

The Inhumane Side of Trade “Human Trafficking”: Critical Analysis of Legislative Framework in India

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Abstract: Human trafficking is a gross human rights violation of Article 21 of the Constitution of India wherein it is provided that every individual has a right to live with dignity. It is a cross-border issue where a country can act as a source, destination or transit. Human trafficking is done for the Sex trade, slavery, child Labour, forced Labour etc. In India, piecemeal legislations are dealing with various forms of human trafficking. It is also lamentable that Indian law does not incorporate all forms of human trafficking as defined under the UN Trafficking Protocol. However, Legislators in India stride to combat and prevent organized criminal human trafficking through Criminal Amendment Act of 2013 and the Union Cabinet has recently in February approved the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 for introduction in the Parliament. The Amendments have been made to align national law in conformity with the United Nations Protocol to Prevent, Suppress and Punish Trafficking with special emphasis on Women and children. The papers aim to provide the reader with an overall prevalence and causes of human trafficking by highlighting the facts and figures of human trafficking in India. It further provides a broad overview of statutes and policies dealing with human trafficking in India and analyzes whether our Domestic Laws align with various International Conventions dealing with human trafficking ratified by the Indian Parliament. It also examines the approach of the Indian judiciary concerning human trafficking.

Keywords: Human Trafficking, Human rights, Sex trade, slavery, forced Labour, Child Labour, Anti- Trafficking Law etc.

I. PREVALENCE OF HUMAN TRAFFICKING

Human trafficking involves cross-border trafficking as well as internal trafficking, which occurs domestically. It has an element of deception where the vulnerable section is preyed and exploited for revenue. There are several traps like false job promises, kidnapping, fraudulent marriages, the sale of children by parents etc. The purpose of trafficking predominantly is the sex trade, domestic work, forced labour, illegal adoption industry, child marriages, drug trafficking, begging etc.

Human smuggling is another crime associated with human trafficking; human smuggling involves the consent of the person who is smuggled. Such persons are smuggled across the borders. However, smuggling becomes trafficking when it is done forcefully without the consent of the person. This modern type of organized crime is a threat to human rights, it

breakdowns families and communities, deprives the country of its human resources etc.

Exact data and figures of the number of persons being trafficked are difficult to report because of the nature of the crime which is illegal, often invisible, borderless and difficult to track.ⁱⁱ Trafficking exists in almost every part of the world in the form of place of origin, transit, destination and this illegal trade reaps enormous profits for offenders.ⁱⁱⁱ The National Crime Records Bureau (NCRB) reported 8,132 human trafficking cases in 2016 as against 6,877 in 2015, with the highest number of cases reported in West Bengal, followed by Rajasthan in the west. The significant cause of 7,670 cases was sexual exploitation and prostitution, while 162 cases were for child pornography.¹ However, several activists contested the figures and said that the report failed to show the true magnitude of crime in India.²

¹ The National Crime Records Bureau Ministry of Home Affairs (2017). Crime in India statistics 2016. [online] New Delhi-110 037: Director National Crime Records Bureau (Ministry of Home Affairs) Government of India. Available at: <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWP DFs/Crime%20in%20India%20->

[%202016%20Complete%20PDF%20291117.pdf](#) [Accessed Feb 28, 2018].

² See Anuradha Nagaraj & Nita Bhalla, India's human trafficking data masks reality of the crime – campaigners. Available at <https://in.reuters.com/article/india-trafficking/indias-human-trafficking-data-masks-reality-of-the-crime-campaigners-idINKBN1DY1PB>. [Accessed on Feb 28, 2018]

India acts as source, destination and transit country for labour as well as sex trafficking, as per reports 90 per cent of trafficking occurs intra-state and inter-state and 10 per cent occurs across national borders.³ India serves as a destination for persons trafficked from countries like Nepal, Bangladesh and acts as a transit country for individuals trafficked to the Middle East, Europe, North America and other countries.⁴ Further, a study conducted in the year 2008 by the Ministry of Women and Child Development in India found that there were an estimated three million sex workers in India.⁵ It is a possibility that many of these are sex trafficked victims. However sometimes after escaping from sex traffickers many of them return to sex work because of lack of an alternative. Women and girl child are exploited for commercial purposes like sex-tourism, prostitution, pornography etc.⁶ Reports on the trafficking of males indicate that men and boys are commonly trafficked for other forms of forced labour.⁷ Delhi is the hotspot for illegal trade of young girls for domestic labour, forced marriage and prostitution. Delhi is also the transit point for human trafficking. One can find several news reports stating the trafficking of women and children. Recent Statistics published by Indian Ministry of Finance in its Economic Survey 2017-2018 shows that more than 63 million women are missing across India and more than 21 million girls

