

# Law against Human Trafficking in India: A critical Analysis

N L Gurjar

Department of Law

Vivekananda Global University, Jaipur

Email ID: n.l\_gurjar@vgu.ac.in

**ABSTRACT:** *Women and children trafficking is one of the worst human rights abuses. Nevertheless, it is very difficult to estimate the extent of the problem as trafficking is closely related to child labor, bonded labor, child marriage, kidnapping and abduction, and prostitution, although these factors may also exist independently of trafficking. This article has tried to examine the nature, causes, methods and size of trafficking in a country that has recently become a soft target for trafficking in persons in the South Asian region. India has failed to comply with certain international standards to combat the crime. The article highlights the need to develop a multidimensional approach and focuses attention on structural factors of trafficking for recommending meaningful stratagems to counter the social evil.*

**KEYWORDS:** *Human Trafficking, Abduction, Prostitution, Child marriage, Law, Guidelines.*

## INTRODUCTION

It is widely recognised that human trafficking refers to the mechanism by which people are put or preserved in an exploitative condition for economic benefit. Trafficking can occur within a region, or cross-border movement may be necessary. Women, men and children have been trafficked for a number of purposes, including forced and exploitative labour in factories, farms and private homes, sexual slavery, and forced marriage. All areas of the globe and most countries are affected by trafficking.

Although it is difficult to collect reliable pattern and number data, our understanding of why trafficking occurs has improved. Only some of the underlying factors found are disparities within and across countries, increasingly restrictive immigration policies, and growing demand for cheap, disenfranchised labour. The several variables that increase individual vulnerability to trafficking include poverty, abuse and discrimination. There is a long history of individual abuse for benefit and international attempts to counter it can be traced back at least a century before the birth of the current human rights system. Nevertheless, only in the past decade has smuggling been a major concern. A comprehensive legal structure was established around the issue during the same time. These modifications confirm that there has been a fundamental change in how the international community thinks of human trafficking. It also confirms a shift in the perceptions of what governments and others can do to counter and prevent trafficking. Human rights are central to the new understanding and the need for a trafficking policy focused on human rights is now generally recognised. Such an approach includes an understanding of how human rights abuses occur in the trafficking process, and how States' obligations under international human rights law are involved, as explained in this fact sheet. It seeks both to recognise and correct racist patterns and the unfair distribution of the power underlying trafficking, to retain immunity for traffickers and to refuse justice to victims.

In fact, it was not until the late 1990s that States began the task of distinguishing trafficking from other activities with which it was widely associated, such as encouraging illegal migration. There is a very recent international consensus on what constitutes 'trafficking in persons.' In the 2000 Protocol to Deter, Combat and Punish Trafficking in Persons, Particularly Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the first negotiated definition of trafficking was introduced (Trafficking Protocol). Since then, the term has been incorporated into several other instruments of law and policy as well as national laws.

## DISCUSSION

### *Important features*

The following are key features of the new international legal understanding about trafficking:

Trafficking affects women, men and children, and involves a range of exploitative practices. Traditionally, prostitution is synonymous with the sexual exploitation movement for women and girls. The international legal definition set out above makes clear that men and women, boys and girls can all be trafficked—and that the range of potentially exploitative practices linked to trafficking is very wide. The list of examples in the description is open-ended and it is possible to identify new or additional exploitative uses in the future.<sup>1</sup>

Trafficking does not require the crossing of an international border.

The definition covers internal as well as cross-border trafficking. That is, it is legally possible for trafficking to take place within a single country, including the victim's own.

Trafficking is not the same as migrant smuggling.

Migrant smuggling involves the illegal, facilitated movement across an international border for profit. While it may involve deception and/or abusive treatment, the purpose of migrant smuggling is to profit from the movement, not the eventual exploitation as in the case of trafficking.

Trafficking does not always require movement.

The definition of trafficking identifies movement as just one possible way that the “action” element can be satisfied. Terms such as “receipt” and “harbouring” mean that trafficking does not just refer to the process whereby someone is moved into situations of exploitation; it also extends to the maintenance of that person in a situation of exploitation.<sup>2</sup>

It is not possible to “consent” to trafficking.

