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HUMAN TRAFFICKING IN INDIA *

Abstract

Human trafficking is a way of exploitation of men, women and children. The contemporary face of trafficking has been changing from trafficking to organ trade to sexual exploitation to smuggling of humans. There is a consensus in the world to stand against it. It should be a concern for every country to curb this menace. As a world of humans, we have to protect our fellow humans from this grave crime.

Through this paper the aim is to examine the definition of human trafficking as well as analysing the causes of this phenomenon. Further the focus will shift on the present legal regime in India with regard to human trafficking. Lastly, this article will conclude with the suggestions for curbing this menace.

I. Introduction

Human trafficking today is a global phenomenon, affecting men, women and children in over 130 countries of the world.¹ Human trafficking can be understood as a process, wherein people being abducted or recruited in the country of origin are transferred through transit regions and then exploited in the country of destination. In the case of internal trafficking, all three stages would occur within the borders of a single country. Coercive or deceptive recruitment methods vary, as do transport modes. Further, the forms of exploitation differ, although for several years the focus has been on sexual exploitation rather than on forced labour and other forms of exploitation.

Essentially Trafficking is a crime against individuals. As such, the consequences are most directly felt by trafficked persons. Trafficking also has broad economic, social and cultural consequences. As a criminal act, trafficking violates the rule of law, threatening national jurisdictions and international law. Further, trafficking in persons redirects the benefits of migration from migrants, their families, community and government or other potential legitimate employers to the traffickers and their associates².

Inadequate knowledge of this crime is often a consequence of failure to identify victims as such. Among those who are identified, adult women are most frequently reported to be trafficked, followed by children. The factors that make people vulnerable to trafficking and exploitation are complex and determined, in part, by the stage of the trafficking process the victim is in.

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¹ United Nations Office on Drugs and Crime, Trafficking in Persons: Global Patterns (Vienna, United Nations, 2006)

² Judith Dixon, The impact of trafficking in person, Background paper: *An introduction to Human Trafficking: Vulnerability, Impact and Action*, UNODC, 2008.

Recognizing the same, various legislations, conventions and protocols have been framed to prevent human trafficking. In May 2011, India ratified UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000. In view of the ratification, the need has arisen to revisit the legal framework existing at the domestic level under the Constitution and in the form of legislative enactments including The Immoral Traffic (Prevention) Act, 1956; Karnataka *Devdasi* (Prohibition of Dedication) Act, 1982; Child Labour (Prohibition and Regulation) Act, 1986; Andhra Pradesh *Devdasi* (Prohibiting Dedication) Act, 1989; Information Technology Act, 2000; the Goa Children's Act, 2003; and the Juvenile Justice (Care and Protection of Children) Act, 2006, Indian Penal Code, 1860, Indian Evidence Act, 1872; Child Marriage Restraint Act, 1929; Young Persons (Harmful Publications) Act, 1956; Probation of Offenders Act, 1958; Criminal Procedure Code, 1973; Bonded Labour System (Abolition) Act, 1976; Indecent Representation of Women (Prohibition) Act, 1986; Transplantation of Human Organs Act, 1994 etc. in order to give effect to the obligations under the said Protocol.

II. Definition of Trafficking

In the simplest terms, human trafficking is the movement of a person from one place to another into conditions of exploitation, using deception, coercion, the abuse of power or the abuse of someone's vulnerability.

The most widely accepted definition of Human Trafficking is found in Article 3(a) of the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, 2000³, which reads as under:

*“ Trafficking in Persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”*⁴

Article 3(b) thereof further clarifies that the consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in Article 3(a) have been used. Further Article 3 (c) provides that 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 the means set forth in Article 3(a). A child has been defined to be a person below the age of 18 years as per Article 3(d).

Another definition of trafficking is found in Article 1 (3), SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution⁵, which reads as:

³ General Assembly resolution 55/25, annex II (Signed by India on 12 December 2002 and ratified on 5 May 2011).

⁴ United Nations, *Treaty Series*, vol. 2237, p. 319; Doc. A/55/383. At p. A-395 74 Visited at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en on 11.06.2016

⁵ SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution (<http://www.saarc-sec.org/SAARC-Conventions/63/> visited on 11.06.2016)

“Trafficking means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.”

Article 1 (5) of the SAARC Convention⁶ further defines “Persons subjected to trafficking” to mean women and children victimised or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means.

Thus, from the perusal of the above, it is clear that it is a limited definition which does not cover the various forms of trafficking and encompasses only commercial sexual exploitation only of women and children ignoring the trafficking of men.

At the domestic level in India, though no definition of trafficking is found in the Central legislations, however, the essential ingredients of trafficking are covered in the provisions contained in the Immoral Traffic (Prevention) Act, 1956 (as amended in 1978 and 1986) and the Indian Penal Code⁷.