are unsolicited by their families.⁸ The Economic Times in December 2015 published that 1,35,000 women and 61,000 children continue to be missing in the country.⁹ BRICS member states have agreed to battle and prevent human trafficking and determined to strengthen dialogue and cooperation among member countries. After the first ministerial meeting on migration held in Sochi, Russia, BRICS member states issued a joint declaration expressing commitment to ensure orderly and legal migration amongst member nations and respect human rights.¹⁰ There is a rise in human trafficking cases after the earthquake in Nepal, as per reports 838 people mostly women, have been intercepted along the Indo-Nepal border from April 25 to July 19, 2015, according to figures compiled by NGOs.¹¹ States in the south of India have reported a high number of trafficking cases. United Nations Office on Drugs and Crime reveals that Tamil Nadu has 528 such cases of human trafficking in 2012. The number is high and proves the poor implementation of the law. Several reports have been published which focused on violence and health issues relating to trafficked women and girls.¹² It is lamentable that the health services of women and children have sadly received limited attention concerning sexual health and mental health.¹³ Data on trafficking has been prepared by referring to repatriated

3 Dr. Sarasu Esther Thomas (2011). Responses to human trafficking in Bangladesh, India, Nepal and Sri Lanka. a review commissioned by UNODC under the United Nations global initiative to fight human trafficking. [online] New Delhi 110021: United Nations Office on Drugs and Crime Regional Office for South Asia. Available at: https://www.unodc.org/documents/human-trafficking/2011/responses_to_human_trafficking_in_bangladesh_india_nepal_and_sri_lanka.pdf [Accessed March 1, 2018]. See also Sadika Hameed Et Al, Human Trafficking In India: Dynamics, Current Efforts And Intervention Opportunities For The Asia Foundation VI (2010). Available at <https://asiafoundation.org/resources/pdfs/StanfordHumanTraffickingIndiaFinalReport.pdf> [Accessed March 1., 2018].

⁴ Ibid

⁵ This number must have increased by now but no specific report is available on the number of sex workers in India. Most of the reports give facts and figures related to number of HIV AIDS affected sex workers.

⁶ USDOS. Trafficking in Persons Report 2011. Washington, DC, United States of America Department of State, 2011.

⁷ United Nations Office on Drugs and Crime. UN.GIFT: human trafficking: an overview. New York, NY, United Nations, 2008.

⁸ Available at <https://www.theguardian.com/world/2018/jan/30/more-than-63-million-women-missing-in-india-statistics-show>. [Accessed March 2, 2018]

⁹ Available at http://articles.economictimes.indiatimes.com/2015-12-08/news/68865919_1_home-ministry-union-territories-uts. [Accessed March 2, 2018].

In addition, as per other reports around 80 percent of trafficking across the world is done for sexual exploitation, rest is for bonded labour, and India is considered as a focal point of such crime in Asia. As per the statistics reported by the Government in every eight minutes a child is found missing in India and it is assumed that only 30 percent of the total cases are reported, so the actual number is high.

¹⁰ Available at http://www.business-standard.com/article/current-affairs/brics-ready-to-check-human-trafficking-migrant-smuggling-115100900784_1.html [Accessed March 3, 2018]

¹¹ According to Murari Kharel, Director of Nepal Human Rights Commission (NHRC) at Nepalgunj, a border town in the neighbouring country (Nepal), the figures were submitted to them by different NGOs working in the field. Available at <https://www.news18.com/news/india/838-people-intercepted-along-indo-nepal-border-in-3-months-1029525.html> [Accessed March 3, 2018]

¹² Understanding and addressing violence against women, Available at http://apps.who.int/iris/bitstream/10665/77394/1/WHO_RHR_12.42_eng.pdf [Accessed 9 Apr. 2018]

¹³ Schinina G. Psychosocial support to groups of victims of human trafficking in transit situations. Geneva, International Organization for Migration, 2004

sex-trafficked girls and women, prostitutes and other sexually transmitted infections, so there is a mixed data and difficult to decide who was trafficked.¹⁴

Trafficked women and children are put to drugs or alcohol thereby affecting their psychological and physical being. The torture they face after being rescued is tremendous and most likely the women and children tend to go back to the same abuse or prostitution because of lack of proper care.

II. REASONS FOR HUMAN TRAFFICKING IN INDIA

Reasons for human trafficking are enormous like men for work migrate to another part of the country and their biological need creates commercial sex. To fulfil their need demand for girls is created which ultimately commercializes sex. Another reason is an economic disparity, for instance, if you are born in a poor family in northeastern states then there are more chances of being trafficked. Sometimes parents are also desperate to sell their daughters to earn money. Further parents in tribal areas think that sending their kids means a better life in terms of education and safety. Parents also pay some money to these agents for food and shelter, but they do not know that their child will be exploited.

Children, especially from the northeast, are taken away from homes and sold away in different states for sexual exploitation, for bonded labour by the agents who lure their parent with money, better life etc. even such girls are forced into a marriage where female to male sex ratio is highly disproportionate. Tribal children are at great risk because of the want of money and education. There were cases of human trafficking in which most of the children were from the Kuki tribe in Manipur's Tamenglong district. The reason was the conflict between the Kukis and Nagas tribe in Northeast region between 1992 and 1997, which left many kids homeless. Agents took these kids to the other parts of the country since there was no one to protect them.

