to gratify the passions of another:
(1) Procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person;
(2) Exploits the prostitution of another person, even with the consent of that person.

⁶ (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub paragraph (a) of this article shall be irrelevant where any of the means set forth in sub paragraph (a) have been used.

“All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage”.

Among all the definition, the UN Protocol definition can be taken as standard definition and human rights standards can be read into it. The definition used in the Protocol not only covers all sectors where trafficking labour is used, but also includes issues of consent and places greater responsibility on States to punish those responsible for trafficking, including consumers of trafficked labour.

Trafficking in persons is a complex and evolving problem that can not be reduced merely to a set of definitions. Definitions are useful in defining the scope of the problem, in setting expectations for action and in gathering reliable data, among other things. On the other hand, what constitutes trafficking in persons is not limited by its definition, and needs to be examined in detail in its actual context.⁷

Human Trafficking – Contributing Factors

Most of the victims of trafficking are often exposed to abuses in terms of physical and sexual, work in an unsafe condition, and deprive of education. They are placed in such typical situation of extreme dependence and conditioned to believe that they have no alternative life option for them.⁸ Trafficking commonly has overwhelming long-term effects on the mental and physical health of the victims, and leads to a tendency to be responsible for poverty and marginalization.

It is necessary for each one of us to understand the factors which are responsible for trafficking. The factors need to be analyzing at global level, regional level and local level. Some of the factors have been generally discussed as below:

1. Economic Vulnerability

Globalization has made impact on price competition in an increasing manner and thereby increasing for cheap labour to keep the cost of production low. This results in the increase of informal labour sectors. These informal labour have become helpless and subject to abusive working condition. Because of these unregulated working conditions are not visible and thus are not subject to labour laws and regulation. Globalization has also impact on traditional family structure. It resulted in each member of the family has become separate and independent unit of labour to be plugged into the modern labour

⁷ *COMBATING HUMAN TRAFFICKING IN ASIA: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices*, Economic and Social Commission for Asia and the Pacific, UNITED NATIONS, New York, 2003.

⁸ Rebecca Everly, *Preventing and Combating the Trafficking of Girls in India Using Legal Empowerment Strategies*, A Rights Awareness and Legal Assistance Program in Four Districts of West Bengal, International Development Law Organization, Italy, 2011.

market. Further, the economic changes like break down rural economy, natural disasters, climatic variation and decrease in employment opportunities drive poor communities with no economic alternative to leave for areas where their chances might be improved. These migrants are generally at high risk of being trafficked.⁹

2. Gender Vulnerability

The source causes of migration and trafficking have common characteristics. The lack of rights afforded to women serves as the chief contributory factor at the root of both woman's migration and trafficking in women. By failing to protect and promote women's civil, political and social rights Governments create situations in which trafficking grows. The factor of poverty where majority of poor women are excluded from access to resources, low status of women in society, lack of education for girls, the expectation to perform certain roles and to be solely responsible for discrimination against women in political participation, sexuality, religion, customs and social practices. The sexual division of labour and the growing demand for reproductive services in the globalized market, whereby women and girls are increasingly being pulled as service providers.

3. Migration

The entire range of migrants, involuntary resettlers, refugees, internally displaced persons, illegal migrants etc., are at high risk of being trafficked, particularly women. There is an increasing presence of women and children in modern-day migration because of unequal societal and family burden on them.¹⁰

4. Limited Migration Policy

In spite of the increasing need for all forms of migrant labour, the immigration laws of different countries fail to satisfy the demand. Therefore, there exists a massive inconsistency between the demand for labour and its supply. This leads to situations where the migrant labourers in need of work fall into the trap of traffickers and migrant smugglers.

5. Development

Increasing number of people from the least developed countries becomes as a commodity for consumption for the developed countries. The underdeveloped countries serve as supply region and developed as demand region. Further, the promotion of sex tourism as a development strategy is also a contributing factor to trafficking for the purpose of prostitution.

6. Religion and Culture

The religious and traditional customs in the form of devadasi or devki system provide legitimization to trafficking and slavery like practices. Such violence, legal and

⁹ *JUDICIAL COLLOQUIUM ON HUMAN TRAFFICKING*, Compiled By: Darshna, Saudamini Singh and Tabinda Khan, Judicial Academy Jharkhand.

¹⁰ Because of lack of education and job opportunities these women are pulled into sex industry, domestic work and marriage market. This leads to what is called feminization of migration.

illegal is then considered a normal private family matter and accepted by society as a normal cultural practice.