At the State level, there is in force The Goa Children’s Act, 2003(as amended in 2005) which defines “child trafficking” in terms of the definition provided under UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children as “the procurement, recruitment, transportation, transfer, harbouring or receipt of children legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise.”⁸

Thus, from the definition of Human Trafficking as found in Article 3(a) of the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, 2000 it is clear that three elements are required to be fulfilled for an act to constitute human trafficking which are:

- **What** is done (action): recruitment, transportation, transfer, harbouring or receipt of persons;
- **How** it is done (means): by use of threat or by 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; and
- **Why** it is done (purpose): for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

Thus, as per the current international framework, it is only when an act satisfies the above parameters, can the same be construed to be an act of human trafficking. The only exception is when the victim is a child; in such cases it is not necessary to prove that one of the acts was accomplished through the use of any of the listed “means”. The actions precede the exploitation, which means that the offence is already constituted if a victim was subjected to one of the actions, by one of the means for one of the purposes⁹. Thus, with the definition as given in the Protocol, it becomes clear that the concept of trafficking does not just refer to the process by which an individual is moved into a situation of exploitation. It extends to include the maintenance of that person in a situation of exploitation. While the “action” element of the

⁶ Signed by India on January 5, 2002.

⁷ Sections 2(f), 3, 4, 5, 6, and 9 of the ITPA, and Sections 366, 366 A, 367, 370, 371, 372, and 373 of the IPC.

⁸ Section 2(z) of Goa Children’s Act, 2003.

⁹ Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the purpose of removal of the organs, Joint Study by the Council of Europe and United Nations. (2009) accessed from <http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=ZqknRQIPtzKTDY618tPPx1Th182pW9qnQyJJchgwQGYF15C77jdK!-656776111?path=Publications%2FOrgan+trafficking> visited on 22.07.2016

definition would constitute the actus reus of trafficking, the final element of the definition, “for the purpose of exploitation” introduces a mens rea requirement into the definition¹⁰. The second element of means constitutes actus reus only for trafficking in adults. Thus, trafficking is thereby a crime of specific or special intent (dolus specialis)¹¹.

III. Causes of Trafficking

The causes of trafficking are provided as under:

a) Poverty

Poverty is a complex term that refers to numerous negative conditions, including a lack of food and productive resources; hunger and malnutrition; ill health; limited or no access to education and other basic services; increasing mortality and morbidity from illness; homelessness and inadequate housing; unsafe environments; social discrimination and exclusion; and lack of participation in the decision-making process. Poverty is created by policies and preserved through structures that reinforce these same policies.¹² For this reason, it is counterproductive to say that poverty is a cause of trafficking without defining the term. Furthermore, it is not necessarily the poorest of the poor who become victims of exploitation leading to trafficking, although victims of labour exploitation, notably in developing nations, are poor.

According to Bales¹³:

“The ill, the elderly, the malnourished, the disabled and the infirm are not sought out by traffickers. They are human commodities of insufficient value to bring high profits.”

The effects of globalization have also introduced new variables into traditional discussions of poverty. “New Poverty”, has been identified by World Bank analysis of the social consequences of the economic collapse of countries of the former Soviet Union as the result of structural adjustments and political decisions that have destabilized the economies of these emerging States and plunged entire sectors of the population into situations that in fact constitute a new form of poverty among people who had never thought of themselves as poor¹⁴. This form of crisis-driven poverty has contributed to a feeling of hopelessness among many of the population. Their sense of despair, coupled with a sense of panic at finding themselves suddenly without any traditional social protection mechanisms to assist their families, was a motivation behind many young women seeking employment outside their countries of origin, leading to extreme forms of exploitation, abuse and trafficking.

b) Social and cultural exclusion

In every country, certain groups benefit from privileges and access to resources and political power that inure them to the potential hazards of economic downturns, political instability or

¹⁰ Issue Paper, *Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, UNODC, 2013

¹¹ *Ibid*

¹² Muhammad Yunus and Alan Jolis, *Banker to the Poor: Micro-Lending and the Battle against World Poverty* (New York, Public Affairs, 2003) cited in Michèle A. Clark, *Vulnerability, prevention and human trafficking: the need for a new paradigm*, Background Paper: An Introduction to Human Trafficking: Vulnerability, Impact and Action UNDOC, 2008.

¹³ International Labour Office, *A Global Alliance against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, International Labour Office, 2005) cited in Michèle A. Clark, *Vulnerability, prevention and human trafficking: the need for a new paradigm*, Background Paper: An Introduction to Human Trafficking: Vulnerability, Impact and Action UNDOC, 2008.

¹⁴ Nora Dudwick and others, eds., *When Things Fall Apart: Qualitative Studies of Poverty in the Former Soviet Union* (Washington, D.C., World Bank, 2003). cited in Michèle A. Clark, *Vulnerability, prevention and human trafficking: the need for a new paradigm*, Background Paper: An Introduction to Human Trafficking: Vulnerability, Impact and Action UNDOC, 2008

natural disasters. Those who do not fall into the “preferred” category suffer discrimination in education, employment, access to social services, including health care, access to resources (especially in times of natural disaster) and lack of a political voice.

Socially excluded groups are cultural subgroups who are marginalized according to complex factors, including ethnic, linguistic and religious differences, low social status and involuntary minority status. Social exclusion prevents groups from receiving benefits and protections that are intended for all citizens. Their economic mobility is usually affected and they are excluded from mainstream activities such as education and employment¹⁵.