According to the International Labour Organization, more than 11.7 million people are working as forced labour in the Asia-Pacific region. Parents or guardians sell their children debt labour for the exchange of cash. Because of which such victims of trafficking suffer from HIV AIDS, mental disorders, depressions etc.

Further, the want of education or training limits the ability of a trafficked person to find employment in other industries. Substitute employment outside prostitution is scarce because they are not accepted in society due to social stigma. Therefore, it is difficult to find out whether a sex worker is in the trade because of being trafficked or they are there because of their own choice.

¹⁴ Decker et al. Sex trafficking, sexual risk, sexually transmitted infection and reproductive health among female sex workers in Thailand. Journal of Epidemiology and Community Health, 2011

¹⁵ See Mary Crawford. Sex Trafficking in South Asia: Telling Maya's Story. London and New York: Routledge, 2010.

Caste and class system further worsens the situation. A person belonging to lower caste is more vulnerable as compared to a higher class. Lower caste people especially women face discrimination on account of both their caste and gender and which affects their status in the society making it easier to exploit and traffic them. The absence of a strong legal framework and the absence of strict implementation of law further contribute to this serious problem.¹⁵

III. INTERNATIONAL CONVENTIONS

Almost every country in the world is affected by human trafficking. The challenge is to assist such victims and give them a better life because every state is under an obligation to protect its citizens. At the International level, efforts have been made to combat human trafficking and the smuggling of migrants by the United Nations Convention on Transnational Organized Crime and its protocols on trafficking in persons and migrant smuggling.

United Nation Convention against Transnational Organized Crime was adopted on 15 November 2000. It is the chief international instrument to fight trafficking. The Convention is further supplemented by three protocols, which focus on specific areas of crime. the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

The Convention signifies the member states of the gravity of the organized crime and the urgent need to foster and enhance cooperation among member states to tackle the crime. States that ratify the convention pledge to serious measures against transnational organized crime, incorporating the provisions in the domestic law, the adoption of frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.¹⁶

It was late in the 1990s that States began to separate trafficking from other practices such as irregular migration. The first definition derived by international consensus of trafficking by was incorporated into the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol). This definition has been incorporated in national legislation by various member states.

The main protocol dealing with women and children is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children which was adopted

¹⁶ United Nations Convention against Transnational Organized Crime and the Protocols Thereto. Available at <https://www.unodc.org/unodc/en/treaties/CTOC/index.html> [Accessed on March 4, 2018]

and enforced on 25 December 2003. It defines what trafficking in-person means. This instrument facilitates convergence in national legislation concerning domestic criminal offences, which would propel efficient international cooperation in investigating and prosecuting trafficking cases. This protocol also aims to assist the victims of trafficking to protect their human rights.

Secondly, other protocol, which is against the Smuggling of Migrants by Land, Sea and Air, was enforced on 28 January 2004. It focuses on the growing problem of organized criminal groups who smuggle migrants. This protocol for the first time at the international level defined smuggling of migrants. It also promotes cooperation among member states to combat the smuggling of migrants and their exploitation.

Another protocol deals in Illicit Manufacturing of and Trafficking in Firearms, which was enforced on 3 July 2005. This protocol facilitates cooperation among state parties to prevent, combat illicit manufacturing of and trafficking in firearms. States have committed to adopt a series of crime-control measures and to establish criminal offences related to illegal manufacturing of, and trafficking in, firearms based on the Protocol requirements and definitions; the second to a system of government authorizations or licensing intending to ensure legitimate manufacturing of, and trafficking in, firearms; and the third one to the marking and tracing of firearms.¹⁷

Trafficking in person has been defined in Trafficking protocol and includes the recruitment, transportation, transfer, harbouring or receipt of persons, using the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for 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. The three essential elements of trafficking in persons (adults) to exist are, therefore:

- (i) Action (recruitment, etc)
- (ii) means (threat, etc.) and
- (iii) Purpose (exploitation).

¹⁷ Supra Note 18

¹⁸ Analyzing the definition one can say that the 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 exploitative purposes is inclusive and the trafficking of person does not require crossing the border.

¹⁹ Human Rights and Human Trafficking, United Nations, New York and Geneva, 2014. Available at http://www.ohchr.org/Documents/Publications/FS36_en.pdf [Accessed on March 4, 2018]

²⁰ Ibid. Following are the most important human rights relating to human trafficking:

For children under 18 years of age, the means element is not required. It is necessary to show that an action such as recruitment, buying and selling and that this action was for exploitation. Therefore, in other words, trafficking of a child will exist if the child was subjected to some act, such as recruitment or transport, the purpose of which is the exploitation of that child.¹⁸

Migrant smuggling involves illegal movement across the border for profit, not the eventual exploitation as in the case of trafficking. Trafficking may or may not involve movement. As per the definition of trafficking, the movement is one possible way that the active element can be satisfied. Further, the term harbouring of the person trafficked means that the person is maintained in a situation of exploitation. Further human rights law recognizes that the inherent inalienability of freedom renders consent irrelevant in which the person cannot exercise his freedom. 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."¹⁹

