

Human Trafficking: Trade in Humans in the era of Celebrated Human Rights

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I. Trafficking- Meaning

The term trafficking was first used in the mid-20th century in phrases such as “white slave traffic” and “the trafficking in women and children” to refer to forcing women and children into prostitution.²

According to Oxford English Dictionary, the term trafficking constitutes a deal or trade in something illegal. The concept of trafficking in people refers to the criminal practice of exploitation of human beings, when they are treated as commodities for profit and after being trafficked, are subjected to long- term exploitation.³

Article 3 of Protocol to Prevent, Suppress and Punish Trafficking in Persons defines:-

- (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 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 of the prostitution of others or other forms of sexual exploitation forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.*
- (b) *The consent of the victim of trafficking in persons to be intended exploitation set forth in sub paragraph (a) of this article shall be irrelevant where any of these means set forth in sub paragraph (a) have been used.*
- (c) *The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of means set forth in sub paragraph (a) of this article.*

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² KATHRYN CULLEN- DUPONT, HUMAN TRAFFICKING GLOBAL ISSUES, 8 (1st edn. 2009)

³ BIRENDRA K GUPTA, TRAFFICKING AND THE LAW, 4 (2nd edn., 2011).

(d) “Child” shall mean any person under 18 years of age.⁴

This definition which appears in a protocol whose very title emphasizes on the trafficking of women and children clearly signals a continued concern for the sexual exploitation aspects of human trafficking. By specifying “forced labour or services, slavery, servitude or the removal of organs”, however, the UN Protocol clearly acknowledged that human trafficking would no longer be defined exclusively by forced participation in the sex trades.⁵

On the basis of the definition given in the Trafficking in Persons Protocol, it is evident that trafficking in persons has three constituent elements;

The Act (What is done)

Recruitment, transportation, transfer, harbouring or receipt of persons

The Means (How it is done)

Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim

The Purpose (Why it is done)

For the purpose of exploitation, this includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

To ascertain whether a particular circumstance constitutes trafficking in persons, consider the definition of trafficking in the Trafficking in Persons Protocol and the constituent elements of the offense, as defined by relevant domestic legislation.⁶

II. Human Rights Based Approach for Human Trafficking

It is generally acknowledged that trafficking in human beings is both a cause and a consequence of the violation of a person’s human rights. In trafficking cases, a broad range of human rights can be and are violated. The most expressive violations are the violation of a person’s personal and physical dignity, the right to personal freedom and security, and the principle

⁴ TOM OBOKOTA, TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE, 3 (2006)

⁵ Cullen, supra note 1 at, 9.

⁶ Human Trafficking, <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last updated January 11, 2015)

of nondiscrimination. Since these violations cover a broad area in the social sphere and are linked to different kinds of activities, attention to limit the chances of these violations occurring should be focused on by various disciplines. This means that an adequate response to the violation of these rights implies a multi-disciplinary approach, but with the intention of preventing the violation of a victim's human rights as a common denominator. Experience has learned that, without such a holistic approach, the interests of the victims and their special position are not sufficiently taken into account. Human rights instruments place obligations on states in which these interests are taken into account in a better way.⁷ Since the 1990s, the policy approach to trafficking in human beings has been criticized many times for being too much focused on a criminal law answer to trafficking. The solution to overcome this one-sided policy was seen in the adoption of a multi-disciplinary approach in which migration law, criminal law, labour law, equal opportunities, development cooperation, etc., receive equal attention. This requires multilevel cooperation and coordination, which has not been established on a broad scale so far. It seems that the call for a human rights based approach is a further development of the multi-disciplinary approach, with a very special addition. The core of a human rights based approach can be found in the central position of the victim. In this approach, the position of the victims, the violations of their human rights and their vulnerable position are the starting points for taking countermeasures against A human rights based approach thus takes the protection of the human rights of victims of trafficking as the guideline for adopting measures, policy, and legislation in the field of combating trafficking in human beings.⁸