Social exclusion can be the result of state policies as well as ingrained cultural traditions and practices. Social exclusion is particularly important to be understood to prevent revictimization and re-trafficking. Trafficked persons face considerable obstacles upon their return home, not the least of which are the attitudes and biases of their own communities. Young women trafficked for purposes of sexual exploitation may encounter discrimination based on their involvement in prostitution. Others face the shame and humiliation of returning penniless in spite of hopes of coming back with provision for their families. And, frequently, these same persons return with the added black mark of having been arrested as “illegal immigrants”, notwithstanding their true status as victims of crime¹⁶.

c) Limited access to education

Individuals with limited education or who are illiterate will likely have fewer income generating opportunities, whether in the formal or the economic sector. In addition, they will not have the knowledge or confidence to inquire about the terms of their contracts or working conditions. Limited access can be determined by gender, social customs, economic capacity, limited access to educational institutions and the cultural relevance of getting an education. Once again, tangible as well as intangible factors contribute to limited access to education, including community attitudes to education, the need for children to earn an income and lack of gender-appropriate teachers or relevant curriculum¹⁷.

d) Social, cultural and legal frameworks

The status of an individual within his or her environment, whether that status is defined through formal systems (such as a legal system) or informal systems, creates different levels of vulnerability. A telling example of this is the emerging importance accorded to birth registration as a long-term anti-trafficking strategy in some parts of the world¹⁸. Some factors that could be considered in such a discussion include discriminatory labour practices; patriarchal social structures; women’s role in the family; precedents of bonded labour and servitude; and early and forced marriage. Social and cultural frameworks are particularly sensitive to context and must therefore be considered with special caution so as to avoid making harmful generalities. One particularly perceptive study on HIV/AIDS prevention describes the extent to which values related to having large families and disapproval of use of any form of contraceptive are so imbedded in some communities that they override any efforts

¹⁵ Maureen A. Lewis and Marlaine E. Lockheed, “Social exclusion: the emerging challenge in girls’ education”, *Exclusion, Gender and Education: Case Studies from the Developing World*, Maureen A. Lewis and Marlaine E. Lockheed, eds. (Washington, D.C., Center for Global Development, 2007)

¹⁶ Michèle A. Clark, *Vulnerability, prevention and human trafficking: the need for a new paradigm*, Background Paper: An Introduction to Human Trafficking: Vulnerability, Impact and Action UNDOC, 2008

¹⁷ *Ibid*

¹⁸ *Vital Voices Global Partnership, Stateless and Vulnerable to Human Trafficking in Thailand*, (Washington, D.C., June 2007), p. 13 (see www.vitalvoices.org).

to teach women to use condoms in order to protect themselves against possibly infected partners¹⁹.

e) Movement

Movement under duress exacerbates existing vulnerabilities and creates new conditions under which individuals are made vulnerable to exploitation and trafficking. Refugees, internally displaced persons and asylum seekers, who find themselves in highly volatile situations and without traditional protection mechanisms, are extremely vulnerable. Outreach workers in a large Central European city encountered numerous young foreign prostituted women in the city's red light district, who upon investigation proved all to have been approached by the same agency in their home country offering to assist them in obtaining asylum. Having successfully facilitated their receipt of asylum status, the agency then forced the women to reimburse it by the provision of sexual services. In the unnatural and often violent conditions pertaining in camps and asylum centres for refugees and internally displaced persons, the need for individuals to obtain and/or provide food and other necessities for dependants is constant and has reportedly been exploited. Consequently, women and children, in particular, find themselves in situations where they must exchange sexual services for food or other survival-related necessities²⁰.

f) Demand

The conditions listed above are found primarily in countries or regions of origin, where most prevention programmes are implemented. A discussion of vulnerability is not complete, however, without a recognition that trafficking is driven in large part by the profits made by various actors along the trafficking chain resulting from the exploitation of men, women and children. Such profits are realized because of the unabated demand for cheap labour and services mainly in the developed world, usually in construction, seasonal agriculture work, the garment and hospitality sectors, domestic service and the ubiquitous commercial sex trade.

Demand provides the incentive to recruiters, who capitalize on misery, despair and desperation. Once an individual is transported to the site of exploitation, that person becomes vulnerable in ways different from those in their countries of origin. Lack of familiarity with the local language and culture, isolation, fear of reprisal and mistrust of local authorities (whether real or imagined) all contribute to sustaining an ongoing exploitative relationship with traffickers. Preventing, or limiting, demand is different from preventing exploitation. Prevention becomes important in countries of destination, although both the factors contributing to vulnerability as well as the methods of empowering individuals will be different from those used in countries of origin. Primary targets for prevention activities, notably awareness-raising campaigns, are clients, consumers and members of the different communities where trafficked persons may be found²¹.

IV. Present Legal Framework

The core provisions with regard to human trafficking in domestic legislation are contained in Constitutional guarantees. The Constitution of India discusses trafficking at twin levels: as Fundamental Right and also as Directive Principles of State Policy.

¹⁹ Desmond Cohen and Elizabeth Reid, "The Vulnerability of Women: Is this a Useful Construct for Policy and Programming?", Issues paper No. 28, HIV and Development Programme (New York, United Nations Development Programme, 1996).

²⁰ *Supra* 16

²¹ *Supra* 16

Article 23 being a Fundamental right prohibits traffic in human beings, begar and other forms of forced labour and reads as:

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

Article 39(e) and Article 39(f) being Directive Principles of State Policy read as:

“(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”

India has ratified the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, 2000 on 5 May 2011, however because of India's special 'dualist' regime any provisions or international law ratified by the Central Government are not directly binding unless there is an explicit measure through enactment of a statute to internalise these obligations²². Hence to make the international laws effective in India, their translation into domestic laws is necessary.