Human rights have explicitly proclaimed the essential immortality and unlawfulness of one person appropriating the legal personality, labour or humanity of another. Human rights demand equality or at least certain key rights to all citizens as well as non-citizens, it detests arbitrary detention, forced labour, the pledging of personal services as security for a debt, forced marriage, sexual exploitation, it includes freedom of movement and the right to leave and return to one's own country.²⁰

International Law also prohibits forced Labour, as defined in Convention of Forced or Compulsory Labour of the International Labour Organization (ILO) that "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself/herself voluntarily" There are several trafficking-related practices prohibited by International Conventions like Slavery, servitude, child sexual exploitation, forced marriage, servile forms of marriage, child marriage, enforced prostitution and the exploitation of prostitution. The Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child lays down provision relating to trafficking. Further, other

The prohibition of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status; The right to life ; The right to liberty and security; The right not to be submitted to slavery, servitude, forced labour or bonded labour; The right not to be subjected to torture and/or cruel, inhuman, degrading treatment or punishment; The right to be free from gendered violence ;The right to freedom of association; The right to freedom of movement; The right to the highest attainable standard of physical and mental health; The right to just and favourable conditions of work ;The right to an adequate standard of living ;The right to social security ;The right of children to special protection.

regional conventions like Council of Europe's Convention on Action against Trafficking in Human Beings and the European Union Directive on preventing and combating trafficking in human beings and protecting its victims recognize trafficking as a gross violation of human rights. The United Nations General Assembly and the Human Rights Council have recurrently stated that trafficking violates and impairs fundamental human rights.

Conventions confirm that trafficked persons are entitled to a full range of human rights in every country, they cannot be discriminated based on nationality, caste etc. International human rights demand special protection because of their vulnerability. In the context of trafficking, relevant groups include women, children, migrants and migrant workers, refugees and asylum seekers, internally displaced persons, and persons with disabilities. Disabled can be targeted for begging. Girls suffer from rape, forced marriage, unwanted or forced pregnancy, forced termination of pregnancy, and sexually transmitted diseases, including HIV/AIDS.

Few classes of victims such as children require immediate and longer-term safety and wellbeing as per International human rights. This is given under Convention on the Rights of the Child: the best interests of the child are to be at all times paramount, which means states cannot prioritize other things over the best interests of the child victim. Further non-citizen child victims of trafficking are also entitled to the same protection as nationals in all matters, including those related to the protection of their privacy and physical and moral integrity.

Trafficking is not always looked from a human right approached it can be dealt with as an immigration issue. It is also possible to deal with trafficking from a crime or public disorder issue. An international consensus has developed around the need for a rights-based approach to trafficking. For instance, the General Assembly and the Human Rights Council, advocates human rights mechanisms, including special procedures and treaty bodies. Such an approach requires states to identify and redress the discriminatory practices and unjust distribution of power that underlie trafficking. Under a human rights-based approach, every aspect of the national, regional and international response to trafficking is anchored in the rights and obligations established by international human rights law. For instance, when policies

are framed by countries than their aim should be to promote and protect rights. The approach should be to identify trafficked and their entitlements and the person who is duty-bound to protect them. Such approach strengthens the capacity of right holders to secure their right to life and dignity. Source of the obligation of members states are the treaties²¹. These obligations are enforceable in international courts and tribunals such as the International Court of Justice, the International Criminal Court or the European Court of Human Rights, and may be enforceable in domestic courts, depending on the domestic law. Treaties dealing with slavery forced labour, child labour, the rights of women, the rights of children, migrant workers and persons with disabilities, as well as more general treaties dealing with civil, cultural, economic, political or social rights, are all applicable to trafficking. Major crime control treaties, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption are also relevant to trafficking. Other sources are custom, general principles and the decisions of international tribunals etc. An example of a judgement of an international tribunal that has helped to establish the international legal framework around trafficking is *Rantsev v. Cyprus and Russia*, which was decided by the European Court of Human Rights in 2009.²² Other soft laws are Principles and Guidelines on Human Rights and Human Trafficking; guidelines on child trafficking, issued by the United Nations Children's Fund (UNICEF), and on trafficking and asylum, issued by the Office of the United Nations High Commissioner for Refugees (UNHCR); resolutions adopted by the General Assembly and the Human Rights Council etc.