7. Information Technology

Information technology, particularly Internet, has been increasingly used to market women and children for the purposes of pornography, prostitution and matrimony. The World Wide Web includes the world sex guide, which is a virtual grocery store where men, women and girls in over 80 countries can be selected for sex tourism. The impact of Internet on the sexual exploitation is unprecedented. Through, Internet, the dehumanization of women as sexual objects has reached unimaginable levels.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,¹¹ Especially Women and Children known as the Palermo Protocol adopted in November 2000.¹²

Human Trafficking and Related Laws

A trafficked victim is a victim of variety of crimes, and acute form of abuse and violation of human rights. The legal regime to trafficking of women and children for commercial sexual exploitation includes the following.

- a. Constitutional Provisions
- b. Indian Penal Code 1860
- c. ITPA-1956
- d. J.J. Act-2015.
- e. Bonded Labour (Abolition) Act 1976
- f. The Child Labour(Prohibition and Regulation) Act 1986
- g. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

a. Constitutional Provisions

The fundamental law of the land, Constitution forbids trafficking in persons. **Article 23¹³** of the Constitution specifically prohibits “*traffic in human beings and*

¹¹ the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or service, slavery or practice similar to slavery, servitude or the removal of organ.

¹² Biswajit Ghosh, *Trafficking in women and children in India: nature, dimensions and strategies for prevention*, The International Journal of Human Rights, Vol.13, No. 5, December 2009.

¹³ Article – 23 – Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

begar and other similar forms of forced labour". Article 24¹⁴ further prohibits employment of children below 14 years of age in factories, mines or other hazardous employment. Other fundamental rights enshrined in the Constitution relevant to trafficking are Article 14,¹⁵ Article 15¹⁶, Article 21¹⁷ and Article 22¹⁸ deals with protection of rights of persons subjected to trafficking.

The Directive Principles of State Policy articulated in the Constitution are also significant, particularly Article 39¹⁹ and Article 39A²⁰ directs the State to enact the laws in accordance with these provisions.

b. Indian Penal Code 1860

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them

¹⁴ Article – 24 – Prohibition of employment of children in factories, etc No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment Provided that nothing in this sub clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7); or such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause (7).

¹⁵ Article 14 – provides for equality before the law or equal protection within the territory of India. The State shall not deny to any person equality before the law or equal protection of law within the territory of India.

¹⁶ Article 15 - Article 15 (1) and (2) prohibit the state from discriminating any citizen on ground of any religion, race, caste, sex, place of birth or any of them.

¹⁷ Article 21 – provides that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” 'Life' in Article 21 of the Constitution is not merely the physical act of breathing.

¹⁸ **Article 22** {Protection against arrest and detention in certain cases} No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

¹⁹ Article – 39 – The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 7, for cl. (f) (w.e.f. 3-1-1977): [(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.]

²⁰ Article 39A - provides that the States are directed to provide free legal aid to the weaker and poorer sections of the society. ... The right to speedy trial and free legal aid have been recognized as being part of the Right to Life and Personal Liberty under Article 21 of the Indian Constitution.

There are atleast 20 provisions that are linked to trafficking. Under the IPC a trafficked girl child has been subjected to multitude of violations for example displacing her from her community would equivalent to kidnapping/ abduction under Section 361, 362, 365, 366, 366A may apply.

- Sold by someone (sec 372)
- Bought by someone (Sec 373)
- Imported from a foreign country (366B)
- Outraging her modesty (354, 354A, 354B, 354C,, 354D)
- Rape, gangrape, repeatedly raped (Sec 375)
- Subjected to perverse Sexual Exploitation (Sec 377)
- Subjected unlawful compulsory labour (Sec 374)

c. Immoral Trafficking Prevention Act 1956 (ITPA-1956)

The International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others has been ratified by India in 1950 and as a result passed the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). This Act has been amended in 1986 and resulted in Immoral Traffic Prevention Act. The Act only deals with trafficking in relation to prostitution and not in relation to other purposes of trafficking such as domestic work, child labour, organ harvesting, etc.

d. Juvenile Justice Act 2015

The Juvenile Justice (Care and Protection of Children) Act, 2000 defines a child in need of care and protection to include a child “*who is found vulnerable and is likely to be inducted into trafficking.*”

The law enforcement agencies should ensure that victimized children must not be accused nor be arrested and they must be produced before Child Welfare Committee. Responsibility for providing compensation to trafficking victims is fragmented between the central government and individual states. This is largely the result of Section 357²¹ of Code of Criminal Procedure, which states that the Central Government should be responsible for compensating victims of any crime (not limited to trafficking) who have suffered loss or injury.

Sections 51(2), 53(2), 98, and 327(2) of Cr. PC 1973 are also relevant in this context.²²

e. Bonded Labour (Abolition) Act 1976

The law prohibits anyone from making any progress or forces any person to render any bonded labour, and any agreement or custom requiring any person to do work as a bonded labour is considered as void and law imposes punishment such act. The law prescribes punishment to any person who compels any other person for bonded labour is imprisonment upto 3 years and fine upto 2000 rupees. According to the act the bonded labour are treated as victims not as offenders.