At the national level, the Immoral Traffic (Prevention) Act, 1956²³ is the only legislation specifically addressing the issue of trafficking and forms the most comprehensive anti-trafficking statute for India providing stringent penalties for those engaged in trafficking in persons. The Immoral Traffic (Prevention) Act, 1956 defines various terms including “child”, “prostitution”, “trafficking officer”, and “special police officer”. The purpose of the enactment is to inhibit or to abolish the commercialised vice of trafficking in women for the purpose of prostitution, as an organised means of living. The Act has criminalised various acts and the offences under the Act include:

- keeping a brothel or allowing premises to be used as a brothel (Section 3);
- living on the earnings of prostitution (Section 4)²⁴;
- Procuring, inducing or taking person for the sake of prostitution (Section 5);
- Detaining a person in premises where prostitution is carried on (Section 6)²⁵;
- Prostitution in or in the vicinity of public place (Section 7);
- Seducing or soliciting for the purpose of prostitution (Section 8);
- Seduction of a person in custody (Section 9).

The law confers wide powers of discretion on the concerned authorities in the matter of rescue and rehabilitation of the victims and the survivors and provides for stringent action

²² National Law School of India University, (2004) *Handbook of Human Rights for Judicial Officers*, NIHR (p.4) cited by Human Trafficking in India: Dynamics, current efforts, and intervention opportunities for the Asia Foundation, Sadika Hamid et.al, March 2010 published by Stanford University, USA.

²³ The earlier Act Suppression of Immoral Traffic in Women and Girls Act, 1956 which was enacted under Art. 35 of the Constitution with the object of inhibiting or abolishing the immoral traffic in women and girls was in pursuance of the Trafficking Convention which India had signed in 1950. The Act was amended in 1978 and again in 1986 when it was renamed as Immoral Traffic (Prevention) Act, 1956.

²⁴ The same may be liable to be interpreted to include even the family member or dependents of the woman which could not have been the intention of the legislature.

²⁵ A rebuttable presumption has been provided for where a child is found in a brothel.

against the exploiters including the eviction of the brothels, surveillance, externment, as well as aggravated punishment when the offences are committed on children²⁶. Thus, the major elements of trafficking in persons is covered under the Act²⁷.

Further the Immoral Traffic (Prevention) Act, 1956 is proposed to be amended and as per the proposed amendment by insertion of Section 5A, the ingredients of offence of trafficking have been further defined and whoever recruits, transports, transfers, harbours, or receives a person for the purpose of prostitution by means of, (a) threat or use of force or coercion, abduction, fraud, deception; or (b) abuse of power or a position of vulnerability; or (c) giving or receiving of payments or benefits to achieve the consent of such person having control over another person, is stated to commit the offence of trafficking in persons.²⁸

As has already been discussed, the act of human activity has been criminalised by the UN Protocol. Though there is no dedicated legislation pertaining to human trafficking, however, various enactments and penal statues existing in India contain provisions which can be applied in a manner so as to penalise the offender i.e. the perpetrator of the act of human trafficking.

The primary acts that form a foundation for trafficking is obtaining possession or custody of the person who is to be trafficked. Section 361 (Kidnapping) of **The Indian Penal Code, 1860 (IPC)** will be attracted unless the guardian of the minor consents to giving up custody of such person temporarily or permanently whereas Section 362 (Abduction) gets attracted when a person is compelled by force or induced by deceitful means to go from any place. However, keeping in view the criteria of the internationally adopted definition of trafficking, different forms of kidnapping can be attracted in cases of trafficking where the victim is kidnapped or abducted for the purpose of exploitation such as such as kidnapping for begging²⁹, kidnapping/abducting a woman to compel her marriage³⁰, procuring a minor girl for illicit intercourse³¹, importation of girl³², Kidnapping for the purpose of slavery etc.³³, buying or disposing off a person as slave³⁴, buying or selling of minors for prostitution³⁵. Further

²⁶ P.M. Nair, *A Report on the Trafficking of Women and Children in India 2002-2003*, Vol.1, NHRC - UNIFEM - ISS Project at p. 244.

²⁷ Dr. Sarasu Ester Thomas, *Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka*, UNDOC (2011)

²⁸ The Immoral Traffic (Prevention) Amendment Bill, 2006, (Bill No. 47 of 2006)

²⁹ Section 363A: Kidnapping or maiming a minor for the purpose of begging (the offence of obtaining custody is punishable with imprisonment of 10 years and fine and the offence of maiming so that the minor can be employed is punishable with life and fine. Both the offences are cognizable and non-bailable)

³⁰ Section 366: Kidnapping/ abducting a woman in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse or by means of criminal intimidation or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person (the offence is punishable with imprisonment extending to ten years and fine)

³¹ Section 366A: Inducing any minor girl to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. (The offence is punishable with imprisonment extending to ten years and fine)

³² Section 366B: Importing a girl under the age of twenty-one years from foreign country or from the State of Jammu and Kashmir any girl with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person. (The offence is punishable with imprisonment extending to ten years and fine)

³³ Section 367: Kidnapping or abducting in order to subject person to grievous hurt, slavery or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of. (The offence is punishable with imprisonment extending to ten years and fine)

³⁴ Section 370: Importing, exporting, removing, buying, selling or disposing off any person as a slave, or accepting, receiving or detaining against his will any person as a slave (The offence is punishable with imprisonment extending to seven years and fine) whereas habitual dealing in slaves is punishable under Section 371 with life imprisonment or imprisonment not exceeding ten years and fine).

trafficked persons are often transported to places that are at some distance from their hometowns and may be confined all through the process³⁶ or some degree of wrongful restraint³⁷ may be involved which again is punishable under the IPC and though not strictly punishes the offence of human trafficking yet can be invoked to deal with one practical aspect of human trafficking. Some forms of wrongful confinement carry greater punishment.