States should identify, protect and support victims of trafficking. Such as providing immediate protection and support, providing legal assistance, including temporary residency, and not criminalizing the victims. As rightly pointed out in Recommended Principles and Guidelines that a failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights i.e. failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons illusory. Further, the State in which a victim is located is responsible for providing that person with immediate protection and support. In *Rantsev v.*

²¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (Trafficking Protocol), Convention on the Elimination of All Forms of Discrimination against Women, 1979, Convention on the Rights of the Child, 1989 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000, United Nations Convention against Transnational Organized Crime, 2000, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, International

Covenant on Civil and Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights, 1966, Council of Europe, Convention on Action against Trafficking in Human Beings, 2005 (European Trafficking Convention), Charter of Fundamental Rights in the European Union, 2000, article 5, and Directive 2011/36/EU of the European Parliament and Council on preventing and combating trafficking in human beings and protecting its victims, 2011, South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

²² Supra Note 16

Cyprus and Russia,²³ it was observed by the European Court of Human Rights affirmed that if State authorities were aware, or ought to have been aware, of a risk of trafficking, a failure to take appropriate measures within the scope of their powers to remove the individual from that situation or risk is a violation of that person's rights.

International Conventions also focus on the right to privacy principle. Recommended Principles and Guidelines, guideline 6 provides "There should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of an accused person to a fair trial." Trafficking protocol also provides that a State party is to protect the privacy and identity of victims of trafficking "in appropriate cases and to the extent possible under its domestic law". Other European Trafficking Convention states that member countries are required to "protect the private life and identity of victims". The States are also required to provide the victims with proper physical and psychological care.

Concerning legal assistance, International conventions require that trafficked persons should be provided with legal and other assistance about any court or administrative proceedings. International Conventions also provide for providing Temporary residence permits and reflection periods to trafficked victims because they may be unable to get support such as housing and work opportunities. They may be vulnerable to further exploitation as well as intimidation and retaliation.

International Human rights also require Non-criminalization of trafficked persons. For example, the European Trafficking Convention requires State parties, following the basic principles of their legal systems, to "provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so" (Art. 26). Usually, in countries of transit or destination, trafficked persons are arrested, detained, charged for unlawful activities which means states fail to identify a trafficked person which furthers criminalizes a victim with the charge of smuggling, prostitution etc.

Further, concerning detention International law and policy provides that routine detention, public detention or private shelters violate the right to freedom of movement, liberty. International law prohibits the discriminatory detention of victims, including detention that is linked to the sex of the victim. However, on case-to-case basis detention could be justified concerning necessity, legality and proportionality.

Another important aspect is the return of the trafficked person to his country. For instance, Trafficking Protocol provides that Countries of origin accept the return of a trafficked national or resident "without undue or unreasonable delay" and "with due

regard for the safety of that person" or to "facilitate and accept the return of a trafficked national or resident with due regard for the "rights, safety and dignity". It is also provided that Countries of destination to ensure that such return "shall preferably be voluntary"

Further, such return of victim should not violate his or her established rights like due process. Repatriation, which is not voluntary amounts to expulsion and International Law, rejects arbitrary expulsion. Such citizens are entitled to present reasons for why they should not be expelled and such reasons are to be reviewed by the competent authority. Such a trafficked person also has the right to remain in the country where legal proceedings are going on.

Concerning remedies that should be provided to victims, the Basic Principles and Guidelines on the Right to a Remedy and Reparation were adopted by the General Assembly in 2005 to clarify the rules on remedies and reparation which includes the right of access to justice, the right to reparation for harm suffered and the right of access to information concerning violations and reparation mechanisms. Access to justice includes the protection of victims' privacy and safety in the course of any legal proceedings as well as measures to ensure that victims can exercise their rights to a remedy. Remedies can involve restitution, Compensation, and rehabilitation.²⁴

Trafficking falls under the ambit of crime as well as human rights. International law requires States to ensure an effective criminal justice response to trafficking. Law provides that the offence of trafficking should be established in the domestic law of every State independently of its transnational nature of the involvement of an organized criminal group. It provides that States are required to ensure that the national definition is in sync with the international standard. Criminal Liability should be imposed on organizing, directing or being an accomplice in the commission of trafficking offences and attempting to commit such offences should also be criminalized.

Further international Law requires due diligence in the investigation of trafficking cases. For example, The Recommended Principles and Guidelines declare that "States have a responsibility under international law to act with due diligence to investigate and prosecute traffickers" (Principle 2). That obligation applies whether the allegation involves a State official or a non-State actor. International treaty law, including human rights law, supports this standard.

Last but not the least states are required to prevent trafficking in future cases. The standard implied in this obligation is, that state is required to take "all reasonable and necessary measures" to prevent a given event from occurring. The key trafficking treaties confirm an obligation of prevention, as do "soft law" sources, such as resolutions and policy documents

²³ Application No. 25965/04, Judgement of 7 January 2010, para. 286.

²⁴ Right to effective remedy is incorporated in many International conventions like American Convention on the Prevention, Punishment and Eradication of Violence against

Women (1994), Declaration on the Elimination of Violence against Women adopted by the General Assembly (1993), General recommendation No. 19 (1992) on violence against women of the Committee on the Elimination of Discrimination against Women.

of United Nations bodies and regional intergovernmental organizations and the work of the human rights treaty bodies and special procedures. Other provisions are dealing with actions to be taken by the state to reduce vulnerability.