III. International Efforts

Support for the international fight against "human trafficking" evolved quickly and comprehensively. The campaign launched by the UN General Assembly in December 1998 led to adoption just two years later of the Trafficking Protocol to the UN Convention against Organized Crime. U.S. President George W. Bush was among those particularly committed to the cause, calling for collective effort to eradicate the "special evil" of human trafficking, said by him to have become a "humanitarian crisis."⁹

⁷ Conney Rijken, Dagmar Koster, A Human Right Based Approach to Trafficking in Human Beings in Theory and Practice (Jan. 17, 2015) <http://ssrn.com/abstract=1135108>

⁸ Ibid.

⁹ James C. Hathaway, The Human Rights Quagmire of Human Trafficking, 49 VA J. INT'L L 1 (2008)

Globalization has opened up borders and this in turn has resulted in increased trafficking in human beings throughout the world in the recent years. Both the size and the seriousness of the problem are augmented by the growing involvement of organized crime groups in the trafficking process. Trafficking in human beings more so in women and children, is one of the fastest growing forms of criminal activity next only to drugs and weapons trade, annually. The international community has recognized the growing threat posed by trafficking in human beings and its ramifications and there are a number of international conventions and protocols prohibiting trafficking. These conventions and protocols take note of the human rights violations and abuses suffered by a victim of trafficking and provide safeguards for the same.

The prohibition on slavery and slave trade was one of the first rights to be recognized under public international law. The 1927 Convention on Slavery of the League of Nations is widely acknowledged to be the first modern day international treaty for the protection of human rights.¹⁰ The 1933 International Convention for the Suppression of the Traffic in Women of Full Age is notable for the provisions that punish traffickers without regard to whether the victim is some way gave consent.¹¹

The 1948 United Nation Universal Declaration of Human Rights extended the prohibition against slavery and the 1957 Supplementary Convention on the Abolition of Slavery further expanded the prohibition, making it applicable to debt bondage, serfdom, servile forms of marriage and the exploitation of children practices that are held to be “similar to slavery”.

In 1930, the ILO Forced Labour Convention was signed by the international community to take measures to prevent compulsory labour from developing into conditions analogous to slavery.

In the early 20th century, the understanding of trafficking for commercial sexual exploitation was almost exclusively confined to the trafficking of white women for prostitution or commercial sexual exploitation. During the first half of the 20th century, many international conventions dealing with the traffic of women and children were concluded and in 1949, they were all incorporated in the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of others. This Convention has numerous important provisions dealing with international cooperation and protection of foreign victims. However, the Convention has been strongly criticized for being ineffective as it focused only on prostitution, rather than trafficking and for having no implementation and supervision mechanisms to guarantee it’s effectively.

¹⁰ GUPTA, supra 2 at 77

¹¹ GUPTA, supra 2 at 78

The prohibition of forced prostitution of forced prostitution and the commercial sexual exploitation of women have been incorporated into other instruments like the Convention for the Elimination of Discrimination against Women. It was adopted in December 18, 1979, and entered into force on September 3, 1981.

Trafficking of Children is on the rise globally and recognizing this, the Convention on the Rights of the Child provides comprehensive safeguards for children who have been trafficked. The prohibition on trafficking and the exploitation of children has been ratified and its scope expanded through the 1990 ILO Convention on the Worst Forms of Child Labour, adopted on June 17, 1999, and came into force on November 19, 2000.¹²

In 1996, the ECPAT movement in collaboration with UNISEF and the NGO Group for the Convention on the rights of the Child organized the first World Congress against Commercial Sexual Exploitation of Children in Stockholm, Sweden. At the Congress 122 Countries adopted the Stockholm Agenda for Action, which calls for States, all sectors of society, and national, regional and international organizations to take action against commercial exploitation of children and to implement the Agenda against commercial sexual exploitation of children and to implement Agenda in six areas: coordination, cooperation, prevention, protection, recovery and reintegration and child participation. In December, 2001 the Government of Japan in Yokohoma hosted the second World Congress. One hundred and fifty nine countries reaffirmed their commitment to the agenda for Action by adopting the outcome document, the Yokohoma Global Commitment.¹³