Crimes of human trafficking are rarely committed by one person alone. Such offences involve multiple offenders. It involves various players like spotter, recruiter, buyer, transporter, seller, etc.³⁸ In trafficking cases, offences of varying kinds are committed by all of them as long as their intention is common. The liability can be fastened on the perpetrators after the commission of the crime on the basis of their common intention³⁹ in terms of Section 34 which makes in a criminal act done by several persons in furtherance of the common intention of all, each of such persons liable for that act in the same manner as if it were done by him alone. However, even prior to such commission of offence, by virtue of Section 120A and Section 120B, IPC, as a mere agreement to do an illegal act, or an act that is not illegal, by illegal methods between such persons for indulging in any of the activities that constitute trafficking would suffice to make it a criminal conspiracy and hence, make such persons liable for prosecution under this Section.

By virtue of Section 107-120 IPC, even the abettors to the offence of trafficking i.e., those who instigate any person to do that thing; or engage with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Intentionally aid, by any act or illegal omission, the doing of that thing, can be punished.

In the process of committing the offence of human trafficking, the perpetrator would also be doing certain acts each of which would also constitute a separate offence making the perpetrator liable for each. For instance, as the offence of human trafficking involves use of threat, force, coercion etc, the penal liability under Sections 349-355⁴⁰ for use of force, under Section 415-417⁴¹ for cheating/deception, criminal intimidation under 503-509⁴². Further if the victims of human trafficking are subjected to sexual exploitation, in limited circumstances, the act may be punished under Section 375-377 IPC⁴³.

In The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, while Section 3 specifically covers forced or bonded labour (clause vi) and sexual exploitation

³⁵ Section 372 and Section 373: selling, letting to hire, or otherwise disposing off or buying, hiring or otherwise obtains possession any person under age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose. (The offences are punishable with imprisonment extending to ten years and fine). The brothel owner/ brothel manager/ brothel madam or the person who employs the trafficked person for labour, etc., can also be prosecuted if they have knowledge of kidnapping/ abduction.

³⁶ As per Section 340, wrongfully restraining any person means as to prevent that person from proceeding beyond certain circumscribing limits. (The offence is punishable with imprisonment extending to one year or fine)

³⁷ As per Section 341, voluntarily obstructing any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed is to wrongfully restrain that person. (The offence is punishable with imprisonment extending to one month or fine)

³⁸ Standard Operating Procedures on Investigation of Crimes of Trafficking for Commercial Sexual Exploitation, UNODC, 2007

³⁹ Common intention implies a pre-arranged plan and a meeting of minds of the persons involved.

⁴⁰ Criminal Force/Assault is punishable with imprisonment for one month to 2 years or fine or both.

⁴¹ Cheating is punishable with imprisonment for 1 year or fine or both.

⁴² Criminal intimidation is punishable with imprisonment upto 2 years or fine or both.

⁴³ Rape is punishable with imprisonment not less than 7 years or 10 years and fine.

of women (clause xi, xii)⁴⁴ and also prescribes a minimum punishment of six months which could extend up to five years, yet the same is restricted in nature as it penalises only part of the act which constitute the offence of human trafficking and all the criteria are not pre-requisites for constituting the offence.

Under **The Juvenile Justice (Care and Protection of Children) Act, 2000**, A trafficked child is considered a 'child in need of care and protection'.⁴⁵ By virtue of Section 23⁴⁶, the person having the actual charge of, or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering has been made liable for punishment. Under Section 24⁴⁷ the employment or use of any juvenile or the child for the purpose or causes any juvenile to beg has also been made punishable. Section 25⁴⁸ makes giving or causing to be given, to any juvenile or the child any intoxicating liquor in a public place or any narcotic drug or psychotropic substance except upon the order of duly qualified medical practitioner or in case of sickness punishable and may be invoked against the offender of human trafficking if the liquor is used as a means of trafficking. Section 26⁴⁹ can be invoked against persons procuring a juvenile or child by any means for the purpose of any hazardous employment ie persons who traffic children for the purpose of labour and against those who employ such trafficked children. It also applies if the juvenile or child is kept in bondage or if his earnings are withheld or used by the employer for his own benefit.

To combat cross-border trafficking, certain provisions in the existing legal framework may be invoked to tackle the same as they mainly regulate the entry and stay of foreigners in India and offences that are committed when people are trafficked across borders. For instance, **The Foreigners Act, 1946**, empowers the Central Government to make provisions relating to any foreigner, or all foreigners, or any group thereof under Section 3 of the Act. Such provisions may relate to regulating entry, exit or behaviour in India. They may prescribe that foreigners shall not enter India, or shall enter India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed. These provisions can be used to counter cross border trafficking by irregular entry and trafficking of people into India. If any person contravenes the provisions of this Act or of any order or any direction given in pursuance of this Act, he shall be punished with imprisonment for a term that may extend to five years and shall also be liable for fine under section 14 of the Act. An attempt to contravene is also similarly punishable under section 13. **Further, the Immigration (Carrier's Liability) Act, 2000** can be used to prosecute those who indulge in the illegal transport of human beings from other countries though it applies only to carriers by

⁴⁴ Section 3. Punishment for offences of atrocities: Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe - ...vi) compels or entices a member of a Scheduled Caste or a Scheduled Tribe to do 'begar' or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government;... xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty; xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed is liable to be punished.