IV. LEGAL REGULATION IN INDIA

As studied in the previous part United Nations protocol provide a roadmap for national collaboration for effectively controlling the domestic human trafficking laws. India ratified the three protocols in the year 2011. Despite its ratification, India lacks a unified comprehensive law dealing with human trafficking. Its anti-trafficking laws are piecemeal legislation dealing with several components of human trafficking such as child marriage, child Labour etc.

Ratification of Conventions in India does not automatically make the convention, the law of the land. It needs to be enacted in an Act passed by Parliament. However, the Indian constitution states that the Government of India should endeavour to foster respect for international law treaty obligation. The Hon'ble Supreme Court of India in *Vishakha and others v State of Rajasthan*²⁵ expanded the scope of application of International Treaties and observed that in absence of domestic law, the contents of international conventions can be considered and interpreted.

The Constitution of India prohibits the trafficking of human beings and forced Labour, however, it does not define what constitutes trafficking and Forced Labour.²⁶ There are other Acts like Bonded Labour System (Abolition) Act, 1976, the Child Labour (Prohibition and Regulation) Act, 1986, and the Juvenile Justice (Care and Protection of Children) Act, 2000 which prohibit the bonded and forced labour in India. The Immoral Traffic (Prevention) Act, 1986 (hereafter referred to as the ITPA) criminalizes most forms of sex trafficking.

ITPA criminalizes some aspects of prostitution like solicitation of clients in public, pimps, brothels etc. It does not criminalize those who sell their bodies within the four walls. It punishes both sex workers who solicit sex work voluntarily and sex trafficking victims who are forced into prostitution. However, ITPA is gender bias in nature. It deals with women being victims and does not deal with men being victims of the sex trade.

The Bonded Labour System (Abolition) Act defines bonded Labour in terms similar to those used for Labour trafficking in the UN Trafficking Protocol, but it fails to specify that persons

may be trafficked for Bonded Labour.²⁷ As per the language of the Act if the creditor-debtor relationship is not, established punishment is not possible.²⁸ Thus, when a situation exists where a person who is not indebted to the trafficker is rescued from the trafficker, the Act does not give remedy to such a person. Further, where a person has been held under forced Labour, prosecution of the traffickers will not take place if Labour relationship does not constitute a bonded Labour system. The Act thus does not criminalize trafficking of persons for forced Labour, which UN trafficking protocol prescribes as Human Trafficking.

The Criminal Amendment Act of 2013 amended various sections of the Indian Penal Code, including provisions relating to human trafficking in India. This is one of the reforms, which reflect a step towards incorporating the obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. (UN Trafficking Protocol). Further, the amendment Act redefines human trafficking under section 370 of the Indian Penal Code to align the definition with that of the UN Trafficking Protocol.²⁹

In nutshell Section 370, as amended, now defines exploitation as including "any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs. The new definition of trafficking expands the kinds of offences, which are criminalized as organized trafficking crime. However, the amendment Act suffers from some lacunas such as Indian law does not recognize and penalize all forms of labour trafficking as required by the UN Trafficking Protocol. The new definition of human trafficking in the Amendment Act excludes forced labour from its purview because of which such conduct does not come under the ambit of Section 370 and other laws dealing with forced labour does not adequately address the issue. Furthermore, the Amendment Act reformed Section 370 to punish those who indulge in the trafficking of women for sex but it does not criminalize those who engage victims of labour trafficking.³⁰

The final definition of Human Trafficking replaced the term forced labour with physical exploitation. However, physical exploitation is not defined in the Act or the UN Trafficking Protocol. The term forced labour is the only term removed from the definition. The Justice Verma Committee Report did not promote for the utilization of the term "physical

or persons, by First.—using threats, or Secondly.—using force, or any other form of coercion, or Thirdly.—by abduction, or Fourthly.—by practising fraud, or deception, or Fifthly.—by abuse of power, or Sixthly.—by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking."

³⁰ The Criminal Amendment Act, 2013.

²⁵ (1997) 6 SCC 241

²⁶ India Const. Art. 23(1)

²⁷ United Nations Office on Drugs and Crime, Factsheet on Human Trafficking. Available at http://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf [Accessed March 4, 2018].

²⁸ *Sannasomannara Somashekarappa v. Gorappa Rudraswamy*, I.L.R. 2004 Kar. 4606 (India).

²⁹ "Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person

exploitation” in place of “forced labour”, it does not even refer to physical exploitation and the Act falls short in penalizing persons who put such victims of trafficking to labour.³¹

Section 370A of Indian Penal Code provides that who knowingly or having reasons to believe that a person is trafficked, uses such person for sexual exploitation shall be punished with imprisonment for a term of three or five years and also with fine. However, the Act does not punish those who engage such victims for physical exploitation. Since the majority of trafficking victims in India fall under Labour, the Act fails to protect them. The Act should be amended to include forced Labour in its definition in line with the UN Trafficking Protocol. Until then the term physical exploitation should be interpreted to include forced labour.