International human rights law has always recognized that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away. This understanding is reflected in the “means” element of the definition of trafficking. As noted by the drafters of the Trafficking Protocol: “once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.

### *Relationship between Human Rights and Human Trafficking*

Migrant smuggling involves movement for profit across an illicit, facilitated international border. Although it may involve fraud and/or abusive treatment, the aim of smuggling migrants is to take advantage of migration, not, as in the case of trafficking, of subsequent violence. At various stages, different human rights in the trafficking cycle would be important. Some would be especially applicable to the causes of trafficking (e.g. the right to an acceptable standard of living); others to either the actual trafficking mechanism (e.g. the right to be free from slavery); and others to the answer to trafficking in human beings (e.g. the right to be free from slavery) (e.g. the right of suspects to a fair trial). Any rights extend generally to such rights.

### *Trafficking as a violation of human rights*

As mentioned above, many of the practises associated with modern-day trafficking are specifically banned under international human rights law. For example, human rights law prohibits debt bondage: the assurance of personal services as debt insurance is not limited and defined where the expense of such services will not be used to pay off the debt or its length or life. Many trafficked individuals who enter into debt with their exploiters are in a debt bond situation (related, for instance, to placement or transportation fees); the debt is used as a way to monitor and exploit them. Human rights law also prohibits forced labour, as set out in Convention No 29 of the International Labor Organization (ILO) on Forced or Compulsory Labor,

<sup>1</sup> UN Trafficking Protocol, Current Status, UNITED NATIONS TREATY COLLECTION

<sup>2</sup> See Jolly George Verghese v. Bank of Cohni, A.I.R. 1980 S.C. 470, 914 (India). See also NAT'L COMM'N TO REVIEW THE WORKING OF THE CONSTITUTION, A CONSULTATION PAPER ON TREATY-MAKING POWER UNDER OUR CONSTITUTION (2001)

as: 'all work or service demanded by any person under threat of penalty and for which that person has not voluntarily offered himself.' Trafficking-related activities prohibited under international human rights law are also prohibited.<sup>3</sup>

### *The human rights of trafficked persons*

The Charter of the United Nations and the Universal Declaration of Human Rights both agree that rights are universal: they apply to all, irrespective of race, gender, ethnicity or any other distinction. Trafficked people are entitled to the full range of human rights. It is clear from international law that trafficked persons should not be operated against merely because they are non-nationals, even though they are outside their state of residence. Different or additional rights may be asserted by people belonging to particular trafficking groups. For example, international human rights law imposes substantial and additional obligations on States to recognise child victims of trafficking in human beings and to ensure their immediate and long-term protection and well-being. The fundamental concept is extracted from the commitments of the Convention on the Rights of the Child: the best interests of the child must always be paramount. In other words, it is not possible for States to put such concerns about the best interests of the child victim of trafficking in human beings, such as those related to immigration or public order controls. Moreover, as the Convention extends to all children under the authority or control of a State, in all matters, including those relating to the security of their privacy and physical and moral integrity, non-citizen children who are victims of trafficking are entitled to the same protection as nationals. Other treaties may also specify certain rights. For example, the Trafficking Treaty provides certain special provisions for child victims, such as the Convention on Action against Trafficking in Human Beings.

### *The importance of a human rights-based approach to trafficking*

Although this connection between human rights and human trafficking is obvious, it does not necessarily follow that human rights would naturally be at the core of responses to trafficking. Cross-border trafficking, for instance, may be addressed as an immigration problem, with human rights presented only as an afterthought. The States may also combat trafficking specifically as a matter of crime or public order. An international consensus has grown over the past decade around the need for a rights-based approach to trafficking.