⁴⁵ Section 2(d) It means a child:-

- vi. who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
- vii. who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
- viii. who is being or is likely to be abused for unconscionable gains; See also *Prerana v State of Maharashtra*, (2003) 2 BOMLR 562

⁴⁶ The same is punishable with imprisonment for a term which may extend to six months or fine or both.

⁴⁷ It is punishable with imprisonment for a term which may extend to three years and shall also be liable to fine

⁴⁸ It is punishable with imprisonment for a term which may extend to three years and shall also be liable to fine

⁴⁹ It is punishable with imprisonment for a term which may extend to three years and shall also be liable to fine

air or by sea. Where the provisions of the Passport Act or any rules made thereunder are contravened in bringing persons from other countries into India, the carrier may be punished by the competent authority under the Passport Act, by order imposing a penalty of rupees one lakh on such carrier. Under the **Indian Passport (Entry into India) Act, 1920**, The Central Government may make rules requiring that persons entering India shall be in possession of passports. It may prohibit the entry into India or any part thereof of any person who does not have in his possession a passport issued to him. This law can be used to counter inter-country trafficking. A trafficker who enters India without such documents as prescribed or those who do not follow the rules laid down under this Act can be punished. The offender is punishable with imprisonment for a term that may extend to three months, or with fine, or with both. Departure from India is dealt with in the **Passport Act, 1967** which prescribes that persons leaving India must have valid travel documents. While making use of this law, care must be taken to avoid revictimisation of victims of trafficking who may be in India without appropriate documents. Action must be taken for their protection. Care must also be taken to ensure that families are not separated and that human rights of all persons, particularly women and children, are protected⁵⁰.

Human trafficking is also carried out for purposes of labour, i.e., for compulsory/ debt/ bonded/ forced or exploitative labour. It is also common for men, women, and children to be trafficked through fraud - i.e., through promises made by an agent for work in domestic labour or other 'lucrative' work. After luring the victims to a place distant from home, the victims suddenly find themselves in an exploitative situation where the work is often very different from what had been described originally to them. Very often the work conditions are poor and the remuneration far below prescribed laws. Trafficking for purposes of child labour may attract the application of four enactments discussed are the Child Labour (Prohibition and Regulation) Act 1986; the Children (Pledging of Labour) Act 1933; the Bonded Labour System (Abolition) Act 1976 and the Juvenile Justice (Care and Protection of Children) Act 2000.

The Child Labour (Prohibition and Regulation) Act 1986, prohibits the employment of employment of children in certain occupations and processes and makes any employment in contravention of the same punishable⁵¹. The Act assumes importance in the context of the human trafficking primarily as a deterrent effect where the potential employer may not employ children or demand or receive children for such work due to fear of prosecution as it does not make the procurement of the child itself as an offence.

The Children (Pledging of Labour) Act, 1933 makes punishable the crime of pledging children for labour by guardians or parents a crime⁵². **The Child Labour (Prohibition and Regulation) Act, 1986 (CLPA)** which defines a 'child' to be a person who has not completed 14 years of age, comprehensively lays down the industries in which children shall not be employed, apart from laying down a few safety measures and other requirements which shall be met irrespective of what is stated in the other labour legislations. The Act provides for penalties to the employer if children are found employed in prohibited employments. It also provides for punishment if a similar offence is committed by a person who has already been convicted under this section⁵³. **The Bonded Labour System (Abolition) Act, 1976**, abolishes

⁵⁰ RESOURCE BOOK ON THE LEGAL FRAMEWORK ON ANTI HUMAN TRAFFICKING, UNODC and Government of India, 2008

⁵¹ It is punishable with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both and previous convicts are liable to be punished with imprisonment for a term which shall not be less than six months but which may extend to two years.

⁵² *Supra* 50

⁵³ Violations under Section-3 have been made punishable with imprisonment which shall not be less than three months which may extend to one year or with fine which shall not be less than ten thousand rupees but which may

the bonded labour system and prohibits anyone from making any advance or compelling any person to render any bonded labour. It states further that any agreement or custom requiring any person to do work as a bonded labourer is void and provides for punishment for anyone who compels any person to render bonded labour or even advance any bonded debt. Punishment in both cases of enforcing bonded labour and advancing bonded debt is imprisonment up to three years and fine up to two thousand rupees. Under the Act, the bonded labourers are to be treated as victims and not offenders.

By virtue of Section 12 of the **Prohibition of Child Marriages Act, 2006**, the marriage of a child has been made void if after the same the child is sold or trafficked or used for immoral purpose.