²¹ Section – 357 – Order to Pay Compensation

²² *CONCEPT NOTE ON THE JUDICIAL COLLOQUIUM*

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The Supreme Court has in *People's Union for Democratic Rights v. Union of India*²³ held that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words forced labour under Article 23 of the Constitution. The Supreme Court in *Neeraja Choudhary v. State of Madhya Pradesh*²⁴ held, "Whenever it is found that any workman is forced to provide labour for no remuneration or nominal remuneration, the presumption would be that he is a bonded labourer unless the employer or the State Government is in a position to prove otherwise by rebutting such presumption."

f. The Child Labour(Prohibition and Regulation) Act 1986

The act imposes prohibition of employment of children in hazardous industries and also lays down safety measures and other essential requirements to meet the objective of labour legislation.

g. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

The people from the marginalized groups who are socially and economically backward are the easy targets of traffickers. The act also provides an additional protection for women and girls who are belonging to SC/ST communities. The act specifically covers certain forms of trafficking, forced or bonded labour and sexual exploitation of women. A minimum punishment of 6 months is provided that could extend upto 5 years in any offence covered under Sec 2.

The Role of Indian Judiciary

As one of the organ of the State, the Indian judiciary has always plays a considerable role in protecting the rights of common people of nation. Law enacted by the legislature is not able to ensure total justice to its citizens in the society. The laws when it is interpreted by the judiciary with its innovative vision have made an attempt to fill the gaps between the law and justice. The interpretation made by the judiciary has paved the way for achieving the just and social order in the society. Supreme Court in the process laid down several new legal principles to alive and activates the system of justice in order to ensure protection of human rights and social justice.

In *Vishal Jeet vs. Union of India and others*²⁵ there was a PIL against the forced prostitution of girls, devdasis and joginis and an appeal for their rehabilitation. The explained the pathetic situation of the victims.²⁶

²³ (1982) 3 SCC 235

²⁴ (1984) 3 SCC 242

²⁵ 1990 (3) SCC 318

²⁶ "No denying the fact that prostitution always remains as a running sore in the body of civilization and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily

In *Lakshmi Kant Pandey v. Union of India*,²⁷ Bhagawati J. while emphasizing the importance of children has expressed his view thus: “It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a ‘supremely important national asset’ and the future wellbeing of the nation depends on how its children grow and develop.”

In *Gaurav Jain vs. Union of India*²⁸ the Supreme Court passed an order directing, inter alia, the constitution of a Committee to make a in depth study of the problems of prostitution child prostitutes, and children of prostitutes, to help evolve suitable schemes for their rescue and rehabilitation.

In *Budhadev Karmaskar v. State of West Bengal*²⁹ the Supreme Court had issued notice to all states while noting down the concern on the pathetic conditions of Sex Workers.

In *Bandhua Mukti Morcha*³⁰ the Supreme Court has elucidated the rehabilitation of Bonded Labour and directed the Government to award compensation to Bonded labour under the provisions of *Bonded Labour System (Abolition) Act 1976* after taking note of serious violation of Fundamental & Human Rights.

In *MC Mehta v. State of Tamil Nadu and Others*³¹ – the Supreme Court seeing the severe violation of fundamental rights in cases of child labour laid down guidelines for compensation and rehabilitation

In *Public Union for Civil Liberties V. State Of Tamil Nadu*,³² the Supreme Court directed the District Magistrates to effectively implement Section 10, 11 and 12 of the Bonded Labour (Abolition) Act, 1976 and that they expected them to discharge their functions with due diligence, with empathy and sensitivity, taking note of the fact that the Act is a welfare legislation

Conclusion

It is important for the success of laws and policies which aimed at the abolition of dependence and exploitation that the justices observe the victims as oppressed and reluctant participants must be treated on equal basis as human beings. The victims of human trafficking especially women and children are entitled to the all the rights guaranteed by the Constitution like equality and liberty. Additionally, as a victim of

making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent but its successful consummation ultimately rests with the public at large.

²⁷ [1984] 2 SCC 244

²⁸ 1997 (8) SCC 114

²⁹ [2011] 10 SCR 578

³⁰ 1984 (3) SCC 161

³¹ Writ Petition (Civil) No.465/1986

³² 2013(1) SCC 585

discrimination on socio-legal perspective are common in India. These victims must afford adequate protection by from the State. It is the fundamental duty and obligation of the State to protect the rights of people who are affected by the trafficking on par with the human rights.

Being the protector of rights of the public, the Supreme Court led the nation in taking the action with more sensitivity and concern towards the victims. It is the duty the judiciary to protect the different rights of the women and girls who become the victim of trafficking. It is also the one of the responsibility of the Court to direct the effective implementation of the existing laws in accordance with the constitutional norms and also made recommendation any changes in the existing laws if required.

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