### *Anti-trafficking law in India*

Although India has become a hotbed of trafficking in human beings, the country's Constitution has banned all kinds of trafficking under Article 23. The Suppression of Immoral Traffic Act 1956 (SITA), which was amended in 1978 and later in 1986 as the Immoral Traffic (Prevention) Act (ITPA), was in response to the ratification of the 1950 International Convention on the Suppression of Immoral Traffic and the Exploitation of Others. The amended law stressing 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. In addition to the ITPA, trafficking in women and children for sexual exploitation is covered by several other sections of the Indian Penal Code (IPC), namely 366A (Procurator of Minor Girls Under the age of 18), 366B (Importation of Girls Under the age of 21 Years From a Foreign Country), 367 (Kidnapping and Abduction for Slavery, Unnatural Lust, etc.), 372 (Sale of Minor Girls for Prostitution). Under IPC, there are some other offences that directly affect the trafficking problem. For example, trafficked women / girls are very often raped before being sold to the brothel (an offense under section 376).<sup>4</sup>

Trafficking of human beings in India can be divided into three categories: (a) for commercial sexual abuse, (b) for exploitative labour, and (c) for several other forms of exploitation, such as selling organs, begging, camel jockeying, etc. A quick look at just the available trafficking documents and studies reveal that trafficked women and children are coerced into practises such as brothel prostitution, massage parlours or beer bars, pornography, dancing, minor crimes, domestic assistance, farm labour, begging, camel pushing hard, organ trafficking, drug trafficking and even trafficking. Increased abuse of young women and girls has been aided by the rapid growth of sex tourism and the increasing demand for cheap labour in the globalised world. At rates that vary, women are traded on the basis of physical appearance and virginity. Most sex industry consumers prefer boys from girls who are deemed to be unaffected by AIDS. As a

<sup>3</sup> See *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 (India). 8 S

<sup>4</sup> Walk Free Foundation Global Slavery Index

consequence, there is a rising appetite for children, even as young as ten, in the sex industry. In camel races, some boys are trafficked to West Asia or the Persian Gulf States and become camel jockeys. During the Hajj, some end up as beggars in Saudi Arabia. Young girls are trafficked to meet the demand for brides in Northern India, where the number of girls is smaller.<sup>5</sup>

### *Prime trafficking targets*

It seems from our research that the primary targets of trafficking in West Bengal are poor Muslims, Hindu Scheduled Castes (SC) and Scheduled Tribe (ST) communities. Landless families, farm employees, tea garden workers, low-paid informal workers in the industry, and marginal and seasonal workers are the affected classes of workers. Finally, the social groups affected are: illegal migrants, teenagers who are illiterate or dropped out, abandoned or widowed mothers, women who have stayed unmarried because of immense dowry demands, children without parents or guardians. There are many factors contributing to trafficking in human beings, especially in women and children. The reasons for trafficking in women and children can be split into two categories: push and pull factors. The driving factors include: weak socio-economic conditions for a large number of families, poverty coupled with regular, sometimes annual natural disasters, such as floods that lead to the virtual poverty of some people, lack of education, skills and income rights for women (and their family members) in remote regions.<sup>6</sup>

## CONCLUSION

Human trafficking is a socio-legal problem and it is a symptom of a far deeper malice in our culture. For such a problem, therefore, there would be no immediate remedy. The complexities of the identification and estimation of trafficking make the mission of reduction even more challenging. Nonetheless, some steps in this process can be taken and the practical application of the steps will definitely yield some positive results. Since the issue is multi-dimensional, its solution also lies in the prevention of a low- and mid-'cosmopolitan'<sup>43</sup> approach: To address the root causes of women's and children's vulnerabilities, there is an urgent need to establish detailed programmes and policies on either the manifest and latent dimensions of trafficking in the sense of circumstances and realities in each country or area. A continent mapping of the origins of trafficking, demand and transit areas would be very beneficial in this direction. Nevertheless, it would be wrong to argue that trafficking in human beings will not be prevented until societies guarantee certain types of 'structural improvements.' The recovered victims should be covered and recovered by adequate structures to avoid re-trafficking. The need for the day is global coordination and collaboration among various stakeholders. Anti-trafficking initiatives should not be viewed solely from a country's national security viewpoint and, instead, topics such as migration or repatriation should be viewed from both legal and human rights viewpoints. More precisely, when performing rapid recovery efforts, the individual rights of a victim should be secured.

<sup>5</sup> "TIP Protocol Ratified status. UN.

<sup>6</sup> . National Crime Records Bureau Data from 2010, 2011, 2012, 2013, 2014. 6. Shamim I. State of Trafficking in Women and Children and their Sexual