The **Transplantation of Human Organs Act, 1994**, provides for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters connected therewith or incidental thereto. By virtue of Section 9, prohibition is made against removal of human organ from the body of a donor before his death and its transplantation into a recipient unless the donor is a near relative of the recipient. However, the same is also subject to exception giving leeway and scope to traffickers who may traffic humans for the purpose of exploiting their organs as Section 9(3) provides that if any donor authorizes the removal of any of his human organs before his death for transplantation into the body of such recipient, not being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ shall be removed and transplanted after prior approval of the Authorisation Committee. Thus an element is introduced which may be manipulated by the traffickers for their unlawful purposes. The Act also makes rendering of services by a person to or at any hospital for purposes of transplantation including conduct association, or help in any manner in the removal of any human organ without authority, liable for punishable with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees. In case such person is a registered medical practitioner, his name is to be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence⁵⁴. The Act also provides for punishment for commercial dealings in human organs i.e., who makes or received any payment for the supply of, or for an offer to supply, any human organ; or seeks to find person willing to supply for payment any human organ; or offers to supply any human organ for payment; or initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ; or takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any above referred arrangement; or publishes or distributes or causes to be published or distributed any advertisement- (a) inviting persons to supply for payment of any human organ; (b) offering to supply any human organ for payment; or (c) indicating that the advertiser is willing to initiate or negotiate any above referred arrangement, which has been made punishable with imprisonment for a term not less than two years but which may extend to seven years and fine not less than ten thousand rupees but may extend to twenty thousand rupees⁵⁵.

extend to twenty thousand rupees or with both. Continuing offence under section (3) have been made punishable with imprisonment for a term which shall not be less than six months but which may extend to two years. Any other violations under the Act have been made punishable with simple imprisonment, which may extend to one month or with fine, which may extend to ten thousand rupees or with both.

⁵⁴ Section 18

⁵⁵ As per the proviso, the court may, for any adequate and special reason to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than two years and a fine less than ten thousand rupees.

As Trafficking of women and children may also be done for the purposes of pornography, Section 292⁵⁶ IPC can be used along with other provisions on trafficking when a person is involved in pornographic offences. Sec. 293 IPC⁵⁷ deals with sale etc. of obscene objects to young persons. Section 294 IPC in respect of an obscene act, song, words, etc., be done or said in or near a public place and that such act annoys others can be used to counter the screening of pornographic films or other such acts done in public places⁵⁸. Further Section 509 IPC in respect of Word, gesture, or act intended to insult the modesty of a woman can be used to combat pornography and even trafficking for the purpose of commercial sexual exploitation and also any other act that lowers the dignity of a woman. It requires the intention to insult the modesty of any woman, coupled with saying any words, making any sound or gesture, or exhibiting any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman⁵⁹. The **Indecent Representation of Women (Prohibition) Act, 1986** deals primarily with the prohibition of advertisements and selling of publications that indecently represents women. Indecent representation of women means the depiction in any manner of the figure of a woman, her form or body or any part thereof, in such a way as to have the effect of being indecent, or derogatory to, or denigrating of women, or is likely to deprave, corrupt, or injure the public morality or morals. This Act in Sections 3 and 4 prohibits the publication or exhibition of any advertisement that in any way indecently represents women and also production, sale, letting for hire, distributing, circulating, or sending by post, any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form. It can be used to prevent trafficking for the purpose of pornography, as any act that facilitates the acts mentioned above is also an offence⁶⁰.

Even the **Information Technology Act, 2000**, makes publishing of information that is obscene in electronic form punishable where such material depraves or corrupts the mind of those exposed to it⁶¹. The **Young Persons (Harmful Publications) Act, 1956** may be used to counter pornography to some extent. Although this Act will only operate if the publication is harmful or corrupts the mind of young persons, it can still be used against pornography. Harmful publications include a book, magazine, pamphlet, leaflet, newspaper or like publications. If a person sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in his possession any harmful publication, or advertises or makes known by any means whatsoever that any harmful publication can be procured from or through any person, he shall be punishable with imprisonment which may extend to six months, or with fine, or with both. This legislation may not be directly relevant in trafficking cases, but would be an add-on where there has been trafficking for pornography for distribution among young persons⁶².

⁵⁶ For first conviction, it is punishable with imprisonment upto two years, and with fine upto two thousand rupees, while for subsequent conviction, it is punishable with imprisonment of upto five years, and fine upto five thousand rupees.

⁵⁷ For first conviction, it is punishable with imprisonment upto three years, and fine upto two thousand rupees, and, for subsequent conviction with imprisonment upto seven years, and fine upto five thousand rupees.

⁵⁸ The offence is punishable with imprisonment of upto three months, or with fine, or with both.

⁵⁹ The offence is punishable with imprisonment upto one year, or with fine, or with both.

⁶⁰ Contravention of Section 3 and Section 4, on first conviction is punishable with imprisonment of upto two years, and with fine upto two thousand rupees; and for second or subsequent conviction, with imprisonment not less than six months upto five years, and also fine not less than ten thousand rupees upto one lakh rupees.

⁶¹ Section 67. On first conviction, the offence is punishable with imprisonment of upto five years, and fine upto one lakh rupees; and for second or subsequent conviction, with imprisonment upto ten years and fine upto two lakh rupees.