Further Indian law even after the Amendment Act does not provide an effective system for safety, recovery and compensation of human trafficking victims as described earlier by the UN Trafficking Protocol. The UN Trafficking Protocol obliges states to provide safety measures to victims after the rescue as well as to assist the victim to recover and integrate into society.³²

UN Trafficking Protocol also requires member states to provide a victim of trafficking compensation for damages suffered. Such compensation is required to provide economic resources and protection so that victims are not re-trafficked, financial resources are given so that they can afford psychological recovery services, and the means to reintegrate in society.³³

There are several schemes launched by Government from time to time to combat trafficking such as Ujjawala: A Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation³⁴ attempts to provide rehabilitation for both immediate and long-term victims. Another is Swadhar Greh: A Scheme for Women in Difficult Circumstances, also under the Ministry of Women and Child Development³⁵, which provides rehabilitation to

victims. Beneficiaries of the program are trafficked women or girls rescued or run away from brothels or other places where they face exploitation.

Also, Ministry in collaboration with Railway stations, have identified 33 railway stations which serve as ‘source’ and ‘destination’ centres for child trafficking & rescue services. The proposal for extending the service in 55 more new railway stations have also been approved by the Ministry.³⁶

Another Act called The Juvenile Justice (Care and Protection of Children) Act, 2000 protects the child, it 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.”³⁷ This Act applies to minors and provides for shelter homes, support so that they can reintegrate in society. Further concerning the compensation part as remedy Section 357, Code of Criminal Procedure, states that the Central Government should be responsible for providing compensation to victims of any crime who have suffered loss or injury. However, it does not elaborate on the type or form of compensation. This section allows individual states to determine the amount of compensation hence there is no centralized system of compensation procedures and amounts. The scheme providing rehabilitation to bonded labour mandates a grant of Rs 20,000 to each bonded labourer, this amount is very less and regardless of the amount of time the victim was into bonded service.

In addition to the above mentioned existing legislations and policies, in the year 2016, as a response to several reports such as the Walk Free Foundation’s Global Slavery Index, wherein it was reported that there were around 45.8 million ‘modern slaves’ around the world, of whom 18.3 million were in India, the Ministry of women and child development proposed an anti-trafficking bill known as the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016 which is approved by the Union Cabinet for introduction in the Parliament in February 2018.

³¹ See Justice J.S. Verma Et Al, Report of The Committee on Amendments to Criminal Law (2013). Available at <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf>. [Accessed on March 4, 2018]

³² “Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.” UN Trafficking Protocol, Art. 6(3)

³³ United Nations Office on Drugs and Crime, Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 13 at 1 (2009). Available at http://www.unodc.org/documents/human-trafficking/TIP_module13_Ebook.pdf. [Accessed on March 4, 2018]

³⁴ Ministry of Women and Child Development, Ujjawala: A Comprehensive scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation (2007). Available at <http://wcd.nic.in/schemes/ujjawala.pdf>. [Accessed on March 4, 2018]

³⁵ Ministry of Women and Child Development, Swadhar Greh - A Scheme for Women in Difficult Circumstances (2001-02). Available at <http://wcd.nic.in/schemes/swadhardtd07102011.pdf> [Accessed on March 4, 2018]

³⁶ Press Information Bureau, Government of India, Ministry of Women and Child Development Year End Review- 2017. Available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=175043> [Accessed on March 4, 2018]

³⁷ The Juvenile Justice (Care and Protection of Children) Act, Section 2(d)(vii)

The Bill combines all existing anti-trafficking laws and includes Labour trafficking in the definition clause, which is missing presently from other legislation as discussed above. The Bill makes a difference between trafficker and trafficked and strives to protect the victims of trafficking by providing a right of rehabilitation to them rather than putting the victim in jail. The victims can have access to the rehabilitation fund and can rebuild their lives. Victims can also give evidence of trafficking without disclosing their identity. The Bill seeks to establish a National Anti-Trafficking relief and rehabilitation committee, which will be headed by the secretary of women and child development ministry. It also provides for the establishment of separate courts in every district for the speedy trials of the trafficking cases and proposes to set up Anti-Trafficking committees at the district, state and national levels to give effect to the objectives of Act i.e. prevention, protection and rehabilitation of the trafficked victims. Unfortunately, the Bill has been subjected to criticism from the sex workers themselves. The sex workers have opposed the Bill on the ground it is drafted on the assumption that all sex workers are trafficked and no sex worker can be voluntary. Other grey areas in the Bill relate to the implementation of the provisions, the certainty of punishment, the plight of girls in shelter homes etc. However, the effectiveness of the law can only be analyzed once it is in force.