IV. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Supplementing the United Nations Convention against Transnational Organized Crime also called the Palermo Protocol, adopted by General Assembly resolution of November 15, 2000, entered into force on September 29, 2003.¹⁴ The Palermo Protocol defines the crime of trafficking and lays emphasis on to the vulnerability of women and children to trafficking for commercial sexual exploitation. It carries special safeguards for the case of children who have been victims of trafficking including legal protection. The Palermo Protocol takes cognizance of the importance of consent and does not confine the definition

¹² GUPTA, supra note 2, at 79.

¹³ GUPTA, supra note 2 at 83.

¹⁴ GUPTA, supra note 2 at 80

of trafficking to protection of trafficking to prostitution alone. The Palermo Protocol is the primary instrument against trafficking in humans. It represents a significant development in the global battle against trafficking due to its consensus on the need to develop national policies and programs that effectively prevent trafficking but do not inhibit labour migration. The major limitation of the Protocol is that the protection and support element are not binding on the States that have ratified the Convention.¹⁵

IV.I. Objectives of the Protocol

The stated purpose of the Trafficking Protocol is two-fold: first, to prevent and combat trafficking in persons, paying particular attention to the protection of women and children; and second, to promote and facilitate cooperation among states parties to this end. Application of the protocol is limited to situations of international trafficking involving an organized criminal group. States parties are required to adopt legislative and other measures necessary to criminalize trafficking and related conduct¹⁶

V. Regional Instruments

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994); or the resolution adopted by the Inter-American Commission for Women (CIM) on “Fighting the Crime of Trafficking in Persons, Especially Women, Adolescents and Children”, which enjoin member states to act against trafficking through domestic legislation and national, bilateral and multilateral coordination mechanisms. In 2004, The General Assembly of the Organization for American States (OAS) adopted a resolution requesting members to take all appropriate measures to strengthen their legal, judicial and administrative systems to combat the trafficking crime.¹⁷

The incidence of trafficking has grown to alarming proportions globally in the past two decades, especially within South Asia. The region has become a major source and destination as well as a transit point for trafficking victims. Persons especially women and children, across the region are trafficked within their own countries and across international borders against their will in an essentially clandestine slave trade. In view of this alarming trend, there have been important steps taken at the regional level to address this issue in the past five years. Regional instruments like the

¹⁵ GUPTA, supra note 2 at 82

¹⁶ Anne Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis”, 23 *H.R.Q* 983 (2001).

¹⁷ Irena Omelaniuk, “Trafficking in Human Beings” available at: www.un.org/esa/population/meetings/.../P15_IOMelaniuk.pdf (Visited on Dec., 3, 2014)

Rawalpindi Resolution of 1996 and the SAARC Convention on Preventing and Combating Trafficking in Women and Children adopted on January 5, 2002 at the eleventh SAARC Summit held at Kathmandu, Nepal.¹⁸

UN agencies, including both the UN High Commissioner for Human Rights and the 'UN High Commissioner for Refugees' have similarly reoriented their efforts to be seen as visible on the anti trafficking front. There is even a UN Special Rapporteur "on the human rights aspects of the victims of trafficking in persons, especially women and children, who conducts trafficking-focused investigatory missions on behalf of the Human Rights Council with a view to "raising the profile of the issue in the international debate and strengthening, through increased coordination, the work of the human rights machinery on the issue of trafficking."¹⁹