⁶² *Supra* 50

The **Goa Children's Act, 2003** is the only domestic legislation to provide a definition of Trafficking⁶³ and addresses several child rights issues in an integrated manner and also prohibits child prostitution. It casts a duty upon the State to remove all child prostitutes from their existing place of exploitation and to ensure that they are rehabilitated and integrated into society including preparation of a comprehensive Plan of Action for this purpose which shall include providing education and livelihood skills to such children and the prevention of child prostitution. Exploiting a child for commercial sexual exploitation has been made punishable with imprisonment of one year and fine upto Rs. 1,00,000/-⁶⁴. Trafficking in children for the purpose of employment has been made punishable⁶⁵ with imprisonment of 3 months and/or fine of Rs. 50,000/-. Abetment of the performance of any ceremony or any act for dedicating a minor girl child as a devadasi or and ceremony or act connected therewith has been made punishable with imprisonment upto 3 years and with fine upto two thousand rupees, but in case such person is the parent or guardian or a relative of the women so dedicated, imprisonment maybe upto 5 years but not less than 2 years and fine upto five thousand rupees but which shall not be less than two thousand rupees⁶⁶. The act also prohibits the sale of children in the garb of adoption to inter alia prevent trafficking.

The Karnataka Devadasis (Prohibition of Dedication) Act, 1982⁶⁷ applicable in Karnataka has been enacted to prevent dedication of women as devadasis in the State of Karnataka as the practice of dedicating women as devadasis to deities, idols, objects of worship, temples and other religious institutions or places of worship exists in certain parts of the State of Karnataka leads women so dedicated to a life of prostitution⁶⁸. Under the Act, performance, permission, taking part in, or abetment in the performance of, any ceremony or act for dedicating a woman as a devadasi or any ceremony or act connected therewith has been made punishable with imprisonment of either description for a term which may extend to three years and with fine which may extend to two thousand rupees with enhanced punishment if the person referred to is the parent or guardian or a relative of the woman so dedicated⁶⁹.

Vide amendment in 2008, the **Code of Criminal Procedure, 1973** has been amended to include Section 357A⁷⁰ which provides for formulation of scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation. The amendment was largely inspired by the efforts of Andhra Pradesh which set up in 2006 the 'Relief and Rehabilitation Fund' for victims of rape, trafficking, abduction, dowry deaths and other related crimes⁷¹.

V. Conclusion & Suggestions

The first suggestion will be that despite of robust legal basis for prosecution of trafficking crimes, the existing domestic legislations do not effectively criminalise the clients and profiteers of the trade and several do not define "trafficking" per se in human beings⁷². Further

⁶³ Section 2(z)

⁶⁴ Section 9(4)

⁶⁵ Section 7

⁶⁶ Section 9(7)

⁶⁷ Published in the Karnataka Gazette Part IV-2A (Extraordinary) No. 75 dated 3-2-1982 at page 5

⁶⁸ Preamble to the Act

⁶⁹ Section 5 of the Act

⁷⁰ The Act requires every State Government to prepare such scheme in co-ordination with the Central Government.

⁷¹ Kant, R. *Victim Compensation in India* accessed from www.lawreports.wordpress.com cited in Human Trafficking in India: Dynamics, current efforts, and intervention opportunities for the Asia Foundation, Sadika Hamid et.al, March 2010 published by Stanford University, USA.

⁷² *Supra* 22

many of the laws relating to trafficking are inconsistently enforced while some prescribe punishments which are not stringent enough.⁷³

Further, the offence of human trafficking in view of UN Protocol is completed the moment there is movement/ recruitment of the person by the means enumerated thereunder for the purposes specified whereas the offences as described in the various existing legislations provide for the punishment of only one aspect/component of human trafficking i.e. either of act or means or purpose. ***Thus, there is a lack of comprehensive legislation encompassing measures in respect of the varied and diverse aspects involved in the offence of human trafficking.***

Secondly, ***the role which the police are expected to play in a society governed by the rule of law is the maintenance of law and order as well as facilitation of the redressal of the grievances of the victims.*** As the perceived guardians of the law, it is the police who are approached by the victims for justice. By the very nature of the role played by the police, they are bound to come in contact with not only with the traffickers but also the victim⁷⁴. The responsibility to prevent the crime by developing intelligence not only in respect of the prospective abuser but also the vulnerable victim as also to ensure that such abuse and exploitation does not take place also lies on the police in a country.

However, the police cannot act beyond the contours of the powers conferred upon them by legislation. As has been discussed there are various domestic legislations in India which though do not specifically deal with 'human trafficking' yet are broad enough to make certain acts constituent in the offence of trafficking as separate offences. Thus, while the power of the police to prevent, investigate and prosecute such constituent offences continue to be governed by the general law embodied in procedural law like Code of Criminal Procedure, it is also noted that the only legislation pertaining to human trafficking though limited to trafficking in women and children also prescribes certain powers of the police under the said Act.

Lastly, the judiciary has to play an important role in curbing human trafficking. ***The role is important with interpreting the existing trafficking laws as well as analysing the evidence required to establish the Crime.*** The judiciary has to play a proactive role with the protection of victims and re-habilitating them.

I would conclude by saying, the road ahead in achieving the target of curbing human trafficking is difficult but with the coordination within all the stakeholders i.e legislature, police, judiciary, NGOs and most important society at large etc. can make it achievable.

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⁷³ See US Department of State, (2009) *Trafficking in persons report: India*. (visited at www.unhcr.org)

⁷⁴ P.M. Nair, *A Report on the Trafficking of Women and Children in India 2002-2003*, Vol.1, NHRC - UNIFEM - ISS Project at p. 264