V. IMPLEMENTATION OF LAW AND JUDICIAL RESPONSE

Government officials and NGOs have themselves stated that the service provided to trafficked victims is ineffective. For example, according to Dr Smarajit Jana of the Sonagachi Research and Training Institute, the facilities for rescued trafficked girls are miserable and are sometimes even worse than brothels. One of the Reports indicates that government-run shelter homes suffer from poor hygiene. The United States 2013 Trafficking in Persons Report states that India's government-run shelter homes are overcrowded and unhygienic, offered below average food and provided only limited services.³⁸ Male victims face more problems because they are less easily identified and less rescued. Recovery homes and related programmes are often not available to men and boys. Ujjawala scheme where the government invested several million applies only to female victims. Several shelter homes try to convince women to get married so that it's easy for them to reintegrate in a society which shows a women's secondary position in

society by making her realize that she can exist in society only after getting married to a man who is superior to him.³⁹ Further, Court decisions deal with issues relating to the treatment of victims to the constitutional protection of victims as well as the prosecution of traffickers. Domestic trafficking has been the focus of the Indian Judiciary. The Apex Court and the High Courts in India have laid down some principles, which shows a positive approach of the judiciary towards cases of trafficking. These decisions deal with the victim's right, asking the government to take actions to protect the trafficked child. Such as in *Prajwala v Union of India*⁴⁰ the court demanded protection of trafficked victim similarly in other cases of trafficking, the perpetrators of the crime were asked to compensate the victim of Bonded Labour.⁴¹ Further, the Apex Court in *Vishal Jeet v Union of India*⁴² gave directions for the protection and rehabilitation of those who had been dedicated as devadasis by their family members or communities for cultural reasons and were in prostitution. This could also apply to Nepali women who find themselves in Indian Brothels. In *Gaurav Jain v Union of India*⁴³ the court has observed the duty of states to rescue, rehabilitate and enable women to lead a good life with dignity, the court also remarked upon the callous attitude of state administration in identifying, releasing and rehabilitating bonded labourers in the country.⁴⁴

Further, concerning the protection of children, the court in *Prerana v State of Maharashtra*⁴⁵ stated that children who have been trafficked should be considered as children in need of care and protection. In another case of *Lakshmikant Pandey v Union of India*,⁴⁶ the court highlighted the vulnerability of children being trafficked in adoption rackets due to the lack of an effective protection mechanism. The court proposed an appropriate mechanism to fill the gap, especially in the context of intercountry adoptions.

VI. CONCLUSION

After analyzing different aspects of Human trafficking, the policymakers are required to increase awareness of the risk of being trafficked especially among those who intend to migrate. Migrant people must be given the same amount of protection and legal redressal as given to the domestic person. Special measures should be taken to protect vulnerable members who require employment and money. The government should come up with policies and laws laying down mandatory acute and longer-term health care to trafficked victims. State-supported health services, prosecuting the offenders and providing necessary financial and human resources can achieve this.

³⁸ See India's Human Trafficking Laws and Policies and the UN Trafficking Protocol: Achieving Clarity , Available at http://www.jgu.edu.in/chlet/pdf/Indias-Human-Trafficking-Laws-Report-Book_Feb-2015.pdf [Accessed on March 4, 2018]

³⁹ Ibid

⁴⁰ Writ Petition (C) No.56 of 2004

⁴¹ *People's Union of Civil Liberties (PUCL) v Union of India* 1998(8) SCC 485

⁴² (1990) 3 SCC 318

⁴³ AIR 1997 SC 3021

⁴⁴ The Apex court decision was reiterated in *Orissa Patita Uddhar Samiti v. State of Orissa and Or* 2007 (1) OLR 150

⁴⁵ (2003) MLJ 105

⁴⁶ 1984 AIR 469

Health facilities provided by hospitals or organizations working for the rehabilitation of trafficked victim should provide sensitive and safe services to victims.

Further researchers should conduct studies and prepare data so that the actual scenario of the crime is put forth in numbers. Further data on the trafficking of men, their health needs and service access, is especially scarce. Similarly, more data are required on trafficking across the full range of Labour sectors involved.

As mentioned in the paper human rights approach be taken by lawmakers, law implementers and judiciary when they deal with trafficking cases. The rescued women should not be forced into shelter homes or separated from children or family and should be provided with adequate support in terms of shelter, finance. Further rescue operation should go along with effective rehabilitation. The survivors of trafficking should have the right to exercise their independent opinion rather than

being compelled to do whatever the State thinks is best for them.

On the part of the judicial system, Cases must be taken up in specialized courts, e.g., courts dealing with violence against women, and judges must be trained and sensitized to handle matters of trafficking. Anti-trafficking training must be organized for different implementing agencies. Training must be done at all levels including training for those deputed to anti-trafficking squads, police etc. there must be greater awareness at all stages such as source, demand, transit and whistle-blowers must be protected. Initiatives from the community level should be taken to reintegrate trafficked victim in the society. The government should make effective laws, plans, and policies to root out the causes of trafficking and to make sure that labour opportunities locally are available and stern enforcement of labour standards is undertaken by the custodian of law.

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ⁱⁱ Oram S et al. International law, national policymaking and the health of trafficked people in the UK. Health and Human Rights, 2011.

ⁱⁱⁱ Belser P. Forced labour and human trafficking: estimating the profits. Geneva, International Labour Organization, 2005.