VI. National Efforts

India has turned into a focus of human trafficking; the Constitution of the country has banned all sorts of trafficking under Article 23 in Part III. The expression "traffic in human beings" used in Article 23 (1), commonly known as slavery, implies the buying and selling of human beings as if they are chattels, and such a practice is abolished by the Article. But the expression is very wide one and includes the prohibition of traffic in women for immoral purpose.²⁰ The Suppression of Immoral Traffic Act 1956 (SITA), amended as the Immoral Traffic (Prevention) Act (ITPA) in 1978 and later in 1986, was in reaction to the ratification of the International Convention on Suppression of Immoral Traffic and Exploitation of Prostitution of Others in 1950.²¹ The National Legislations like Indian Penal Code 1860, Immoral Traffic Prevention Act 1956, and Juvenile Justice (Care and Protection of Children) Act 2000, Child Labour (Prohibition and Regulation) Act 1986, Child Marriage Restraint Act 1929, Bonded Labour System (Abolition) Act 1976 make attempts at addressing the issue of trafficking directly.²²

VI.I. The Immoral Traffic Prevention Act

The Suppression of Immoral Traffic in Women and Girls Act 1956 (SITA), now Immoral Traffic (Prevention) Act (ITPA), was enacted in pursuance of India's international commitment on ratifying the Convention

¹⁸ GUPTA, supra note 2 at 83

¹⁹ Supra 10 at p 14

²⁰ M.P. Jain, *Indian Constitutional Law*, 1197 (Lexis Nexis, Nagpur, 5th edn., 2009).

²¹ Sarthak Patnaik, "An Overview: The Legal Facets of Women Trafficking in India", 3 *IJSR* 217 (2014).

²² HATHAWAY, supra note 10 at 36

for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of others (signed at New York on 9th May, 1950). The Act was amended twice first in 1978 and then amended and renamed as the Immoral Traffic Prevention Act in 1986. Again in 2006 a bill had been placed before the parliament for amendment of certain sections of the Act to remove some loopholes, particularly the section 8 and 20, which results in further victimization of the victim. Moreover, the present Act gives less importance on traffickers. The Bill is still pending and the same has been referred to the Parliamentary Standing Committee.²³ Legislation on the subject of suppression of immoral traffic did exist in a few States but the laws were neither uniform nor did they go far enough. In the circumstances, it became necessary that a Central law be passed which would not only secure uniformity but also be sufficiently deterrent for the purpose.²⁴

The objective of the ITPA is to:

- Punish immoral trafficking;
- Punish traffickers;
- Punish persons living off the earnings of a woman; and
- Provide welfare measures directed towards rehabilitation of sex workers.²⁵

The aim of the legislation as made abundantly clear from the preamble to the 1956 version of the Act is, “to inhibit or abolish commercialized vice namely, the traffic in women and girls for the purpose of prostitution as an organized means of living”.²⁶

The Act consisting of twenty five sections extends to the whole of India. Section 2 of the Act is defining various expressions used in the statute, however, without defining the word ‘trafficking’.

The amended law emphasizing on prevention rather than suppression of human trafficking took into consideration the international conventions and protocols and provided severe penalties for different types of exploitative conditions. The ITPA also provides security and rehabilitation for the rescued girls. Keeping a brothel or allowing sites to be used as a brothel is a crime under the ITPA. It also provides penalty to (a) adults living on the incomes of prostitutes, (b) getting a person for the sake of prostitution, and (c) keeping a person in premises where prostitution

²³ JAIN, supra 19

²⁴ Research Study on Human Rights Violation of Victims of Trafficking *available at* ncw.nic.in/.../human_right_violation_of_victims_of_trafficking.pdf (Visited on Dec., 10, 2014).

²⁵ Ibid.

²⁶ HATHAWAY, supra 10 at 55

is carried on. But, prostitution is not a crime under the ITPA. It however forbids solicitation or engaging in sex work in or near a public place. Often this endowment of the act is used by the police to harass and penalize the sex workers who themselves are the victims of trafficking.²⁷ The ITP Act also provides for “special police officer” appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purpose of this Act and “trafficking police officer” may be appointed by the Central Government under Section 13 (4) for the purpose of investigating any offence under this Act or under any other law for the time being in force dealing with sexual exploitation of persons and committed in more than one State appoint such number of police officers as trafficking police officers and they shall exercise all the powers and discharge all the functions as are exercisable by special police officers under this Act with the modification that they shall exercise such powers and discharge such functions in relation to the whole of India.²⁸

VI.II. Immoral Traffic (Amendment) Bill 2006

ITP Act has faced criticisms for not addressing to the issue of trafficking in a holistic manner. There are several lacunas in the statute e.g.

- ✓ The ITP Act, the only central Indian Legislation that deals with trafficking inexplicably fails to provide a definition for the same.
- ✓ There is no clear direction to catch the traffickers.
- ✓ The Act does not address children directly.
- ✓ The amendment to the ITP Act also fails to address the issue of children being trafficked for the purpose of sexual exploitation.²⁹

Therefore, to further amend the trafficking laws a new amendment bill i.e. Immoral Traffic (Amendment) Bill was introduced in the Lok Sabha on May 22, 2006.

Highlights of the Bill

- The Immoral Traffic (Prevention) Amendment Bill, 2006 amends the Immoral Traffic (Prevention) Act, 1956 to combat trafficking and sexual exploitation for commercial purposes.
- The Bill deletes provisions that penalised prostitutes for soliciting clients. It penalises any person visiting a brothel for the purpose of sexual exploitation of trafficked victims.

²⁷ JAIN, supra 19

²⁸ The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956)

²⁹ HATHAWAY, supra 10 at 56-62

- All offences listed in the Bill would be tried in camera, i.e., the public would be excluded from attending the trial.
- The term “trafficking in persons” has been defined with a provision for punishing any person who is guilty of the offence of trafficking in persons for the purpose of prostitution.
- The Bill constitutes authorities at the centre and state level to combat trafficking.

Key Issues and Analysis

- While prostitution is not an offence, practicing it in a brothel or within 200 m of any public place is unlawful. There seems to be a lack of clarity on whether prostitution ought to be a legitimate way of earning a living if entered into by choice.
- Penalizing clients who visit prostitutes could drive this sector underground, preventing legal channels of support to victims of trafficking.
- This Bill only punishes trafficking for the purpose of prostitution and trafficking for other purposes like bonded labour and domestic work is not covered by the Bill.
- The rank of special police officer, who would enforce the Act, is lowered from Inspector to Sub-Inspector. Such powers delegated to junior officers could lead to greater harassment.
- The Bill constitutes authorities at the centre and state level to combat trafficking. However, it does not elaborate on the role, function and composition of these authorities.³⁰

VII. Conclusion

Trafficking in human beings is a universal phenomenon that has been attracted attention at national and international level in recent years. It is exceptionally hard to measure the scale of trafficking is recognized with child labour, child marriage, abduction and kidnapping and prostitution despite the fact that these phenomenon can also exist independent of trafficking and despite greatly increased attention, attempts to deal with trafficking and related exploitation at the national, regional and international levels have been largely ineffective. To stop the trend and to save the humans from sale and purchase as commodity in this celebrated era of human rights, there is no easy solution, only well-reasoned choices which we

³⁰ The Immoral Traffic (Prevention) Amendment Bill, 2006 *available at* <http://www.prsindia.org/billtrack/the-immoral-traffic-prevention-amendment-bill-2006-143/> (Visited on Dec., 13, 2014).

all have to make under a concerted strategy involving social workers, policy makers, NGO, government and the police can lead us to some light .In such cases police also cannot do anything alone. For that purpose, awareness among the general people is also required. Human trafficking is a gross violation of human rights and any strategy to eradicate trafficking should be framed within a human-rights perception by placing the victim at the centre. Human rights based approach endeavors to attach new aspect in tackling this hazard of trafficking. Rights based approach to trafficking also gives primary importance to the suffering and restitution of the victims of trafficking. Along with that it also helps to find out reasons, process, and consequences of the trafficking through the victim's Human Rights perspective.